WE all knowing the great Learning and Judgment of the Author, do (for the Benefit of the Publick) approve of and allow the Printing and Publiſhing of this Book, Intituled, *The Reports of Sir* Peyton Ventris *Kt. late one of the Juſtices of the Court of Common Pleas.*

April the 20th, 1695.

J. Somers, C.S.
J. Holt,
Geo. Treby,
Ed. Nevill,
Joh. Powell,
W. Gregory,
N. Lechmere,
Tho. Rokeby,
G. Eyre,
Jo. Turton,
John Powell,
Sam. Eyre.

THE

REPORTS

OF

Sir Peyton Ventris Kt.

Late one of the JUSTICES of the

COMMON PLEAS.

In Two Parts.

PART I.

Containing Select CASES Adjudged in the KING'S BENCH, in the Reign of K. *CHARLES* II.

WITH

Three Learned ARGUMENTS, One in the KING'S BENCH, by Sir *Francis North*, when Attorney General; and Two in the EXCHEQUER, by Sir *Matthew Hale*, when Lord Chief Baron.

With Two TABLES; One of the Cases, the other of the Principal Matters.

PART II.

Containing Choice CASES Adjudged in the **Common Pleas**, in the Reigns of K. *CHARLES* II. and K. *JAMES* II. and in the Three first Years of the Reign of their late Majesties K. *WILLIAM* and Q. *MARY*; while he was a JUDGE in the said Court: With the Pleadings to the same.

ALSO

Several CASES and PLEADINGS thereupon in the **Exchequer-Chamber**, upon Writs of ERROR from the **King's Bench**.

Together with many Remarkable and Curious Cases in the Court of **Chancery**.

Whereunto are added

Three Exact TABLES; one of the Cases, the other of the Principal Matters, and the Third of the Pleadings.

With the Allowance and Approbation of the Lord Keeper *and all the* Judges.

The Fourth Impression, carefully corrected, with an Addition of several Thousands of References, never before Printed.

In the *SAVOY*.

Printed by E. and R. NUTT, and R. GOSLING, (Assigns of *Edward Sayer* Esq;) for D. Browne, J. Walthoe, T. Osborn, W. Mears, T. Ward, T. Woodward, and J. Hooke. MDCCXXVI.

TO THE

READER.

THE Name of the Reverend and Learned JUDGE, who was the Compiler of theſe *REPORTS*, will be a ſufficient Invitation to the Underſtanding Reader, not only to caſt his Eye upon, but ſeriouſly to peruſe them.

And as my Lord *Coke* in his *Commentary upon Littleton* (fol. 249. b.) ſays, That *for the moſt Part the later Reſolutions and Judgments are the ſureſt, and therefore beſt to ſeaſon Students with at the Beginning, both for the Settling of their Judgments, and Retaining of them in Memory, and eaſier to be underſtood than the Antient:* So it is to be hoped that theſe following REPORTS, collected with Care, Diligence and Experience, by the Learned Author thereof, will fully anſwer theſe Directions given by that before-mentioned famous Lawyer.

The

The Author of theſe REPORTS was ſo Eminent in his Profeſſion of the LAWS, that ſhould I preſume to give a Character of him, it would come very ſhort of His great Worth; and therefore I ſhall only commend him to the Courteous Reader, where he will find his own Character given by himſelf.

Vale.

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ADVERTISEMENT.

Note, That the Author of theſe *Reports* has referr'd to *Croke*'s *Elizabeth* as the firſt Part, and *Croke*'s *Charles* as the third Part of thoſe *Reports*, except in the firſt thirty Sheets of the firſt Volume, in which thirty Sheets he referr'd to *Croke*'s *Charles* of the firſt Edition as the firſt Part, and *Croke*'s *Elizabeth* as the third Part of thoſe *Reports.*

TERMINO Sancti Michaelis,

Anno 20 Car. II. in Banco Regis.

Sparks, *&c. verſus* Martyn.

JONES moved for a Prohibition to the Court of the Admiralty, for that they libelled againſt one for Reſcuing of a Ship, and taking away the Sails of it, from one that was executing the Proceſs of the Court againſt the ſaid Ship, and for that in the Preſence of the Judge and Face of the Court he aſſaulted and beat one, and ſpake many opprobrious Words againſt him. Now ſeeing that theſe Matters were determinable at Law, the Ship being infra corpus Comitatus, and they could not adjudge Damages to the Party, or fine or impriſon him, he prayed a Prohibition.

Admiralty Juriſdiction. Vide 4 Inſt. 33, 134, *&c.* 145, *&c.* Pryn on 4 Inſt. 75 to 103. 111 to 115. Cro. Car. 216, or 296. 1 Salk. 31, 32, 33, *&c.* 3 Sal. 24. 4 Mod. 176.

Hob. 212. 2 Sand. 260. 1 Mod. 18. 2 Show. 86. 6 Mod. 25, 79. 3 Mod. 244. 1 Sid. 441. Poſt. 32, 47, 173, 308.

But the Court denied it, (abſentibus *Wyndham* & *Moreton*) For they may puniſh one that reſiſts the Proceſs of their Court, and may fine and impriſon for a Contempt to their Court, acted in the Face of it, tho' they are no Court of Record; but if they ſhould proceed to give the Party Damages, they would grant a Prohibition quoad that: And of that Opinion was Wyndham, the Caſe being afterwards put to him by the Chief Juſtice. But the Parties afterwards put into their Suggeſtion, That the original Cauſe upon which the Proceſs was grounded, was a Matter whereof the Court of Admiralty had no Cogniſance: Wherefore a Prohibition was granted; For then the Reſcous could be no Contempt.

Sir John How *verſus* Woolley, *an Attorney of the Court.*

IT was moved, That Woolley ſhould put in ſpecial Bail, being an Attorney at large and having diſcontinued his Practice. But the Court ſaid, Attornies at large have the ſame Privilege with the Clerks of the Court; and are to appear de die in diem. And they were not ſatisfied that he had diſcontinued his Practice.

Attornies Privilege. Vid. poſt. 11, 16, 29. 2 Vent. 47. *&c.* ibid.

Suffil's *Case.*

Dyer 164. 2 Jon. 39. 1 Sal. 321. 2 Sal. 586. Cro. Jac. 241, 242, 485. 2 Roll. 277.

IT was moved to quash the Return of a Rescous against Suffil and divers others, who rescu'd a Person taken upon Mesne Process; because the Rescuers being particularly named 'tis said rescusserunt, and not added quilibet eundem rescussit. And for that a Case was cited in the 2 Cro. 485. where the Sheriff returns an Exigent against divers, quod non comparuerunt upon the Quinto exacti, and doth not add nec aliquis eorum comparuit; and for that Cause it was reversed in a Writ of Error: Notwithstanding which, Twisden (he being only in Court) held it to be well enough, it being in the Affirmative.

Anonymus.

2 Roll. 295. N. 8. Contra per Coke. 1 Sid. 393. 2 Keb. 436, 439. T. Jon. 44, 246.

A Prohibition was prayed to the Ecclesiastical Court, for that a Parson libelled against one there for calling of him Knave, and 'twas granted, it not appearing to relate to any thing concerning his Function: And a Case was cited to be adjudged, 24 of the Queen, the Suit being in the Ecclesiastical Court for these Words, (viz.) Sir Priest, you are a Knave; and a Prohibition was granted.

See Cro. Jac. 108.

Note, If a Man be taken in Execution, he cannot be bailed, tho' he brings a Writ of Error.

Anonymus.

See 2 Vent. 295. Post. 119.

IN Debt upon a Lease for Years, the Defendant may plead Entry into Part, upon which follows Suspension, and it doth not amount to the General Issue.

Heely *versus* Ward.

2 Keb. 437. Vide post. 72, 243. 1 Lev. 50, 69, 96, 105, 137, 156, 208. Ray 75. 2 Lev. 87, 230.

ERror to reverse a Judgment given in the Court at Hull, where the Plaintiff in an Assumpsit did declare, That at such a Place, infra Jurisdictionem Curiæ, the Defendant in Consideration that the Plaintiff had assumed to pay him so much a Yard, promised to deliver him so many Yards of Kersey; and it was assigned for Error, That the Delivery is not laid to be at a Place infra Jurisdictionem Curiæ; and indeed there is no Place at all. And of that Opinion was Twisden, (he being only in Court) and cited a Case, where in an Assumpsit in the Marshalsey, upon a Promise to make a Lease of a House in Middle Row, and after Judgment it was held erroneous, because Middle Row was not laid to be infra Jurisdictionem Curiæ.

1 Sid. 65. 1 Keb. 128, 190.

The Biſhop of Lincoln *verſus* Smith.

The Biſhop of Lincoln ſued in the Court holden before his Chancellor, for a Penſion, to which he intitled himſelf by Preſcription, and a Prohibition was prayed for Smith the Defendant there; for that being by Preſcription, that Court had no Cogniſance of it: And for that, my Lord Coke's Opinion was cited, 2 Inſt. 491. eſpecially he could not ſue for it in his own Court. Vide 2 Salk. 550. Far. 8. 6 Mod. 230. F.N.B. 51 B.

But it was reſolved by Keyling and Twiſden (the other Juſtices being abſent) that Penſions, tho' they were by Preſcription, might be ſued for in that Court for having Cogniſance of the Principal, that ſhall draw in the Acceſſary. As if one libel for a Modus decimandi, if they allow it, they may try it; and Coke's Opinion they ſaid was not warranted by the Books, and Fitz. N. B. 524. is againſt it, and the Court being held before the Chancellor, and not the Biſhop himſelf, he might ſue there: Vide Hob. 87. Conuſance of Pleas granted to be holden before the Steward of the Grantee, licet the Grantee fuerit pars; ſed vide ibid. in Pede, That even an Act of Parliament to make a Man Judge in his own Caſe would be void. 1 Mod. 218. Poſtea 120. 265, 335. 2 Vent. 239. 2 Cro. 483. 2 Salk. 551. 5 Mod. 436. 6 Mod. 230.

Anonymus.

An Attachment was prayed againſt one, who being arreſted upon a Latitat, gave a Warrant of Attorney to confeſs a Judgment, and preſently after ſnatched it out of his Hand to whom it was delivered, and tore off the Seal: And the Court ſeemed to incline, in regard it was to confeſs a Judgment in this Court, that it was a Contempt, upon which an Attachment might be granted. Attachment where it lies. See 1 Sal. 73, 84, 201, 586. 8 Hawk. cap. 22. per tot.

Anonymus.

A Prohibition was prayed, to ſtay a Suit in the Court-Chriſtian for Tithes upon the Suggeſtion of a Modus, which was alledged in this Manner: That the Proprietors and Occupiers of ſuch a Manor, or any Parcel thereof, ſhould pay a Groat to the Parſon for Herbage Tithes. See 1 Sid. 251.

The Court held that this could not be, for if a Man had but two or three Foot of Ground in the Manor he ſhould pay a Groat; but it ought to have been laid: That the Proprietors and Occupiers of ſuch a Manor, for themſelves and their Farmers, had paid Four Pence. Yelv. 2.

Twiſleton *verſus* Hobbs.

Action for theſe Words, [You are a Forger of Bonds, a Publiſher of Forgery, and ſue upon forged Bonds.] Poſtea 18. 1 Danv. 146. pl. 3.

The Jury found the Defendant Not Guilty, as to the firſt Words, and reſolved the laſt Words were not actionable, it not being laid that he knew of the Forgery.

Sir Thomas Grieſly's *Caſe.*

INformation againſt him for ſtopping of the High way, the Word was Obſtupabat. It was proved in Evidence, that he plowed it up; and reſolved, it did well maintain the Information.

Anonymus.

See 2 Mod. 140. 1 Sid. 366, &c. ib.

IN Debt, If the Defendant wages his Law, the Oath of the Eleven which are ſworn de credulitate, may be diſpenſed with by the Plaintiff's Aſſent. Vid. Mag. Charta, c. 28.

T. Jones 21. 1 Show. 174. 1 Lev. 211. Poſtea 7. 269. 1 Sid. 330. 1 Lev. 211.

Note, It was adjudged in the King's Bench, 19 Car. II. That if a Priſoner eſcape by the Permiſſion of the Sheriff, yet he may be retaken by the Party at whoſe Suit he was condemned; for it may be the Sheriff is inſufficient; and it is not Reaſon that his own Act ſhould damnifie the Plaintiff. Vide Hob. 202. But the Sheriff himſelf can't afterwards retake him tho' the Party may. Vide Cro. Car. 75, 240, 255.

Termino Sancti Hillarii, Anno 20 & 21 Car. II. In Banco Regis.

Barnes *verſus* Bruddel.

1 Sid. 396. 1 Rolle 19, 37. 1 Lev. 261. 2 Keb. 451. Poſt. 7. 10, 21, 61, &c.

ACtion for theſe Words, alledged to be ſpoken of the Plaintiff, (viz.) She was with Child by *J. S.* whereof ſhe miſcarried; and concludes, That by Reaſon thereof ſhe was ſo brought into her Father's Diſpleaſure that he turned her out of Doors, and that ſhe was brought within the Penalty of the Statute of 18 Eliz. And in Maintenance of this Action a Caſe was cited out of Rolle's 1ſt Part 35, inter *Meadows* & *Boyneham*, an Action was brought for calling one, Whore, Per quod conſortium amiſit Vicin' ſuorum; and held it would lie. And in Anne Davie's Caſe, 4 Co. 17. it is held, That ſince the Statute of the 18 Eliz. cap. 3. to ſay, One had a Baſtard, would bear an Action.

But notwithſtanding the Opinion of the Court was, That ſuch an Action would not lie unleſs a ſpecial Damage had been alledged, as to ſay, She had loſt her Marriage, as in Anne Davie's Caſe; and the Reaſon upon the Statute alledged in the Caſe, was ſaid by Twiſden to be of my Lord Coke's putting in; for Juſtice Jones affirmed to him, there was nothing ſaid thereof in the Caſe.

Cumberba. 391, 392. 2 Sal. 694.

A Woman that has a Baſtard-Child is not puniſhable by 18 Eliz. unleſs the Child becomes chargeable to the Pariſh. 2 Salk. 694.

Anonymus.

IF a Tradeſman contracts Debts and gives over trading, he may be afterwards a Bankrupt within the Statute in reſpect of the Debts contracted before: And ſo it was ſaid to be ruled in Sir Job Harvey's Caſe. 1 Sid. 411. Poſtea 29, 166. 2 Keb. 453.

Anonymus.

A Warren may pay Tithes by Cuſtom: So of Doves in a Dove-houſe, or Fiſh in a River. Croke Car. 339.

Note, It was ſaid by Twiſden, That if a Libel be in the Eccleſiaſtical Court for a Thing whereof they have Cogniſance, altho' the Party intitles himſelf to it by Cuſtom, no Prohibition lies. 2 Keb. 452.

Anonymus.

A Prohibition was prayed, for that they cited him to anſwer unto Articles in the Eccleſiaſtical Court, and did not deliver a Copy of the Articles; and it was granted quouſque they ſhould deliver to him the Copy: But the Prohibition which was taken out was abſolute, which the Court being informed of, they did not think fit to grant a Conſultation, but to diſcharge that Prohibition by a Superſedeas. Whereupon they proceeded and excommunicated the Party for Default of anſwering: Who again moved the Court for a Prohibition, and one was granted with a Mandamus in it, to abſolve him, if it were for not anſwering before they gave him a Copy of the Articles. Raym. 170. F.N.B. 43.E. 1 Sid. 403. 2 Keb. 352, 404, 449. 1 Lev. 180. 2 Lev. 247.

Bains *and* Biggerſdale.

ERror to reverſe a Judgment in an Action of Debt upon a Bond in Rippon-Court; becauſe it was entred upon the Record, Aſſid' damna ultra miſas & cuſtagia ad 10 l. and doth not ſay, Occaſione detentionis debiti, or Occaſione prædicta; and the Judgment was, Quod recuperet damna prædicta, and doth not ſay, per Juratores aſſeſſa: Yet notwithſtanding the Judgment was affirmed.

Billingham

Billingham *and* Vavaſor.

2 Keb. 590. ERror to reverſe a Judgment in Debt, in the Court of York: aſſigned,

Variance. Firſt, In the Variance between the Count and Plaint; for the Plaint was entred, Ad hanc Curiam venit & queritur de Placito deb' ſuper demand' 14 l. and the Count was for 12 l. But it was anſwered, That the Certainty of the Sum needed not to be expreſſed in the Plaint, and ſo Surpluſage. But otherwiſe it is of a Variance between the Original and the Count; for the Writ muſt comprehend the Certainty of the Debt; and 2 Cro. 311. was cited, where Debt was brought in the Common Bench for 40 s. and after the Return of the Pluries Capias the Entry was, Quod Querens obtulit ſe in pl'to deb' 40 l. and aſſigned for Error, and diſallowed. But to that it was ſaid, That that was but a Miſpriſion in the Entry of a Continuance which had a former Record to warrant it: And here, tho' the Certainty of the Sum need not to have been expreſſed; yet when it is, the Plaint muſt not vary from it. Et adjornatur.

4 Mod. 246. 2 Lev. 85. Far. 87, 153. 5 Mod. 302.

Vid. 3 Cro. 619.

Bourne *verſus* Maſon. & al'

2 Keb. 454, 457, 527. IN an Aſſumpſit, the Plaintiff declares, That whereas one Parrie was indebted to the Plaintiff and Defendants in two ſeveral Sums of Money, and that a Stranger was indebted in another Sum to Parrie; that there being a Communication between them, the Defendants in Conſideration that Parrie would permit them to ſue in his Name the Stranger for the Sum due to him, they promiſed that they would pay the Sum which Parrie owed to the Plaintiff; and alledged, that Parrie permitted them to ſue, and that they recovered. After Non Aſſumpſit pleaded, and a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That the Plaintiff could not bring his Action, for he was a Stranger to the Conſideration.

Poſtea 318, 332.

But in Maintenance thereof a Judgment was cited in 1658. between Sprat and Agar, in the King's Bench, where one promiſed to the Father, in Conſideration that he would give his Daughter in Marriage with his Son, he would ſettle ſo much Land. After the Marriage the Son brought the Action; and it was adjudged maintainable. And another Caſe was cited of a Promiſe to a Phyſician, That if he did ſuch a Cure, he would give ſuch a Sum of Money to himſelf, and another to his Daughter; and it was reſolved, the Daughter might bring an Aſſumpſit. Which Caſes the Court agreed: For in the one Caſe the Parties that brought the Aſſumpſit did the meritorious Act, tho' the Promiſe

Vide 3 Cro. 619. 1 Rolle 31. N. 6. 2 Sid. 115.

Raym. 302.

was made to another; and in the other Case, the Nearness of the Relation gives the Daughter the Benefit of the Consideration performed by her Father; but here the Plaintiff did nothing of Trouble to himself, or Benefit to the Defendant, but is a meer Stranger to the Consideration; wherefore it was adjudged Quod nil capiat per billam.

Herbert *versus* Merit.

A Prohibition was prayed to the Ecclesiastical Court, for that the Defendant libelled against the Plaintiff there, for calling of her, Impudent Whore, which was said to be only a Word of Passion; and the later Opinions have been, that unless some Act of Fornication were expressed that Prohibitions should be granted. 1 Sid. 404. 2 Keb. 453. 454. Vide Cumberba. 26, 28, 29, 138.

But the Court denied it in this Case, it being an Offence of a Spiritual Cognisance, and Eaton and Ailoff's Case. 1 Cro. 78. or 110. and Pewe's Case, 339. were cited. Postea 10, 61, 220, 343. 1 Mod. Rep. 21. 1 Cro. 110.

The Sheriff may sell Goods that he takes in Execution by a Fieri Facias, at any Rates, if the Defendant denies to pay the Money. Fi. Fac. post. 20, 21.

Nota, No Action of Debt lies against the Sheriff when the Party escapes who is taken upon a Mesne Process, but an Action upon the Case only. Escape. Vide antea 4.

Vaughan *and* Lloyd.

IN an Audita Querela, the Party appeared upon the Scire Facias and demurred, for that the Scire Facias bore Date the 23d Day of October, and the Audita Querela the 3d of November after. To which it was said, that this Fault in the Mesne Process is aided by Appearance; but if an Original should bear Date upon a Sunday or the like, the Appearance of the Party would not help it. But on the other side it was said, That the Party had no Day in Court by the Audita Querela, and this was a Default in the first Process against him, and compared it to a Scire Facias upon a Judgment, in which such a Fault shall not be cured by Appearance. To which the Court agreed. For there the Scire Facias is the Foundation, and quasi an Original, and the Judgment is given upon it; but here the Scire Facias is only to bring in the Party to answer, and in the Nature of a Mesne Process, and the Judgment is given upon the Audita Querela; wherefore they disallowed the Demurrer. 1 Sid. 406. 2 Keb. 461. 1 Salk. 63. 2 Cro. 424.

Barnes

Barnes *verſus* Hughes.

1 Lev. 249. 1 Sid. 400. Curtis & Inman. Poſtea 364. Lit. Rep. 163. 3 Lev. 71. 2 Keb. 401, 424, 447, 458. 2 Mod. 246. 1 Salk. 373. con. Hick's Caſe.

DEbt tam pro Domino Rege quam pro ſeipſo, upon the Stat. of 5 Eliz. cap. 4. for exerciſing of the Trade of a Grocer in Salisbury, not being bound Apprentice thereunto. The Defendant pleads Nil debet, and being tried by Niſi Prius, and a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that this Action could not be brought in this Court, for by the Stat. 21 Jac. cap. 4. It is enacted, That all Offences againſt any penal Statute, for which an Informer may lawfully ground any popular Action, Bill, Plaint, Suit or Information before Juſtices of Aſſize, *Niſi Prius* or Goal-delivery, Juſtices of *Oyer* and *Terminer*, or of the Peace in their General Quarter-Seſſions, ſhall be commenced, ſued, *&c.* before the ſaid Juſtices, they having Power to hear and determine the ſame; and not elſewhere; which Negative Words, as it was ſaid, take away the Juriſdiction of this Court: And whereas 31 Eliz. reſtrained not the King's Attorney becauſe it only made mention of Common Informers; the King's Attorney is expreſly named in this Statute, and the Caſes in 2 Cro. 85. between Kenn and Drake, and Shoyle and Taylour's Caſe, 2 Cro. 178. were quoted. And the Statute would be to little Purpoſe, if it did not extend to Actions of Debt, as well as Informations and Indictments. But it was ſaid on the other ſide, That it could not extend to Actions of Debt, for they could not be brought before Juſtices of Aſſize, or the other Juſtices named in the Act; and it ſhall only extend to ſuch Suits as an Informer might lawfully commence before them. And it has been reſolved, That this Act did give no new Juriſdiction; as 1 Cro. 79. or 112. Farrington and Keymer's Caſe, in an Information upon the Statute of 23 H. 8. cap. 4. for ſelling of Beer at an unlawful Price, which gives the Forfeiture to be recovered in Courts where no Protection or Wager of Law ſhall be allowed in any Suit grounded upon it, extends only to the Courts at Weſtminſter; as 6 Co. in Gregory's Caſe it was reſolv'd, That no Information for any Offence againſt this Statute could be commenced before the Juſtices of Aſſize or Peace at the Seſſions, notwithſtanding the Act in 21 Jac. which ordains, That Suits for Offences againſt Penal Laws ſhall be before them and the reſt there mentioned; for the Act only extends to thoſe Offences for the which an Informer might lawfully ground any popular Action before them; and it was never held that that Act gave any new Juriſdiction. Now if this Action cannot be brought in this Court, the Statute muſt repeal a great Part of the Remedies given by 5 Eliz. againſt this Offence, and only leave it to be puniſhed by Indictments and Informations, which certainly was never the Intent of the Statute, and would be very miſchievous; for if the Offender goes out of the County

Cro. Car. 146.

after the Offence committed, he cannot be punished; for the Justices named in the Statute cannot award Process out of the County, and therefore for that Reason there should be Remedy in a Court of General Jurisdiction, and since 21 Jac. there have been many Precedents of like Actions; all which would be reversed, if that Act should take away Actions of Debt in this Court. And for these Reasons the Case being moved divers Times, the Court gave Judgment for the Plaintiff. Styl. 340.

1 Salk. 373. contra. Holt C.J. said this was no Objection, for Process of Outlawry might be sued out against him. Postea 364.

Anonymus.

IN Debt upon an Obligation the Defendant pleads, That he delivered it as an Escrow, & hoc paratus verificare. This Plea is vicious, for he ought to shew to whom he delivered it; and also he ought to conclude his Plea, & issint nient son fait.

Plo. Com. 66. 2 Cro. 85.

Anonymus.

A Lease for Years is made to A. and then another Lease is made for twenty Years, to commence after the Expiration of the former Lease, if B. and C. should so long live, with a Reservation of several Things, and Reddend' 3 l. nomine Herioti after the Death of B. or C. B. dies during the Continuance of the first Lease. The 3 l. must be paid; for it is not in the Nature of a Rent, but a Sum in gross.

Postea 91. 2 Saund. 165. 1 Sid. 437. contra Hangon v. Carve.

Clipsam *and* Morris.

THE Plaintiff in an Assumpsit declared, That J. S. being indebted unto him in 50 l. gave him a Note directed to the Defendant, requiring him to pay the Plaintiff the said Sum of 50 l. Then he saith, that the Defendant upon View of the Note, in Consideration that the Plaintiff would accept of his Promise for Money, and stay a Fortnight for the same, he did assume to pay him.

1 Lev. 248. 1 Sid. 369. Postea 154. 2 Keb, 401, 443, 453.

To which the Defendant demurs for the Insufficiency of the Consideration; it being nothing of Trouble or Prejudice to the Plaintiff, or Benefit to the Defendant, for he might sue his Debtor in the mean Time; neither is it alledged, that the Defendant was indebted to J. S. But if it had been in Consideration, that the Plaintiff would accept of the Defendant for his Debtor, that might have been good; for that is an implied Discharge of the other, whom if he had sued, the Defendant might have had an Action. 1 Roll. 29. And for this Reason the Opinion of the Court was against the Plaintiff. And this Point was said to be adjudged between Newcomen and Lee in this Court, Paschæ 1650. Rot. 62. Styl. 249. Note, In the principal Case here Judgment was given for the Defendant, 1 Lev. 248.

1 Mod. 12. Hardr. 71. Winch 7.

1 Saund. 210. 1 Sid. 396.

Anonymus.

Poſtea 16, &c. ib. 2 Keb. 249.

A Man was indicted for ſaying, The Juſtices of the Peace had nothing to do with the Exciſe: And it was quaſhed by the Opinion of the Court; for ſuch an Information could not make a Man criminal.

Nurſtie *verſus* Hall.

1 Saun. 230. &c. 237. 3 Mod. Rep. 336, 337, 338. 1 Sid. 401. 3 Lev. 394. 2 Keb. 439, 448, 468, 492. 1 Lev. 259.

THE Grantee of a Reverſion brings an Action of Covenant againſt the Leſſee for Years, for Non-payment of Rent. The Queſtion was, Whether it ought to be laid where the Leaſe is alledged to be made; or, where the Land lies? It was ſaid, That the Statute of 32 H. 8. c. 34. which gives the Action of Covenant to the Aſſignee of the Reverſion, ſaith, That they ſhall have ſuch Actions in like Manner as the Leſſors ſhould have had. Now if it had been brought by the Leſſor, it had been tranſitory, and ſo in the Caſe of an Aſſignment by Commiſſioners of Bankrupt, the Aſſignee of the Commiſſioners of Bankrupt ſhall bring Debt as the firſt Creditor ſhould have done.

But it was ſaid on the other Side, That the Statute intended not to aſſign it as a bare Choſe en Action, but to knit it to the Reverſion; and where it ſaith, The Aſſignee ſhall have Remedy in like Manner; that is, the ſame Remedy in Subſtance: And in the Caſe of the Bankrupt's Debt the Contract is only aſſigned. And in the 42 E. 3. cap. 3. it is ſaid, That an Action of Covenant lay for the Aſſignee at the Common Law. But becauſe the Court was not full, it was thought fit this Caſe ſhould be adjourned till the next Term.

3 Mod. 338.

1 Roll. 519. No. 10.

Note, It was ſaid in this Caſe, the Word Reddendum makes a Covenant.

Day *and* Pitts.

2 Keb. 471.

A Prohibition was moved for to ſtay a Suit in the Spiritual Court, upon a Suggeſtion, that it was for calling one Old Thief, and Old Whore; and if there were any ſuch Words ſpoken, they were ſpoken at the ſame Time; which Suggeſtion was not good; for the Words ought to have been fully confeſs'd. And it was ſaid by the Court, That this Matter ought to have been pleaded there, and if they had not admitted the Plea, then to move for a Prohibition, and not before.

2 Lutw. 1043.

Gilman

Gilman *and* Wright.

BUrgh moved againſt Wright (Steward of Havering Court in Eſſex) for refuſing to admit Gilman an Attorney in this Court to appear for a Man in an Action ſued againſt him there; alledging, That the Attornies of the Courts of Weſtminſter might practiſe in any inferior Court; neither had they a Preſcription or Charter to have a certain Number of Attornies of their own, and to exclude others. 1 Sid. 410. 2 Keb. 477. 1 Mod. 23.

But becauſe it was the general Uſage of thoſe inferior Courts to admit none but their own Attornies, tho' the Court ſeemed to incline, That they ought not by Law to refuſe others; and it was ſaid to be ſo adjudged in the 15th of Car. 1. in one Darcie's Caſe; yet they would be adviſed until the next Term. Quære Cro. Car. Prouſe's Caſe.

Note, One who is ſubpena'd for a Witneſs, may have a Writ of Privilege to protect him from Arreſts in going and returning. Witneſs privileged.

Anonymus.

A Prohibition was granted to the Court of the Marches of Wales for that Lands being deſcended to an Infant, which was ſubject to a Truſt, they had not only enjoined the Poſſeſſion of thoſe Lands, but of other Lands deſcended to him. And it was ſaid by the Court, That they could not ſequeſter Lands at all, for the Performance of a Decree of their Court to pay Money. For they can only agere in perſonam, & non in rem. 2 Keb. 472. 1 Sid. 189.

Termino Paſchæ, Anno 21 Car. II.

In Banco Regis.

Anonymus.

Poſtea 24.

THE Sheriff returned Non eſt inventus to a Writ brought againſt his own Bailiff, and delivered to him. But the Court amerced him Forty Shillings, and he was ordered to amend his Return.

Anonymus.

2 Keb. 476. V. Yel. 166. Cr. Car. 254. 1 Roll. 6. Nov. 6, 7. Poſtea 18.

TRover and Converſion was brought againſt Baron and Feme, for that they ad uſum proprium converterunt & diſpoſuerunt; and held not to be good, becauſe the Wife cannot convert with her Husband. Vide poſt. 24, 33.

Skinner *and* Gunter, *&c.*

2 Cro. 667. Hob. 205. 266. Poſtea 18. 23, 25, 362. 1 Saun. 228. Raym. 176. 2 Keb. 473, 476, 497.

A Bill in the Nature of Conſpiracy was brought againſt Three, for that they, conſpiratione inter eos habita, cauſed the Plaintiff to be arreſted in London, on purpoſe to ver him and have him impriſoned, knowing that he was not able to find Bail, whereas they had no Cauſe of Action. The Defendants pleaded Not Guilty, and the Iſſue was found only againſt one of them.

It was moved in Arreſt of Judgment, That the Declaration was inſufficient, becauſe it was not declared that the firſt Action was determined; for no Conſpiracy lies upon an Indictment before Acquittal.

But the Court inclined to diſallow this; for here the Ground of the Action is the cauſleſs Troubling of him to put in Bail: But when a Man is indicted, he lies under the Scandal of the Crime until he is acquitted.

Raym. 118, 176. Poſtea 234.

Another Exception was, That this Bill being in the Nature of a Writ of Conſpiracy, there being One only found Guilty, the Action fails. But it was ſaid, True, it is ſo in Caſe of Conſpiracy to indict one of Felony; but here 'tis rather in the Nature of an Action upon the Caſe, and the Conſpiracy alledged is by Way of Aggravation. Fitz. N. B. 116. Et adjornatur. Poſtea 18.

Rex *verſus* Bromley.

AN Indictment was removed hither the laſt Term out of Middleſex, againſt Edward S. of Perjury, and he was named Edward all along in the Indictment unto the Concluſion, and then it was, & ſic prædictus Johannes commiſit perjurium. The Court was moved that this might be amended, and it was ſaid, Indictments removed out of London have been amended by the Original, for they do not certifie that, but only a Tranſcript; and a Jury have been reſummoned to amend an Indictment found in this Court; and in this Caſe, if by Examination of the Clerk of the Peace it appeared, that the Indictment certified varied from the Original, it might be amended; ſed Curia adviſare vult. 2 Keb. 476. Miſnomer in Indictments. Vide Hawk. Vol. 2. chap. 25. ſect. 70, 71. Poſt. 25.

Nota, If a Venire Facias be returned and not filed, a new one may be taken out.

Thomas Burgen's *Caſe*.

AN Indictment was brought againſt Thomas Burgen, for ſelling Ale in black Pots not marked, and doth not conclude contra formam Statuti, and held to be good enough, for the Common Law appoints juſt Meaſures; and tho' the Statute adds this Circumſtance, yet the Crime being at Common Law, the Concluſion is as it ought to be. 1 Sid. 409. 2 Keb. 477. 1 Saund. 249, 250.

Where a Statute makes an Offence more penal, (as that which deprives one that ſteals the Value of five Shillings, out of a dwelling Houſe in the Day-time, of his Clergy,) yet the Concluſion of an Indictment in that Caſe is not contra formam Statuti. 1 Saund. 249.

Nota, Where one is ſued by a Name with an Alias, the Addition muſt be expreſſed after the firſt Name. Cr. Eliz. 198, 249, 583. 2 Inſt. 669. 2 Leon. 183. Dy. 50.

Clerke *and* Cheney.

IN Treſpaſs for breaking of his Cloſe, the Defendant juſtifies by Reaſon of a Way from his Houſe thorough the Place where, uſque altam viam regiam in parochia D. vocat. *London* Road, and Iſſue was joined upon the Way, and found for the Plaintiff: It was moved in Arreſt of Judgment, that there was no Iſſue joined, for the Incertainty of the Terminus ad quem, whither this Way ſhould lead; and one that juſtifies for a Way, if he alledges the Place from whence, and to which, and that it leads over the Place where, 'tis ſufficient, tho' he miſtake the other mean Paſſa- 2 Keb. 480. 488. Hob. 189. 6 Mod. 1, 2, 4. 3 Lev. 305. 3 Sal. 275.

ges

ges of it, and tho' this be the Defendant's own Plea, yet he may take Exceptions to it, not being certain enough to make an Iſſue.

Sed non allocatur, for in regard it is found that he had a Way over the Place where, it is not material to the Juſtification whither it leads, it being after Verdict, when the Right of the Caſe is tried: And it is added at laſt by the Statute of Oxford, 16 Car. And ſo Twiſden ſaid, it was the Opinion of all the Judges at Serjeants-Inn, he putting the Caſe to them at Dinner.

Norris *and* Cuffuil.

2 Keb. 479, 513.

IN an Action upon the Caſe the Plaintiff declared, That the Defendant in Conſideration of ſix Pence paid in Hand the 13th of Jan. 17 Car. and that the Plaintiff would pay him 20 s. a Month, he promiſed to ſerve him in his Glaſs-houſe after the firſt Journey of Glaſs; and ſets forth, quod primum iter vitrii tunc prox. ſequens aggreamentum prædictum fuit 21 Feb. 17 Car. which was the Year before, and that the Defendant did not come to ſerve him.

After Verdict for the Plaintiff it was moved in Arreſt of Judgment, That the Plaintiff had not declared ſufficiently of any Journey of Glaſs after the Agreement, but that alledged, appears to be the Year before. Et adjornatur: This Caſe being moved again, Twiſden ſaid he had put it to the Judges at Serjeants-Inn, and they were all of Opinion that it was well enough after a Verdict.

Heath *verſus* Pryn.

1 Sid. 426. Clark *verſus* Pryn. 1 Mod. 11. 2 Keb. 484, 556.

IN an Ejectione Firmæ of the Rectory of Weſtbourne in Chicheſter, upon Not Guilty pleaded, it appeared upon the Evidence that the Plaintiff's Title was as Preſentee of the Grantee of the next Avoidance from the Lord Lumley, and Letters of Inſtitution under the Seal of the Ordinary were produced; but by Reaſon of the Times (the Ordinary, Parſon and Patron being ſequeſtred,) no Induction followed thereupon, until the King's Reſtoration; this Inſtitution was 1645. Soon after the Defendant was placed in this Church by an Ordinance of Parliament, and hath enjoyed it ever ſince; and there was an Act of Parliament made, 12 Car. 2. which confirms Miniſters in their Poſſeſſions of any Benefice with Cure, tho' they come not in by Admiſſion, Inſtitution and Induction, but according to a Form uſed in thoſe Times, in which Act there is alſo a Clauſe of Reſtitution of ſequeſtred Miniſters, to ſuch Benefices as they had been ſeized of by taking the Profits.

It was alledged on the Defendant's Side, that the Plaintiff proving nothing of a Preſentation, the Inſtitution could not be admitted as an Evidence of it, eſpecially in this Caſe, where the Induction was ſo long after; to which the Court did incline. And then the Oath of the Grantee of the next Avoidance was offered, which was not admitted, altho' his Intereſt was executed by the Preſentment. And it was ſaid, That an Aſſignor might be ſworn a Witneſs to the Aſſignment of a Leaſe, where there were no Covenants. It was alſo ſaid, That the Plaintiff was not within Clauſe of Reſtitution of the Act of 12 Car. becauſe he was never ſeized by taking the Profits, which cannot be until Induction, according to Hare and Bickler's Caſe, in the Commentaries, quod fuit conceſſum.

To which it was replied, That neither was the Defendant within the Clauſe of Confirmation, becauſe the Rectory in Queſtion was not a Benefice with Cure, for there is belonging to it a perpetual Vicaridge endowed, and the Vicar comes in by Admiſſion, Inſtitution and Induction, who performs Divine Service, pays the Synodals and Procurations, repairs the Chancel; and therefore it hath been adjudged, that ſuch a Vicar ſhall have Arbores in Cœmiterio: And it was ſaid that the Statute of 21 H. 8. againſt Pluralities, doth not extend to Rectories, where there are Vicaridges endowed. And Linwood deſcribes a Benefice without Cure, cujus cura Vicariis perpetuo exercenda eſt: Otherwiſe where the Vicar is temporal and removeable. And the Difference is inter curam actualem & habitualem. And 'tis the Cure that the Rector hath, and ſo hath every Biſhop in his Dioceſe; who when he gives Inſtitution ſaith Accipe curam tuam & meam; but the Act only extends to the firſt.

It appeared alſo on the other Side, That the Parſon had come once or twice a Year, and preached and adminiſtred Sacraments; and that without the Vicar's Leave, and alſo paid Firſt-Fruits: Upon all this Matter the Opinion of the Court was, That the Parſon had a concurrent Cure with the Vicar, and reſembled it to the Caſe where there are two Incumbents in one Church, and coming in by Admiſſion, Inſtitution and Induction, the Vicar could not diſcharge him of the Cure of Souls. But Donatives, which are conferred by Laymen, are ſine cura.

Note, The Plaintiff's Counſel would have denied the Act of 12 Car. to be an Act of Parliament, becauſe they were not ſummoned by the King's Writ; but the Judges would not admit it to be queſtioned, and ſaid, That all the Judges reſolved, that the Act being made by King, Lords, and Commons, they ought not now to pry into any Defects of the Circumſtance of calling them together; neither would they ſuffer a Point to be ſtirred, where-

Vide 1 Sid. 1, 2.

in

Hob. 109. 33 H. 6. 19.

in the Eſtates of ſo many were concerned. Notwithſtanding all this, the Jury found for the Plaintiff. It ſeemed by the Court in this Caſe, that Letters of Inſtitution muſt be under the Epiſcopal Seal; ſed vide Cro. lib. 1. 249.

The King *againſt* Burford.

Antea 10. 2 Keb. 494. Vide Poſt. 50. 1 Lev. 52. 280. 1 Sid. 67. 1 Mod. 22. Cumberba. 46, 65, 66.

HE was indicted, for that he ſcandaloſe & contemptuoſe propalavit & publicavit verba ſequentia, *viz.* That none of the Juſtices of Peace do underſtand the Statutes for the Exciſe, unleſs Mr. *A. B.* and he underſtands but little of them, no, nor many Parliament-Men do not underſtand them upon the reading of them. And it was moved to quaſh the Indictment, for that a Man could not be indicted for ſpeaking ſuch Words; and of that Opinion was the Court: But they ſaid he might have been bound to his Good Behaviour.

Stone's *Caſe*.

Attorney's Privilege. Vid. antea 1. Poſtea 29. Raym. 179. 1 Lev. 265. 2 Keb. 477, 486, 491, 508. 1 Cro. 422. March 30. Cr. Car. 389.

A Writ of Privilege was prayed for Stone, an Attorney of the Court, who was a Copyholder of a Manor, where the Cuſtom was, for the Homage to chuſe one of the Tenants to collect the Lord's Rents for the Year following; and they elected him. But it was ſaid, that this might be taken to be a Parcel of his Tenure, for the Lords uſe to ſeize the Land for not executing of it; and his Privilege ought not to deprive the Lord of the Service of his Tenant. In the Book of H. 6. the Archbiſhop of York being bound by Tenure to collect the Tenths, pleaded the King's Letters Patents in Diſcharge thereof, and they were diſallowed; and tho' Attornies have had their Privilege where they have been preſſed for Soldiers, as in Venable's Caſe, 1 Cro. 8 Co. Entries, 436. Spring's Caſe, and 1 Cro. 283. and where by Cuſtom it came to an Attorney's Turn to be a Conſtable, vid. Roll. 2. part 276. yet theſe are publick Services to which every one is bound; but Privileges may be allow'd to exempt particular Perſons, as the King may grant to one, that he ſhall not be of a Jury.

But the Court inclined to grant the Writ; for it did not appear that it was Parcel of his Tenure, but rather impoſed upon him by the Cuſtom of the Manor; and if Attornies ſhall be diſcharged of the Service of the Common-wealth, a fortiori of any private Service. Vide poſtea 29.

The King *verſus* Webb.

IN an Action brought againſt him for imbeziling of the King's Goods, which was laid in the Declaration to be in London; it was moved for the King, that the County might be changed: And the Court held the King might chooſe his County, and might waive that which he had ſeemed to have elected before, as he may waive his Demurrer and join Iſſue, & contra. 1 Sid. 412. 2 Keb. 386.

Perry's *Caſe*.

IN an Information of Forgery againſt him, being an Attorney of the Common Pleas, it was alledged, That he had framed a certain Writing in the Form of a Releaſe at Sherborn, and that he publiſhed and gave it in Evidence at Dorcheſter, and the Venue came out of Dorcheſter; whereas it was ſaid, it ought to have come out of both Places. To which it was anſwered, That the Publiſhing, and not the Framing, was the Crime, But notwithſtanding it was held to be a Miſ-trial, and being in an Information it was not aided by any Statute. Poſtea 35. Poſtea 35. 2 Keb. 490, 501, 527. 1 Sid. 67.

Anonymus.

IN Trover and Converſion, amongſt other Things the Plaintiff declared de ſex bovibus, inſtead of bobus. Upon Not guilty pleaded, and found for the Plaintiff, and entire Damages aſſeſſed,

It was moved in Arreſt of Judgment, That the Jury ought to have given no Damages; for bovibus being a Word inſenſible, and entire Damages being given, it was naught for all. To which it was anſwered; That if the Word be inſenſible, notwithſtanding the Anglice, the Jury ſhall not be intended to have regarded it in the Giving of Damages; and if it hath a Signification, then it is well enough; but 'twas anſwered, Bovibus was an old Latin Word, and is found in Plautus, and 'tis bobus only by Contraction. It was alſo objected, That the Plaintiff brought this Action as Executor, and the Trover was laid in the Teſtator's Time, which was not ſufficient, tho' the Converſion was alledged in his own. Poſtea 30, 31.

But the Court held neither of theſe Exceptions ſufficient to arreſt Judgment.

Rumſey *verſus* Rawſon.

Poſtea 25.

IN Replevin, the Defendant avowed for Damage-feaſant.

Raym. 171. 2 Keb. 410, 493, 504.

The Plaintiff replies, That the Parſon of ſuch a Pariſh, and all his Predeceſſors, have had Time out of Mind Common in the Place where, &c. belonging to his Glebe, and that the Beaſts of the Plaintiff were Levant and Couchant upon the Glebe, and he put them into the Common by the Licence of the Parſon.

Poſt. 384. 2 Lev. 2. 3 Lev. 98.

The Defendant traverſes that they were Levant and Couchant, and found for the Plaintiff. And it was moved in Arreſt of Judgment,

That the Plaintiff had not alledged Matter ſufficient to juſtify his Beaſts going in the Common; for no other Beaſts ought to be put into the Common, but thoſe of the Tenant of the Land to which it is appendant, or thoſe which he takes to compeſter his Land. Fitz. N. B. 180. B. and that tho' the Common be claimed for a certain Number.

And the Opinion of the Court was, That the Defendant might have demurred in this Caſe. But after a Verdict the Court ſhall intend they were Beaſts which the Parſon procured to compeſter his Land, and the Right of the Caſe is tried, ſo aided by the Statute of Oxford. But they gave farther Time to ſhew Cauſe. Poſtea 25.

Anonymus.

Poſt. 323. 1 Sid. 413. Antea 3. 1 Roll. 67. N. 27, 68. N. 29. 2 Keb. 494.

AN Action was brought for theſe Words, [Thou haſt received ſtoln Goods, and knew they were ſtoln. Alice S. ſtole them, and thou wert Partner with her] For the firſt Words the Court held them not actionable; for they might admit of a juſtifiable Conſtruction, as if the Goods were waived. But the laſt were holden ſufficient; for Partner with her muſt intend Partner in the Felony.

Skinner *verſus* Gunter & al'.

Antea 12. Poſtea 23, 25. See 1 Salk. 13, 14, 15. 3 Mod. 220. 3 Salk. 97. 5 Mod. 349, 405. Inſt. Leg. 299, 301.

THE Caſe was moved again by Pemberton, and alledged in Maintenance of the Action, That it was but in the Nature of an Action upon the Caſe; for at the Common Law no Writ of Conſpiracy lay but for indicting one of a capital Crime; and that after an Acquittal by Verdict. But ſince the Stat. of 33 Ed. 1. de Conſpiratoribus, Actions have been brought for Conſpiring to indict one of Treſpaſs, or to ſue one maliciouſly without Cauſe of Action, as this Caſe is, and ſo is Br. tit. Conſp. pl. 2. and by F. N. B. 116.

ſuch an Action in the Nature of Conſpiracy lies againſt one. And the Title of the Action in this Caſe is In placito tranſgr. ſuper caſum; and for theſe Reaſons all the Court were of Opinion for the Plaintiff. Vide antea 12. Poſtea 234.

Braithwaite's *Caſe.*

BRaithwaite brought a Mandamus to the Mayor, Bailiffs and Burgeſſes of the Town of Northampton, to be reſtored to his Place of Alderman there. 2 Keb. 488. 2 Show. 66, 67, 179, 183, 217.

They make a Return, and in their Return ſet forth the Letters Patents of 16 Car. by which they were incorporated; and Power is given them of holding a Common Council, conſiſting of a Mayor, 2 Bailiffs and 48 Burgeſſes, and that the Mayor, Bailiffs, and ſuch Burgeſſes as had been Mayors (commonly called Aldermen) ſhould have Power, upon juſt Cauſe, to amove any Common Council-Man from his Place there; and then they ſet forth how Braithwaite was a Member of the Common Council, and had committed divers Offences, which they expreſſed in particular. Whereupon, the 18th of Dec. 17 Car. the Common Council aſſembled together, & ſummoniri procuraverunt the ſaid Braithwaite; and he not coming to anſwer, was the ſame Day amoved ab officio ſuo & loco ſuo in Communi Concilio per Majorem & Burgenſes authoritate, & ſecundum Chartam prædictam. 1 Keb. 33, 549. 1 Lev. 148. 2 Salk. 433. 3 Salk. 229.

It was alſo ſet forth, That they had a Command from the King and Council to amove him. Upon this Return there were four Exceptions taken.

Firſt, That it did not appear that he was ſummoned; for it ought to have been, qui quidem Braithwaite poſtea ſummonitus fuit, and not ſummoniri procuraverunt. Sed non allocatur; for it was held clearly to be all one. Otherwiſe, if it had been quod procuraverunt J. S. eum ſummonire.

A ſecond Exception was, That their Proceedings were too quick; for they amoved him the ſame Day wherein he was ſummoned. Sed non allocatur; for it appearing he lived in the ſame Town, and refuſed to come to make his Defence, they might immediately amove him.

A third Exception was, That they had exceeded their Power, which was only to amove him from his Place in the Common Council, and they had amoved him from his Office. Sed non allocatur; for 'tis that wherein his Office conſiſts, and indeed it was ſo averred in the Return.

But the main Exception was, For that they had not (as was alledged) purſued their Authority; for the Mayor, and ſuch Burgeſſes who had been Mayors, have Power given them to amove. And here the Amotion is ſaid to be per Majorem & Burgenſes, ſo that it

might be by the Mayor and Burgeſſes which never had been Mayors; and if in Regard it was indefinite, it ſhould be intended, that all the Burgeſſes were there, and it may be the Amotion was by the Vote of ſuch Burgeſſes as have not been Mayors, they being the greater Number, and the others might diſſent; as if the Mayor and Court of Aldermen in London were impowered to do a Thing, and this is done per Cives Londini, it cannot be good. Sed non allocatur. For

Firſt, it ſhall be intended, That all the Burgeſſes were there, and that they all agreed in the Amoving of Braithwaite. And if the Truth were, that the Burgeſſes which were qualified, diſſented, which muſt not be preſumed, they might bring an Action upon the Caſe for the falſe Return: And further, to enforce the Intendment as before, it is ſaid to be per Majorem & Burgenſes ſecundum Chartam: If it had been returned, that he was amoved ſecundum Chartam generally, that had not been good, for there muſt be the Manner returned, that the Court may adjudge whether the Authority be purſued.

Nota hoc. And Quære the Quo Warranto Caſe.

It was further declared by Kelyng, Rainsford and Moreton, That the King and Council might diſfranchiſe any Member of a Corporation. And it was ſaid by Rainsford, That the Walls of Northampton were ordered to be pulled down by the King and Council; a fortiori an Alderman might be diſplaced upon juſt Cauſe; and here was no Exception to the Cauſes returned. But to this Twiſden ſaid nothing.

Merchant *contra* Driver Adminiſtrator' Rowe.

Fi. facias. 5 Co. 32. 1 Saund. 303. Poſt. 21. 221. 1 Sid. 412. 2 Keb. 488.

UPon a Fieri facias to levy a Debt recovered againſt an Executor, the Sheriff returned nulla bona; whereupon after a Teſtatum, &c. a Writ was awarded to the Sheriff to enquire, &c. who returned, That Goods to the Value of the Debt came to the Executor's Hands, & elongavit, vendidit, diſpoſuit & ad proprium uſum ſuum convertit. And Iſſue was taken by the Party, who came in upon a Scire facias, quod non elongavit, &c. and the Jury found for the Plaintiff. And it was moved by Saunders in Arreſt of Judgment,

That there was no proper Iſſue, neither did it appear that there was any Devaſtavit; for the Executor may eloigne and ſell the Goods; therefore the Return and Iſſue ought to have been quod Devaſtavit.

Sed non allocatur; for this tantamounts; and the Precedents are ſo; as 'tis a good Warrant for a Capias in Withernam when the Sheriff returns, that the Defendant in Replevin hath eloigned the Beaſts; ſo the Executor ought to be charged de bonis propriis upon his Return.

Wharton *and* Brook.

IN an Action for Words, the Plaintiff declared, That ſhe was and had been a long Time a Midwife, and got divers Gains; and that the Defendant, to ſcandalize her in her Profeſſion, ſaid of her, She is an ignorant Woman, and of ſmall Practice, and very unfortunate in her Way: There are few that ſhe goes to, but lie deſperately ill, or die under her Hands. Cr. Car. 211. 2 Keb. 489. 1 Danv. 118. pl. 46. Cro. Car. 211. Flower's Caſe.

The Court held the Action maintainable.

But Twiſden ſaid, This hath been adjudged, where one brought an Action, declaring ſhe was a School-miſtreſs, and taught Children to Write and Read, by which ſhe got her Livelihood; and that the Defendant ſaid of her, She was a Whore, and that J. S. kept her as his Whore: That to ſlander one in ſuch a Profeſſion was not maintainable without ſpecial Damage. Vide antea 4, 7, 10, &c. ib.

Sir Thomas Player (*Chamberlain of* London) *and* Jones.

RESOLVED by the Judges, That the By-Law in London, whereby the Number of Carts were reſtrained, was a good By-Law. 1 Sid. 284. 2 Keb. 27, 501, 873. Poſtea 196. Raym. 288, 324.

Walter *and* Chauner.

IN Treſpaſs the Defendant juſtifies for Damage-feaſant. The Plaintiff in his Replication preſcribes for Common, in the Place where, &c. in this Manner: 1 Rol. Abr. 364. N. 5. 2 Keb. 491.

Until the Field was ſown with Corn; and after it was ſown *& poſt Blada illa meſſa*, until it was ſown again. To which the Defendant demurs. Miller and Ward. Poſtea 92. 1 Rol. Abr. 267.

And it was ſaid, That this Preſcription was unreaſonable, viz. To have Common in Land ſown. To which it was anſwered and reſolved by the Court, That as the Preſcription was laid, the Common was not claimed until after the Corn was reaped.

Nota, Upon a Fieri facias the Sheriff returned, That he had taken Goods, and that they were reſcued from him by certain Perſons: And it was held to be no Return, and that he was to be amerced. Fi. facias. Poſt. 52, 221. Antea 7, 20. 2 Rol. 459. N. 2.

Anonymus.

ONE recovers Debt, and then brings a new Action of Debt upon the Judgment: The Defendant pleads a Tender of the Money before the Action brought, & uncore priſt, and the Plaintiff could have no Coſts.

If

5 Co. 111. a. Allen 65. Yelv. 112. Raym. 118. 1 Sid. 252.

If the Defendant plead in Abatement of the Writ, and the Plaintiff demurs, and 'tis adjudged againſt the Defendant, it ſhall be only quod reſpondeat ulterius.

But if he alledge any Thing in Abatement whereupon Iſſue is joined and tried, and found againſt the Defendant, there the Plaintiff ſhall have his Judgment to recover his Debt.

Skier *and* Atkinſon.

2 Inſt. 288, 289. 1 Co. 116. a. b. 2 Keb. 496, 499, 508, 528. 3 Cro. 583. 1 Leon. 282. 2 Leon. 52.

IN an Action upon the Statute of 8 H. 6. of Forcible Entry, the Secondary craved the Direction of the Court before he could tax Coſts; and they were doubtful in it; and rather inclined, that the Plaintiff was to have no Coſts: But upon the View of Pilford's Caſe in 10 Co. and the Books there cited, they reſolved that he ſhould have treble Coſts.

Croſſe *and* Winter.

1 Saund. 246. Raym. 181. 1 Mod. 199. 2 Keb. 496. 1 Danv. 142, 143.

IN an Action for theſe Words, Thou art a thieviſh Rogue, and didſt ſteal Plate from Wadham College in Oxford.

The Defendant juſtified, for that he did ſteal the College Plate.

The Plaintiff replied, De injuria ſua propria. The Words were alledged to be ſpoken in London, and thither the Venire facias was awarded, and there was a Verdict for the Plaintiff.

It was moved in Arreſt of Judgment, That there was a Mis-Trial, for the Jury ought to have come out of Oxford; for the Iſſue is joined upon the Matter in the Juſtification, and the Words are confeſſed: And with this agrees Ford and Brooke's Caſe in 3 Cro. 361. expreſly.

Hob. 76. Jenings and Hunkin. Poſtea 13, 263.

But it was reſolved by the Court, That this was aided by the late Statute made at Oxford, being tried by a Jury of the proper County where the Action is laid, tho' the Iſſue upon Pleading may ariſe out of another Place and County.

1 Saund. 246. Hob. 78. 1 Lev. 265.

Note, An Act of Parliament was made to continue for three Years, and from thence until the End of the next Seſſion of Parliament and no longer. And it was reſolved, That this muſt be intended a Seſſion, which commences after the three Years expired: For if a Seſſion ſhould be within the three Years, and continue for many Years after, the Act would continue.

1 Sid. 457.

Note, It cannot be called a Seſſion of Parliament unleſs the King paſſes an Act.

The King *and* Serjeant.

UPon a Certiorari to remove a Conviction of forcible Detainer by the View of the Juſtices of the Peace upon the Statute of 15 R. 2. the Record returned was, Queſta eſt nobis Jana Wood Vid', quod quidam pacis Domini Regis perturbatores in domum manſional' exiſtens liberum tenementum ipſius Janæ manu forti ingreſſi ſunt, &c. 1 Sid. 414. 2 Keb. 499, 505, 718. 584. Poſtea 25.

Exception was taken to it, becauſe it was not adtunc exiſtens liberum tenementum ipſius Janæ.

To which it was anſwered, That altho' in an Indictment of Forcible Entry it muſt appear that the Place was the Freehold of the Party at the Time of the Entry with Force, becauſe upon the Finding of it a Reſtitution is to be awarded, and where 'tis generally exiſtens liberum tenementum, it may be referred as well to the Time of the Indictment, as to the Entry; yet here 'tis not material, becauſe no Reſtitution is to be awarded; but the Malefactors being convicted by the View of the Juſtices, are to be fined and impriſoned: And the Precedent in Mr. Dalton's Book of Juſtices of the Peace, fo. 356. makes no Mention of whoſe Freehold at all: But however here, exiſtens liberum tenementum ſhall be referred to the Complainant, tho' there be not adtunc, and of that Opinion were the Court: But Twiſden was of Opinion, That it was not neceſſary to be alledged in this Caſe at all. Poſtea 25. 1 Mod. 73.

Sir Andrew Henley *verſus Dr.* Burſtall.

IN an Action upon the Caſe the Plaintiff declared, That he being a Juſtice of the Peace the Defendant had indicted him for reſcuing of a Vagabond out of the Conſtable's Hands, who brought him before him, ſo that the Law could not be executed againſt him. Poſtea 25. Antea 12, 18. Raym. 135, 180. 2 Keb. 486, 494.

It was ſaid, To indict a Man for ſuch a Crime in the Execution of his Office, was actionable; and it has been often reſolved, That an Action would lie for Indicting a Man of Barretry, and in the Book of Aſſiſe 13. for Indicting one for Treſpaſs. And to this the Court did incline; but they would further adviſe. Poſtea 25.

The King *verſus* Ring.

ERror to reverſe a Judgment in an Indictment of Forgery againſt Ring upon the Statute of 5 El. cap. 4. for that he ſcienter, ſubdole & falſo fabricavit quoddam falſum factum & ſcriptum indentatum barganiæ & venditionis, which was ſaid to be inrolled, per quod Harriſon Keymer & Henry Keymer did ſell to J. S. 2 Keb. 129, 245, 501, 532.

J. S. ſuch Lands: And then ſets forth the Indenture verbatim, & quod poſtea prædict' Ring ſciens præd' chartam eſſe falſam & contrafactam, vi & armis pronunciavit & publicavit; and this was ea intentione ad perturbandum ſtatum, titulum & intereſſe of Harriſon and Henry Keymer, and their Heirs.

The firſt Error aſſigned was, That the Indictment was for Forging of a Deed of Bargain and Sale; and the Indentures ſet forth were a Leaſe and Releaſe. Alſo it did not appear in what Court it was inrolled; and it muſt be inrolled at one of the four Courts at Weſtminſter, or before the Juſtices of the Peace at the Seſſions, to be a Bargain and Sale; and whereas the Indictment is for Forgery of a Deed, per quod Harriſon and Henry Keymer did ſell, only one of them was Party to the Deed ſet forth. And it ought to have been in quo continetur that they did ſell, and not, They did ſell, whereas the Deed was forged, which, as was ſaid, is oppoſitum in objecto. And where it is that Sciens prædictam chartam eſſe falſam, vi & armis pronunciavit & publicavit, it was ſaid it ought to have been, Vi & armis prædictam chartam pronunciavit & publicavit: And for this Vaux's Caſe in 4 Co. was cited, where it is Nich. neſciens prædictum potum cum veneno fore intoxicatum, ſed fidem adhibens dictæ perſuaſioni dicti W. recepit & bibit; and becauſe it was not prædictum venenum recepit & bibit, it was held inſufficient; for Indictments muſt have preciſe Certainty. fo. 44.

Another Exception was, That this Forgery was ſaid to be ea intentione ad perturbandum ſtatum, titulum & intereſſe of them and their Heirs, and it did not appear that they had a Freehold; and the Puniſhment inflicted by the Statute is more ſevere when the Forgery is to diſturb the Freehold, than when it only concerns a Chattel: Alſo it ought to appear in whom the Freehold was at the Time of the Forgery, as an Indictment of Forcible Entry upon the Statute of 8 H. 6. muſt expreſs in whom the Freehold was at the Time of the Force. Et adjornatur.

Anonymus.

Antea 12. UPon Proceſs againſt one, the Sheriff returned a Non eſt inventus, and an Affidavit was made, That the Defendant was one of the Sheriff's Bailiffs; and the Sheriff was amerced.

Anonymus.

Antea 12. Poſtea 33. IN Trover and Converſion againſt Baron and Feme, the Plaintiff declared, Quod ad uſum proprium converterunt, which was naught, becauſe it muſt only be ad uſum of the Husband; and yet it may be converterunt if ſhe were preſent; yet whatever ſhe doth is the Act of her Husband. 1 Cro.

Vide 2 Vent. 45. 2 Lev. 145.

Sir Andrew Henley *verſus Dr.* Burſtall.

THE Caſe was moved again, and ſpoken to in Arreſt of Judgment, That no Action would lie for proceeding againſt a Man by Indictment; and it would diſcourage all legal Proſecutions of Offences, and 4 Co. 14. b. was cited, where it is reſolved, That no Action lies for exhibiting of Articles to a Juſtice of the Peace againſt one, tho' the Matter be falſe; nor for preferring a ſcandalous Bill in the Star-Chamber, concerning Things whereof the Court had Juriſdiction. But an Action upon the Caſe, or Conſpiracy, lies where Life or Member are brought in Jeopardy by a malicious Indictment. Antea 23. Antea 12, 18. Raym. 180.

But notwithſtanding the Court reſolved, That the Plaintiff ſhould have Judgment. Tho' 'twas further alledged, That there was no Iſſue joined; for in the Pleading and Joining of the Iſſue the Defendant's Chriſtian Name was miſtaken, but the Court would amend that, it being rightly named before in the Record. Vide poſt. 217. Vide antea 13.

The King *and* Serjent.

AN Indictment of Forcible Entry and Detainer was preferred againſt Serjent; and the Jury found, as to the Detainer with Force, Billa vera; but as to the Entry, Ignoramus: And it was moved to quaſh this Indictment, becauſe they ought to have found all or none; and of that Opinion was the Court. Antea 23. 1 Sid. 97, 99, 414. Yel. 99. 2 Keb. 505.

Rumſey *verſus* Rawſon.

THE Caſe was moved again by Mr. Solicitor, That the Plaintiff having intitled the Parſon to Common for 200 Sheep, levant and couchant, and that theſe Beaſts were levant and couchant, and that he put them in by the Licence of the Parſon; he ought to have ſhewn, That the Licence was by Deed, being to take a Profit in alieno ſolo; and the Statute (which gives Remedy after Verdict, when he doth not ſay, Hic in Curia prolat') doth not aid this: And 'tis neceſſary to plead a Thing by Deed, whoſe Nature requires it. Antea 18. Poſtea 384. 2 Cro. 575.

But to this it was anſwered by Jones, That a Parole Licence was ſufficient in this Caſe, being only to take the Profit unica vice, there paſſing no Eſtate in it: And the Plaintiff had Judgment. Antea 18. 2 Cro. 574. Antea 18. Poſtea 124, 165. 2 Saund. 327, 328. 2 Ro. Rep. 146, 175.

Pomfret *verſus* Ricroft.

Poſtea 44. 1 Sid. 429. 1 Saund. 321. 2 Keb. 505, 543, 569. 1 Danv. 233.

IN Covenant the Plaintiff declares, That the Defendant demiſed unto him a certain Meſſuage, excepting a Piece of Ground whereupon a Pump ſtood; and grants, that he ſhall have the free Uſe of the Pump during the Term; and covenants, that he ſhould enjoy dimiſſa præmiſſa; and aſſigns a Breach, in that he ſuffered Antliam prædictam eſſe fractam & totaliter ſpoliatam. And to this the Defendant demurs.

Vide poſt. 44, 45.

And it was ſaid in Maintenance of the Action, That the Defendant having granted the free Uſe of the Pump, was bound to do all Things neceſſary to make his Grant effectual to the Plaintiff, or elſe he broke his Covenant of Enjoying; and if the Plaintiff ſhould come to repair it, he would be a Treſpaſſer: And of this Opinion was Kelynge. But Twiſden conceived, That an Action of Covenant would not lie, there being no expreſs Covenant to repair it: Otherwiſe if he had taken away the Pump; and here he might bring an Action upon the Caſe, becauſe he loſt the Uſe of it; and they Two being only in Court, it was adjourned. Poſtea 44.

Anonymus.

2 Roll. 139. No. 2, 141.

A Preſentment was made in a Leet for erecting of a Glaſs-Houſe, which was ſaid to be ad magnum nocumentum, per juratores Jurat' pro Dom' Rege, & Dom' Manerii, & tenentibus.

2 Keb. 500.

It was ſaid, A Man ought not to be puniſhed for erecting any Thing neceſſary to the Exerciſe of his lawful Trade; but it was anſwered, That this ought to be in convenient Places, where it may not be a Nuſance. For Twiſden ſaid, He had known an Information adjudged againſt one for erecting of a Brew-houſe near Serjeants-Inn: But the other Juſtices doubted, and agreed, That it was unlawful only to erect ſuch Things near the King's Palace.

But this Preſentment was clearly ill, becauſe it was not ad commune nocumentum: And it was ſaid further, That the Leet was the King's Court, and therefore it ought not to be Jur' pro Dom' Rege & Dom' Manerii, & tenentibus. But the Court held it Surpluſage for tenentibus, and good for the King and the Lord of the Manor: For Leets are granted to the Lords as derived out of the Tourn, for the Eaſe of the Reſiants within its Juriſdiction.

2 Cro. 382.

More *verſus* Lewis.

IN an Aſſumpſit the Plaintiff declares upon two Promiſes; one was, That in Conſideration he had done him multum & gratiſſimum ſervitium, the Defendant promiſed to pay him ten Pounds a Year. Poſtea 44. 1 Sid. 413, 425. 2 Keb. 488, 507, 552. Hob. 106. 2 Leon. 30. 225.

The Conſideration of the other was, That he had done him multa beneficia.

Upon Non Aſſumpſit pleaded, and found for the Plaintiff, as to both the Promiſes, and entire Damages given, it was moved in Arreſt of Judgment, That neither of theſe Conſiderations were ſufficient, eſpecially the laſt; for there ought to have been ſome Service particularly expreſſed.

To which it was anſwered, That this being after a Verdict, the Court muſt intend, that the Plaintiff gave in Evidence ſomething that he did, which was a Conſideration ſufficient; otherwiſe the Jury would have given no Damages. And a Caſe was cited in Hutton's Rep. 84. where the Plaintiff in an Aſſumpſit declared, That in Conſideration that ſhe had ſerved the Defendant and his Wife, and done them loyal Service, that he would give her 13 s. 4 d. And a Verdict being found for her, ſhe had Judgment. Sed nota, In the Book nothing was ſaid to be moved in Arreſt of Judgment, but the Inſufficiency of the Conſideration, in reſpect that it was executed, and laid to be done at the Requeſt of the Defendant.

But the Court held clearly, That nothing being particularly expreſſed in the Conſideration of the ſecond Promiſe in this Caſe, it was meerly void; and entire Damages being given, the Plaintiff could not have his Judgment. And thereupon Judgment was entred, Quod querens nil capiat per Billam.

Gregory *verſus* Eads.

ERror to reverſe a Judgment given in the Court at Warwick, in an Aſſumpſit, where the Plaintiff declared of three Promiſes, whereof one was found for the Plaintiff, and as to the other Two, that the Defendant Non Aſſumpſit; and Judgment was given for the Plaintiff for that which was found for him; but no Judgment was given as to the other; that the Plaintiff ſhould be amerced pro falſo clamore, or, quod Defendens eat inde ſine die. And it was aſſigned for Error, That this Judgment was defective, and ought to be reverſed. To which it was anſwered, That the Judgment ought to ſtand for ſo much as was good; and 2 Cro. 243. was cited, where, in an Action for Words ſpoken at divers Times, the Jury found the Defendant guilty as to all, and gave ſeveral Damages; whereupon there was Judgment; and a Writ Poſtea 39. 1 Roll. 775. No. 6. 2 Keb. 506, 535. Vid. con. 2 Cro. 424.

of Error brought and aſſigned, in that the Words ſpoken at one of the Times were not actionable. Which being agreed, the Court reſolved, That Judgment ſhould be reverſed only quoad them, and ſhould ſtand for the Reſidue; for utile per inutile non
1 Cro. 442. vitiatur. And Slocomb's Caſe (1 Cro. 319.) where a Writ of Error was brought to reverſe a Judgment, given in an Action for Words, and aſſigned, in that it was entred, Conceſſum fuit quod querens nil capiat, &c. whereas it ſhould have been conſideratum: Yet becauſe the Words were inſufficient, the Court (tho' they held the Manner of the Entry erroneous) ordered Judgment to be given, Quod querens nil capiat per Billam. Et adjornatur. Poſt. 39.

1 Roll. 769. No. 9, 10. Note, It was ſaid by Serjeant Maynard, That after all the Evidence given in an Information, the King's Counſel may, without the Party's Conſent, withdraw a Juror, and try it over again: And ſo he ſaid it was done by Hobart, Attorney General, 5 H. 7. and in the Exchequer by Noy, in King Charles the Firſt's Time.

Barkley *verſus* Paine.

IN an Aſſumpſit in an inferior Court, the Conſideration was, That the Plaintiff ſhould ſolicit a Cauſe in Chancery.

The Court reverſed the Judgment for Want of Juriſdiction. It had alſo another Fault, for it was Defendens in miſericordia & capiatur.

Anonymus.

Vide antea 2, &c. ibid. IT was moved to quaſh a Return of a Reſcous, for that it was Vi & armis in Ballivum meum affraiam fecerunt, & e cuſtodia mea adtunc & ibid' reſcuſſerunt, and not Vi & armis reſcuſſerunt. Sed non allocatur; for by Reaſon of adtunc & ibidem, vi & armis mentioned at firſt, ſhall be applied to all.

Hanway *verſus* Merrey.

THE Caſe was, The Defendant had covenanted to pay the Plaintiff a Sum of Money the 24th of June next; whereupon the Plaintiff takes out a Latitat, Teſte 3 Maii, returnable the
2 Keb. 503. laſt Day of Trinity-Term following, and arreſted the Defendant upon it: Which being made appear to the Court, they diſcharged the Arreſt. For tho' 'tis allowed a Man may take out a Latitat before the Money is due; yet the Party muſt not be arreſted upon it before: And this differs from an Original, which if it bears Teſte before the Money be due, it is abateable; but the Latitat is only to bring him in cuſtodia, that the Plaintiff may declare againſt him by Bill, and after that the Proceedings upon the Latitat ceaſe.

Note, By the Cuſtom of London, the Debtor may be arreſted before the Money is due, to make him find Sureties. Hob. 86. 2 Cro. 667.

It was alſo moved, That the Defendant might have Coſts, being put to the Charge of Motions to be diſcharged; but the Court would grant none, it being but for Taking out of the Proceſs of the Court.

Stone's Caſe.

THE Caſe being moved again, the Court (abſente Moreton, & dubitante Rainsford) granted a Writ of Privilege altho' he were obliged by his Tenure to be the Lord's Reeve, for the Privilege is preſumed more antient than the Creation of the Tenure, or at leaſt ſhall be preferred, in as much as it concerns the Adminiſtration of Juſtice. And Kelynge ſaid, An Attorney could not be amerced for not doing Suit to his Lord's Court, at ſuch Time as his Attendance is required at Weſtminſter. Antea 16. Antea 16. 1 Lev. 265. Raym. 179. 2 Keb. 508. 1 Danv. 16. 2 Vent. 47, &c.

Sir Robert Cotton *verſus* Daintry.

IN Trover and Converſion for Goods and Money aſſigned by Commiſſioners of Bankrupt, upon Not guilty pleaded, the Queſtion of Fact before the Jury was; Whether Sir A. B. (whoſe the Goods were) was a Bankrupt? 1 Sid. 411. 2 Keb. 487, 498, 506, 508.

The Plaintiff proved, That he had Silk and other Merchandiſe in his Warehouſe to a very great Value; and that upon the Credit of them he took up divers Sums of Money, and afterwards ſold them; but could not prove that they were brought in after the Debts contracted; or that he had exported any Thing at any Time after, or a good While before.

To this the Court delivered their Opinions, That the Selling of ſuch Merchandiſe, if they were but the Effects of his former Trading, (for he had been a Turkey Merchant) which he could not put off immediately upon his Ceaſing to trade, could not make him a Trader; for the Statute only extends to thoſe that live by Buying and Selling. It was alſo proved, That he had a 16th Part in a Coal-ſhip, which at preſent traded to Newcaſtle, but brought no preſent Profit to the Owners, ſhe being much in Debt for Repairs. It was ſaid to be reſolved in one Craſhaw's Caſe, That the having a Part in a Ship did not make a Man a Trader; but that was a Merchant-Ship, which the Owner let out to Fraight; but the Owners fraighted this Ship themſelves, and were to have an Account of Profit and Loſs, and that if an Owner refuſed to fraight, he was compellable. But in regard it could not be proved that Sir A. B. had fraighted, or that he had received any Account of Profit, Kelynge and Twiſden were of Opinion, That it did not make Antea 5. Poſtea 166. contra. 1 Sid. 411. 3 Mod. 329.

make him a Trader. Rainsford and Moreton doubted. Wherefore it was offered the Plaintiff's Counſel to have it found ſpecially; but they declined it, and the Jury found a General Verdict for the Plaintiff.

The Day after, Motion was made for a new Trial, Affidavit being made, That the Foreman of the Jury was Brother-in-law to one of the Creditors of Sir A. B. The Court was alſo informed, That the Plaintiff, after the Verdict, had paid the Jury 4 l. a Man, whereas the Rule of Court is, That they coming but out of Hertfordſhire, ſhould have but 20 s. a Man.

Moreton and Rainsford held neither of theſe Reaſons ſufficient. For the Firſt, it was their own Laches that they did not challenge upon it. For the other, They thought the Breach of the Rules of Court ought to be puniſhed, but did not think fit to ſet aſide the Verdict for it.

Twiſden for the laſt Reaſon held a new Trial was to be granted, and that it was fit to be made an Example to other Juries: For if the Parties may give what they will, it is to be preſumed, the Ability of one or other will much incline the Jury to find for him, from whom they may expect the greateſt Reward.

Kelynge held both Reaſons ſufficient for a new Trial; which could not be, in Regard the Court was divided; whereupon Judgment was entred for the Plaintiff, and Execution taken out, and a Writ of Error was brought, which was ſealed about an Hour before Execution executed. Whereupon it was moved, That the Sheriff might bring the Money into the Court, for that the Writ of Error was a Superſedeas; for though the Sheriff ſhall not be in Contempt, if he makes Execution after the Writ, if no Superſedeas be ſued out, for that he had no Notice; yet the Writ of Error immediately upon the Sealing foreclоſes the Court, ſo that the Execution made after is to be undone; of which Opinion was the Court, and ordered the Money to be brought in, and not delivered to the Plaintiff.

2 Keb. 506, 508. Mar. R. 54. 3 Lev. 312. 1 Mod. 28. Sty. 159. God. 439.

Mr. Juſtice Moreton's *Caſe.*

HE brought Debt as Executor upon 2 Ed. 6. for not ſetting forth of Tithes due to the Teſtator. Upon Non debet pleaded, and a Verdict for him, it was moved in Arreſt of Judgment, That this being a Forfeiture given by the Statute for a Tort done to the Teſtator, it could not be brought by the Executor. To which it was anſwered, That this Action was maintainable within the Equity of the Statute 4 Ed. 3. that gives the Executor Treſpaſs de bonis aſportatis in vita teſtatoris. So an Ejectione firmæ lies upon an Ejectment done to the Teſtator, and Trover and Converſion, where the Converſion was in the Time

Vide 1 Salk. 12. 4 Mod. 403. 1 Sid. 88, 407. Raym. 57. 2 Keb. 502. 3 Cro. 377, 384. Latch 167. Antea 17. Noy 87. T. Jones 173. 1 Roll. 913.

of the Teſtator. 1 Cro. adjudged, That an Executor may bring an Action upon the Caſe againſt the Sheriff, for an Eſcape upon Meſne Proceſs ſuffered in his Teſtator's Life-time. And the Court were clear of Opinion for the Plaintiff, and ſaid, It had been formerly reſolved ſo in the Exchequer-Chamber. But this Action does not lie againſt Executors for their Teſtators not ſetting forth of Tithes. 1 *Sid.* 407.

The Lady Wortley *verſus* Holt.

A Writ of Error was brought to reverſe a Judgment given in Dower, in the Common Pleas, which being affirmed in this Court, a Writ of Error was brought returnable in Parliament, which was diſcontinued by the Prorogation of the Parliament. 1 Sid. 413. 2 Keb. 438, 491, 509. 1 Mod. 106, 285. Raym. 5.

Another Writ of Error was brought Teſte the laſt Day of the Seſſion of Parliament, viz. 1 March, returnable 19 November, the Day to which it was prorogued.

The Court reſolved, That though the firſt Writ of Error was not diſcontinued by any Act of the Party, yet this ſecond ſhould be no Superſedeas. Firſt, It was doubted, whether this Writ of Error bearing Teſte the laſt Day of the Seſſion, was not determined by the Prorogation? And it was held clearly, That a Writ of Error returnable ad proximum Parliamentum could not be good: But here the Parliament was prorogued to a Day certain. But however all the Court held, That in regard of the Length of Time in the Return it ſhould be no Superſedeas. And Twiſden cited a Caſe between Limmery and Limmery, where a Writ of Error was brought Teſte 28 Nov. returnable 28 Nov. proximè ſequen' in Parliament', and reſolved to be no Superſedeas, by Reaſon of the Length of the Return. Poſtea 100, 266. 1 Mod. 106, 285. 1 Sid. 44, 45. 2 Cro. 341.

Anonymus.

AN Information was exhibited againſt A. B. for cauſing to be framed, printed and publiſhed a Scandalous Libel, entitled, &c. thereby ſcandalizing of one C. D. Upon Not guilty pleaded, it appeared upon the Evidence, that after the Diſcovery of the Libel, there were Warrants from the Lord Arlington, Principal Secretary of State, to ſearch the Lodgings of the Defendant, who was ſuſpected to be the Contriver of it, where were found two of theſe Libels printed. 2 Keb. 502. Vide 6 Mod. 164, 268, &c. 1 Salk. 48, 49, &c. 3 Salk. 224, 225 &c. Cumberb. 36, 358, 359. Moor S.C. 1100.

The Opinion of the Court was, That this was no Crime within the Information, though he gave no Account how they came there; and the having of a Libel and not Delivering of it to a Magiſtrate, was only puniſhable in the Star-Chamber, unleſs the Party maliciouſly publiſhed it. 9 Co. 59, 60. 5 Mod. 167. 5 Co. 125. b.

Anonymus.

Anonymus.

Hob. 192, 300, 301. Dyer 117.

IF the Jury, upon an Iſſue joined in a Prohibition upon a Modus Decimandi, find a different Modus, yet the Defendant ſhall not have a Conſultation, for it appears he ought not to ſue for Tithes in Specie, there being a Modus found.

Termino Sanctæ Trinitatis, Anno 21 Car. II.

In Banco Regis.

Jurado *verſus* Gregory.

1 Sid. 418. 2 Keb. 511, 610. 1 Lev. 267. Videantea 1. Poſtea 47, 173, 308.

THE Caſe was this, There was a Contract at Malaga concerning the Lading of a Ship, and for Breach of this which was laid to be upon the Sea, (viz.) That he would not receive forty Buts of Wine into the Ship according to the Agreement; there was a Libel in a Foreign Admiralty, and Sentence that the Wine ſhould be received into the Ship; which being refuſed, another Libel was commenced in the Admiralty here in England, reciting the former Sentence, and charging the Defendant with the Breach of it; and a Prohibition was prayed, becauſe it appears the Contract was made upon the Land.

Vide Latch 234. Raym. 473.

Againſt which it was objected by Finch Solicitor, That where Sentence is obtained in a Foreign Admiralty, one may libel for Execution thereof here, becauſe all the Courts of Admiralty in Europe are governed by the Civil Law, and are to be aſſiſtant one to another, though the Matter were not originally determinable in our Court of Admiralty; and for this he cited a Judgment, 5 Jac. Roll. Tit. Courts, Sect. Admiralty. And to this the Court agreed. But here was no compleat Sentence in the Foreign Admiralty, but only an Award, that the Wine ſhould be received; and now for Breach thereof he ſues here, which is in the Nature of an original Suit, and to have Execution of the Sentence; and this ought not to be, though the Breach were at Sea, it being of a Contract made upon the Land; wherefore they granted a Prohibition.

1 Roll. 929. No. 3. 1 Saund. 274, 275. 1 Sid. 142, 420. 3 Roll. 195. E. No. 1. 2 Keb. 526, 533, 671.

The King grants bona & catalla felonum, the Grantee ſhall not have Felons Debts, nor bona & catalla Felonum de ſe.

Anonymus.

A Conviction was certified of one, for carrying of a Gun, not being qualified according to the Statute, where the Words in the Statute are, Upon due Examination and Proof before a Justice of the Peace. 1 Sid. 419.

The Court resolved, That that was not intended by the Jury, but by Witnesses; and no Writ of Error lies upon such Conviction. Postea 171. 1 Mod. 17.

And an Exception was taken, because it was before such an one, Justice of the Peace, without adding Nec non ad diversas Felonias, Transgressiones, &c. audiend' assign'. And the Court agreed so it ought to be in Returns upon Certiorari's to remove Indictments taken at Sessions. But otherwise of Convictions of this Nature, for 'tis known to the Court, that the Statute gives them Authority in this Case. Postea 39.

The King *versus* Benson.

IN an Information against him for Extortion, an Issue was joined; and the Day the Jury were return'd, the King sent a Writing under his Sign Manual, to Sir Thomas Fanshaw Clerk of the Crown, to enter a Cesser of Prosecution: And Palmer Attorney General affirmed, That the King might stay Proceedings; yet notwithstanding, the Court proceeded to swear the Jury, and said, They were not to delay for the great or little Seal; whereupon the Attorney entred a Noli prosequi. 1 Sid. 420. 2 Keb. 521.

Anonymus.

TRover against Baron and Feme, and laid quod ad usum proprium converterunt; and it was alledged, proprium might be applied only to the Husband; so also if it had been ad usum suum. But the Court held neither had been good; so it was prayed that Judgment might be entered, quod Querens nil capiat per billam: For if it had been quod Defendens eat inde sine die, the Plaintiff could not have brought an Action de novo. Antea 12,24 Cr. Car. 254, 2 Keb. 476, 520.

Note, A Man is outlawed in Middlesex, a Capias utlegatum may be sued out against him into any other County, without a Testatum.

Anonymus.

1 Saun. 227. 2 Cro. 44. antea.

IN Treſpaſs, the Defendant juſtifies by Reaſon of Common in the Place where, for Cattle Levant and Couchant upon his Land, and doth not aver the Beaſts were Levant and Couchant. This is aided after a Verdict.

1 Lev. 153. 1 Sid. 236. 1 Roll. 337. 1 Roll. Ab. 600. 2 Keb. 520. 1 Sid. 419. Yel. 113, 209. Moor 701. 2 Keb. 467, 520.

A Judgment in Debt is had in the King's Bench, and a Writ of Error is brought; it ſtill remains a Record of the King's Bench; and an Action of Debt may be brought upon the Judgment.

In a Writ of Error, if the Defendant die, the Writ is not abated: Otherwiſe if the Plaintiff die. And the Secondary informed the Court of a Caſe between Sir H. Thyn and Corie, where a Scire Facias ad audiend. errores went againſt the Executors, when the Defendant in the Writ of Error died.

Note, The Exchequer-Chamber doth not award a Scire Facias ad audiend. Errores; but Notice is given to the Parties concerned.

Skirr *and* Skies.

Cr. Car. 142, 535. 1 Sid. 143. Poſtea 49. 1 Sid. 420. 2 Keb. 525, 528.

IN Treſpaſs upon the Stat. of 8 H. 6 the Plaintiff had Judgment. It was moved, whether a Writ of Error would lie of this into the Exchequer-Chamber. For though Treſpaſs be one of the ſeven Caſes where the Statute gives it; yet it might intend Common Treſpaſſes only, and not where the Action is founded upon a Statute; as Actio de ſcandalis Magnatum is not within the Statute. And the Court would adviſe.

Cabel *and* Vaughan.

5 Co. Whelpdale's Caſe, He cannot plead non eſt factum. 1 Saund. 291. Poſtea 76, 135. 1 Sid. 420. 2 Keb. 525, 528. Hard. 198.

IN an Action of Debt upon a Bond againſt one, and it appears another was jointly bound with him; wherefore the Defendant demurs. But it was adjudged for the Plaintiff; for the Defendant cannot demur in ſuch Caſe, unleſs the other Obligor be averred to be living, and alſo that he ſealed and delivered the Bond. 3 Cro. 494, 544. Aſcue and Hollingworth's Caſe, 28 H. 6. 3. And if one be bound to two, one Obligee cannot ſue unleſs he avers the other is dead. In B. R. 1651. 1068. Levit & Staneforth.

Perry's *Case*.

IN an Information of Forgery against him, there was a Mistrial. And it was moved, That this was aided by the Statute of 21 Jac. the general Purview whereof is extended to any Action, Suit, Bill or Plaint. Then there is a Proviso, which excepts Indictments and Informations upon Penal Statutes; and this being an Information at Common Law, was not within the Proviso; and it may be taken within the Word Suit, for it is Secta Domini Regis. Antea 17.

But the Court held it not remedied, either by the Words or Intention of the Act. Vid. antea 17. 1 Sid. 66.

Nokes *and* Stokes *versus*. - - - - -

THey two brought an Action of Debt upon a Bond. The Defendant pleads the Release of one of the Plaintiffs. They pray Oyer of the Release, which was of all Actions, Suits, &c. that he had against the Defendant upon his own Account; and pleads that this Bond was not upon his own Account; and upon this, Issue is taken, and found for the Plaintiff. 2 Keb. 530, 613. 1 Lev. 100, 272,

Now it was moved in Arrest of Judgment, That this Issue was frivolous. And upon the whole Matter it appears, That the Plaintiffs have no Cause of Action; for the Release of one Obligee dischargeth the Bond; and it must be upon his own Account.

But the Court Seriatim delivered their Opinions for the Plaintiffs; for he might take his Bond as a Security of a Debt, with which he was intrusted for another. And the Truth of the Case upon the Evidence was, That the Defendant being charged with the Payment of divers Legacies to Strangers, was requested by one of the Plaintiffs to enter into Bond to him, and the other Plaintiff (who afterwards made the Release) that should be conditioned for the Payment of the Money bequeathed to the Obligees, to the Use of the Strangers, which not being done, the Defendant was arrested at the Suit of the Plaintiffs; this being made known to the Plaintiff, who was absent at the taking of the Bond, and knowing nothing of the Suit, was contented to release all Actions he had against the Defendant upon his own Account. 3 Mod. R. 277, 278, 279.

King *versus* Atkins.

DEbt upon a Bond of 2000 l. The Defendant demands Oyer of the Condition, which was, That whereas the Plaintiff was bound with the Defendant to the King, That the Defendant should give a true Account of such Monies, as he should receive for Postea 78, 204. 1 Sid. 442. 2 Keb. 529, 596, 609, 642, 739, 747.

for the Excise and Chimney-Money, And that the Defendant should save him harmless from all Payments, or Suits upon that Bond; and pleads that no Suits, Process or Execution was against the Plaintiff upon that Bond, & issint he saved him harmless. The Plaintiff replies a Scire facias issued against him out of the Exchequer upon the Bond, and that he was forced to retain an Attorney, and that he paid 1 s. for his Appearance. To this the Defendant demurs.

Because he did not alledge that he gave him Notice. And this was said not to be like Broughton's Case, 5 Co. For there the Defendant knew the Money was to be paid at the Day, and it was to save him harmless from the single Thing, but here from a great many; so that it was requisite he should have Notice. Where the Mesne is bound to acquit the Tenant, the Tenant shall not recover Damages, unless he gives the Mesne Notice that he is distrained, so that he may replevy the Beasts.

But it was said, That no Notice ought to be given, where the Thing is an Act of a third Person, as to pay Money when J. S. comes into England.

To which it was answered, That did not lie in the Conusance of either Party; but this was the Notice of the Obligee. But that which seemed most against the Demurrer in this Case was, That the Defendant having pleaded no Process, &c. he takes upon him the Knowledge of it: And if in the Replication the Plaintiff had alledged Notice, and the Defendant had traversed it, it would have been a Departure; and the Court advised until the next Term. Postea 78.

Vid. 1 Cro. 54.

Welsh *versus* Bell.

1 Sid. 422, 440. 2 Keb. 529, 530, 595, 631. Raym. 218. 1 Roll. 667. N. 22. Roll. 270. 3 Cro. 783.

TRespass quare clausum fregit, and taking of two Horses out of his Cart: The Defendant justifies the Taking of them, as a Distress for Rent due to him. And to this the Plaintiff demurs.

First, He could not sever the Horses, but ought to have distrained Cart and all, according to the Book of 20 Ed. 4, 3. Distress of a Cart loaden with Corn, and four Horses in it; adjudged not excessive, because he could not sever the Horses. And in 3 Cro. 7 a Difference is taken between Distress for Rent, and Damage Feasant to this Purpose. And the common Ground is, That a Distress must be taken so as it may be returned in the same Plight. 1 Inst. 47. a.

Secondly, It appeared also in the Declaration, That there was a Servant of the Plaintiff's in the Cart, by Reason of which was alledged, That the Cart and Horses were privileged; for a Horse cannot be distrained upon which a Man is riding. 3 Cro. 549, 596. Et adjornatur.

Twiſden cited a Caſe adjudged before Rolle Chief Juſtice, in Treſpaſs, for taking of his Trunk. The Caſe was, the Defendant diſtrained it for Rent, and being informed that there were Things of Value in it, he cauſed it to be corded to prevent Damage. And for that he was adjudged a Treſpaſſer ab initio.

Anonymus.

AN Action on the Caſe was brought againſt the Defendant, for taking and keeping of the Plaintiff's Wife from him. And upon Iſſue joined, the Court was moved to defer the Trial; the Caſe being that the Wife was Daughter of the Defendant, and taken from him by the Plaintiff without his Conſent, and as the Plaintiff affirmed, married to him. Now this Marriage was queſtioned in the Court Chriſtian: And the Court thought it reaſonable that the Trial ſhould be delayed until the Marriage was determined there. But they were informed on the other Side, that the Court were ready to give Sentence, That the Marriage was good, and the Defendant had appealed. Wherefore they thought fit that the Trial of the Cauſe ſhould proceed. Vide poſt. 103. 1 Lev. 299. 2 Saund. 169. 5 Mod. 286. 6 Mod. 288. 2 Sal. 606.

The King *verſus* Nelſon.

AN Order for the keeping of a Baſtard-Child being removed by Certiorari, it was moved to have it quaſhed, becauſe it was ad Seſſionem pacis in Com' præd', and doth not ſay, Tent' pro Com' prædict.

Sed non allocatur: For ſuch Strictneſs is not required in an Order. But Twiſden ſaid, it ought to be ſo in an Indictment.

It was further alledged, that it ought to appear, That the Child was likely to be chargeable to the Pariſh; which was agreed. But that was ſufficiently ſet forth in the Order; for upon Reading of it, it appeared, that he was ordered to pay ſuch Charges as the Pariſh had been at. See 1 Sal. 122, 123, 124.

Wherefore the Court confirmed the Order, and awarded, That he ſhould pay ſuch Coſts as the Pariſh had been at for Conteſting of it; as was done formerly in one Haſlefoot's Caſe: And beſides, the Court committed Nelſon.

Tapſcott *and* Wooldridge.

DEbt upon a Bond, conditioned to perform Covenants: If the Defendant pleads Performance without demanding Oyer of the Indenture, it is a good Cauſe of Demurrer. Kelw. 71. a. 1 Sid. 425. Cr. Jac. 360, 460.

Anonymus

Anonymus.

2 Keb. 535. IN Covenant the Plaintiff declares, That he let the Defendant a House, and that he covenanted to repair it. The Defendant pleads, That it was sufficiently repaired before the Action brought.

The Plaintiff demurs, because he doth not plead, That he repaired it; for it may be the Plaintiff himself did it.

Keyling and Rainsford inclined against the Demurrer; because if it were repaired, be it by any Body, the Plaintiff hath no Damage nor Cause of Action.

But Twisden doubted, and afterwards the Parties waved their Demurrer and went to Issue.

Anonymus.

S. C. 1 Sid. 421. 2 Keb. 531. AN Information was brought upon the Statute of Usury, for taking, the 30th of May in the 20th Year of the King, 42 s. pro deferendo 25 l. for three Quarters of a Year (viz.) from the 30th of August, Anno 19. Upon Not Guilty pleaded, it was found for the King, and moved in Arrest of Judgment, that this was not within the Statute, which extends only where there is an Raym. 197. Usurious Contract in the Beginning, and there it makes the Security void: Or if there be an Agreement after the Money lent for Forbearance, upon Consideration of paying more than the Statute allows for Interest, which is punishable in an Indictment or Information; but the Money is not lost: But in this Case, the Time 1 Saund. 294. 1 Mod. 69. of Forbearance was past, and the Party might give what he pleased in Recompence for it, there being no precedent Agreement to enforce him to it.

Sed non allocatur: For the Court said, They would expound the Statute strictly; and if Liberty were allowed in this Case, the Brokers might oppress the People exceedingly by detaining the Pawn, unless the Party would give them what they would please to demand for the Time after Failure of Payment.

Wingate *and* Stanton, *the Bail of* William Stanton.

2 Keb. 536. Hob. 72. Cr. Car. 300. Cro. Jac. 171. Postea 169. 1 Rol. Ab. 762. Far. 6. IT was resolved, That where a Scire facias goes against the Bail in this Court, and two Nichils are returned, and Judgment is had thereupon, no Writ of Error can be brought in the Exchequer-Chamber, but in the Parliament only.

Also, After such a Return it cannot be assigned for Error, that there was no Capias awarded against the Principal. But in that Case the

Bail is relievable only by Audita querela. But if the Sheriff returns a Scire feci, they may plead it. Fitz. N. B. 104.

Nota, A Man cannot release a Debt by his Will. 1 Sid. 421.

The King *versus* Saunders.

SAunders was convicted before two Justices of the Peace upon the Statute of 32 H. 8. cap. 6. for carrying of a Gun. Which being removed by Certiorari, was quashed, because it was coram nobis Justiciariis Domini Regis ad pacem suam conservand', wanting the Word assignatis. S.C. 1 Saund. 263. 1 Sid. 419. Antea 33. 2 Keb. 521, 537, 694.

Anonymus.

AN Indictment was quashed, because it was Justiciarii ad pacem conservand' assign', and not ad pacem Domini Regis; neither would ad pacem publicam serve. And for another Reason, because it was ad Sessionem in Com' tent', and not pro Com': But if it were ad Sessionem in a Borough incorporated, it were good, tho' it were not pro Burgo. S. C. 1 Sid. 422. 1 Lev. 175. Postea 175.

Maleverer *and* Redshaw.

DEbt upon a Sheriff's Bond: The Defendant pleads, That there was an Attachment issued out of Chancery against him, returnable Octab' Sanctæ Trin'; and the Condition of this Bond was, that he should appear Craft. Sanctæ Trin. and so he pleads the Statute of 23 H. 6. against it, for that it was taken pro Esiamento & favore. S. C. 1 Sid. 456. 2 Saund. 78. 2 Keb. 536, 596, 625. 1 Mod. 1, 35.

The Plaintiff replies, That the Writ was returnable Crastino Sanctæ Trin. and traverses, That the Bond was taken for Ease and Favour. To which the Defendant demurs, supposing that he should have traversed, that the Writ was returnable Octab. Sanctæ Trin. which is the Matter of the Defendant's Bar, and the other is but the Consequence or Conclusion. Et adjornatur. V. 11 Co. 10. a.

Gregory *versus* Eades.

ERror to reverse a Judgment given in an Inferior Court, where an Assumpsit was brought, and the Plaintiff declared upon three several Promises, and the Jury found two for him, and the other, non Assumpsit: And Judgment was given for the two, that he should recover; but no Judgment for the third, that he should be amerced pro falso clamore, or that the Defendant eat inde sine die. And for this Cause Error was assigned. Antea 27.

But Powys argued for the Defendant in the Writ of Error, That the Judgment should be affirmed as to the two Promises, for which it

1 Roll. R. 24.

it was perfect, and cited Miles and Jacob's Case in Hob. 6. and 2 Cro. 343. where an Action was brought for Words, declared to be spoken at several Times, and several Damages given, and Judgment, and a Writ of Error brought, and assigned for Error, that the Words spoken at one of the Times were not actionable; which tho' they were not, yet the Judgment was reversed quoad them only.

But the Court said, That it was not like this, for here the Judgment was altogether imperfect; and so were inclined to reverse it; but gave further Time. Antea 27.

Ward *and* Culpepper.

S. C. Raym. 170. 1 Sid. 380. 2 Keb. 409, 431, 536. 1 Lev. 255.

IN Replevin the Defendant avows for Rent arrear. Upon Non conceſſit pleaded, the Jury find for the Avowant. The New Statute says, That the Defendant may pray that the Jury should enquire what Rent is arrear, and that he shall have Judgment for so much as they find.

Now the Court was moved, That this might be supplied by a Writ of Enquiry; as if they omit to enquire of the four Points in a Quare Impedit, it may be so supplied, 10 Co. Cheney's Case. But the Court held this could not be; for the Defendant loseth the Advantage of it by not praying of it: As where a Tales is granted, if it be entered ad requiſitionem Querentis or Defendentis, it is not good; wherefore he was bid to take his Judgment quod returnum habeat averiorum, at the Common Law.

Foxwiſt *verſus* Tremain.

S. C. 1 Lev. 299. 2 Saun. 212, 213. Poſtea 54, 102, 103. 1 Roll. 288. N. 3.

FOur Executors, two of them are under Age; Quære, Whether they shall sue by Attorney? It seems, Those of Age may make an Attorney for those under Age. *Vide* 1 *Mod.* 72. 2 *Lev.* 38, 239, 240. 3 *Cro.* 541.

Note, An Infant may bring an Action against his Guardian, which pleads any Thing to his Prejudice: Not so of an Attorney.

Wells *verſus* Wells.

S. C. 1 Lev. 273. 2 Keb. 531.

IN an Aſſumpſit the Plaintiff declares as Adminiſtratrix to her Husband, who in his Life-time agreed with the Defendant, That they should be Partners in making of Bricks for J. S. and after his Death the Defendant promiſed the Plaintiff, in Conſideration that she had promiſed him to relinquiſh her Intereſt in the Partnerſhip, that he would pay her so much Money as her Husband had been out about the Bricks. And upon Non aſſumpſit pleaded it was found for the Plaintiff.

It was moved in Arrest of Judgment, that here was no Consideration; for the Plaintiff had no Interest in the Partnership, which being joint, must survive to the Defendant; and she ought to have shewn how she relinquished her Interest.

But the Court held it a good Consideration; for it may be there were Covenants, that there should be no Survivorship; (and the Court will intend, after a Verdict, that there were) which though they do not sever the joint Interest in Law, yet they give Remedy in Equity, which to debar her self of is a good Consideration, and being laid by Way of reciprocal Promise, there needs no Averment of Performance.

Termino Sancti Michaelis, Anno 21 Car. II. In Banco Regis.

William Bates's *Case*.

A Prohibition was prayed to the Commissary of the Arch-Deacon of Richmond, to stay a Suit against Bates a School-Master; who, as it was alledged, taught School without the Bishop's Licence; and it was granted, because they endeavoured to turn him out; whereas they could only censure him, he coming in by the Presentation of the Founder. 1 Mod 3. 2 Lev. 22.

In a Feoffment of Tithes and Lands, where there is no Livery; if they do adjudge the Tithes to pass, notwithstanding there is no Livery, a Prohibition will lie. 2 Cro. 270.

In Debt upon a Lease at Will, there must be an Averment that the Lessee occupied the Lands. But it is otherwise upon a Lease for Years. Quære, postea 56, 57. 1 Sid. 423. 1 Salk. 209. 1 Mod. 3. 2 Keb. 543,

Anonymus.

The Court was moved to grant an Attachment against a Justice of the Peace, who upon Complaint refused to come and view a Force: But the Court denied it, and directed the Party to bring an Action of Debt for the 100 l. Forfeiture given by the Statute in that Case.

It was said by the Court, That in an Execution upon a Statute-Merchant there is no Need of a Libertate, as there is upon a Statute-Staple: And in the Case of a Statute-Staple, the Conusee 4 Mod. 48. 3 Lev. 312. 1 Show. 290, 291.

Vid. 1 Show. 291. 2 Salk. 563. 3 Lev. 312. 4 Mod. 48. Et per ter, but can't

can bring no Ejectment before the Liberate; neither can the Sheriff upon the Liberate turn the Terre-Tenant out of Poſſeſſion, as he is to do upon an Habere facias poſſeſſionem.

Holt, by the Return of the Extent and Intereſt veſts in the Conuſee, and he may aſſign till actual Entry.

Dyer *verſus* Eaſt.

S.C. 1 Lev. 7. 1 Sid. 425. 1 Mod. 9. 2 Keb. 554.

AN Action was brought againſt the Defendant upon an Indeb' pro diverſis Mercimoniis venditis & deliberatis to the Wife, to the Uſe of her Husband, it being for wearing Apparel. And after Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that this Declaration being laid, That the Sale was to the Wife, tho' it was to the Uſe of the Husband, it was not good; as if it had been ſold to the Servant of the Plaintiff.

Nevertheleſs the Court were of Opinion, That it being for her Apparel, and that ſuitable to her Degree, the Husband was to pay for it; as had been reſolved in this King's Time, in Scot and Manby's Caſe in the Exchequer-Chamber, and that the Declaration was well enough.

Anonymus.

2 Keb. 553, 555.

THE Defendant in an Action of Debt upon a Bond, ſued out an Injunction in Chancery; where after the Caſe had depended for two Years, the Court was moved, That the Plaintiff might accept of his Principal, Intereſt and Charges.

The Court ſaid, If the Defendant comes before Plea pleaded, and makes ſuch a Proffer, they are ex debito Juſtitiæ to allow it: But now he having delayed the Plaintiff in Chancery two Years, it was in their Diſcretion. And the other three, againſt the Opinion of Keyling, thought fit to deny it.

Clarke *verſus* Philips & al'.

S. C. 1 Saun. 319. 1 Mod. 10. 2 Keb. 555.

UPON the Trial in an Ejectment, the Title of the Plaintiff's Leſſor appeared to be by a Remainder limited to him for Life upon divers other Eſtates, and that there was a Fine levied, and Proclamations paſſed; but he, within the five Years after his Title accrued, ſent two Perſons to deliver Declarations upon the Land, as the Courſe is upon Ejectments brought.

The Court reſolved, That this was no Entry or Claim to avoid the Fine, he having given no expreſs Authority to that Purpoſe; and the Confeſſion of Leaſe, Entry and Ouſter, by the Defendant, ſhould not prejudice him in this Reſpect. In this Caſe Keyling and Twiſden were of different Opinions in this Point, (viz.) If he that hath Power of Revocation over Lands, &c. makes a Leaſe for Life, whether it ſuſpends the Power only, as a Leaſe for Years would do, or extinguiſh it as a Feoffment?

The

The King *verſus* Monk & al'

IN an Information for a Riot, it was concluded contra formam Statuti 13 H. 4. which appoints Juſtices of the Peace, upon Complaint of Riots, to view and record them. And after Verdict it was moved in Arreſt of Judgment, that this Information was not good, it being grounded upon this Statute, which only mentions Riots, and appoints them to be puniſhed in the Manner there expreſſed. 2 Keb. 566.

But the Chief Juſtice Keyling was of Opinion, That it being a Crime at the Common Law, and mentioned in this Statute, the Information was well concluded: But the other Juſtices inclined to the contrary.

Anonymus.

DEbt upon a Bond conditioned to perform Covenants in an Indenture. The Defendant pleaded, That there were no Covenants contained in the Indenture on his Part to be performed. The Plaintiff demands Oyer of the Indenture, which is entred verbatim, and then demurs; which he could not well do before the Entry of it, whereby it becomes Part of the Bar; ſo the Cauſe of the Demurrer appears. 1 Saun. 327. S. C. come ſemble. 3 Lev. 165, 293. 1 Mod. 274. 1 Sal. 69, 70, 72, 74.

Then it was alledged by Saunders, (whoſe Hand was to the Plea) That the Plaintiff could not have Judgment, becauſe he had ſet forth no Breach. But the Court was much offended with him: For they held the Plea in Bar meerly for Delay, and adviſed againſt the Statute of Weſtm. 1.

Robinſon *verſus* Pulford.

IN an Aſſumpſit the Plaintiff declared, That the Defendant in Conſideration that the Plaintiff would deliver ſuch ſilver Threads, and other Wares into the Shop of J. S. that he ſhould require that he would ſee him paid. 2 Keb. 563.

Now, after Non Aſſumpſit pleaded, and a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That the Plaintiff had not averred in his Declaration, That J. S. had not paid for the Goods: For the Promiſe to ſee him paid was no more than if he had ſaid, If J. S. doth not pay you, I will; in which Caſe ſuch Averment muſt have been.

But the Court reſolved, That a Promiſe to pay, and to ſee him paid, was all one, and the Averment unneceſſary.

Ruſhden *verſus* Collins.

S. C. 1 Sid. 425. Antea 27. 1 Mod. 8. 2 Keb. 552. 6 Mod. 266.

IN an Aſſumpſit the Plaintiff declared the Conſideration to be, pro opere præantea facto. After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That opere was too general, and might intend ſo inconſiderable a Matter as would not amount to a Conſideration for the Plaintiff: But they gave Judgment; for they ſaid labore or ſervitio had been adjudged ſufficient.

Lee *verſus* Edwards.

S. C. 1 Sid. 428. 2 Cro. 44. 1 Sid. 428. 2 Keb. 559, 566, 618. 1 Mod. 14. Antea 27. 1 Lev. 280.

IN an Aſſumpſit the Plaintiff declared, That in Conſideration that he would employ his Skill and Pains, and provide Medicaments for, and cure a certain Perſon of a Phthiſick, that he would pay what he deſerved; and lays another Promiſe at the ſame Time in Conſideration as aforeſaid, and alledges the Promiſe ſomewhat varying from the firſt; and concludes with an Averment, That he had beſtowed his Pains, and cured accordingly.

Upon Non Aſſumpſit pleaded, and a Verdict for the Plaintiff, the Court was moved to ſtay Judgment, becauſe the Plaintiff had made no Averment of the Cure upon the firſt Promiſe, and entire Damages were given; ſo it was ill in all. 1 Mod. 14. But the Court were of Opinion, That in regard he had averred it upon the ſecond Promiſe; ſo as it appeared upon Record that the Cure was done, it aided the Omiſſion of it in the firſt, eſpecially being after a Verdict.

Nota, There is an Inquiſition upon every one's Death that dies in the King's Bench, by the Maſter of the Crown-Office and Coroner.

Pomfret *verſus* Roycroft.

S. C. Antea 26. 1 Saun. 321. 1 Sid. 429. 1 Danv. 233.

IN a Writ of Covenant the Plaintiff declared, That the Defendant demiſed to him an Houſe, with the Uſe of a Pump, and that he ſuffered it to be ſo out of Repair that it became uſeleſs. To this Declaration the Defendant demurs: And Counſel being heard on either Side divers Times, the Court delivered their Opinions ſeverally.

Keyling, Rainsford and Moreton held, that the Action did lie, the Uſe of the Pump being Part of the Things demiſed, which Words make a Covenant, as in 4 Co. Nokes's Caſe, and in 5 Co. Spencer's Caſe: If a Man let an Houſe together with Eſtovers to be taken in the Wood of the Leſſor, and afterwards the Wood is ſtubbed up, there Covenant lies for the Leſſee. And Rainsford put this Caſe: If a Man lets the middle Rooms of his Houſe to one, and the upper to another, and lets the Roof of the Houſe

decay, he conceived Covenant would lie for the Leſſee of the middle Rooms. And if a Parſon makes a Leaſe, and then reſigns, he is liable to Covenant, as in 12 H. 4. And the Leſſee would be at a Miſchief, for he ſhould be a Treſpaſſer to enter and repair; and if the Leſſor ouſts the Leſſee of any of the Things demiſed, 'tis clear that Covenant lies; and this is as much an Ouſter as can be in this Caſe, where the Leſſor is poſſeſſed himſelf. And ſo *Judgment was given for the Plaintiff, againſt the Opinion of Twiſden, who held ſtrongly to the contrary; for he ſaid he might have an Action upon the Caſe, and ſo have Remedy for his Damage. Alſo he held clearly, That he might enter and repair, as if one licences another to lay Pipes in his Ground to convey Water, he may juſtifie an Entry to repair the Pipes. And he cited a Caſe adjudged in 9 Jac. where one by Licence erected a Cock of Hay in another's Ground: And it was held, That the Owner of the Soil might put in his Beaſts into that Ground; but he that had the Licence, might by Virtue of that Licence alſo fence in his Hay. Quando aliquid conceditur, conceditur & id ſine quo res ipſa uti non poteſt; and he ſaid that he never met with a Caſe where Covenant would lie but upon an actual Ouſter either by a Stranger that hath eigne Title, or the Leſſor himſelf: And this was a non feaſans, and in that he differenced it from the Caſe of Eſtovers, being an actual Tort to ſtub the Wood up; and in Covenant upon an Ouſter of a Term, if it be not incurred, Judgment ſhall be to recover the Term it ſelf, as F. N. B 145. which cannot be in this Caſe, for the Sheriff cannot put him into Poſſeſſion of the Uſe of the Pump; neither is it fit that he ſhould recover Damages for all the Term, for it may be the Pump will be preſently repaired. And he conceived, that if the Leſſor cuts down Trees growing upon the Land demiſed, no Covenant lies, yet the Trees are demiſed with the reſt. Antea 26.

Owen 505. Moor 644. Cr. Jac. 121. Cr. Eliz. 18. 11 Co. 52. 1 Saun. 323. *This Judgment was reverſed in the Exchequer Chamber afterwards. viz. 22. 3 Car. 2. 1 Saun. 321, 322. Moor 644. Godb. 282. 2 Roll. R. 143, 152. 2 Roll. Abr. 567. Poph. 151.

Anonymus.

A. Draws a Bill upon B. to the Uſe of C. and upon Non-payment C. proteſts the Bill; he cannot ſue A. unleſs he gives him Notice that the Bill is proteſted; for A. may have the Effects of B. in his Hands, by which he may ſatisfie himſelf.

1 Mod. Rep. 27. 2 Keb. 584. Vide poſtea 152. 2 Vent. 307. 6 Mod. 29, &c. ibid.

Note, It was ſaid, if an Action to recover Lands of which a Fine was levied, was brought and diſcontinued by the Demandant, this would not amount to a Claim.

Glyn

Glyn *verſus* Smith.

1 Mod. Rep. 19. 2 Keb. 567.

A Scire Facias upon a Record in the King's Bench, where the Action is brought by Original, muſt alledge a Place where the Court was holden; becauſe 'tis Ambulatory, and the Writs returnable there are coram nobis ubicunque tunc fuerimus in Anglia. But it is otherwiſe upon Records in the Common Pleas, for that is confined to a certain Place by Magna Charta.

Anonymus.

IT was moved to quaſh a Return of a Reſcous, becauſe it was Mandavi Ballivis, who took him virtute Warr' præd', And it was ſaid, Mandavi did not imply that it was in Writing. But the Exception was diſallowed by the Court. For it ſeems, The Vid. 47. Sheriff cannot command his Bailiff to arreſt, without a Warrant in Writing.

Anonymus.

1 Roll. Rep. 133.

IF the Party that brings an Audita Quærela be out of Priſon, the Court will bail him, though grounded upon a Surmiſe of a Matter of Fact, as Payment, &c. But if he be in Priſon, not unleſs it be upon a Specialty.

Parry's *Caſe*.

DIvers Deeds and Evidences were ſhewn to Counſel for his Opinion of the Title to certain Lands which were to be ſold. He delivers them to one Parry a Scrivener, by the Conſent of the Parties. Parry finding a Deed to concern the Intereſt of a third Perſon, gives it to him, and upon Complaint to the Court, they commanded him to produce the Deed, that it might be delivered back again to the Parties, they conceiving it an Abuſe in his Practice, which was under the Regulation of this Court.

Anonymus.

IN Replevin, in the Court at Canterbury, the Defendant avowed for Rent.

Afterwards this was removed by the Plaintiff into the King's Bench, and the Defendant prayed a Procedendo; becauſe Canterbury was a County of it ſelf and no Aſſizes there, and ſo the Cauſe could not be tried: But the Court denied it, ſaying, It was their own Fault that they had not the Aſſizes there, and every Subject had the Liberty of removing his Suit into a Superior Court. Twiſden ſaid, He had formerly known it to be denied in an Ejectment.

Girlington *verſus* Pitfield.

IN an Action upon the Caſe, for maliciouſly proſecuting of an Indictment of Perjury againſt him, of which he was acquitted; upon Not Guilty Pleaded, it appeared upon the Evidence, That the Defendant was a Juſtice of the Peace, and procured ſome as Witneſſes to appear againſt the Plaintiff, and his own Name was endorſed upon the Indictment to give Evidence. 2 Keb. 572. See 1 Salk. 13, 14, 15.

The Court agreed, That this did not make him a Proſecutor; for if a Juſtice of the Peace knows any Perſon that can give Evidence againſt one that is indicted, he ought to cauſe him to do it. But it was proved on the Defendant's Side, That this Indictment was drawn up by an Order of the Seſſions. Wherefore Keyling Chief Juſtice ſaid, That the Plaintiff deſerved to be bound to his Good Behaviour for bringing of this Action.

Horn *verſus* Ivy.

IN Treſpaſs for taking of a Ship and Sails, the Defendant juſtified by a Command from the Governours and Society of the Trade into the Canaries, who were incorporated by that Name, and had the ſole Trade granted to them, with a Forfeiture of all ſuch Goods as ſhould be imported hither from thence, by any Perſon not of their Company; and that the Ship of the Plaintiff brought Goods from thence. To this the Plaintiff demurred. 1 Sid. 441. 1 Mod. 18. 2 Keb. 567, 604. Vide antea 1, &c. ibid.

His Counſel did not much inſiſt upon the Validity of the Patent, becauſe it was a Monopoly; though it was ſaid to be alſo againſt divers Statutes, to prohibit Merchants free Trading to foreign Parts, as 9 E. 3. cap. 1. 25 Ed. 3. cap. 2. 11 R. 2. cap. 7. and that there could grow no Forfeiture of Goods by Patent, at leaſt not before Conviction. Neither were the Words of the Patent very full to this Purpoſe, for they were only, That they ſhould forfeit ſuch Ships and Goods, and be impriſoned as by Law could be inflicted upon the Contemners of the King's Authority, 8 Co. 125. Noy 183. And the Court ſaid the Queſtion was, Whether the King could prohibit the Importation of Foreign Goods; for if he might, the Importation of them would cauſe them to be forfeited; and the Chief Juſtice ſaid, the Ship alſo in which they were ſhipped: But no Forfeiture of Engliſh Goods could grow by Letters Patents. And admitting all this for the Defendant, yet it was ſaid the Plea was naught. Firſt, becauſe he juſtified by a Command from a Corporation, and did not alledge it to be by Deed: And it was agreed, that a Corporation might employ one in ordinary Services without Deed, as to be Butler. 18 Ed. 4. 8 Br. Corp. 59. Antea 46.

or the like: But one could not appear in an Assize as a Bailiff to a Corporation without Deed. Pl. Com. 797. 12 H. 7. 27. Neither can they licence one to take their Trees without Deed, nor send one to make a Claim to Lands. 9 Ed. 4. 39. They cannot make themselves Disseisors by their Assent without Deed, or command one to enter for a Condition broken. 7 H. 7. 9. Rolle Tit. Corp. 514. Again it was said, The Plea was double; for that the Patent prohibits the Trading thither, and also Importing from thence; and 'tis said that he loaded Wines there and brought them hither, so an Offence respecting both Parts, and one would have served. But of these Matters the Court would be advised. And afterwards gave Judgment for the Plaintiff. 1 *Sid.* 441.

Burwell's *Case.*

1 Mod. 20. 2 Ked. 575. Sal. 122, 482, 486, 489, &c.

Upon Complaint to two Justices about a Bastard-Child; they by the 18 Eliz. order one Reynolds to keep the Child; Upon this Reynolds appeared at Sessions; where they vacated the Order, and referred it back again to the Justices, who do nothing.

The next Sessions after Burwell is judged the reputed Father, and ordered to pay so much a Week to the Parish, until the Child was 12 Years old. This was removed into the King's Bench by Certiorari.

The Sessions may affirm or quash, but not supersede an original Order. Salk. 472, 477, &c. 1 Sal. 121, 478. Vid. post. 59.

And they resolved, that the Referring back again to the Justices, by the Justices at Sessions, was not warranted; and that the last Order was insufficient, because it was that he should pay the Parish so much a Week until the Child was 12 Years old, whereas the Father might take it away when he pleased; but it ought to have been that he should allow so much a Week so long as it should be chargeable to the Parish; wherefore they bound the Parties to appear at the next Sessions by Recognizance.

Tomlin *and* Fuller.

1 Mod. 27. 5 Co. 100. b.

A Man hath a Messuage and a Way to it through another's Freehold, and 'tis stopped; then the House is alienes: The Alienee can bring no Action for this Nusance before Request.

2 Kob. 575, 583.

If a Man lets a House, reserving a Way through it to a Back-House, he cannot come through the House without Request, and that too, at seasonable Times.

Anonymus.

IF the Husband and Wife be arrested in an Action that requires Special Bail, and the Husband puts in Bail for himself, he must put in Bail for his Wife also; but if he lies in Prison, the Wife cannot be let out upon common Bail. But it is otherwise, if the Husband absconds himself and cannot be arrested. 1 Salk. 115. There the Wife must put in common Bail.

1 Lev. 216. 1 Mod. 8. 2 Cro. 445. not Law. 1 Roll. 983. Lit. Rep. 18. 1 Sid. 21, 395.

Anonymus.

IF a Man brings Debt for Rent, and upon his own Shewing he demands more than is due, and upon non debet pleaded the Jury find for him, he may remit the Overplus, and have Judgment for the Residue.

Style 175. 1 Saund. 284. 5 Mod. 212. 1 Roll. 785. 1 Roll. Rep. 335. 1 Bulst. 155.

Note, One was committed for sending of a Note to a Juryman, (after a privy Verdict was given) to know what Verdict they gave.

Parris's *Case*.

AN Information was brought against him, for that he fraudulenter & deceptive procured one Anne Wigmore to give a Warrant of Attorney to confess a Judgment.

To this he pleaded Not guilty, and upon the Trial it was debated, Whether she might be admitted to give Evidence against the Defendant? For if he were convicted, the Court said they should set aside the Judgment. Nevertheless she was sworn, by the Opinion of three Judges, against Twisden, this Suit being for the King. Upon his Trial he was found Guilty, and fined 100 Marks, and ordered to come with a Paper on his Hat expressing the Offence.

3 Cro. 774. Moor 468. 6 Mod. 301. 1 Sid. 431. 1 Inst. 6. 2 Roll. 685. 2 Keb. 572. Post. 78. Quære & Vide 1 Salk. 283, Hardr. 331.

Note, No Writ of Error to reverse a Judgment given in an Action, qui tam, &c. lies into the Exchequer-Chamber, because the King is Party; so also upon the Statute de Scandalis Magnatum. 1 Cro. Lord Say's Case.

Antea 34. Raym. 275. cont.

Perill *versus* Shaw.

A Scire facias was brought against the Bail, who plead, that before the Return a Capias was issued out against the Principal; and that he was taken at D. and detained in Prison quousque postea he paid the Money: The Plaintiff pleads non solvit, then the Defendant demurs.

2 Mod. 304. 1 Mod. Rep. 24. 2 Keb. [illegible]

And it was adjudged for the Plaintiff; for the Defendant's Plea was vitious, because there is no Place alledged where the Money was paid; and it is not necessary to be intended to be paid where he was imprisoned: And though the Plaintiff did not demur, but replied; yet when there is a Demurrer, the first Fault is fatal.

Vide 3 Lev. 311, 393.

Sir John Kerle *versus* Osgood.

S.C. 1 Lev. 280. 1 Sid. 432. 1 Mod. 22. 2 Keb. 548, 579.

AN Action was brought for these Words, spoken of him being a Justice of the Peace, He is a forsworn Justice, and not fit to be a Justice of Peace; if I did see him, I would tell him so to his Face.

1 Danv. 120. pl. 9, 121. pl. 12, 13. See 6 Mod. 24.

After Verdict for the Plaintiff, it was moved in Arrest of Judgment, that these Words were not actionable, because forswore doth not necessarily intend any judicial Perjury, and there was no Communication of his Office. One said of a Justice of Peace, He is a Blood-sucker, and seeks after Blood; if one will give him a Couple of Capons he will do any Thing, and held not actionable; because there was nothing to make them relate to his Office. Rolle 29, 56. Nevertheless the Plaintiff had his Judgment by the Opinion of all the Court; for the Calling of him forsworn Justice, shews he intended Perjury relating to his Office; to which an Oath is annexed.

1 Danv. 111. pl. 3.

Manwood brought an Action for calling of him A corrupt Judge, 4 Co. Cases of Slander. 1 Cro. for calling an Attorney, A cheating Attorney. And Sir John Masham recovered for calling

1 Danv. 121. pl. 11.

of him Half-eared Justice. Vide Rolle 53. pl. 4. and 4 Co. Stucley's Case. And here the later Words, viz. That he is not fit to sit upon a Bench, shews that he intended the Scandal in his Office; and Words shall not be taken in mitiori sensu, so far as to draw them from the general Acceptation; and sermo refert ad conditionem personæ.

1 Danv. 116. pl. 33.

Twisden cited a Case, where a Man brought an Action for saying, He was a debauch'd Man, and not fit to be a Justice of the Peace; and not maintainable, because spoken of the Time past: If it had been, he is debauched, he said the Action would lie.

Hill *versus* Langley.

1 Brown. 112. 1 Mod. 849. 1 Roll. Rep. 223, 375. 3 Bulstr. 62. 2 Keb. 571, 580.

DEbt upon a Bond to perform an Award. After nullum fecere Arbitrium pleaded, the Plaintiff replies and sets forth, That they submitted to the Award of Four, so that they made it by the 16th of Nov. and signified it under the Hands and Seals of Two of them, and then alledges the Award under Two of their Seals; to which the Defendant demurred, conceiving the Award to be void,

because the Submission was to four. But the Court gave Judgment for the Plaintiff, according to the Cases in 2 Cro. 276. and ibid. 399. Berry *versus* Penring.

Anonymus.

IN an Indictment for the using of a Trade contrary to the Statute of 5 Eliz. it was said, That to keep a Shop within a Country Village was not within the Statute; and it were very inconvenient, that the Inhabitants must go to some great Town upon every Occasion. And it was also, Juratores dicunt super Sacramentum suum, and not adtunc & ibidem jurati. 1 Mod. 26. 2 Keb. 583. Post. 60.

If a Statute appoints an Indictment to be taken at the Quarter-Sessions, the Caption must be entred ad Quarterial' Sessionⁱ, &c. for ad Generalⁱ Sessionⁱ pacis will not serve.

Jackson *versus* Gabree.

JAckson took out a Capias ad satisfaciend' against Gabree and his Wife; the Gaoler lets the Husband escape. The Court was moved, that the Wife might be discharged; alledging that the Husband took no care of her, but let her lie there in a very necessitous Condition. They were doubtful what to do in it at the first Motion, but did afterwards resolve, That unless the Plaintiff would get the Husband taken again, as he might do, they would discharge the Wife; and they said, the Escape of the Husband was the Escape of the Wife. 1 Sid. 395. 2 Keb. 442, 576.

Smith *and* Bowen.

AN Infant brought an Assumpsit by his Guardian, and declared, That whereas the Defendant entred into his Close and cut his Grass, that in Consideration that he would permit him to make it Hay, and carry it away, he promised to give him six Pounds for it; and he also declared for six Pounds Debt more that he owed him. 1 Mod. 25. 1 Sid. 41. 1 Rolle 19. N. 41. 1 Keb. 1. 2 Keb. 531. Hob. 77. 1 Sid. 446.

Upon this Declaration the Defendant demurred, supposing it to be no Consideration; for the Infant was not bound by his Permission, but might sue him notwithstanding; and then the Promise to pay six Pounds Debt was not good, because not declared how indebted. But the Court gave Judgment for the Plaintiff. 1 Rolle 19.

Sir Henry Frederick Thynne *versus Sir* James Thynne.

6 Co. 69. 1 Sid. 190. 1 Keb. 591. 2 Rolle 396. 3 Cro. 524, 707. 2 Keb. 26, 591, 691, 716. 1 Lev. 27.

PAsch. 13 Car. 2. B.R. Rot. 448. Upon a Special Issue directed out of Chancery, the Case was thus: One was seised in Tail of the Manor of B. and of two Closes, which in Reality were not Part, but

but reputed Part thereof, and ſuffered a Recovery only of the Manor with the Appurtenances; and whether the Recovery was a Bar as to the two Cloſes, was the Queſtion. And in the 16th Year of this King, it was reſolved by all the Court, and Hide Chief Juſtice delivered the Opinion of the Court, That the Lands reputed Parcel of the Manor ſhould paſs, by Reaſon of the Deed of Covenants to lead the Uſes, which explained the Intent. Dyer 223. 1 Cro. Sir George Symond's Caſe, Hob. 177. Dyer 376. Long Quinto E. 4. 303. 6 Co. Sir Moyle Finch's Caſe, Modern Rep. 250.

Termino Sancti Hill. Anno 21 & 22 Car. II.

In Banco Regis.

Wilbraham *verſus* Snow.

S. C. 1 Lev. 282. 1 Sid. 438. 2 Saund. 47, 345. 1 Mod. 12, 30. 2 Keb. 588.

IN an Action of Trover the Plaintiff declares, That he was Owner, and poſſeſſed of certain Goods, and ſets them forth particularly, and that they came to the Defendant's Hands, who converted them, &c. The Defendant pleaded Not guilty, and the Jury find this Special Verdict;

That the Plaintiff was Sheriff, and that he took the Goods into his Poſſeſſion by Force of a Fieri facias; and that the Defendant (who was alſo Defendant in the Execution) took them away. And then they demand the Judgment of the Court, if the Plaintiff could maintain this Action.

It was ſaid that he might, Becauſe he was anſwerable over to the Plaintiff in the Execution, at whoſe Suit he took them; and could not return that they were taken away: And if he returns, that he hath taken Goods ſufficient, and after loſes them, he is bound to anſwer the Value as returned. A Bailee of Goods ſhall bring Treſpaſs, quare bona ſua cepit: And Rolle 5. a Carrier from whom Goods are taken may bring Trover. But it was argued on the other Side, That the Property is in the Defendant, notwithſtanding the Seizure. Dyer 99. a. and Yelverton 44. And the Sheriff had but an Authority in Law to ſell, as Commiſſioners of Bankrupt have of the Eſtate of the Bankrupt per 13 Eliz. 7. or Executors upon a Deviſe, that they ſhall ſell Land, &c. but Treſpaſs he might bring becauſe of the Poſſeſſion, but Trover cannot be maintained without Property.

Antea 21.

But the Court held that the Action was maintainable; and that the Reason was the same, as in the Case of the Carrier, and also held that the Defendant's Property ceased by the Seisure: And also that if a Man becomes a Bankrupt after that the Commissioners have granted over his Goods, he cannot meddle with them. 1 Cro. 106. So by the Opinion of Kelynge, Rainsford and Moreton, hæsitante Twisden, Judgment was given for the Plaintiff.

Gavell *and his Wife versus* Burket.

AN Action was brought for these Words spoken of the Wife, You are a Pimp, and a Bawd, and fetch young Gentlewomen to young Gentlemen, and declared of a Special Damage. The Jury gave a Special Verdict, and found the Words spoken, but not the Damage, as the Plaintiff had declared. Now, whether the Words were actionable of themselves, was the Question. 1 Sid. 438. 2 Keb. 589. 1 Mod. 31. Salk. 404, 552.

And it was agreed, That no Action would lie for calling one Bawd or Pimp, 1 Cro. 286. Dimock's Case, Rolle 44. pl. 10. But to say one keeps a Bawdy-house, it will lie. 26 H. 8. 14. an Indictment lies for Keeping a Bawdy-house, because it is a common Nusance; but here the subsequent Words expound in what Sense the former Words should be taken, that is, To bring Gentlewomen to Gentlemen for Bawdry, which is as much as Keeping a Bawdy-house; and 1 Cro. was cited, where Judgment was given for these Words, Thou keepest a House worse than a Bawdy-house, and keepest a Whore in thy House. And in 3 H. 7. it is said, that Constables ought to apprehend Bawds. Cr. Car. 393.

But the Court inclined, That the Action would not lie; for a Bawd was not punishable in our Law, unless for Keeping of a Bawdy-house, it being a Crime of Ecclesiastical Conusance. Sed adjornatur. Judgment was given for the Plaintiff. 1 *Mod.* 32.

Thomlinson *versus* Hunter.

TRespass, Quare clausum fregit & arbores succidit ad valentiam decem librarum. To which the Defendant demurred generally. The Plaintiff prayed Judgment for Breaking of his Close; but as to the other, the Declaration was insufficient, because not expressed what Kind of Trees. 5 Co. Playter's Case 34. 3 Cro. 837.

Anonymus.

A Writ of Error was brought upon a Judgment given in Ireland. It was held, that a Day ought to be given by Rule of Court to the Plaintiff, to assign his Errors, or else to nonsuit him; for the Defendant could have no Scire facias into Ireland. Dy. 56. b. 2 Keb. 590. 2 Bulst. 118.

Leech

Leech *verſus* Widſley.

S. C. 1 Lev. 283. 2 Keb. 590, 601. Raym. 185.

IN an Action of Treſpaſs for Chaſing of his Sheep, and Impounding of them, and there Detaining of them until he gave him 12 d. per quod one of the Sheep died. The Defendant pleads, that J. S. was ſeiſed in Fee of the Place where, and that the Sheep were there Damage-feaſant, and that he by the Command of J. S. leniter chaceavit eas, and impounded them until he gave him Satisfaction, quæ eſt eadem Tranſgreſſio. The Plaintiff in his Replication entitles himſelf to Common there. The Defendant rejoins, and ſays, That the Place where was Parcel of a great Waſte, wherein the Plaintiff had Common appurtenant, and that the Lord incloſed the Place where, and that the Plaintiff had tempore quo, &c. & ſemper poſtea, ſufficient Common for all his Sheep levant and couchant. To which the Plaintiff demurs,

Vide 1 Salk. 408.

First, For that the Bar was inſufficient; for the Plaintiff chargeth him with detaining them until he paid him a Shilling; and he pleads, that he detained them until he gave him Satisfaction; ſed non allocatur.

Vide 3 Cro. 384. Hill and Prideaux's Caſe; but here the Plaintiff hath waived that Advantage by Pleading over.

Again, He doth not anſwer to the Killing of the Sheep; ſed non allocatur; for he pleads leniter chaceavit; ſo that if the Sheep did die he is not anſwerable; neither doth the Plaintiff declare of any extraordinary Chaſing; but alledges the Dying of the Sheep only in Aggravation of the Damages, coming after the per quod, and that is not traverſable: As in an Action for Beating of his Servant, per quod ſervitium amiſit, the Loſs of the Service cannot be traverſed.

But that which was moſt inſiſted on was, what he alledges in his Rejoinder, (viz.) That the Plaintiff had Common ſufficient left him for his Sheep levant and couchant upon the Tenements. Whereas he ought to have ſaid, Sufficient ad tenementa prædicta. For it may be the Ground was underſtocked. Alſo, 'tis not ſet forth, that he had free Egreſs and Regreſs; the Words of the Statute of Merton are, Tantam paſturam habeant quantum ſufficit ad tenementa ſua, & quod habeant liberum ingreſſum: Sed non allocatur, for by his Sheep levant and couchant is intended as many as the Land will maintain, and if there were no Egreſs or Regreſs, it ought to come on the other Side. So Judgment was given for the Defendant, niſi cauſa.

Antea 40. Poſtea 102, 103. 2 Saund. 212, 213. 2 Cro. 420, 441. 1 Rol. Rep. 388.

Foxwiſt *verſus* Tremaine.

AN Infant Executor brings an Action. It was ſaid by Twiſden, that it had been adjudged, that he ought to ſue by Guardian.

Ely *verſus* Ward.

IN a Writ of Error to reverſe a Judgment given in the Court at Hull; upon an Aſſumpſit the Plaintiff declared, that it was agreed between them at a Place infra Juriſdictionem Curiæ, That upon Requeſt, &c. and that he requeſted him at a Place infra Juriſdictionem Curiæ. S. C. 1 Sid. 438. 1 Mod. Rep. 32. Vide antea 2, and 72. Poſt. 243.

It was aſſigned for Error, that this Action ought not to have been brought in Hull, becauſe the Requeſt was not appointed to be made within the Juriſdiction by Agreement. Sed non allocatur, as long as the Agreement and Requeſt were made there, tho' the Requeſt might have been elſewhere. 2 Lev. 87, 230. 1 Lev. 50, 69, 96, 105, &c.

Another Error was aſſigned, in that the Precept to the Serjeant at Mace for Returning of the Jury was, Probos & legales homines qui null' affinitat', &c. attingen', whereas the Form of the Venire is, attingunt. Sed non allocatur: For it was held to be as well. Tho' Twiſden ſaid, The Form of a Writ ought not to be altered into another Expreſſion of the ſame Signification.

Then the Entry was, Ad quem diem venerunt the Plaintiff and Defendant, & Juratores; and it ſhould have been, Veniunt; ſed his non obſtantibus, the Judgment was affirmed.

Parker *verſus* Welby.

IT was held, That if the Sheriff returns a Cepi Corpus upon a Capias, altho' he has not his Body in Court at the Day of the Return, yet no Action can be brought againſt him, but he is to be amerced for it at the Common Law. One ſo taken could not be bailed, but by a Homine Replegiando; and now the Statute 23 H. 6. obliges the Sheriff to take Bail, however the Return is as at the Common Law, Cepi Corpus. S. C. Poſt. 83. 1 Sid. 439. 1 Saund. 60. 1 Mod. 33, 57, 240, 244. 2 Saund. 60, 154, 155. 2 Keb. 591, 626, 630, 657.

Freeman *verſus* Barnes.

TRin. 20 Car. 2. Rot. 554. Error to reverſe a Judgment given in Communi Banco in an Ejectment; where, upon Not guilty pleaded, the Jury found a Special Verdict to this Effect: Tenant in Fee makes a Leaſe for an hundred Years, in Truſt for himſelf, to wait upon the Inheritance; the Leſſee enters, Ceſtuy que Truſt enters and takes the Profits, and makes ſeveral Leaſes, all which being expired, he makes a Leaſe for fifty-four Years, and for the Corroborating of it levies a Fine with Proclamations; the Leſſee enters, five Years paſs. And Tyrrel and Archer (they being the only Judges in the Common Pleas then) gave Judgment, That the Fine ſhould bar the Leſſee for an hundred Years. Upon which a Writ of Error was S. C. 1 Lev. 270. Poſt. 80, 81. Carter 161, 195. 1 Show. 72. 3 Mod. 195. 1 Sid. 337, 349, 458. 2 Keb. 521, 597, 650.

was brought in this Court, and argued this Term by Levinz for the Plaintiff in the Writ of Error; and Finch Solicitor, for the Defendant.

See 1 Salk. 245. 2 Lev. 387. Hardr. 400, 401.

And for the Reversing of the Judgment, Levinz argued, That this Lease by the Cestuy que Trust, and the Entry of his Lessee, did not dispossess the former Lessee; and then the Fine and Non-claim could not prejudice his Interest, which was not put to a Right: For first, the Cestuy que Trust was at least Tenant at Will. So is Littleton, Sect. 464. Cestuy que Use may enter, and hold at the Will of his Feoffees; then his Lease can be no Disseisin, because the Inheritance was in himself. 'Tis true, in some Cases a Man may do an Act which shall devest his own Estate: As if a Stranger disseises Tenant for Life to the Use of him in the Reversion, and he assents, Co. Litt. 180. b. The Law shall not construe a Disseisin against the Party's Intention, Rolle 661. He that enters by Colour of a void Lease is no Disseisor, 1 Cro. 188. nor any one that enters by Consent, 15 E. 4, 5. b. Neither shall the Interest of the Lessee be devested but at his Election; for this Lease works in Point of Contract, and not so violently upon other Mens Interests as Livery doth. In Latch's Rep. 75. Sir Thomas Fisher's Case, Tenant for Years lets at Will, the Lessee makes a Lease for Years; this works no Dispossession. If a Copyholder makes a Lease for Years without Licence, the Entry of the Lessee is no Disseisin to the Lord, and he may chuse whether he will take as a Forfeiture. Rolle 830. Lease for Years, upon Condition to be void upon Non-payment of Rent, a Demand is made, the Lessor may make a new Lease of the Land, the former Lessee being still in Possession. And Blunden and Baugh's Case was cited in 1 Cro. to the same Purpose; and that a Fine doth not bar an Interest which is not devested. He quoted also the 1 Inst. 388. 9 Co. 106. and 5 Co. Saffin's Case, where a Fine and Non-claim shall bar the Interest of a Term; yet it appears in 2 Cro. 60. that two Judges were against that Judgment given by the other Three. 2 Cro. 659. Tenant at Will makes a Lease for Years, and it was held to be no Disseisin volens nolens to him that had the Inheritance. And for Isham and Morris's Case, 1 Cro. 77, or 109. it was the Judges Opinion upon Evidence, and there a Fine was levied of the Inheritance, which passed the Trust inclusively; but this Fine was only to establish an Interest for fifty-four Years. Then he argued, that the Inconvenience would be very great to Purchasers, who often keep such Leases and Interests on Foot, tho' they buy the Inheritance, if they should be all barred by Levying of the Fine.

Cro. Car. 220, or 302. Latch 53. W. Jon. 315. 5 Co. 123, &c.

1 Roll. 859.

Hetl. 81.

The Solicitor econtra, He agreed that a Fine could not bar any Interest, which was not devested at the Time of the Fine. He argued first, that the Cestuy que Trust was not Tenant at Will; for a Man shall not be Tenant at Will against his own Conveyance,

unleſs by Conſtruction of Law, to avoid a Tort: As in Littleton's Caſe, where the Ceſtui que Uſe enters upon his Feoffee. But tho' the Leſſor hath a Right to the Poſſeſſion before the Entry of his Leſſee for Years; yet when the Leſſee enters, as 'tis found in our Caſe, he doth as much as declare, That Ceſtui que Truſt ſhall not be Tenant at Will. Indeed the Bargainee of an Eſtate for Years is in actual Poſſeſſion by Force of the Statute; yet the Bargainor (in Caſe of a Mortgage) may enter to hold at Will, becauſe there was no Act done to expreſs his Diſſent. He agreed alſo, That no Diſſeiſin was wrought; but there may be an Expulſion without a Diſſeiſin, as Hob. 322. where it is ſaid, If the Leſſor puts out his Leſſee for Years, there is no Diſſeiſin committed; and yet the Leſſee hath loſt his Eſtate, and hath but a Right to it, and that whether he will or no: And if he were Tenant at Will, he by making this, and divers Leaſes before, hath abſolutely determined his Will: If Tenant at Will be ouſted by a Stranger, and he in Reverſion diſſeiſed, he may enter again; not where he is the Wrong-doer himſelf, for that were to make him Tenant at Will againſt his Will. If Tenant at Will makes a Leaſe for Years and the Leſſee enters, the Tenant at Will is the Diſſeiſor. 2 Cro. 660. 3 Cro. 830. 5 E. 4, 2. And Tenant at Will is intruſted with and hath Power over the Poſſeſſion. And where it was ſaid, It ſhould be in the Election of the Leſſee for 100 Years, to take this for an Eſtate or no, he argued that it ought clearly to be in the Election of the Leſſor.

See 1 Inſt. 271, 272. Quære, 5 H. 7, 1. 21 H. 7, 36. 1 Mod. 251. Vide prox. pag. 1 Roll. 859.

For firſt, It was his own Act, and therefore he could beſt explain quo animo hoc fecit, and that his antecedent Acts had ſufficiently done, eſpecially being Ceſtui que Truſt, and having alſo the Inheritance in him; and he inſiſted very much upon the Notice that the Law takes of ſuch an Intereſt, tho' relievable only in Equity. 7 H. 5, 3. Ceſtui que Uſe of a Manor, to which an Advowſon was appendant, was outlawed, the Church became void; the King brought a Quare Impedit. 2 Cro. 512. A Truſt of a Chattel, reſolved to be forfeit by Attainder, Hob. 214. in that Caſe the King ſhall have the Land it ſelf, and Proceſs ſhall iſſue out of the Exchequer to ſeize the Land it ſelf; which ſhews that it hath a legal Influence upon the Land; therefore he, and not the Truſtee, ought to have the Election. If Ceſtui que Truſt had made a Leaſe for Years, this had been a Diſſeiſin, until 1 R. 3. 5 H. 7, 56. 8 H. 7, 8. A Leaſe of two Acres, habendum the one for Life, the other in Fee, to the Uſe of another; ſhall not the Ceſtui que Uſe determine in which the Inheritance ſhall be? Again, It is agreed that this Fine conveys away the Truſt; ſhall the Law ſtrain to ſave the Intereſt of the Truſtee, to occaſion a Chancery-Suit? And the Judges ever expounded the Statute of 4 H. 7. ſtrictly, to bind the Right of Strangers, Leonard 99. It was the Chief Baron Man-

wood's Opinion, That he that had a future Interest to Lands, of which a Fine was levied, ought not to have five Years after his Interest came in esse, neither is there any Reason to favour long Leases. By the Ancient Law, a Lease for above 40 Years was void. Mirror 164, 293. 1st Inst. 46. They are never without Suspicion of Fraud: And 3 Co. Twine's Case, that which is called a Trust, is in plain English a Fraud; and as this is found, it appears by the Circumstances to be almost Fraud apparent. And as to the Inconvenience which was alledged would come to Purchasers, who desire to keep Leases on foot; he answered, That might be prevented by claiming within five Years; and it would be mischievous to Purchasers, if it were otherwise, to have such Leases set up against their Titles. Postea 80, 81.

1 Inst. 76, 290.
3 Co. 80, 81, &c.
Mo. 638.
Lane 44, 47.

Note, One makes a Lease, wherein the Lessee covenants to repair, and then bargains and sells Part of the Reversion: He shall have an Action of Covenant per 32 H. 8.

2 Cro. 240.

Bosvile *versus* Coates.

IN Debt upon a Bond with Condition, That the Obligor should bring in the Son and Daughter of J. B. at their full Age, to give such Releases as a third Person shall require. The Defendant pleads, That the Son is alive under Age at Doncaster. To which the Plaintiff demurs, and held he might; for it must be taken at their respective Ages. Vid. 5 Co. Justice Wyndham's Case.

1 Mod. 33.
2 Keb. 591.
5 Co. 7, 8.
2 Len. 106.
Mo. 191.
Cro. El. 199.
Lit. R. 364.

Crispe *and* Jackson *versus The Mayor and Commonalty of* Berwick.

IN a Writ of Covenant, the Plaintiff declared upon an Indenture of a Demise of an House from the Defendants, wherein they covenanted, That the Plaintiffs should enjoy it without the Interruption of any Person whatsoever: And assigned for Breach, That J. S. entred and dispossessed them at Berwick. Upon which the Defendant takes Issue. Whereupon the Plaintiff suggests, That such a Place in Northumberland is the next to Berwick; and the Venire is awarded to the Sheriff accordingly, and a Verdict was found for the Plaintiff.

It was moved by Jones in Arrest of Judgment, That here was a Mis-Trial, not aided by any Statute; for the last Act, which is the largest, remedies all Trials, so as they be in the proper County; but this is not so: And he said, It ought to have been tried where the Action was laid. As when an Action is brought upon a Charter-Party, and a Breach is assigned in a Foreign Kingdom, it shall be tried where the Charter-Party is dated; and here the Covenant

S. C. Postea 90.
1 Sid. 381, 462.
Raym. 173.
1 Mod. 36.
2 Keb. 391, 397, 676, 414, 602, 676.
1 Lev. 250, 252.

Covenant bore Date at the Caſtle of York; and there the Trial ought to have been. 6 Co. Dowdale's Caſe: And Berwick is Part of Scotland, and bound by our Acts of Parliament, becauſe conquered in Edward the Fourth's Time: But the Courſe is to name it expreſly, becauſe 'tis out of the Realm, and not like to Wales, where the Trials in ſuch Caſes ſhall be out of the prochein County, 19 H. 6. 22. for that is a Member of England: Vid. 7 Co. Calvin's Caſe. But two Precedents being ſhewn, where the Trials were as it is here, and one of them affirmed in a Writ of Error; alſo the Caſe in Roll. tit. Trial 597. A Writ of Error was brought to reverſe a Judgment given in Ireland, and an Error in Fact was aſſigned and tried in a County next to Ireland: The Court ruled the Venire to be well awarded.

Twiſden ſaid, The Reaſon why an Ejectment would not lie of Lands in Jamaica, or any of the King's foreign Territories, was, Becauſe the Courts here could not command them to do Execution there; for they have no Sheriffs.

This Caſe having remained two or three Terms ſince the Poſtea was returned, and no Continuances entred, one of the Plaintiffs died, and it was doubted whether Judgment could be now entred: And the Secondary ſaid, That they did enter up Judgments two Terms after the Day in Bank, as at the Day in Bank, without any Continuances. And of this Matter the Court would be adviſed. Poſtea 90.

Anonymus.

IF one, upon Complaint to two Juſtices, be ordered to keep a Baſtard Child, and this upon an Appeal to the Seſſions is revoked, that Perſon is abſolutely diſcharged; and unleſs a Father can be found, the Court ſaid, That the Juſtices of Peace muſt keep it themſelves.

2 Cro. Prigeon's Caſe, 341, 350. 2 Keb. 604. Vide antea 48.

The Earl of Peterborough *verſus Sir* John Mordant.

IN an Action upon the Statute de Scandalis Magnatum, for ſpeaking theſe Words of the Plaintiff, I do not know but my Lord of *Peterborough* ſent *Gybbs* to take my Purſe. After Judgment by Default, and a Writ of Enquiry of Damages returned, it was moved in Arreſt of Judgment, That no Action would lie for theſe Words.

1 Lev. 127, 277. 1 Sid. 434. 2 Mod. 150. 2 Keb. 537, 559, 605.

Firſt, He doth not poſitively charge him with it.

Again, The Words do not import a felonious Taking, Hob. 326. Maſon's Caſe, I charge him with Felony, for taking Money out of the Pocket of *H. Stacie*, adjudged not actionable. And in 1 Cro. 312. Thou did'ſt ſet upon me and take my Purſe; go before a Juſtice and I will charge you with Felony. It was held there that no Action would lie.

See Cro. Car. 202, 277. con. 1 Mod. 232, &c.

But the Court gave Judgment for the Plaintiff. As to the first, it was held to be as much as a direct Affirmation; for otherwise one might slander another, and by such a slight Evasion escape an Action.

Twisden said, He knew these Words adjudged actionable, He hides himself for Debt, and for ought I know is a Bankrupt.

And for the Words the Court said, There was a Difference between an Action grounded upon the Statute de Scandalis Magnatum, and a common Action of Slander. The Chief Justice said, That the Words in the one Case shall be taken in mitiori sensu, and in the other in the worst Sense against the Speaker, that the Honour of such Great Persons may be preserved. Moore 55. The Earl of Leicester had Judgment for these Words, My Lord of Leicester is a cruel Man, an Oppressor, and an Enemy to Reformation. Leon. 33. The Lord Abergavenny sued for these Words, My Lord Abergavenny sent for us, and put some of us into the Stocks, some to the Coal House, and some to the Prison in his House called *Little Ease*; and recovered. Vide Crompton's Jurisdiction of Courts. 13. and Leonard, 336.

1 Mod. 232.

2 Sid. 21.
2 Mod. R. 160.
2 Leon. 336.
2 Mod. R. 160.

Anonymus.

An Indictment was, Compertum fuit per Sacramentum duodecim proborum & legalium hominum, *&c.* and quashed, because it was not jurat' & onerat'. And the Clerk of the Crown-Office informed the Court, That that was always the Course; also it must be, Adtunc & ibidem jurat', where the Caption is recited to be taken.

Antea 51.

William *versus* Gwyn.

Error to reverse a Judgment given in Dower in the Grand Sessions in Wales. It appeared by the Record, that the Tenant appeared upon the Summons returned, and Day was given over, & adtunc venit per Attornatum, & nihil dicit in barram: Whereupon, Consideratum est quod tertia pars terr' & tenemen' capiatur in man' Domini Regis, and Day given ad audiend' Judicium; at which Day Judgment was given quod recuperet.

2 Saun. 45.
2 Keb. 450, 351, 605.

It was assigned for Error, That the Court here had awarded a Petit Cape, and yet the Defendant appeared, whereas they should have given Judgment upon the Nient dedire; for a Petit Cape is always upon Default after Appearance, and only to answer the Default: The Grand Cape is before Appearance, to answer the Default and the Demand. Vet. N. B. 97. So it was said, the Court had erred in Judgment; and tho' it were in Advantage of the Tenant by the Delay, yet not being by his Prayer as an Essoin granted, where none ought to be, is not Error, but the Act of the

Court, as if they should enter a Misericordia for a Capiatur, it were erroneous. 8 Co. 59. 1 Leon. 152. 1 Roll. 679. N. 7.

But the Court answered, That the Reason of that was, because it is a Parcel of the Judgment, and the King should lose his Fine: But this was only the Awarding of Process more than should be, and in Advantage of the Tenant, wherefore they resolved that they could not reverse it for Error. And Twisden said, Admitting it were erroneous, they might then give Judgment in this Court. 1 Roll. Rep 88.

Anonymus.

A Prohibition was prayed to the Arches for Libelling against one there, for calling Whore and Bawd, because they were but Words of Heat; also the Party lived in the Diocese of London, so against 23 H. 8. to cite him there. But the Court would not grant it; for tho' formerly there hath been divers Opinions touching these Words, yet Twisden said, Ever since 8 Car. the Law hath been taken, that they may punish such Words, pro reformatione morum. And for the other it appeared Sentence was given, and that it was too late to pray a Prohibition, when it appears they have Jurisdiction of the Cause, as the Superior Court; and he that would have the Benefit of the Statute against Citing out of the Diocese, must come before Sentence. 1 Cro. 78. or 110, *&c.* 1 Sid. 433. Antea 7. Postea 220. 343. 1 Mod. 21. 2 Keb. 577, 58. V. 2 Inst. 602. 2 Roll. 318. N. 1, 2, 319. N. 1, 2.

Crouch *versus* Risden.

Finch, Solicitor, moved for a Prohibition to the Ecclesiastical Court, to stay a Suit for Tithes of Hops, commenced there by the Vicar, upon a Suggestion, that they had paid for all Tithe-Hops so much an Acre to the Parson, Time out of Mind. But it was denied; for there could be no such Composition Time out of Mind, Hops not being known in England until Queen Elizabeth's Time; for then they were first brought out of Holland, though Beer is mentioned in a Statute in Henry the Fourth's Time. 1 Sid. 443. 447. 2 Keb. 612,

But it was said by the Court, That perhaps the Vicaridge was endowed Time out of Mind of the small Tithes, of which Nature Hops were. Then the Prescription of paying a Modus to the Parson shall not take them from him; for it shall be taken to have commenced since the Endowment. Postea 107.

Note, If the Matter concerns the whole County, it is to be tried in another County which is indifferent. 2 Roll. 59. N. 2.

Hall

Hall *verſus* Philips.

2 Keb. 613. AN Information was brought for the Forfeiture of a certain Quantity of Brandy, and ſets forth the two Acts, 13 & 14 Car. 2. c. 23 and 24. of Exciſe upon that and other Liquors, and then the additional Act of 15 Car. c. 11. wherein it is enacted, That no Foreign imported exciſeable Liquors ſhall be landed, *&c.* before due Entry be firſt made thereof, *&c.* or before the Duty of Exciſe due and payable for the ſame be fully ſatisfied and paid; and that every Warrant for the Landing or Delivery of any ſuch Foreign Liquors ſhall be ſigned by the Hand of the ſaid Officer, *&c.* upon Pain that that all ſuch Foreign Liquors as ſhall be landed, *&c.* contrary to the true Intent and Meaning thereof, or without the Preſence of an Officer or Waiter for the Exciſe, or the Value thereof, ſhall be forfeited and loſt, the one Moiety to the King, the other to him which ſhall ſeize, inform, *&c.* And avers that this Brandy was landed, the Duty not fully ſatisfied and paid, and without the Preſence of an Officer or Waiter for the Exciſe; but doth not aver, that a due Entry was not firſt made thereof.

Vide Plow. 6, 7, 8, &c.

Whereupon it was moved, after a Verdict for the Informer, in Arreſt of Judgment; That if either the Duty were paid, or Entry made, or the Landing were in the Preſence of an Officer, it ſatisfied the Act, which is in the Disjunctive, and the Word Or ſhall not be taken Conjunctively, unleſs the Words are of like Nature, as 1 Mar. cap. 3. Maliciouſly or Contemptuouſly diſturb Preachers; eſpecially in a Penal Law. Beſides, if the Act required theſe three Things ſhould be done, then Payment would not ſuffice, without the Preſence of an Officer at Landing; the like Words are taken Disjunctively in Reniger's Caſe, Pl. Com.

Poſtea 148.

Plowd. 4, 5, &c.

But it was ſaid on the other Side, That the Word Or muſt be taken here in the Conjunctive, and that for the apparent Inconvenience that would follow; and that the Statute intended all three ſhould be performed, and that an Entry ſhould not ſuffice without Payment, or Agreement with the Officer, which tantamounts: For otherwiſe this Act which was made to be further remedial to the King, would rather diſappoint this Revenue of Exciſe given by former Acts, which did alſo require an Entry to be made; but this Act adds the Penalty for Non-entry, and this Entry is to be made for a Check upon the Officer, that he accounts right to the King. Elſe it appoints Landing in the Preſence of the Officer, that it may be obſerved whether more be landed than is contained in the Warrant for Landing, but never meant that an Entry ſhould ſuffice without Payment; for ſo, if the Party be a Foreigner or Inſolvent, the King loſeth his Duty.

2 Co. 322.

And the Court gave Judgment for the Informer: But said they would have stay'd until the next Term, but that great Mischief might be done in the Interim, if it should be known that such a Doubt sticks here; and they would not give any Incouragement to the Lessening of the King's Revenue.

Crofton's *Case*.

IN an Indictment upon the Act for coming within five Miles of a Corporation. 1 Sid. 209, 439.

It was moved, That no Indictment lay upon it, because the Act appoints a Penalty of 40 l. to be recovered by Action of Debt, Bill, Plaint or Information. 1 Sid. 439.

Sed non allocatur: For when a Statute makes an Offence, the King may punish it by Indictment; but an Information will not lie, when a Statute doth barely prohibit a Thing. Vid. Cro. 643. 3 Cro. 544. Of Informations vide 1 *Mod.* 71, 288. 2 *Mod.* 301, 302. 3 *Mod.* 66, 73, 104, 116, 134. 3 *Sal.* 199. *Cumberb.* 345, 381, 358, 477. 2 *Hawk.* ch. 26. per tot. 1 Mod. 34. 2 Keb. 614.

Note, It was resolved at Serjeants-Inn, That when a Penalty is to be divided, (viz.) To the King, the Poor and the Informer; if the King alone sue, so that there is no Informer, yet the Poor shall have their Part.

Adrian Lampereve *and other* Frenchmens *Case*.

A Motion was made by the Solicitor upon a Special Direction from the King in Behalf of the said Lampereve and other Frenchmen, to have a Certiorari to Bedford Gaol, where they were committed for Robbery. S. C. 1 Mod. 41. Certiorari. Postea 93, 146.

Keyling Chief Justice. I lately attended his Majesty about this Matter, and I thought he had been satisfied with what I then said and now repeat, (viz.) That if we should remove them now, we should discharge his Majesty's Justice; for there is no Indictment found, and none can be found but at Bedford, and the Prosecutors and Witnesses are there; but he might have it tried at the Bar if he pleased, so the only Way is to let them stay at Bedford till the Assizes; and then if the Prosecutors appear not, or an Ignoramus be found, they will be discharged by Proclamation; and if the Indictment be found, then the Judge may take a new Recognizance of the Prosecutors to appear and prosecute here; and you may have a Certiorari now to deliver there, or you may have it there from my Brother Rainsford, who goes that Circuit, to remove all up hither.

Solicitor. I suppose this will satisfie.

Curia. We must acquit our selves of the King's Justice.

In Easter Term following they were brought up hither, and being arraigned upon the Indictment, they pleaded Not Guilty; and some of them desired to be bailed, and the Court said they ought, but it must be done in the Court, because the Bail must be bound Body for Body; and they required four Men to be Bail, each worth 300 l. Body for Body, and in no Sum certain.

They were afterwards tried per medietat' linguæ, and some of the Aliens were not Frenchmen, and most of them dwelt in Middlesex.

Lady Baltinglass's *Case.*

Vide 2 Sal. 648, 650.

THE Court denied a Trial at the Bar, because the Costs were not paid upon other Trials, which went against her in other Courts; which the Court here would take Notice of.

2 Keb. 615.

Articles were exhibited against a Register of an Ecclesiastical Court, for Misdemeanors done by him in his Office.

2 Roll. 305. Vide 1 Sid. 217. 1 Lev. 138.

He moved for a Prohibition; but it would not be granted, unless they examine him concerning the Articles upon his Oath.

Wright *and* Johnson.

1 Sid. 440.

ASsumpsit, To deliver a Gelding in as good Plight as he borrowed him; and avers, That he did not deliver him at all. A Verdict was had for the Plaintiff, yet Judgment was given against him, because the Breach was not laid as the Promise is. Vide 1 *Lutw.* 279. *Powel* J. said this was a strange Case.

Playters *versus* Sheering.

IN a Replevin (removed by Recordari) there was a Nonsuit for want of a Declaration, and whereupon the Defendant made a Suggestion, and took out a Writ of Enquiry upon 17 Car. 2. c. 27. The Plaintiff moved that this might be set aside, because the Nonsuit happened through the sudden Sickness of the Person employed to prosecute.

Curia. This new Statute having taken away the Writ of Second Deliverance, hath made the Plaintiff remediless, unless we help him; therefore we will endeavour it as far as we can. Let the Defendant shew Cause, why he should not accept of a Declaration upon Payment of Costs.

Termino

Termino Paſchæ, Anno 22 Car. II.

In Banco Regis.

Anonymus.

Prohibition. 2 Keb. 617. 1 Sid. 464. Poſtea 73.

IF there be ſeveral Contracts between A. and B. at ſeveral Times, for ſeveral Sums, each Sum under 40s. and they do all amount to a Sum ſufficient to entitle the ſuperior Court; they ſhall be there put in Suit, and not in a Court which is not of Record. And ſo it was reſolved in the Caſe of the Savoy Court, and Staundforde, 24 C. 2. Alſo it was ſaid, That if a Man at divers Times ſteals Things, all which amount to above 12 d. 'tis Felony Capital.

1 Mod. Rep. 42. 1 Danv. 231.

In an Account after a Judgment Quod computet, the Court aſſigns Auditors, and they ſit upon and return the Account when they will; for Day is not given them, and they give the Parties in the Interim what Time they pleaſe; but if the Defendant delays, they return it to the Court, and Proceſs goes out againſt him.

Nota. Memorandum, On Tueſday April the 26th. Stephen Moſdel, to whom Mr. Lenthal had granted the Office of Marſhal of the King's Bench for Life, was ſworn Marſhal. The Oath was this, (Viz.) You ſhall ſwear, That during the Time of your being Marſhal, you ſhall well and truly Uſe, exerciſe and behave your ſelf in the ſaid Office; you ſhall encreaſe no Fees, and in all Things ſhall do your Duty in the ſaid Office, *&c.*

It was reſolved, That the ſaid Stephen Moſdel could not afterwards practiſe as an Attorney of this Court; and that Mr. Lenthal, Marſhal in Reverſion, had no Privilege.

Anonymus.

A Promiſe was made to give 1000l. to one for curing his Eyes: And an Aſſumpſit is brought.

Upon this, the Jury may give leſs than 1000l. Damages, if they think fit.

Sir W. Mewes *verſus* Mewes.

2 Keb. 634. A Title of Land was tried out of the proper County, upon a feigned Wager, Whether well conveyed or no? (*this is the Courſe of Iſſues directed out of Chancery.*)

Note. In this Caſe a Bill in Chancery was given in Evidence againſt the Complainant, tho' held to be but of ſlight Moment.

Smith's *Caſe.*

1 Lev. 288. 1 Mod. 44. 2 Keb. 635. SMith and other Commiſſioners of Sewers which ſate at White-Chapel, were brought in upon an Attachment awarded againſt them for a Contempt of this Court. And the Caſe was thus:

Raym. 166, 186. See 1 Salk. 144, 145, 201. A Certiorari was lately ſent and delivered to them out of this Court, (upon ſpecial Direction and Recommendation by the King and Council, before whom the Buſineſs had been agitated) to remove hither certain Orders and Proceedings of theirs, in order to a Trial of the Right of the Matter in Queſtion.

At firſt they did not allow the Certiorari; but afterwards having allowed it, they proceeded de novo upon the ſame Matter; and made an Order again, which certain Perſons (being the ſame Perſons who procured the Certiorari,) refuſing to obey, the Commiſſioners fined them 10 l. a-piece.

Then a ſecond Certiorari was taken out and delivered to them; after which they impriſoned Perſons for not Executing and Obeying of a Warrant made upon their ſecond Order, and for Speaking contemptuous Words of the Commiſſioners, and fined them 5 l. a-piece. Being now queſtioned by the Court, concerning theſe Contempts and Misdemeanors, they ſaid, They did this wholly by the Advice of their Counſel Mr. Offley, (who being in Court received a ſevere Reprimand therefore;) and the Commiſſioners were committed to Priſon.

About a Fortnight afterwards, having made and filed their Return, they were brought into Court to receive the Sentence of the Court. And then it was ſaid by them and Coleman their Counſel, That they would not urge any Thing in Juſtification of their not returning their Proceedings; they only offered, That what they did was by the Advice of their Counſel; and that the Clauſe in 13 Eliz. cap. 9. was ſo penned as to give a great Occaſion of Doubt in this particular, which Clauſe upon their Deſire was read, and is thus:

And be it further enacted, *&c.* That from henceforth the ſaid Commiſſioners of Sewers, nor any of them ſhall not be compelled,

or compellable to make any Certificate or Return of the ſaid Commiſſioners, or any of them, or of any of the Ordinances, Laws or Doings, by the Authority of any of the ſaid Commiſſioners, nor ſhall not have any Fine, Pain or Amercement ſet upon them, or any of them, or any Ways to be moleſted in Body, Lands or Goods for that Cauſe; and after the Reading thereof, the Court delivered themſelves ſeriatim, as followeth.

Moreton. This is a great Offence and Contempt: The Commiſſioners of Sewers and their Proceedings are ſubject to the Juriſdiction of this Court. Sir Henry Mildmay's Caſe, 2 Cro. 336. and Sir H. Hungate's in our Memory: If Commiſſioners of Sewers, or any other inferior Juriſdiction, exceed their Commiſſion, we may reform and reſtrain them and it; nay, we prohibit them in Caſes where they have no Juriſdiction of the Matter: Many Precedents are with us in this preſent Caſe, And we cannot anſwer our Duty to the King, without taking Notice of and puniſhing this Offence. Therefore my Opinion is, That for their not obeying of the firſt Writ, they be fined 40 Marks a-piece, and for their not obeying of the ſecond Writ, 20 Marks a-piece.

Rainsford. This is indiſputably an Offence and Contempt, and the greater for that it was ſeconded. It is aggravated too, in that the Commiſſioners proceeded after they had allowed the Certiorari, and that they fell upon and ſhewed their Indignation againſt thoſe Perſons, who only purſued the King's Authority; and that this was in a Caſe which was recommended by the King and Counſel, to which Recommendation the Commiſſioners were privy; they had contrary Advice from other Counſel then there, but they would hearken to that Advice which pleaſed them beſt: Obedience is that Ligament of the Government, without which all will be turned into Anarchy and Confuſion. Without betraying the Truſt repoſed in us by the King, and violating of our Oaths, we cannot omit to puniſh this, therefore I agree the Fines: The Reaſon of the Fines is the Diſobeying of the Writs; the Reaſon of their Diſproportion is to reſemble the Meaſures the Commiſſioners obſerved towards thoſe Perſons whom they unduly fined.

Twiſden. It was reſolved in 23 Car. That this Statute hath no Reference to this Court, and that this Clauſe extends only to Certificates and Returns into Chancery; the Statute ſpeaks of Superſedeas, &c. which Iſſue out of the Court of Chancery only; for this Court does not, nor ever did, ſend out Superſedeas's, but this Court ſends out Certiorari's, which are to bring the Buſineſs before the King here, and the Words of them are, quia coram nobis terminari volumus & non alibi. What ſhould move that Gentleman to give ſuch Advice (as he did) I cannot imagine: I ſuppoſe there is more in the Matter than we know, and 'tis a ſtrange Thing that theſe Commiſſioners ſhould ask Counſel, whether they

should obey the King's Writ or no? Especially when it went out upon such particular Direction and Recommendation. 'Tis some Mitigation, that they had such Advice of Counsel; otherwise I should not stick to fine them 100 l. a-piece. We are bound to take care of the Support of the Government. I agree the Fines.

Kelynge Chief Justice. It is provided by 23 H. 8. cap. 5. That the Laws, Acts, &c. to be made by the Commissioners of Sewers, should stand good and effectual, &c. no longer than the Commission endured, except they were engrossed in Parchment, and certified under their Seals, into the King's Court of Chancery; and then the King's Royal Assent to be had to the same, &c. But that was altered by this of 13 Eliz. whereby it is enacted, That their Laws, &c. should stand and continue in Force, without any such Certificate to be made thereof into the Chancery; and then a little after in this Statute follows the Clause which hath been read, and that refers wholly to Certificates or Returns to be made into Chancery, for the Purpose afore-mentioned. 'Tis plain, the Clause refers not to this Court, for it speaks of returning their Commissions; now their Commissions were never returnable into this Court; this Court cannot be ousted of its Jurisdiction without special Words; here is the last Appeal, the King himself sits here, and that in Person if he pleases, and his Predecessors have so done; and the King ought to have an Account of what is done below in inferior Jurisdictions. 'Tis for avoiding of Oppressions, and other Mischiefs. To deny and oppose this, and to set up uncontroulable Jurisdictions below, tends manifestly to a Commonwealth; and we ought, and we shall take Care that there be no such Thing in our Days. I know there is a great Clamour, so soon as an inferior Jurisdiction is touched; and 'tis thought we deal hardly with them: But unless we will suffer this Court to be dissolved, and the Prerogative of the King to be encroached upon, we must oppose our selves to these Proceedings.

I have a great Respect for these Persons the Commissioners, but 'tis but usque ad aras. When the Jurisdiction of the Crown, the Justice of the Kingdom, and the Duty of my Place is concerned, I ought not to spare my best Friends. Some Precedents have been cited in this Case, and many more might; there are two memorable Records cited. 1 Cro. concerning Persons which contemned the King's Writ and their Penalties. I agree the Fines, and hereby we do not go so high as our Predecessors have gone Hundreds of Years ago.

Nota. This Proceeding and Sentence of the Court, was upon Confession of the Commissioners; the Court forthwith making an Entry and Record of their Confession.

In an Aſſize only, where the Writ is returnable into this Court, it is apud Weſtmonaſter'; but in all other Caſes, where Writs are returnable out of Chancery into this Court, they are returnable Ubicunque, &c.

The King *verſus* Jane D——

She was indicted for Stealing of ſeveral Things, and pleading Not guilty, and a Jury ſworn to try her; the Witneſſes not appearing, were ſuſpected to be tampered with by the Priſoner; and the Jury were diſcharged, and the Trial put off. Vide 1 Inſt. 227. b. contra.

Wiſe's *Caſe*.

An Order of the Juſtices of Peace, for the Maintenance of a Poor Woman, was confirmed, tho' it appeared ſhe was able of Body to work: But the Juſtices of the Peace are Judges of that.

Couſin's *Caſe*.

Error to reverſe a Fine for Infancy: Now 'twas moved, That the Party being in Court ſhe might be inſpected, and the Inſpection recorded: And there was produced and read a Copy of the Regiſter-Book, ſworn to be a true one, and ſeveral Affidavits of her Age. 2 Roll. 572, 573. See 2 Salk. 567. 1 Lev. 142. 2 Saund. 94, 95. 1 Sid. 321, 446.

Curia. Let the Inſpection be now recorded; the Iſſue of her Infancy may be tried at any Time hereafter, tho' ſhe comes of Age.

Nota. A Priſoner in the King's Bench that lies in the Common Side, pays no Fees for his Lodging.

Anonymus.

It was ſaid by Twiſden, That if two ſubmit to an Award, this contains not a reciprocal Promiſe to perform; but there muſt be an expreſs Promiſe to ground an Action upon.

Nota. A Fine which was ſet two or three Terms ſince, was this Term ſet aſide, becauſe of ſome ſurreptitious Practice and Miſ-information to the Judge. Raym. 186.

Aubery

Aubery *verſus* James.

1 Sid. 444. 2 Keb. 623.

ASſault, Battery and Wounding: The Defendant inſiſted, for that he being Maſter of a Ship, commanded the Plaintiff to do ſome Service in the Ship, which he refuſing to do, he moderate caſtigavit the Plaintiff, prout ei bene licuit.

The Plaintiff maintains his Declaration abſque hoc quod moderate caſtigavit, and Iſſue was taken thereupon.

Negativum infinitum.

After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That the Iſſue was not well joined; for non moderate caſtigavit doth not neceſſarily imply that he did beat him at all, and ſo no direct Traverſe to the Defendant's Juſtification, which immoderate caſtigavit would have been: But, De injuria ſua propria abſque aliqua tali cauſa would have been the moſt formal Replication.

But the Juſtices held, That it would ſerve as it was after a Verdict, tho' the Statute at Oxford, 16 Car. 2. the laſt and moſt aiding Act of Jeofails be * expired, and that de injuria ſua propria, not adding abſque aliqua tali cauſa, hath been held good after a Verdict.

(* Which was a Miſtake.)

Green *verſus* Cubit.

2 Keb. 626, 630, 637.

ERror to reverſe a Judgment, given in the Court at Norwich, in Debt upon a Bond; where the Plaintiff declared that the Defendant per ſcriptum ſuum Obligatorium, at a certain Place there, became bound, &c.

The Defendant pleaded, That he was in Priſon, & ſcriptum prædictum was obtained by Dureſs; which was found againſt the Defendant, and Judgment given accordingly.

The Errors aſſigned were firſt, Becauſe he declares of a Writing obligatory, and doth not ſay ſigillo Defendentis ſigillat'. 3 Cro. 571. Declaration in Covenant was held inſufficient for the ſame Cauſe.

Secondly, There is no Place where the Defendant alledgeth himſelf to be in Priſon; and being in an inferior Court, it ſhall not have any Aid of Intendment.

But the Court over-ruled the firſt, becauſe the Plea of the Defendant confeſſes the Deed; and the ſecond, becauſe the Impriſonment muſt of Neceſſity refer to the Place where the Plaintiff declares the Bond to be made: For the Defendant pleaded, That he was then in Priſon; wherefore they affirmed the Judgment. 3 Cro. 55. 2 Cro. 420. 3 Cro. 737. 19 H. 6. 15, 16.

Baldway *and* Ouſton.

DEbt upon a Bond, the Condition was, That the Defendant ſhould pay ſuch Coſts as ſhould be ſtated by two Arbitrators by them choſen. 2 Keb. 624.

He pleaded, That none were ſtated.

The Plaintiff replied, That the Defendant did not bring in his Bill.

To which it was demurred: For tho' if the Defendant were the Cauſe that no Award was made, it was as much a Forfeiture of his Bond, as not to perform it would be; yet here there was a precedent Act of the Plaintiff's neceſſary, (viz.) To chooſe an Arbitrator, which he ought to have ſhewn before any Fault could be aſſigned in the Defendant, in not bringing in of his Bill. And to this the Court did incline: Sed adjornatur.

Nota. It was ſaid, Tho' every Inn-keeper may detain a Horſe until he is paid for his Meat, yet he cannot ſell him; for that was good only by the Cuſtom of London. Yelv. 67. 2 Roll. 85. N. 5. 2 Brownl. 255. Moor 877.

Haſpurt *and* Wills.

A Cuſtom was alledged in the City of Norwich, That in regard they maintained a Common Key, for the Unlading of ſuch Goods as were brought up the River in Veſſels to the ſaid City, that every Veſſel paſſing thro' the ſame River by the ſaid Key, ſhould pay a certain Sum. 1 Sid. 454. 1 Mod. 47, 104, 231. 2 Keb. 624, 665.

It was held a void Cuſtom as to thoſe Veſſels which did not unlade at the ſaid Key, nor any other Place in the City; there being no Benefit redounding to them from the Maintenance of the Key, they only paſſing by, and were bound for another Place, and therefore could have no Impoſition upon them: But if they had received their Freight at the ſaid Key, it might extend to them. Raym. 232.

And Coleman ſaid, The laſt Seſſion of Parliament there was Complaint made againſt the Governor of Graveſend, who would have preſcribed to have two Shillings and Sixpence of every Boat that paſſed by the Fort there: And it was held to be unreaſonable.

Tailor *verſus* Wells.

TRover and Converſion for a Pair of Curtains and Vallance was held inſufficient, for the Uncertainty of what was meant by a Pair in this Caſe. 2 Saund. 74. contra. 1 Mod. 46. contra. Poſt. 106, 114. 2 Keb. 623.

Bernard 1 Sid. 445. contra, ſo 2 Show. 315.

Bernard *verſus* Bernard.

1 Lev. 153, 289. 2 Keb. 626, 635, 646, 650, 696, 699, 708, 716. Vide antea 2. Poſt. 243. 1 Lev. 50, 69, 96, &c. Raym. 75. 1 Sid. 331. 1 Jon. 230. 1 Mod. 32. 2 Mod. 141. 2 Show. Caſe 430.

ERror to reverſe a Judgment in the Court of Hull, upon an Aſſumpſit, where the Plaintiff declared upon two Promiſes; the firſt was upon an Indebitatus infra Juriſdictionem Curiæ, for Money lent.

The Error aſſigned was, That the Loan did not appear to be within the Juriſdiction; but upon View of the Record it was adtunc & ibidem.

The other Promiſe was, That there being Communication between the Plaintiff and Defendant concerning a Houſe, which was ſaid to be at Hull-Bridge, which the Plaintiff ſold him, the Money being unpaid, and the Defendant unable; in Conſideration that the Plaintiff would releaſe to him the ſaid Debt, he promiſed to deliver him up the Poſſeſſion of the Houſe by a certain Day. Then he avers, that tho' he releaſed him, yet the Defendant had not delivered him up the Poſſeſſion, licet ſæpius requiſitus.

It was aſſigned for Error, That the Houſe was not expreſſed to be within the Juriſdiction; for the Performance of the Promiſe muſt be as well within the Juriſdiction, as the Promiſe it ſelf: But it is not material, tho' there be other foreign Circumſtances in the Caſe; as Aſſumpſit upon a Promiſe to re-deliver a Horſe at Hull, which the Plaintiff lent the Defendant at Hull to ride to Beverly: This that Court had Conuſance of, tho' Beverly was out of the Juriſdiction. And tho' the Houſe were alledged to be at Hull-Bridge, that ſhall be intended a Vill by it ſelf, and no Part of Hull: And of that Opinion was Twiſden; but Kelynge otherwiſe.

Cro. Car. 571.

Another Error was aſſigned, That there was no Requeſt laid, which ought to have been, being a collateral Thing, (viz.) To deliver up Poſſeſſion of a Houſe.

See 1 Mod. 27. 6 Mod. 200, 227, 260. N. Lutw. 90.

Sed non allocatur: For being to be done at a Time certain, there was no Need of Requeſt; but if no Time had been ſet, he would have had Time during his Life, unleſs haſtened by Requeſt.

Another Error aſſigned was, That the Style of the Court was, Placita coram Majore, &c. virtute Literarum Patentium, H. 6. yet the Iſſuing out Proceſs, and filing Bail, was entered ſecund' conſuetud' Cur'; And for this, 1 Cro. 143. Long and Nethercote's Caſe was cited, where the ſame Matter was held to be Error; for the Court being erected within Time of Memory, could have no Cuſtom to warrant their Proceedings. Sed non allocatur: For it is according to Law, and the juſt Courſe of their Court.

But Twiſden ſaid, If it had been ſecund' conſuetud' Cur' de temps d'ont memorie ne court, it had been ill.

Girling *verſus* Alders.

IN a Prohibition to the Court of the Honour of Eye, the Caſe was, One contracted with another for divers Parcels of Malt, the Money to be paid for each Parcel being under Forty Shillings; and he levied divers Plaints thereupon in the ſaid Court. Wherefore the Court here granted a Prohibition; becauſe tho' they be ſeveral Contracts, yet foraſmuch as the Plaintiff might have joined them all in one Action, he ought ſo to have done, and ſued here, and not put the Defendant to an unneceſſary Vexation, no more than he can ſplit an entire Debt into divers, to give the Inferior Court Juriſdiction in fraudem Legis. Antea 65. 2 Keb. 617, 1 Sid. 464.

Heskett *verſus* Lee.

PAſch. 21. Car. 2. Rot. 408. Error to reverſe a Common Recovery had in the County Palatine of Lancaſter, againſt an Infant. 1 Sid. 446. 2 Saun. 94, 95. 1 Mod. 48.

The firſt Error was aſſigned in a Variance between the Writ and the Count; the Writ was of Lands in Bikerſtaffe, and the Count was Bickerſtaffe, (5 Rep. 46. Iſfeild for Iffeild; but there the Court ſuffered it to be amended, being the Default of the Clerk:) Sed non allocatur, quia idem ſonant. Hob. 196. 2 Keb. 627. See 1 Sid. 321, 44. 1 Lev. 142, 446, 467. 1 Jon. 318.

Another Error was aſſigned in the Entry of the Admiſſion of the Guardian. Which was thus: Conceſs' eſt per Cur' quod Johannes Molineux Armig', ſequatur pro Thoma Heskett Armig', ut Guardian' prædict. Thomæ in pl'ito terræ verſus Lee: Whereas it was ſaid it ſhould have been, ad comparendum & defendendum, and this is ad ſequendum, which is a Form proper only for the Demandant, and ſo is the 2d Cro. 641. and the Reaſon why Infants are bound by Recoveries when Guardians are aſſigned them, is, Becauſe if they ſuffer any Wrong, they have an Action againſt the Guardian, in whoſe Default it was: Whereas if the Infant ſhould bring an Action in this Caſe and declare againſt Molineux, That he was admitted as Guardian to defend for him; if Iſſue were taken upon it by this Record, the Trial would againſt him. Cro. El. 323. Cro. Car. 307.

Again, It is ſequatur pro Thoma ut Guardianus, and ut is but ſimilitudinary.

Another Error was aſſigned in the Entry of the Appearance, which was, prædict' Thomas Heskett per præd' Johannem Molineux qui ſpecialiter admiſſus eſt per Cur' ad ſequend' pro prædict' Tho' venit in propria perſona & defendit jus ſuum: Where it was ſaid, It muſt be taken that the Tenant appeared in Perſon, and not the Guardian, and a Recovery ſuffered by an Infant where he appears by Attorney, or in proper Perſon, is erroneous, Rolle 371.

But notwithſtanding theſe Errors the Court affirmed the Recovery.

For the Admiſſion of the Guardian ad ſequend' is proper enough; for it ſignifies no more than to follow the Cauſe: And in many Caſes the Tenant or Defendant doth proſecute, as in Voucher, praying Tales, carrying down Trials by Proviſo, &c. and in Replevin the Avowant is Actor, and in ſuffering of a Recovery the Tenant is the main Agent, being to his Uſe if no other be declared. And it was an Error aſſigned in the Lord Newport and Mildmay's Caſe, as appeareth by the Record; yet it ſeems it was taken to be ſo plain, as not fit to be inſiſted on: Wherefore there is nothing of it in the Report of the Caſe, 1 Cro. 224. yet there was all Endeavour imaginable uſed to reverſe that Recovery; and divers other Precedents there are of the ſame Manner of Entry: And if it can appear to the Court, that there was a Guardian admitted, the Form of the Entry ſhall not be ſo ſeverely examined, as in the 4 Rep. 53. where there was no Entry of any Admiſſion of the Guardian by the Court at all; yet it appearing quod venit per Guardianum, the Court would not reverſe the Judgment for Error. And for the Book of the 2 Cro. 641. there were other Reaſons which reverſed the Judgment, and the Admiſſion ad proſequendum was not mentioned, until the Court upon the other Matters had reſolved the Reverſal: And the Books there cited do not at all prove it to be Error. And ad ſequend' ut Guadianum is not at all amiſs; for Ut many times notes an Identity; Seiſitus ut de feodo, makes Conuſance ut Ballivus, &c. And for the Entry of the Appearance, it may be taken that the Guardian came in proper Perſon, and ſo it ought to be: But if propria perſona refers to the Infant, he muſt have reverſed the Recovery during his Non-age. And ſo Twiſden ſaid, it hath been reſolved in this Court lately. Vid. Roll. 1ſt Part 171. and 2d Part 573.

Cro. Car. 307.

Cro. Eliz. 158, 172. 1 Sid. 173.

Anonymus.

See 1 Sid. 153, 154, 420.

SCroggs, the King's Serjeant, moved to have a Trial at Bar, in an Indictment of Perjury, and for ſome further Time, urging that it was the King's Caſe.

The Chief Juſtice ſaid, The King was no otherwiſe concerned in it, than in Maintenance of the Common Juſtice of the Realm: It was uſually the Subject's Intereſt, and his Proſecution, and therefore muſt not deviate from the Courſe in Civil Cauſes, and not to be reſembled with Cauſes wherein the King is concerned in Point of Intereſt.

Tilden *verſus* Walter.

A Prohibition was prayed to ſtay a Suit for Tithes of Wood. The Plaintiff ſuggeſted, That he had a Houſe in the Pariſh, and that the Wood was cut for Fuel burnt in his Houſe.

But the Court ſaid, That this would not ſerve, unleſs it were expreſſed, that the Houſe was for Maintenance of Husbandry, by Reaſon of which the Parſon had uberiores Decimas.

1 Mod. 50. 2 Keb. 628, 1 Sid. 447. Hetly 88. 110. 2 Inſt. 652. 1 Roll. 642. N. 36. 644. N. 3. 645. N. 9, 10. 3 Cro. 609. Moor 917. Cr. Car. 113. 2 Keb. 629.

Barett *verſus* Milward & al'.

A Scire facias was awarded againſt the Defendants upon a Recognizance, which they entred into as Bail for a Plaintiff in a Writ of Error, that he ſhould proſecute it with Effect, or pay the Money if the Judgment were affirmed.

They plead, That he did proſecute it with Effect, and that the Judgment was not yet affirmed.

The Plaintiff replied, Proteſtando, That they did not proſecute with Effect, Pro placito, That the Judgment was affirmed by the Juſtices of the Common Bench, and Barons de gradu de la Coif, Et hoc paratus eſt verificare per Recordum. To which the Defendants demurred generally,

Becauſe it was not alledged, that there were Six Juſtices and Barons preſent when the Judgment was affirmed: For 27 Eliz. c. 8. which gives them Authority, requires, that there ſhould be Six at the leaſt.

Sed non allocatur: For the Defendant ſhould then have pleaded Nul tiel Record; for if there were not Six, their Proceedings were coram non Judice.

Nota, If a Certiorari be not returned, ſo that an Alias be awarded, the Return muſt be as upon the firſt Writ, and the other muſt be returned quod ante adventum iſtius brevis the Matter was certified.

Gybbons *verſus* North.

IN an Aſſumpſit the Plaintiff declared, That whereas at the Defendant's Requeſt he was bound with him in a Bond of 200 l. he in Conſideratione inde promiſed to ſave him harmleſs, and obliged himſelf, his Heirs and Executors in 200 l. to the Performance of it; and the Money not being paid, the Defendant did not ſave him harmleſs: But, per debitum legis proceſſum, he was forced to pay the Money.

1 Sid. 447. 2 Keb. 630, 631.

The Defendant demurred, becauſe he did not alledge, That he did not pay him 200 l. For obliging of himſelf in the Penalty of 200 l. to ſave him harmleſs, he hath Election either to ſave him harmleſs, or pay 200 l.

But the Court gave Judgment for the Plaintiff; for there is no Election in this Caſe, being no more than an ordinary Promiſe to ſave harmleſs. And this Action is brought upon the Plaintiff's Dampnification, which is a Breach, and he doth not demand the 200 l. Alſo a Verbal Contract cannot create a Penalty to oblige the Heir.

Jordan *verſus* Forett.

1 Sid. 449.
1 Mod. 50.
1 Keb. 632.

ERror to reverſe a Judgment given againſt an Executor, in Debt, in the Common Pleas, where the Executor pleaded divers Judgments formerly obtained againſt him; and the laſt he pleads thus: That one Eliz. H. in eadem Curia implacitaſſet, *&c.* and recovered in Trinity-Term, but expreſſes not in what Year; and there, upon a general Demurrer, Judgment was given for the Plaintiff, and it was aſſigned for Error.

That this Incertainty in Reſpect of Time was good at leaſt upon a general Demurrer.

But the Court affirmed the Judgment: For if ſuch Pleading ſhould be allowed, it would be very inconvenient to the Plaintiff, and very difficult to find out the Record, and then how ſhould he plead that it was kept on foot by Fraud, or ſuch like? But if it had been aſcertained when the Plea commenced, though no Time alledged when the Judgment was obtained, yet that would have been good; for the Continuances would have directed to the finding of it.

Twiſden ſaid, That the Courſe in this Court was in a Scire facias upon a Judgment, to ſay quod cum recuperaſſet, without alledging any Time: But in the Common Pleas they ſet forth the Term.

Putt *verſus* Vincent.

2 Keb. 632.
Poſtea 135.
Antea 35.

IN Debt for 3900 l. the Plaintiff declared upon Articles of Agreement, wherein Putt covenanted to convey certain Lands to one Noſworthy; and there are alſo certain Covenants from Noſworthy to the Plaintiff, and from the Defendant Vincent; who after Imparlance pleads, That Noſworthy ſealed the Deed, and is ſtill alive.

To which the Plaintiff demurred.

And it was alledged by Jones, That this being after Imparlance, could not be pleaded, it being only in Abatement, and that he commences his Plea Actio non, as if it were a Plea in Bar.

And the Court inclined that it was inſufficient for both Cauſes: But then it was ſaid, It appears by the Deed to which Noſworthy was a Party, that the Plaintiff could not ſue the Defendant alone, and ſo of his own Shewing he could not have Judgment. But it was anſwered, That it did not appear, that Noſworthy ever ſealed the Deed. Et adjornatur. Poſtea 135.

Gifford *verſus* Perkins.

IN Debt upon a Bond entred into to Eliz. Perkins, who was the Plaintiff's Wife, and he as her Adminiſtrator brings this Action. The Defendant pleads, That he delivered the Bond to one Eliz. Perkins his Siſter, quæ obiit ſola & innupta, abſque hoc that he delivered it to Elizabeth Perkins the Plaintiff's Wife, and to that the Plaintiff demurs ſpecially. For if it be taken that there are two of the Name, the Defendant ſhould have pleaded non eſt factum; for it amounts to no more. Or at leaſt he ought to have induced his Plea, that there were two Elizabeth Perkins. But this Traverſe is deſigned to bring the Marriage in Queſtion, which is not to be tried now. Wherefore the Court gave Judgment for the Plaintiff. 1 Sid. 450. 2 Keb. 633.

Twiſden ſaid, If the Iſſue be, Whether the Wife of ſuch a Man or no? This is to be tried per Pais: For if ſhe be a Wife de facto, it ſerves upon the Iſſue: But the Loyalty of Matrimony is to tried by the Certificate of the Biſhop only. 2 Cro. 102. 2 Roll. 585. 1 Lev. 41.

Dighton's *Caſe*.

A Mandamus was prayed to the Corporation of Stratford ſuper Avon, to reſtore Dighton the Town-Clerk. 1 Lev. 291. Poſtea 82.

They returned their Letters Patents of Incorporation, whereby they had Authority to grant the Office of Town-Clerk Durante bene placito; and that he was amoved from his Office by the Mayor and Burgeſſes. 2 Keb. 641, 656. 1 Sid. 461. 2 Sid. 49, 73. Raym. 188

It was ſaid, That here appeared no Cauſe of Amoval upon the Return, which was manifeſtly needleſs, having Authority to turn them out at their Pleaſure. But Twiſden ſaid, It hath been held, that where any ſuch like Power is to chuſe one into a Judicial Office, as an Alderman, whoſe Place concerns Judicature; that they cannot amove him without Cauſe: But this was in a Miniſterial Office. Poſtea 331, 342.

It was further moved, That it did not appear, that they had diſcharged him by any Matter in Writing under Seal; and it could not be by Parol. Sed non allocatur; for it is returned to be done by the Mayor and Burgeſſes; and a Corporation cannot do any thing by Parol. Poſtea 82.

An

2 Saund. 148. 1 Mod. 62. 2 Keb. 641.

An Executor obtained Judgment in Debt in this Court, and was afterwards upon an Information here convicted of forging the Will: It was alſo made void by Sentence in the Eccleſiaſtical Court. Whereupon the Court was moved to vacate the Judgment, which they order'd accordingly, and the Cauſe of vacating thereof to be entred upon the Record. Vide Antea in Paris's Caſe. 49.

King *verſus* Atkins.

Antea 35, 36. 1 Sid. 442. 2 Keb. 529, 596, 609, 642.

IN Debt upon a Bond, the Condition recited, That whereas the Plaintiff was bound with the Defendant being an Exciſe-Man, that he ſhould render a true Account in the Exchequer; that the Defendant ſhould ſave him harmleſs at all Times, &c. The Defendant pleaded non fuit damnificatus. The Plaintiff replied, That a Scire facias iſſued out againſt him, &c. To which the Defendant demurred, becauſe he did not alledge that he gave Notice.

This being ſpoken to divers Times, the Court thought Notice not requiſite in this Caſe, no more than upon a Promiſe to pay ſo much at the other's Marriage, or Return into England. Vid. Hob. 112, 113. 1 Bulſt. 12 and 13. where it is held, Upon a Promiſe Notice is not neceſſary, otherwiſe upon a Bond, becauſe of the Penalty. Antea 35, 36.

1 Roll. 463. Hob. 51, 68. Poſtea 204.

Cheſter *verſus* Wilſon.

Co. Lit. 301. b. 1 Sid. 452. 2 Saund. 96. Raym. 187. 2 Keb. 641, 642. 2 Roll. 86.

IN Rin. 21 Car. 2. Rot. 498. The Caſe was two Joint-Tenants, the one grants, bargains and ſells all his Eſtate and Intereſt to the other. It was held clearly by all the Court, That this amounted to a Releaſe; but it muſt be pleaded quod relaxavit; for one Joint-Tenant cannot grant to another.

A. 1, 403. L. 3. 3 Cro. 696. 2 Ven. 149. 4. 149. 3 Lev. 291. Baker and Lade.

Wilſon *verſus* Armorer.

Poſtea 87, 106. Raym. 207. 2 Keb. 643, 667, 719. 1 Lev. 287.

IN Debt againſt the Heir, upon the Bond of his Anceſtor, who pleaded riens per diſcent, the Jury find a ſpecial Verdict to this Effect;

That the Father was ſeiſed of a Manor in Fee, and made a Feoffment of it, excepting two Cloſes, for the Life of the Feoffor only, and referred it to the Judgment of the Court, whether theſe Cloſes deſcended to the Defendant or not? So that the Queſtion was, Whether the Cloſes were well excepted, or paſſed by the Feoffment?

And it was argued by Levinz for the Plaintiff, That by theſe Words, the two Cloſes were totally excepted, and that the Law ſhould reject the later Words; becauſe they cannot take Effect according to the Parties Intention, to reſerve to the Feoffor a particular Eſtate. If one ſurrendred a Copyhold to the Uſe of J. S.

and his Heirs, which Eſtate is to begin after his Death; adjudged in 2 Rolle 261. a preſent Fee-ſimple paſſed. 3 Cro. 334. A Man ſaid to his Son being upon his Land, Stand forth, *Euſtace* my Son, reſerving an Eſtate for mine and my Wife's Life, I do give you this Land, to you and your Heirs. Reſolved there that this is a good Feoffment. Moor 950. Poph. 49. A Man poſſeſſed of a Term in an Houſe in the Right of his Wife, granted it, excepting the Cellar, pro uſu ſuo proprio, and held that by theſe Words it was altogether excepted out of the Grant. 1 Anderſon 129.

Serjeant Turner econtra, For that it is but one Sentence, and cited 38 H. 8. 38. An Advowſon was granted, ſaving the Preſentation to the Grantor during his Life, and held void; and Pl. Com. 156. where it is ſaid, If a Termor granted his Term after his Death, it is void. But if in two Sentences, as to grant his Term, Habendum after his Death, there the Habendum is only void. Et adjornatur. Poſtea 87, 106.

Love *verſus* Wyndham.

AN Action upon the Caſe, upon an Iſſue directed out of Chancery; upon a Special Verdict, the Caſe was, George Searl being ſeiſed of the Manor of N. demiſed the ſame to Nich. Love for 99 Years, if three Lives ſhould ſo long live. N. Love deviſed it to Dulcibell his Wife, the Remainder to Nich. his Son for Life, and if he the ſaid N. the Son ſhould die without Iſſue, then to Barnaby Love the Plaintiff. The Executor aſſented, and whether the Deviſe to Barnaby were good, was the Queſtion. Jones for the Plaintiff: This is a good Poſſibility. I ſhall make two Points.

S. C. 1 Lev. 290. 3 Lev. 22. 1 Sid. 450. 1 Mod. 50, 114. 1 Roll. 611, 612. 2 Keb. 637. 2 Cha. Rep. 14, 15. 2 Danv. 523, 526. See 1 Sid. 37.

Firſt, If a Termor deviſe firſt to one and then to another, whether he may deviſe it over?

Secondly, Whether the Limitation here after the Death without Iſſue, be a good Limitation over?

Firſt, He may make a third Limitation, which is a Poſſibility upon a Poſſibility; at leaſt he may make two or three ſuch Limitations over. I can't certainly ſay where it will end. It can't be denied, but that a Termor may deviſe firſt to one for Life, and after to another. 8 Co. 95. But I ſay he may go further, and that will appear by Reaſon and Authority.

Firſt, By Reaſon. The Reaſon given, why the executory Deviſe in the firſt Caſe is good, is, becauſe 'tis in Conſtruction of Law, as much as if he had deviſed it to the laſt firſt, (if the firſt Man ſhould die within the Term) and then had deviſed, that the firſt ſhould hold during Life; and without ſuch a Tranſpoſition it cannot be good. Now this being the Way of Operation, there is no Reaſon why he may not deviſe it to one after the Death of two,

two, as well as after the Death of one. This would be so in Grants, were it not that a Certainty is required in them, 1 Cro. 155. which is not required in Devises.

Termino Sanctæ Trinitatis, Anno 22 Car. II.

In Banco Regis.

Freeman *versus* Banes.

1 Show. 72. 3 Mod. 195. Peirce and Smith. Antea 55,56, 57. 1 Sid. 349, 458. 1 Lev. 270. 2 Keb. 521, 597, 650.

ERROR to reverse a Judgment in an Ejectione firmæ in the Common Pleas; the Case upon a Special Verdict was thus.

The Marquels of Winchester being seised in Fee of the Lands in Question the 8th of July, 9 Jac. lets them to Sir An. Mayne for 100 Years, in Trust for the Marquels and his Heirs, and to wait upon the Inheritence. The Lessee enters, afterwards the Marquels enters, and lets it to the Lord Darcy for seven Years, and then lets it to the Spanish Ambassador for seven Years, which Leases being expired, Sir A. M. demises to Freeman for a Term yet unexpired. (This Demise is not found to be upon the Land.) Afterwards the Lord Marquels demises to Germin for 54 Years, upon Consideration of Money, and reserves a Rent, and covenants to levy a Fine, for the Assurance of the Term, which was afterwards done with Proclamation. Germin enters, and five Years passed without any Claim made; which Lease by mean Assignment came to Wicherly, the Lessor of the Defendant, who was Plaintiff in the Common Pleas, and there had Judgment.

The only Question upon this Special Verdict was, Whether the Fine and Non-Claim should Bar the Interest of Sir A. M. the Lessee in Trust?

Gr. Car. 110. This Case having been argued three several Times at the Bar; the Court did this Term deliver their Opinions, and did all agree, That the Judgment ought to be affirmed.

It was considered quid operatur by the Entry of the Marquels, and they all, except Moreton, held, that prima facie he was Tenant at Will, as Littleton Sect. 463. is, There the Feoffor enters upon the Feoffee to his Use; but that the Entry of Germin his Lessee did oust Freeman the Assignee of Sir A. M. which Assignment, tho' not found to be upon the Land, was good, as the Chief Justice held, 2 Cro. 660. because the two former Leases made by the Marquels were expired, so he became Tenant at Will again; but then he making of another

ther Leaſe, and the Leſſee entring, this muſt work an ouſter, and ſo the Fine would bar the Right: For they agreed, That a Fine regularly ſhall not work upon an Intereſt which is not deveſted; though in ſome Caſes it doth, as upon the Intereſt of a Term, according to Saffin's Caſe, 5 Co. which yet cannot be deveſted; but though the firſt Entry make but a Tenancy at Will, yet taking upon him to make Leaſes, that is enough to declare his Intent to diſpoſſeſs his Leſſee in Truſt. Beſides he reſerves a Rent, and covenants for quiet Enjoyment, and to make further Aſſurance, which could not ſtand with the Intereſt of the Leſſee in Truſt: And for the Caſes that were objected, as Blunden and Baugh's Caſe, 1 Cro. 320. where it is adjudged, That the Entry of the Leſſee for Years of Tenant at Will, ſhould be no Diſſeiſin, nolens volens, to him that had the Freehold, for there was no Intention of the Parties to make it ſo; and here the Law ſhall rather give the Election to him which had the Inheritance to make it a Deveſting, than the Leſſee; or rather, as the Chief Juſtice ſaid, The Law conſtrues ſuch Acts to amount to a Deveſting, or not Deveſting, as is moſt agreeable to the Intention of the Parties, and the Right of the Thing; which diſtinguiſhes it alſo from the Caſe of Powſley and Blackman, cited in Blunden and Baugh's Caſe; where the Mortgagor held at the Will of the Mortgagee, and let for Years, the Leſſee entred, and held notwithſtanding, that the Mortgagee might deveſt. So Sir Tho. Fiſhe's Caſe, in Latch's Rep. where Tenant for Years lets at Will, and the Leſſee makes a Leaſe for Years, and then the Remainder is granted over; this Grant is held to be good; which, whether by the Remainder there be underſtood the Intereſt of the Leſſee, or the Fee-ſimple; yet it is no more than my Lord Nottingham's Caſe, and not like the Caſe in Queſtion: For there the Leſſee held the Intereſt in his own Right, and here but in Truſt; and for the Caſe in Noy's Reports 23. Twiſden ſaid, he wholly rejected that Authority; for it was but an Abridgment of Caſes by Serjeant Size, who when he was a Student borrowed Noy's Reports, and abridged them for his own Uſe.

Vide 1 Salk. 245, 280. Smartle and Williams. 3 Lev. 387. Cumberba. 249.

The Caſe was thus: Tenant in Fee makes a Leaſe for Years, then levies a Fine before Entry of the Leſſee: It is held there, though five Years paſs, the Leſſee is not barred; which is directly againſt the Reſolution in Saffin's Caſe; and for Authority in this Caſe, they relied upon the Caſe of Iſham and Morris, in 1 Cro. 109, 110. where upon Evidence it was reſolved by the Juſtices, That if the Ceſtuy que Truſt of a Leaſe for Years, purchaſeth the Inheritance, and occupies the Land, and levies a Fine, that this after five Years ſhall bar the Term, which is not ſo ſtrong as this Caſe; becauſe there were no Leaſes made, and Entry thereupon; and the Truſt muſt paſs inclusively by the Fine, as is reſolved

solved in divers Books; especially in this Case, where it is to wait upon the Inheritance, which though it arises but out of a Term, yet it shall follow the Land, and go to the Heir.

And for the Inconveniencies which were objected, That if any Man purchased Land by Fine, that he could not keep on foot Mortgages and Leases, which it is often convenient to do, the Chief Justice declared his Opinion, That in that Case the Fine should not bar, there not being any Intention of the Parties to that Purpose. 2 Vent. 329.

And as to the other, that where the Mortgagor continuing in Possession, levies a Fine, this should bar the Mortgagee; he denied that also, and grounded himself upon Fermour's Case, in 3 Cro. and Twisden agreed. Antea 55, 56, 57.

Dighton's *Case*.

HE brought a Mandamus to be restored to his Place of Town-Clerk of Stratford super Avon. The Corporation returned Letters Patents, whereby they were empowered to chuse one into the Office of Town-Clerk, Durante beneplacito, and that they removed him from his Office. 1 Lev. 291. Antea 77. Post. 331. 1 Sid. 461. Raym. 188. 2 Keb. 641, 656.

Jones prayed that he might be restored notwithstanding, because no Cause of his Removal was returned, nor that they had ever summoned him; whereas if they had, he might peradventure have shewed such Reasons as would have moved them to have continued him; and he cited Warren's Case, 2 Cro. 540. who was restored to his Aldermanship, where the Return was as here. 6 Mod. 18. Cumberba. 348. 133. 317. 2 Salk. 428, 435, 439. 1 Lev. 148.

But the Court held, That they could not in this Case, (altho' they confessed they knew the Merits of the Person) help him: And the Chief Justice said, That the Case of the Alderman differed, for he is a Part of the Corporation, which is a continuing Body, and no Member thereof can be displaced at the Will of the rest; but it is otherwise in Case of such an Office as this; the Cases cited agree, if it had been a Common Council-Man, as was returned at first.

And here they said it were fit a Scire facias went out of Chancery, to repeal these Letters Patents as unreasonable. If they had been to chuse a Town-Clerk generally, it had been for his Life; or if to chuse one, provided they might turn him out at their Will and Pleasure; yet they could not have done so without Cause, as Twisden said: But here the Authority is absolute, to chuse him Durante beneplacito, which it was said was not so much to be admired at, for the Offices of Judicature in the Courts at Westminster are so determinable. Post. 342.

Foot *verſus* Berkley.

PAſch. 19 Car. 2. Rot 1618. In a Writ of Error to reverſe a Judgment, given in an Ejectione firmæ in C. Banco. The Caſe upon a Special Verdict was this: The Prior of Bodmin was ſeiſed in Fee, and 29 H. 8. demiſed to John Monday and others for ninety-ſix Years, at the Rent of 60 l. per Annum. Poſtea 88. 1 Lev. 234. 1 Sid. 460, 461. Carter 147. 2 Keb. 321, 480, 514, 611, 654, 673.

The Poſſeſſions of the Priory afterwards came to the Crown, and deſcended to Queen Eliz. who in the 42d Year of her Reign granted to John Monday for thirty Years, Habendum after the End of the former Term, under the ſame yearly Rent. The Inheritance was afterwards conveyed to divers in Truſt for the late Queen-Mother; who in 14 Car. 1. demiſed to Francis Godolphin in this Manner, reciting that Queen Eliz. in the 32d Year of her Reign, (whereas it was the 42d) demiſed to J. M. (and did not recite for what Term) to commence after the Expiration of the Term for ninety-ſix Years, granted by the Prior, reſerving 60 l. Rent, did demiſe to the ſaid Francis for twenty-one Years, to commence after the End of the Term granted by the ſaid recited Letters Patents of Queen Eliz. They find no Leaſe made in the 32d Year of the Queen, &c. Now whether Godolphin's Leaſe ſhould begin from the Making, (which if it ſhould, it is for ſome Years expired,) or to expect while the Leaſe made in 42 Eliz. ſhould determine, was the ſole Queſtion.

And by the Opinion of the Court of Common Pleas, (Tyrrel only to the contrary,) it was adjudged, That the Leaſe ſhould commence preſently upon the Making: And a Writ of Error being brought, after divers Arguments at Bar, it was this Term argued by the Court, and reſolved, That the Judgment ſhould be affirmed. Cr. Car. 399.

They held, That every Leaſe for Years muſt have a certain Beginning and a certain End, either expreſſed, or referred to ſomething which may make it ſo: And here it is referred to a Leaſe, whereas there is not any ſuch Leaſe; therefore it is to begin preſently; as if it had been to commence from an impoſſible Date. Co. Litt. 46. b. A Leaſe made from the 30th of February ſhall commence preſently; and it is the ſame Thing, when to begin from the End of a Leaſe miſrecited, for it is no more than to refer it to nothing, Br. Leaſes 62. 1 Cro. 220. Miller and John's Caſe, Dy. 116. 2 Roll. 55. 4 Rep. 53. Palmer's Caſe, Bendlow's Rep. 35. 1 Anderſon 3. Leonard Mount's Caſe. And whereas it was objected in this Caſe, that the Date is not material, and that there was enough expreſſed to aſcertain what Leaſe the Parties intended; and the Caſe in Hob. 129. was cited, where one made a Leaſe, Habendum a Feſto Purificationis, and then reciting by his Deed, that he had made a Leaſe to commence Poſtea 137.

mence a Feſto Annunciationis, granted the ſaid Reverſion: The Court held this there a good Grant.

Co. Lit. 46. b. 1 Jon. 354. Vaugh. 73. 6 Co. 36. 1 Cro. 399. 3 Cro. 601.

It was anſwered, That the Leaſe here was tied up by ſuch preciſe Words, to begin upon the Determination of the Leaſe granted by the ſaid recited Letters Patents, that this cannot be referred to a Leaſe which varies in the Date, tho' agreeing in other Circumſtances; (yet the Certainty of the Term is not recited neither;) And tho' a Leaſe is good without a Date, yet when a Leaſe is recited to be of one Date, a Leaſe which bears another Date cannot be ſaid to be the ſaid recited Leaſe. And the Caſe in Hobart is very different from this Caſe; for in the Grant of the Reverſion, the Miſrecital of the particular Eſtate is not material in the Caſe of a common Perſon, ſo long as he hath a Reverſion in him: But here one Term is recited to give a Certainty of Commencement to another; and if here be none ſuch, it muſt begin preſently; ſo that however, the Grant is good alſo here, either to paſs the Reverſion with Attornment, or being by Indenture to take Effect upon the Forfeiture, &c. of the former Term. Pl. Com. 453.

1 Sid. 464.

Twiſden ſaid, Walter Chief Baron reported this Caſe to be adjudged, where one made a Leaſe to begin from the Nativity of our Lord laſt paſt: It was reſolved it ſhould begin preſently, and not from Chriſtmas, for that was the Feaſt of the Nativity; and to take it from the Nativity, the Time would have been aſſured many Times over, and that in the King's Caſe, ſuch a Leaſe would be void. But here, if the Caſe was thus, that A. had made a Leaſe to B. for thirty Years, to commence from the 1ſt of March, and then A. reciting the former Leaſe to be made the 1ſt of May for thirty Years, had made another Leaſe, to commence from the End of B.'s Leaſe; the Leaſe ſhould have commenced after the former ended. But it cannot be ſo in the Caſe in Queſtion, becauſe tied up to the ſaid recited Deed.

Another Objection was, Becauſe this being by Indenture, the Parties ſhould be eſtopped to ſay, that there was no ſuch Leaſe; and this was much inſiſted on by Serjeant Maynard, in his Argument for the Plaintiff.

To which it was anſwered, That this being by Recital, could work no Eſtoppel.

Again, The Queſtion is not now between the Parties to the Leaſe; and tho' they and their Aſſignees might be bound in Pleading, yet being in a Special Verdict, the Court ſhall judge accordCr. Car. 110. ing to the Truth. And ſo is Iſham and Morrice's Caſe, 1 Cro. 77. And Rawlins's Caſe, 4 Rep. is between the Parties themſelves. So they all reſolved, That Judgment ſhould be affirmed.

The King *verſus* Bates.

ERror to reverſe a Judgment given in an Information at the Aſſizes in Norwich, becauſe the Information was exhibited before Juſtice Moreton and Juſtice Rainsford; and the Trial and Judgment was at the next Aſſizes before two other Judges. 2 Keb. 657.

And it was objected by Pemberton, That their Commiſſion of Oyer and Terminer doth not empower them to determine any Thing which was not commenced before them; and ſo is Bro. tit. Commiſſion 24. And in the 4th Inſt. my Lord Coke ſaith, That the Statute of Edward the 6th extends only to Juſtices of Gaol-delivery; Sed non allocatur. 1 E. 6. c. 7.

For the Court ſaid, The Statute extends to both; and ſo hath been the conſtant Practice.

Secondly, There was no good Trial; for there is an Award of a Venire facias, but no Writ certified. But this was alſo over-ruled; for it is the Courſe of the Aſſizes not to make out any Writ.

Thirdly, Iſſue is joined by the Clerk of Aſſize, which the Court ſaid ought to be; for he is Attorney General there.

Parker *verſus* Welby.

THE Plaintiff brought an Action upon the Caſe againſt the Defendant, and declared, That he ſued out a Latitat againſt a third Perſon, directed to the Defendant, being Sheriff; who thereupon arreſted him, and after let him go at large: And then he returned a Cepi Corpus & paratum habuit, ubi revera he had not his Body at the Day. Antea 55. 1 Sid. 439. 2 Saund. 59, 60, 154.

To this Declaration the Defendant demurred, ſuppoſing that no Action would lie for this Falſe Return; for the Statute of 23 H. 6. obliges the Sheriff to let to Bail; and if he hath not the Body at the Day, he is to be amerced. Antea 55. 1 Mod. 57, 240, 244.

But the Court were of Opinion for the Plaintiff: For it ſhall be intended that he let him go without Bail; and if he did not, he ought to have pleaded the Statute of 23 H. 6. which is a private Law: And at the Common Law a Man could not be let at large in ſuch Caſe, without a Homine Replegiando. 2 Keb. 591. 1 Sid. 22, 23, 24.

Or elſe he might have pleaded Not guilty, and given the Statute in Evidence: And ſo it is adjudged in Layton and Gardiner's Caſe, 3 Cro. 460. So Moor, placito 996. 2 Cro. 352, & 3 Cro. 624. where the Defendant pleaded, That he let to Bail according to the Statute; and the Plaintiff was barred. 2 Saund. 155. contra. 1 Mod. 58. 1 Sid. 22, 23, 24. 2 Saund. 60.

Twiſden

1 Mod. 33, 57, 58.

Twiſden cited a Caſe in this Court, Paſchæ 21 Car. 1. Rot. 616. between Franklyn and Andrews; where the Plaintiff declared as in this Caſe. And the Defendant pleaded the Statute, and that he let him at large upon Sureties, and traverſed abſque hoc, that he returned his Writ Aliter aut alio modo: To which the Plaintiff demurred.

It was reſolved,

Firſt, That the Sheriff could return nothing but Cepi Corpus: And he was then amerced, becauſe he offered to make a Special Return.

Secondly, That where the Sheriff let the Parties out to Bail, and he made ſuch Return; that it was no Falſe Return, and therefore he ſhould not have traverſed abſque hoc, that he returned Aliter vel alio modo; as in Maintenance, where the Defendant juſtifies, for that the Party could not ſpeak Engliſh, and therefore he went with him to inſtruct his Counſel: He ſhall traverſe abſque hoc, that he maintained Aliter; becauſe that he maintained would not do, tho' it be juſtifiable. So in that Caſe the Court ordered it to be entred upon the Roll, that Judgment was given for the Plaintiff, quia Traverſa fuit mala.

2 Saund. 153. Antea 55.

So here they ordered it to be entred, becauſe the Defendant did not plead the Statute of 23 H. 6.

Hocking *verſus* Matthews.

1 Lev. 292. 1 Sid. 463. 2 Keb. 636, 663. Vide 1 Salk. 14, 15, 21. 5 Mod. 394, 405. 6 Mod. 25. 1 Jon. 312.

AN Action upon the Caſe was brought for maliciouſly Impleading, and cauſing him to be excommunicated in the Eccleſiaſtical Court; whereby he was taken upon an Excom' Cap', and impriſoned, until he got himſelf abſolved.

The Defendant pleaded Not guilty, and found againſt him: And it was afterwards moved in Arreſt of Judgment, That the Declaration was not good; for no Action will lie for ſuing a Man in the Spiritual Court, tho' without Cauſe, no more than in ſuing in the Temporal Courts. For Fitz. N. B. is, That a Man ſhall not be puniſhed for bringing the King's Writs. So Hob. Waterer and Freeman's Caſe. And it hath been lately held, That no Action will lie for an Indictment of Treſpaſs, tho' falſo; but an Action of the Caſe will lie for ſuing in Court Chriſtian for a Temporal Cauſe.

T. Jones 132. Raym. 418. 2 Mod. 52.

But the Court in this Cauſe gave Judgment for the Plaintiff: For tho' in an Action between Party and Party in the Eccleſiaſtical Court; where (if the Matter goes for the Defendant) he ſhall have his Coſts, no Action will lie if the Court hath Juriſdiction: Yet where there is a Citation ex Officio, and that is proſecuted maliciouſly without ground, the Party ſhall have his Action; for in ſuch Suit he can have no Coſts: And ſo is Carlion and

Mill's Caſe adjudged, 1 Cro. 291. and this ſhall be ſo intended after the Verdict, or otherwiſe the Defendant ſhould have ſhewed it to be otherwiſe, and juſtified. And Rainsford ſaid, without Cauſe, ſhall be underſtood without any Libel or legal Proceedings againſt him.

Anonymus.

IN Debt upon an Obligation to perform an Award, which was to pay the Rent mentioned in ſuch an Indenture: He that pleads Performance of this Award, needs not to ſet forth the Indenture, but refer generally to it: But if it be to be paid in ſuch Manner, and at ſuch Times as is expreſſed in the Indenture, then it muſt be ſet forth at large. 2 Keb. 667.

The like of an Award for Payment of Money given by a Will.

Wilſon *verſus* Armorer.

THE Caſe was argued again this Term by Coleman for the Plaintiff, who argued, That the Exception takes the two Cloſes wholly out of the Grant, and that no Modification can be annexed to it, 3 Cro. 657. and Moor, Pl. 747. A Leaſe was made for certain Lands, excepting a Cloſe, and Covenants were for quiet Enjoyment of the Premiſſes. The Leſſee diſturbed the Plaintiff's Poſſeſſion in the Cloſe excepted, yet he could not bring a Writ of Covenant; for by the Exception it is as much as if it had been never mentioned; and in this Caſe the Livery being ſecundum formam Chartæ, could not work upon theſe Cloſes. The Caſe of Hodge and Croſſe, cited in Hob. 171. was this: A Man gave Lands to another, Habendum to him and his Heirs after the Death of the Feoffor, and Livery ſecundum formam Chartæ: Reſolved a void Feoffment, and relied upon the Caſe in 1 And. 129. as full in the Point, a Leaſe of an Houſe, excepting a Chamber pro uſu ſuo proprio & occupatione: It was held that he might aſſign. Antea 78, 79. Poſtea 106. 1 Lev. 287. 2 Keb. 642, 643, 667, 719. Dav. 58. Cro. Eliz. 255. Co. Lit. 48. b.

Weſton econtra. This Exception is altogether void; for it cannot be for the Life of the Feoffor only. Bro. tit. Reſervation 13. and it ſhall not except the whole Fee againſt the Intention of the Parties; for then the ill Wording of his Exception ſhould give him above twice as much as otherwiſe he ſhould have had; and it is but one entire Sentence, and taking it altogether it muſt have an Effect, which the Law doth not admit, and is therefore to be wholly rejected: As where a Man grants his Term after his Death, the Grant is void. Otherwiſe where he grants his Term habendum after his Death; for there the laſt Sentence is rejected, Hob. 171. The Caſe of the Exception of the Chamber is not alike; for excepting it for his own Uſe are apt Words to give him Power to diſpoſe of it at his Pleaſure.

Kelynge,

Kelynge, Rainsford and Moreton held the Exception good for the entire Fee.

Twiſden, That it was wholly void, becauſe one Sentence. Plus poſtea 106. Antea 78.

Sympſon *verſus* Quinley.

2 Keb. 672, 679. 1 Lev. 172. 1 Lev. 293.

TRin. 20 Car. 2. Rot. 719. A Cuſtom, that Lands ſhould deſcend always to the heirs Males, (viz) To the Males in the Collateral Line, excluding Females in the Lineal, was held good. Which it was ſaid was allowed anciently in the Marches of Scotland, in order to the Defence of the Realm, which was there moſt to be looked to; tho' it is ſaid in Davis's Reports, that the Cuſtom of Gavelkind, which was pretended in Ireland and Wales, to divide only between Males, was naught. But the former Cuſtom was adjudged good in this Court. Hill. 18 Car. 2. Rot. 718.

Foot *verſus* Berkly.

Vide antea 83, &c. ibid.

BErkly had Judgment in an Ejectment in Communi Banco, and Execution of his Damages and Coſts. Foot brings Error, and the Judgment is affirmed. Whereupon Berkley prays his Coſts for his Delay and Charges; but could not have them.

For no Coſts were in ſuch Caſe at the Common Law, and the Statute of 3 H. 7. c. 10. gives them only where Error is brought in Delay of Execution; ſo 19 H. 7. c. 20. And here tho' he had not Execution of the Term, yet he had it of his Coſts.

3 Cro. 658.

If one hath Judgment in a Formedon in Remainder, and before Execution the Tenant brings Error, the Judgment is affirmed; yet he ſhall pay no Coſts, becauſe none were recoverable at firſt. 1 Cro.

Weyman *verſus* Smith.

2 Keb. 673. Raym. 189. Poſt. 180, 333. 1 Mod. 63, 81. 2 Saund. 155. 3 Cro. 873. 2 Cro. 596. Ow. 143. 1 Sid. 464. 2 Mod. 197. contra.

A Prohibition was prayed to the Mayor and Court of Briſtol, ſuggeſting, That a Plaint was entred there for 66 l. and that the Cauſe of Action aroſe in London, and not at Briſtol, and ſo out of their Juriſdiction.

Note, An Affidavit was alſo made thereof, and this is upon Weſtm. c. 35. and ſo is F. N. B. 45. unleſs the Party pleading in Bar, or Imparling, admits the Juriſdiction of the Court. 2 Inſt.

Tarlour *and* Rous *verſus* Parner.

2 Keb. 675, 704. 1 Mod. 65.

AN Account brought by the Plaintiffs as Church-wardens, againſt the Defendant the former Church-warden, for a Bell, &c.

The

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The Defendant pleads, That it lacked mending, and that by the Aſſent of the Pariſhioners it was delivered to a Bell-founder, who kept it until he ſhould be paid. To which the Plaintiff demurred. See 1 Roll. Ab. 121. 1 Danv. 223, &c. 1 Mod. 42, 65. 1 Sid. 159.

For this Plea is no Bar of the Account, but a good Diſcharge before Auditors. But it was ſaid on the other Side, That the Matter pleaded, ſhewed that the Defendant was never accountable, therefore it might be in Bar. The contrary whereof is adjudged in the ſame Caſe in terminis, 1 Rolle 121. between Methold and Wynne; and ſo was the Opinion of the Court here. 1 Mod. 65

But then it was alledged, That the Declaration was not good, for there were two Plaintiffs, and yet it is quod reddat ei compotum, and it is de bonis Eccleſiæ, whereas it ſhould have been, bonis Parochianorum.

For the Firſt, the Court ſaid that it ſhould be amended; for it was the Default of the Clerk.

But the other was doubtful: For the Precedents were affirmed to be both Ways; but they rather inclined, That the Declaration was not good for that Cauſe.

Anonymus.

AN Indictment of Forcible Entry in unum Meſſuagium vel domum Manſional', (quære, if not uncertain) and other Lands and Tenements, tent' ad voluntat' Dom' ſecundum conſuetudinem Manerii, and doth not expreſs what Eſtate. Vide 1 Sid. 97, 99. 1 Lev. 90.

For which the Court held, It ought to be quaſhed; for the Statutes 8 H. 6. and R. 2. extend only to Freeholds, and the Statute in King James's Time, to Leaſes for Years and Copyholds. And here, tho' he ſaith, At the Will of the Lord, according to the Cuſtom of the Manor; yet 'tis not ſufficient, becauſe he ſaith not, By Copy of Court-Roll. And it was adjudged in 1653, in this Court, that none of the Statutes extended to Tenants at Will. 1 Mod. 71, 73.

Martin *verſus* Delboe.

IN an Aſſumpſit the Plaintiff declared, That he was a Merchant, and the Defendant being alſo a Merchant, was indebted to him in 1300 l. And a Communication being had between them of this Debt, the Defendant promiſed him in Conſideration thereof, That he ſhould have a Share to the Value of his Debt, in a Ship of the Defendant's, which was then bound for the Barbadoes; and that upon the Return of the Ship, he would give him a true Account, and pay him his Proportion. And ſets forth, That the Ship did go the ſaid Voyage, and returned to London; and that after the Defendant, with ſome other Owners, had S. C. 1 Lev. 298. 2 Saund. 124. 5, 6. 1 Sid. 465. 1 Mod. 70. 2 Keb. 674, 696, 717. Vide 1 Jon. 401. Yelv. 227. 2 Lev. 118, 124. 1 Mod. 13, 41. 1 Sid. 84, 306. 1 Saund. 23. 2 Saund. 74.

made an Account of the Merchandize returned in the ſaid Ship, which amounted to 9000 l. and that the Plaintiff's Share thereof came to 1700 l. which he had demanded of the Defendant, and he refuſed to pay it, &c.

To this the Defendant pleads the Statute of Limitations, and the Plaintiff demurred.

Alledging, That this Action was grounded upon Merchants Accounts, which were excepted out of the Statute. Tho' if an Action be brought for a Debt, upon an Account ſtated between Merchants, the Statute is pleadable, as was adjudged in this Court laſt Hillary-Term, between Webber and Perit; yet here there being no Account ever ſtated between the Plaintiff and Defendant, it is directly within the Statute: And of that Opinion were Kelynge and Rainsford.

2 Saund. 124. 1 Mod. 70, 269. 2 Mod. 311. 2 Keb. 622, 624.

But Twiſden inclined otherwiſe, becauſe the Plaintiff declares upon an Account ſtated, and tho' between Strangers, yet he bringing his Action upon it, admits it. Et adjornatur. Judgment for the Defendant. 1 Mod. 70, 71.

13 Rep. 33. 1 Jones 401. 1 Mod. 296.

Poſtea 183, 189.

Nota, Every Pariſh of common Right ought to repair the Highways, and no Agreement with any Perſon whatever can take off this Charge which the Law lays upon them.

Criſpe *and* Jackſon *verſus* The Mayor and Commonalty of Berwick.

S. C. Antea 58. 1 Lev. 252. 1 Sid. 381, 462. 1 Mod. 36. Raym. 173. 2 Keb. 391, 397, 414, 602, 676.

IN Covenant, after Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That there was a Miſ-trial, the Venire being awarded to an adjoining County: Which the Court, after hearing of Arguments in it, ruled it to be well enough; but one of the Plaintiffs died before the Court had delivered their Opinions.

It is prayed notwithſtanding that Judgment might be entred, there being no Default in the Plaintiffs, but a Delay which came by the Act of the Court, and that it was within the Statute of this King, That the Death of the Party between Verdict and Judgment ſhould not abate the Action, and that it was in the Diſcretion of the Court, whether they would take Notice of the Death in this Caſe; for the Defendant hath no Day in Court to plead, there being no Continuances entred after the Return of the Poſtea. 1 Leon. 187. Iſley's Caſe, Latch's Rep. 92. And the Court were of Opinion, That Judgment ought to be entred, and there being no Continuances, it may be entred as if immediately upon the Return of the Poſtea. Antea 58.

Lion *verſus* Carew.

THE Caſe was; A Leaſe was made to two for ninety-nine Years, if three Lives ſhould ſo long live, and this to commence after the End of a Leaſe for Life, Reddend' a certain yearly Rent, and two Days Work in Harveſt, poſt principium inde, & reddend' inde 3 l. nom' Herioti, poſt mortem of the Leſſees, or either of them, and reddend' two Capons at Chriſtmas, poſt principium inde. One of the Leſſees died before the Leaſe for Life determined, whereupon the Leſſor brings Covenant for the 3 l. and ſets forth this Matter in the Declaration. S. C. 1 Lev. 294, 295. 1 Sid. 437. 2 Saund. 165, &c. 2 Keb. 50, 558, 572, 677. 1 Sid. 437.

To which the Defendant demurred, ſuppoſing that the 3 l. was not to be paid unleſs the Death had happened after the Term had commenced. And the Court having heard it ſpoken to divers Times by Counſel on both Sides, by the Opinion of Twiſden, Rainsford and Moreton, Judgment was given for the Defendant. Antea 9.

For all the other Reſervations but this were expreſly poſt principium termini, and Clauſes in Companies are to expound one another, as it is ſaid in the Earl of Clanrickard's Caſe in Hobart. It is in the Nature of a Rent and Reſervation, which it is not neceſſary that it ſhould be annual. And in Randall and Scorie's Caſe, 1 Cro. ſuch a Duty was diſtrained for, and it ſhall attend the Reverſion, Rolle 457. And he that hath but an Intereſſe termini, is not to pay the Rent reſerved; for there is no Term, nor no Reverſion, until it commences.

If A. lets to B. for ten Years, and B. redemiſes to A. for ſix Years, to commence in futuro; in the mean Time this works no Suſpenſion of either Rent or Condition. The Intention of the Parties is to be taken, That it ſhould not be paid until then. However, Reſervations are to be taken moſt ſtrongly againſt the Reſerver: As Palmer and Prowſe's Caſe, cited in Suffeild's Caſe, 10 Co. is; The Reverſion of a Leaſe for Years was granted for Life, reſerving certain Rent cum reverſio acciderit; a Diſtreſs was made for the Rent arrear ever ſince the Grant.

Reſolved, That it was good for no more than was incurred ſince it fell into Poſſeſſion.

Kelynge Chief Juſtice held ſtrongly to the contrary: For he ſaid the Words were ſo expreſs in this Caſe, that they have left no Place for Conſtruction, which other Clauſes or the Intention of the Parties may direct, when the Expreſſion is doubtful. He took it for a Sum in groſs; for diſtrained for it could not be, being reſerved upon the Death of the Leſſees, or either of them; which was alſo the Limitation of their Leaſe: And that Interpretations were not to be made againſt the plain Senſe of Words,

he relied upon Edrich's Case. 5 Co. where the Judges said, They would not make any Construction against the express Letter of the Statute; yet there was much Equity in that Case to incline them to it. And he said, As well as a Fine is paid upon the Taking of such Lease before it begins, why may not something be paid also when their Interest determines? And in some Countries they call such Payments, a fair Leave.

Miller *versus* Ward.

Walter and Chaucer. Antea 21. 2 Keb. 676.

TRespass for Breaking of his Close on the 1st of August, and putting in his Cattle. The Defendant justifies for Common, which he prescribes for in this Manner, viz. That two Years together he used to have Common there, after the Corn reaped and carried away until it was sown again, and the third Year to have Common for the whole Year; and that that Year the Plaintiff declares for the Trespass, was one of the Years the Field was sown, & quod post grana messa, &c. he put in his Cattle, absque hoc that he put them in aliter vel alio modo.

The Plaintiff demurs, which it was ruled he might; for the Defendant doth not answer to the Time wherein the Trespass was alledged; and the Traverse will not help it; for aliter vel alio modo doth not refer to the Time.

Anonymus.

2 Keb. 679. 3 Cro. 503. Ch. Just. Jones 47. Postea 109, 110. 1 Cro. 219. 2 Keb. 679.

AN Administrator brings Debt upon an Obligation. The Defendant pleads Payment to himself. Upon which it was found for the Defendant.

Coleman prayed that he might have Costs: As where an Executor brings an Action for Trover and Conversion, in his own Time, and found against him; it was ruled in Atkyns's Case. 1 Cro. That he should pay Costs; and here of his own Knowledge he had no Cause of Action, the Money being paid to himself.

But the Court resolved, That there ought to be no Costs in this Case; for the Action of Trover in his own Time might have been brought in his own Name, so it was needless to name himself Executor or Administrator; but the Action here is meerly in Right of the Intestate.

Harvey *versus* James.

1 Keb. 679.

AFter Verdict at the Assizes, the Clerk delivered the Postea to the Attorney, by whose negligent Keeping it came to be eaten with Rats. But the Court examining the Clerk of Assize, it appeared, That he had entred the Jurors Names, Verdict and

Tales in his Book, and according to that, the Court ſuffered the Verdict to be entred on Record.

Anonymus.

IN an Action of Battery againſt Baron and Feme, the Jury find the Feme only Guilty and not the Baron.

It was moved in Arreſt of Judgment, That this Verdict was againſt the Plaintiff; for he ought in this Caſe to have joined the Baron only for Conformity, and he declaring of a Battery by both, the Baron being acquitted, he hath failed of his Action; and ſo is Yelv. 106. in Drury and Denny's Caſe.

But here the Court gave Judgment for the Plaintiff, and ſaid, That that in Yelverton was a ſtrange Opinion.

2 Cro. 203. Cr. Car. 407. 1 Brow. 209. 2 Mod. 66. Poſtea 328. 2 Vent. 29. 1 Show. 350. contra.

Anonymus.

A Certiorari was prayed to remove an Indictment of Manſlaughter out of Wales; which the Court at firſt doubted, whether they might grant, in Regard it could not be tried in an Engliſh County: But an Indictment might have been found thereof in an Engliſh County, and that might be tried by 26 H. 8. cap. 6. Vide 1 Cro. Soutley and Price's Caſe, and Chedley's Caſe.

But it was made appear to the Court, That there was a great Cauſe to ſuſpect Partiality, if the Trial proceeded in Wales; for the Party was bailed already by the Juſtices of Peace there, (which Twiſden ſaid it was doubtful whether they had Power to do for Manſlaughter.) They awarded a Certiorari, and took Order that the Proſecutor ſhould be bound by Recognizance to prefer an Indictment in the next Engliſh County.

1 Mod. Rep. 64, 68. 2 Keb. 681, 685. Latch 12, 18. Lit. Rep. 359. 1 Cro. 247, 248, 331, 332. Roll. 294. Ch. Juſt. Jones 155. Poſtea 146. Antea 63.

Collet *verſus* Padwell.

IN Debt upon a Bond to perform an Award, which was, That one ſhould make a Leaſe to another before the 21ſt of October, which was two or three Months after the Award, and that the other upon the Making of the Leaſe ſhould pay him 50 l.

The Queſtion was, Whether Notice in this Caſe ought to be given, when he would make the Leaſe? For otherwiſe it was ſaid, the other muſt have 50 l. always about him, or be in Danger to break the Award.

And it was reſolved by the Court, That no Notice was neceſſary.

2 Keb. 670. Notice and Requeſt. See 1 Lev. 48, 110, 191. 1 Saund 37. 2 Saund. 66, 121, 125. 3 Lev. 367. 6 Mod. 200, 227, 260.

Noell

Noell *verſus* Nelſon.

1 Lev. 286. 1 Sid. 448. 2 Saund. 226. 2 Keb. 606, 621, 631, 666, 671. 1 Danv. 461.

MIch. 21 Car. 2. Rot. 745. Error to reverſe a Judgment given in the Common Pleas, where the Caſe was thus. Nelſon brings Debt againſt Noell, as Executor of Sir Martin Noell, who pleads plene adminiſtravit. The Plaintiff confeſſeth the Plea, and prayeth Judgment de bonis Teſtatoris quæ in futuro ad manus Defendentis devenerint; and upon a Suggeſtion of Aſſets afterwards, he had a Scire facias againſt Noell, and Judgment thereupon.

Noell brings a Writ of Error, and aſſigned it in this, that the Plaintiff confeſſing the Plea of Fully Adminiſtred, ought to have been barred.

And it was argued by Winnington for the Plaintiff, and Simpſon for the Defendant.

Winnington. Where an Executor pleads falſly or deceitfully, Judgment is to be given againſt him; as upon ne unques Adminiſter come Executor, Judgment ſhall be de bonis propriis: But where he pleads truly, it is Reaſon the Plaintiff ſhould be barred; and the Plaintiff confeſſing his Plea, it is as ſtrong as if found by a Jury, or rather more; for Verdicts may be falſe, and therefore Attaints are provided; and ſuch expreſs Confeſſion as here is, is much ſtronger than an implied Confeſſion ſur Demurrer. Indeed if upon plene adminiſtravit Aſſets are found for Part of the Debt, Judgment ſhall be for the Whole, 8 Rep. 134. Shipley's Caſe, Becauſe the Plea was falſe: But if an Executor ſhould be liable to be ſued, and have Judgment given againſt him when he had fully adminiſtred, it would put a great Inconvenience upon him, as to be put to Charge to defend the Suit, and to be in Miſericordia.

And whereas it was objected, That if the Plaintiff ſhould be barred in ſuch Caſe, he would yet have no Advantage by commencing his Suit, of having his Debt paid before other Debts in pari gradu; he anſwered, This Inconvenience is not to be matched with that, that the Executor ſhould be liable to; beſides, the Law will ever favour the Executor; for if an Executor be ſued and the Plaintiff Nonſuit, he ſhall have Coſts, but an Executor Plaintiff ſhall pay no Coſts upon a Nonſuit. 3 Cro. 503. Vide Hob. 83. Lawney's Caſe. Alſo a Man may be preſumed to know whether an Executor hath Aſſets or no; for he may conſult the Inventory.

And for the Caſes that might be objected, as that of the Warrantia Chartæ againſt an Heir, who pleads Riens per deſcent, or that the Plaintiff is not impleaded, the Plaintiff may pray Judgment preſently. F. N. B. 134.

He

He answered, 'Tis true, the Writ may be brought quia timet, for he may be after impleaded in an Action wherein he cannot vouch; yet if he be after impleaded in a Præcipe he much vouch, and this is a Line real, and the Heir merely in loco patris; whereas, when an Executor hath fully administred, the Executorship is as it were determined. And for the Case where Debt is brought against the Heir, who pleads Riens per descent; the Plaintiff may pray Judgment presently, to have Execution of Assets, as shall afterwards descend; he said he knew no particular Authority where it was so done; but if it be so as it is said in Shipley's Case, yet not to be resembled to this Case; for the Heir is charged as for his own Debt, and the Action is in the Debet & Detinet, Com. 443. and if the Heir pleads Riens per descent, and found against him, the Judgment is general, and so of an Executor; so where the Judgment is sur nihil dicit, Moor 522. Dyer 81, 344. 2 Rolle 67. tit. Heir; so where he confesses the Action; but if an Executor after pleading Plene Administravit confesses the Action, the Judgment shall be de bonis Testatoris. Hob. 178. And for the Opinion in Shipley's Case, 8 Rep. which is according to the Judgment here, he said it was obiter: but he relied upon Cro. Dorchester and Webb's Case, where that Opinion is denied, and it is said there, that all the Precedents are, that the Plaintiff is in such Case to be barred. Rastal's Entries 323, 324. 3 Cro. 692. 1 Cro. 373.

Simpson contra. The Nature of the Plea is to be considered, it doth not deny the Cause of Action, but goes only to take away the present Effect of it; remoto impedimento resurgit Actio vel Executio. 34 H. 6. 23. Prisot saith, If an Executor pleads ne unques Executor, and it is found against him, Judgment is to be de bonis propriis. But otherwise if he pleads Plene Administravit, for then he doth not put the Party from his Action for ever. He said the Case of the Action of Debt against the Heir was the same, for he is bound only by Reason of the Land descended. 1 Rolle 929. If an Executor pleads Plene Administravit, and the Plaintiff takes Issue, and it is found against him, he is to be barred, for he (as the Book saith) hath waived his Advantage; he cited also the Book of the Office of Executors, (supposed to be written by Doderidge) lib. 7. c. 15. and relied principally upon Shipley's Case, 8 Co. 134. which is cited and allowed in Hob. 199. and upon a Precedent in this Court, Trin. 13 Jac. Rot. 2104. between Perryman and Westwood, where Judgment was just as in this Case, and Mich. after Rot. 206. upon Suggestion of Assets, a Scire facias was taken out, and Issue taken and tried at Guild-hall, before my Lord Coke; where Assets were found for Part, and Judgment to recover so much, and the Residue if Assets should come after; which as to the later Judgment, was somewhat further than the principal Case. 3 Cro. 887.

Kelynge,

This Judgment was afterwards affirmed in Parliament upon a Writ of Error there. 2 Saund. 226, 227.

Kelynge, Rainsford and Moreton held clearly, That Judgment ought to be affirmed, chiefly for the great Inconvenience it would be to one that had commenced an Action, and yet his Debt should have no Preference before others of the same Sort; and many Times the Teſtator leaves a great Eſtate in Bonds and Specialties, which yet are no Aſſets until the Money is paid: Whereas the Caſe of the Heir is much ſtronger, in Regard of the Improbability of his having Aſſets in futuro.

5 Co. 87. 8 Co. 17. b.

In 16 H. 7. 10. it is ſaid, If an Executor pleads Plene Adminiſtravit, it is but a temporal Bar. A Rent is granted in Fee, provided that it ſhall ceaſe during the Minority of the Heir, the Wife brings Dower, the Heir being under Age, ſhe ſhall have Judgment, ſed ceſſet Executio.

V. Hutton 128. the Caſe reported without any ſuch Opinion. 2 Saund. 227.

Twiſden ſtuck much to the Authority of Dorcheſter and Webb's Caſe, but at length conſented, that Judgment ſhould be affirmed.

Note, The Judgment was in Miſericordia, and the Court doubted at firſt, whether it were not erroneous for that Cauſe? But it appeared that the Executor did not come in primo die, wherefore notwithſtanding they affirmed the Judgment.

Termino Sancti Michaelis, Anno 22 Car. II.

In Banco Regis.

Prydyerd *verſus* Thomas.

Raym. 189. 1 Sid. 466. 2 Keb. 654.

A Writ of Error was brought upon two Judgments, given in an inferior Court, and they returned two Records between the ſame Parties, but it ſeems not thoſe which the Plaintiff intended, and this was complained of to the Court; and it appeared, That thoſe which the Plaintiff brought his Writ of Error upon, were not determined; for Writs of Enquiry of Damages were returned, but no Judgments entred.

Curia. If there be divers Records between the ſame Parties, the inferior Court may remove which they pleaſe, they being warranted by the Writ ſo to do; and if Judgment be given after the Teſte, and before the Return of the Writ of Error, the Record ſhall be removed; but if Judgment be entred after the Writ is returnable, the Writ only is to be returned, and that no Judgment is yet given; and here was an Omiſſion in the Plaintiff, that he did not ſee that Judgment was entred; for after a Writ of Enquiry of Damages returned, the Court is to give Judgment at the Prayer of either Party, and not without.

1 Mod. 112.

Note,

Note, If the Record vary from the Writ of Error, yet the inferior Court ought to remove it.

The King *verſus* Ledgingham.

IN an Information againſt him for the King, the Court took a priviy Verdict, and ſo it was ſaid was the uſual Courſe at the Aſſizes. But it cannot be ſo in Caſe of Felony and Treaſon, as is ſaid in the 1 Inſt. 227. b. Poſtea 104. Raym. 193. 2 Keb. 687, 697.

In Caſes of Life and Member, if the Jury cannot agree before the Judges depart, they are to be carried in Carts after them; ſo they may give their Verdict out of the County. 2 R. Ab. 712. 1 Mod. 71. 288. 1 Lev. 299,

Polus *verſus* Henſtock.

IN Treſpaſs for impounding 11 Oxen. The Defendant pleads, That Sir H. Vernon was ſeized of a Cloſe called the Cowes-Leſowe in Fee, and let it to him for 99 Years; and that the Cattle came upon the Cloſe, and ſo juſtifies for Damage Feaſant. Raym. 192. 2 Keb. 686, 707.

The Plaintiff replies, confeſſing Sir H. V's. Eſtate and the Leaſe, and ſaith, That H. V. was ſeized of another Cloſe adjoining, called Browne's Cloſe, and alledges a Cuſtom in Peplow, (in which Town both the Cloſes are;) That all the Occupiers of the Cowes-Leſowe had maintained a Fence againſt Bowmers, and that the Cattle came upon the Land in Default of a Fence, &c. and Iſſue taken upon the Cuſtom, and found for the Plaintiff.

It was moved in Arreſt of Judgment; Firſt, That this was in the Nature of a Preſcription, and not of a Cuſtom; for a Cuſtom cannot be laid in a Vill, and applied to a particular Place, or Inhabitant therein, unleſs in Caſe of a Copyholder; where it is neceſſary, in regard he cannot preſcribe. 4 Co. 113. 1 Lutw. 128.

Secondly, If it had been alledged by Way of Preſcription, it ſhould be laid in him that had the Inheritance. And if it be objected, that it is hard to give a Stranger to diſcover that; then it ought to be alledged quod omnes Tenentes; but not as it is here, omnes Occupatores. 1 Cro. Baker and Brereman's Caſe.

Thirdly, By the Unity this Duty of Fencing is extinguiſhed, and ſhall not revive though the Cloſes come after into ſeveral Hands. In Dyer 295. b. it is left a Quære. But in Popham 172. it is clearly held ſo, where it is ſaid, Things of Neceſſity ſhall revive, as a Way to Market or Church; but not ſo of Eaſements. 1 Cro. Baker and Brereman's Caſe. Hob. 131. contra.

And of this Opinion were the Court.

Jones *verſus* Powell.

S. C. 1 Lev. 297. Raym. 196. 2 Keb. 710. 1 Mod. 272. contra.

THE Plaintiff declared, That he was an Attorney, and the Defendant to ſcandalize him in his Profeſſion ſaid of him, That he could not read a Declaration; by Reaſon of which many of his Clients left him. And the Opinion of the Court inclined againſt the Plaintiff.

For the Allegation of ſpecial Damages will not maintain the Action, unleſs the Words import ſome Slander, which theſe did not, unleſs brought in by ſome Words precedent, touching his Knowledge in his Profeſſion; for the Declaration might be ſo written, that he might not be able to read it, without any Imputation of Ignorance. Judgment for Plaintiff. 1 *Lev.* 297. & *Raym.* 196.

Sard *or* Yard *verſus* Ford.

S. C. 1 Lev. 296. 1 Mod. 69. 2 Saund. 172. Raym. 195. 2 Keb. 689, 706.

MIch. 21. Car. 2. In an Action upon the Caſe the Plaintiff declared, That he was ſeized of the Manor of Newton-Abbot, and that he, &c. had kept a Market there every Wedneſday, and uſed to have the Profits of Stallage, &c.

That the Defendant had erected a new Market, at a Place ſeven Miles diſtant from the Plaintiff's, held every Tueſday, *&c.*

Jones excepted to this Declaration, For that it could not be to the Hindrance of the Plaintiff's Market which was ſeven Miles off, and kept upon another Day. 22 H. 6, 14. 2 Roll. 140. It appears that an Action was brought againſt one that levied a Market not above five Miles diſtant, and upon the ſame Day.

Curia contra. The Writ of ad quod dampnum doth not expreſs the Market to be erected the ſame Day, and notwithſtanding it will hinder Recourſe to the other Market.

Dean and Chapter of Windſor *verſus* Gower.

S. C. 1 Lev. 308. Raym. 194. 2 Saun. 302, 303. 2 Keb. 688, 727, 737, 775.

A Dean and Chapter made a Leaſe of Tithes for Years; the Leſſee aſſigned over his Intereſt, and afterwards the Dean and Chapter bring Debt againſt him for the Rent: Who pleads, That the Plaintiffs accepted the Rent, due ſince the Aſſignment from the Aſſignee, to which the Plaintiffs demur.

Jones. This is no Rent, but a meer Sum in groſs due upon the Contract, therefore in the 5 Rep. in Jewell's Caſe it appears, That ſuch a Rent cannot go to the Succeſſor of a Biſhop, for the Succeſſor of a Sole Corporation cannot ſue upon a Perſonal Contract to his Predeceſſor.

If the Reverſion be granted over, the Grantee cannot bring Debt, 2 Roll. 447, 451, 1 Inſt. 47. a. By the ſame Reaſon the Aſſignee of the Leaſe is not liable.

Again,

Again, The Acceptance is not well pleaded, for it is only Acceptaverunt. Whereas a Corporation aggregate cannot accept but by Bailiff, and an Aquittance must be given.

Saunders contra. This is not a meer Sum in gross, but in the Nature of a Rent, as is held in Valentine and Denton's Case, 2 Cro. 111. If it were a Sum in gross, no Action could be brought until all the Days of Payment were incurred, 2 Inst. as upon a Bond to pay Money at several Days.

Also the Pleading of Acceptaverunt is good; for it being such a Corporation as can accept, necessary Circumstances are ever implied, as Livery in a Feoffment; such a Corporation in an Assumpsit shall declare of a Promise made to them, which yet must be by Means of their Bailiff or Attorney.

The Court held this last Matter to be most doubtful. And Twisden and Rainsford said it might be questioned, whether after Acceptance of the Assignee, the Lessor might not resort to his Lessee for his Rent? It is delivered in Walker's Case thus, fuit dit, not as a Resolution, 3 Co. At adjornatur.

Catterel *versus* Marshal.

ERror to reverse a Judgment in an Assumpsit, brought by Marshal in the Common Pleas; wherein he declared, That he being sued in the King's Bench, retained Catterel for his Attorney; who in Consideration of 30 s. given him, and that he would enter into a Bond with sufficient Penalty to save him harmless, promised to get Bail filed for him; and avers that he did give him Bond with a great and sufficient Penalty, &c. The Defendant pleads Non Assumpsit, and found for the Plaintiff, and he had his Judgment. S. C. 2 Keb. 692. 1 Mod. 70. 1 Lev. 297. Vide 1 Sid. 270.

Now it was agreed for Error, that he did not express of what Penalty the Bond was, that it might appear to the Court to be sufficient; as if one avow for a Distress upon a Copyholder for a reasonable Fine, the Value of the Land must be set forth, and the Certainty of the Fine, that the Court may judge of it. Austin and Gervase's Case, Hob. 69. 77. In Consideration that he should give him Bond for 10 l. the Defendant promised, &c. and pleads, That he offered him Bond for the said Sum, &c. and upon Issue non Assumpsit, it was found for the Plaintiff. But he could not have Judgment, because the Sum wherein he offered to become bound was not expressed, so that it might appear to the Court to be sufficient.

Jones contra. This differs from the Case in Hob. for there the Sum being certain for which the Bond was to be given, the Court may well judge what Penalty will secure it. But it is not so in this Case, for it doth not appear to what Value the Damnifi-

cation may be; ſo there is nothing, as in the other Caſe, whereunto to proportion the Penalty of the Bond.

The Court held, That it would not have been good upon a Demurrer; but being after a Verdict, and the Statute of Jeofails made at Oxford, (which Twiſden ſtyled an omnipotent Act) they gave Judgment for the Plaintiff.

Lord Biron's *Caſe.*

THE Lord Biron was Plaintiff in an Action, and upon a Nonſuit five Pounds Coſts were taxed againſt him, and he brought another Action for the ſame Matter, which was ſaid to be meerly for Vexation; and that he refuſed to pay the Coſts; neither could he be compelled being a Peer, and in Parliament Time.

Wherefore the Court gave Day to ſhew Cauſe, why this Action ſhould not ſtay until he had paid the Coſts in the former.

Anonymus.

1 Mod. 287. Antea 31. Poſtea 266. 2 Cr. 241, 242.

IF a Writ of Error be brought in the Exchequer-Chamber, and that being diſcontinued, another is brought in Parliament; this ſecond Writ is a Superſedeas. But if a Writ of Error be brought in Parliament, and that abates, and the Plaintiff brings a ſecond; this is no Superſedeas, becauſe it is in the ſame Court.

Prior *verſus* Shears.

2 Keb. 694.

IN a Writ of Error to reverſe Judgment given in the Palace-Court in an Aſſumpſit, where the Plaintiff declared ſur indebitatus pro Naulo, and upon Non Aſſumpſit, *&c.* had Judgment.

It was aſſigned for Error, That it was not aſcertained how the Defendant was indebted; and that Fraight was uſually contracted for by Charter-Party, and if ſo, the general Indebitatus would not lie for a Debt by Specialty.

Notwithſtanding the Judgment was affirmed; for, for ought appears, there was not any Deed in the Caſe; and it ſhall not be intended; and it is no more than the Common Action, pro mercimoniis habitis & venditis.

See the Stat. 4, 5 Ann. cap. 16.

Note, It was further objected, That this appears to be for Mariners Wages for ſailing to ſome Foreign Parts, which muſt needs be out of the Juriſdiction of the Marſhalſey, and though the Agreement were made within it, yet the Thing being to be done elſewhere, they could not hold Plea; as if a Carrier ſhould agree within the Limits of the Court, to carry Goods from thence to York; no Action could be brought there upon it; which was agreed.

But the Court ſaid here, It doth not appear they were to ſail to any Place out of the Juriſdiction, and they have laid all the Matter to be infra Juriſdictionem Curiæ. And therefore the Judgment was affirmed.

Hayman *verſus* Trewant.

TRrin. 22. Car. 2. Rot. 710. In an Action upon the Caſe, for that the Defendant bargained with him ſuch a Day and Year for the Corn growing upon ſuch Ground, affirming it to be his own, whereas he knew it to be the Corn of J. S. and poſtea adtunc & ibid. fraudulenter vendidit & warrant', *&c.* Raym. 199. 1 Mod. 72. 2 Keb. 692.

The Defendant pleads, That the Plaintiff had another ſuch Action depending for the ſame Cauſe, and demands Judgment of the Writ. See 1 Lev. 133. 2 Saund. 102. 2 Saund. 73, 189.

The Plaintiff replies, That the Action was commenced for another Cauſe, and not for the ſame; abſque hoc, that it was for the ſame Cauſe. To which the Defendant demurs ſpecially; becauſe the Plaintiff having denied what the Defendant affirmed, ought not to have added a Traverſe, but to have concluded to the Country: As the Caſe of Harris and Phillips, 3 Cro. 755. was adjudged, where in an Audita Querela, to avoid the Execution of a Recognizance, the Plaintiff ſets forth, that it was defeazanced upon Payment of divers Sums of Money at certain Days; and that he was at the Place appointed, and tendered the Money, and that the Defendant was not there to receive it. The Defendant pleaded Proteſtando, That the Plaintiff was not there to pay it, and that he was there ready to receive it; abſque hoc, that the Plaintiff was ready to pay it. 1 Cro. 164. Co. Lit. 126. a.

Which being ſpecially demurred to, the Court held the Plea naught, and that there being an expreſs Affirmative and Negative, there ſhould have been no Traverſe; for ſo they may traverſe one upon another in infinitum.

Notwithſtanding the Traverſe was here held good, which was allowed for putting the Matter more ſingly in Iſſue: And it appears that Phillips's Caſe was adjudged upon another Matter; for that the Plea in Bar was not entred as the Defendant's Plea, but was entred thus: Pro placito Buſh, a Stranger, dicit. Yelv. 38.

Then it was moved, That (as the Plaintiff hath declared here) it appears, that the Warranty was ſubſequent to the Bargain: For it is ſaid, that he bargained for the Corn, knowing it to be the Corn of J. S. poſtea adtunc & ibidem vendidit, which is repugnant. Sed non allocatur; for where it is ſaid firſt, that he bargained, that ſhall be intended a Communication only, and the Conſummation of it after, when the Warranty was given, which is alſo ſaid to be adtunc & ibidem. So alledged well enough.

Foxwith

Foxwith *verſus* Tremaine.

Antea 40, 54. 2 Saund. 212, 213. 1 Sid. 449. 1 Mod. 47, 72, 296, 297. Raym. 198. 2 Keb. 537. —, &c. 1 Lev. 181, 299. 2 Lev. 38, 239, &c. 1 R. Ab. 288.

TRin. 21. Car. 2. Rot. 1512. Five Executors bring an Action ſur Indebitat' Aſſumpſit. The Defendant pleads in Abatement, That two of them are under the Age of 17. and that they appeared by Attorney. And to this the Plaintiffs demur.

They who argued for the Defendant made two Queſtions:

1. Whether they ought all to join in the Action? And it was ſaid, they ought not; for one under Age cannot prove the Will. And in Smyth and Smyth's Caſe, Yelv. 130. it is reſolved, They muſt be all named, ſo that their Intereſt may be reſerved unto them; but are not to be made Parties to the Action. And for this the Caſe between Hatton and Maſcue, which was adjudged in the Exchequer Chamber, was cited: Where in a Scire facias it was ſet forth, That A. being the Executor of B. made his Will thus:

I deviſe all my Perſonal Eſtate to my two Daughters and my Wife, whom I make my Executrix: And that they had declared in the Eccleſiaſtical Court, that this made them all three his Executrixes, and that the Will was proved; and that the Wife brought this Scire facias, to have Execution of a Judgment obtained by A. the Teſtator. And the Defendant demurred, becauſe not brought in all their Names; and it was reſolved in the King's Bench that the Action was well brought, and affirmed upon a Writ of Error in the Exchequer-Chamber: But if in the Caſe at Bar they ought to join, they muſt appear by Guardian.

It having depended divers Terms, It was now reſolved by Rainsford and Moreton, That the Action was well brought; and they relied upon the Caſe in Yelverton; and they ſaid, the Caſe of Hatton and Maſcue was no Authority againſt it, for there they were named; and where ſome are of Age, no Adminiſtration durante minori ætate is to be granted.

They held alſo, That the Appearance ought to be by Attorney, becauſe they join with others; and ſo in auter droit; and ſo is 3 Cro. 377. the Counteſs of Rutland's Caſe, and 541. Reſolved, that an Infant Adminiſtrator ſhall ſue by Attorney. See 1 Roll. 288. and 2 Cro. 420, & 421. Cotton and Weſtcote's Caſe. The Difference is taken where an Infant Executor is Defendant, and where Plaintiff, and Judgment given for him; in which laſt Caſe only the Appearance by Attorney is ſaid to be good.

Twiſden contra. An Infant cannot in any wiſe ſue or defend by Attorney;

Firſt, becauſe he cannot make an Attorney;

Secondly, If it ſhould be allowed, he might be amerced pro falſo clamore, and no Way to avoid it but by bringing a Writ of Error.

Thirdly, he might be injured by the Attorney's Plea, and could not remedy himself, as he may against his Guardian; as if in Debt the Defendant should plead a Release, and the Attorney confesseth it. And he cited a Case in this Court, Mich. 1649. between Colt and Sherwood, Where an Administrator brought an Action, and it appeared by the Record, that he was above 17; yet it was ruled that he ought to sue by Guardian: For tho' by the Civil Law he was of Age to undertake the Administration; yet the Manner of his Suing was to be determined by our Law, and that could not be by Attorney until the Age of 21.

Another Case he cited between Peyton and Dorce, adjudged in this Court upon a Writ of Error out of the Petit Bag; where Peyton sued as Administrator, and the Entry was Quod queritur, and did not express, whether per Attornat', Guardianum, or how; and had Judgment; and Error was brought in this Court, and these four Points were resolved:

First, That a Writ of Error did lie out of the Petit Bag into this Court, upon an Error in Fact.

Secondly, That the Entry being general, it should be taken that the Appearance was in propria persona.

Thirdly, That the Plaintiff being an Infant, tho' an Administrator, could not sue or appear, but by Guardian or Prochein amy.

Fourthly, That the Statute of Jeofails did not aid this Case, which expresses only the Defendant's appearing by Attorney.

As to the other Point, he inclined that the Action brought by them all was well enough: But he acknowledged that much might be urged against the Case of Hatton and Mascue; for the naming of them could signifie nothing, not being made Parties to the Action. But he was not so much swayed by that Authority, because he held, That the Cause did not come well into the Exchequer-Chamber, being a Scire facias, upon which he said no Writ of Error lay thither, tho' upon a Judgment, no more than upon a Recognizance, and said, they did join here, as it were, for Conformity. *As if a Feme Infant be made Executrix, and marries, the Administration durante minori ætate ceases, tho' she be under 17, and she and her Husband shall sue. contra 3 Wms 88.

The Chief Justice was absent, being sick; and so the Plaintiff had Judgment by the Opinion of Rainsford and Moreton.

Ward *versus* Rich.

WArd brought an Action against Hatton Rich de uxore abducta, and keeping of her from him, usque such a Day, which was some Time after the Exhibiting of the Bill, and concluded contra formam Statuti. 2 Saun. 169. 1 Lev. 299. Vide antea 37.

After Verdict for the Plaintiff, it was moved in Arrest of Judgment,

ment, and the Declaration was held good notwithſtanding the impertinent Concluſion of contra formam Statuti, there being no Statute in the Caſe.

Vide 1 Sal. 212. 5 Mod. 307. Hob. 189. 3 Lev. 246.

Secondly, The Court reſolved, That Judgment ſhould be ſtayed; for the Jury ſhall be intended to give Damages for the whole Time mentioned in the Declaration: As in Treſpaſs, with a Continuando to a Day after the Writ brought, the Plaintiff ſhall not have Judgment after Verdict, which gives Damages by Intendment for the whole Time declared for.

And Twiſden ſaid, Theſe two Caſes were reſolved: A Tradeſman brought an Action in an Inferior Court for ſlandering of him in his Trade, by which he loſt his Cuſtom within the Juriſdiction of that Court & alibi; and it was held maintainable notwithſtanding the alibi.

The other was an Action brought upon the Sale of ſeveral Things for divers Sums of Money, quæ quidem pecuniarum ſummæ attingunt ad 10 l. whereas rightly computed they came but to 9 l. The Jury gave Damages leſs than 9 l. and it was held good: But if the Verdict had been for 10 l. it had been naught.

The King *verſus* Ledgingham.

S. C. Antea 97. Raym. 193, 205. 2 Mod. 71, 288. 1 Lev. 299.

AN Information was brought againſt Ledgingham, for that he being a Man of an unquiet Spirit, communis perturbator & oppreſſor vicinorum & tenentium, had taken exceſſive Diſtreſſes of divers of his Tenants.

After Verdict for the King at the Aſſizes, it was ſaid, That no Judgment could be given upon this Information, which was ſaid to be defective both in Matter and Form.

See 1 Sid. 282. Far. 52. 6 Mod. 178, 289, 311. 1 Sal. 382.

It hath been often ruled, That Communis oppreſſor, or ſuch like general Words, without particulariſing Offences, was inſufficient in an Indictment or Information, unleſs the Word Communis Barrectator, which is of known Signification in Law, and comprehends divers Crimes; and Twiſden ſaid, is as much as Common Knave, 9 Aſſ. 2. Communis latro, not good: Vid. Roll. 79. Moor 451. Neither can an Information be exhibited for taking of exceſſive Diſtreſſes; for that was not puniſhable until the Statute of Marlebridge, cap. 4. which ſaith, That he that ſo diſtrains ſhall be amerced, whereas upon an Information he muſt of Neceſſity be fined. 2 Inſt. 107.

Again, It ought to have been expreſſed upon what Tenants the Diſtreſſes were taken, with their Names, otherwiſe it is too uncertain. One was indicted, for that he ſerving upon ſuch a Grand Enqueſt, did reveal the Secrets of the King and himſelf. It was reſolved to be ill, becauſe not expreſſed what Secrets. Moor 451. and of this Opinion was the Court in omnibus. Antea 97.

Pierſon

Pierſon *verſus* Ridge.

IN Replevin, the Defendant made Conuſance as Bailiff to a Lord of a Manor, who had a Court-Leet by Preſcription, and laid a Cuſtom for ſuch a Townſhip to ſend one to be ſworn Conſtable there, which not being done, a Fine was ſet, and this Diſtreſs taken for it. Upon which it was demurred; Becauſe no Cuſtom was alledged to warrant the Diſtreſs: For tho' of common Right a Diſtreſs may be taken for a Fine in a Court-Leet, that is, where it is impoſed for ſuch Things as are of common Right incident to its Juriſdiction, as for Contempts, or the like: Yet where Cuſtom only enables them to ſet a Fine, it cannot be diſtrained for without Cuſtom alſo. 11 Co. Godfrey's Caſe: And to this Opinion did the Court incline. Sed adjornatur.

Raym. 204. 2 Keb. 701, 739, 745.

11 Co. 42. 1 Rol. Rep. 32, 73.

Anonymus.

TWO Actions of Account were removed into this Court by Habeas Corpus, and Special Bail put in. And it was moved, That the Bail might be diſcharged, and Common Bail filed; becauſe in an Account, Special Bail is not to be put in. But it was ſaid, That the Plaintiff had declared in one in an Action upon the Caſe, and ſo prayed that the Bail might ſtand quoad that.

But it was ruled, That the Bail ſhould be diſcharged; and if the Plaintiff would have Special Bail, he muſt arreſt the Defendant again in an Action upon the Caſe.

S. C. 1 Lev. 300. 2 Keb. 713. Vide Noy 28.

Doctor Lee's *Caſe*.

DOctor Lee having Lands within the Level, was made an Expenditor by the Commiſſioners of Sewers; whereupon he prayed his Writ of Privilege in this Court; and it was granted. For the Regiſter is, Vir militans Deo non implicetur ſecularibus negotiis; and the ancient Law is, Quod Clerici non ponantur in Officia. F. N. B. Clergy-men are not to ſerve in the Wars.

S. C. 1 Mod. 282. 1 Lev. 303. 2 Keb. 693.

Jemey *verſus* Norris.

ERror to reverſe a Judgment in an Aſſumpſit, upon a Quantum meruit for divers Things ſold.

It was aſſigned for Error, That the Declaration amongſt the reſt was for unum par Chirothecarum, and did not expreſs what Sort of Gloves they were, which are of much different Prices, according to the different Leather they are made of. And Playter's Caſe, 5 Co. was cited, where Treſpaſs for Taking of his Fiſhes

S. C. 1 Lev. 303. 1 Mod. 295. 2 Keb. 715.

Poſt. 114, 211. Antea 71.

was held not good, because not ascertained of what Kind: Sed non allocatur.

Vide 1 Sid. 445. 2 Saund. 74. Antea 71. Post. 114. 1 Mod. Rep. 46, 289. Style 352.

Another of the Things declared for was una parcella fili, which (as it was said) was utterly uncertain; and that was held to be naught. Tho' it was said, an Action was brought for Taking away unum cumulum Fœni, Anglice, a Rick of Hay, and not alledged how much it contained; yet held good. But in Webb and Washburn's Case an Action was brought for a Pair of Hangings, and it was adjudged against the Plaintiff, for the Incertainty.

Jones contra; and cited a Case in this Court, 24 Car. 1. Green and Green, in Trover for six Parcels of Lead, and notwithstanding the Incertainty the Plaintiff had Judgment. So in Trover for a Trunk de diversis Vestimentis, and did not say what Garments; and yet held good. But admitting it should not be good in Trover, yet it is well in this Action. 'Tis the common Course to declare sur Indebitatus pro mercimoniis, and never express what they are.

1 Show. 144. 2 Show. 315.

And the Court were of Opinion, That the Plaintiff was to have Judgment; for it is an Action much of the same Nature with an Indebitatus.

And Twisden said, Where the Promise is to pay Quantum meruit, he knew not why the Plaintiff might not declare upon an Indebitatus in a certain Sum, and that he might prove the Value upon the Evidence; and if such a Case came to be tried before him, he would have a Special Verdict found in it.

The Court said, Such an uncertain Declaration would hardly be good in Trover or Replevin, and held the Case of the six Parcels to be strange; and for the Trunk, that an Action lies; for that the Things contained in it were alledged but as Matter of Aggravation of Damages.

2 Saund. 74. 2 Sid. 174, 175. Antea 71. Postea 114.

Vide the Case of Taylour and Wells, antea: Trover de decem paribus velorum & tegularum, Anglice, Ten Pair of Curtains and Vallance.

Wilson *versus* Armorer.

Antea 78, 79, 87. Raym. 207. 1 Lev. 287. 2 Keb. 642, 643, 667, 719.

IN Debt against the Heir, and Riens per Discent pleaded, the Case upon Special Verdict was thus: The Ancestor made a Feoffment of a Manor to divers Uses, excepting two Closes for the Life of the Feoffor only; and whether those two Closes did descend, was the Point referred to the Judgment of the Court.

And it was adjudged, That they did descend, either for that the Exception was good; tho' the later Part of the Sentence, (viz.) for the Life of the Feoffor only, was void, and therefore to be rejected; or, if the whole Exception was void, because one intire Sentence.

Yet they all agreed, that there was no Uſe limited of thoſe two Cloſes which were intended to be excepted; for the Uſe was limited of the Manor exceptis præexceptis, which excluded the two Acres: For altho' there were not ſufficient Words to except them, yet there was enough to declare the Intention of the Feoffor to be ſo. Antea 78, 87.

Rex *verſus* Nevill.

AN Indictment for Erecting of a Cottage for Habitation, contra Statut' 31 Eliz. cap. 7. was quaſhed, becauſe it was not ſaid that any had inhabited in it; for 'tis no Offence before; per Rainsford & Moreton, cæteris abſentibus. 1 Mod. 295. 2 Keb. 705. Vide Style 33.

Termino Sancti Hillarii, Anno 22 & 23 Car. II.

In Banco Regis.

Robſon's *Caſe*.

A Prohibition was prayed to a Suit for Tithes by the Parſon, upon a Suggeſtion of a Modus paid to the Vicar, and that the Vicarge had Time out of Mind been endowed. 2 Keb. 719, 729. Antea 61.

Coleman moved for a Conſultation, becauſe the Endowment of the Vicarage was not proved by two Witneſſes within ſix Months, according to the Statute.

But it was denied; for that Part of the Suggeſtion is not to be proved by Witneſſes, but only the Payment of the Modus. And it was ſaid, If the Suggeſtion conſiſted of two Parts, it was ſufficient to produce one Witneſs to the one, and another to the other. Antea 61.

Dacon's *Caſe*.

DAcon was preſented in the Court-Leet for refuſing the Office of Conſtable, and fined. S.C. 2 Saund. 290.

It was moved to quaſh it, becauſe it expreſſed the Court to be held infra unum menſem Sancti Michael' (viz.) 12 November, and ſo the Day ſhewn above a Month after Michaelmas. And it is neceſſary to ſet down the preciſe Day, for it may elſe be upon a Sunday, and yet within a Month after Michaelmas; and for this Cauſe the Court held, that it muſt be quaſhed. 2 Keb. 731. See 1 Salk. 173, 380. 1 Mod. 13. 3 Mod. 96, 179. 6 Mod. 96. 1 Jon. 300, 301.

Error.

Vide 1 Lev. 164. 2 Show. 60, 68. Cumberb. 19.

AN Outlawry was reverſed, for that the Proclamations were returned to be ad Comitat' meum tent' apud ſuch a Place in Com' prædict', and not ſaid, pro Comitatu: For anciently one Sheriff had two or three Counties, and might hold the Court in one County for another.

Calthorpe *verſus* ——

2 Keb. 734.

IN Debt for Rent, the Plaintiff declared, That he let the Defendant ſuch Land, anno 16 of the King, quamdiu ambabus partibus placeret; and that anno 16 the Defendant entered, and occupied it pro uno anno tunc proxime ſequent'; and becauſe the Rent was behind pro præd' anno finit' 18. he brought the Action. Upon which it was demurred,

Becauſe the Rent is demanded for the Year ending 18. and it is not ſhewn that the Defendant enjoyed the Land longer than anno 17. And in Debt for Rent upon a Leaſe at Will, Occupation of the Tenant muſt be averred.

1 Salk. 209. Antea 56.

To which it was anſwered,

That it is ſaid, pro prædicto anno, which refers to the Year mentioned before, which was next following the Leaſe, and it might be ſaid finito anno 18. for ſo it was ended then, or at any Time after.

And the Court ſaid, It would be clearly good after a Verdict: But being upon a Demurrer they would adviſe.

Anonymus.

Poſt. 111.

AN Indictment for not performing of an Order of the Juſtices of the Peace, concerning a Baſtard-Child.

It was moved to quaſh it, becauſe it did not conclude contra pacem. But it was held, that ought not to be, it being but for a Non-feaſance.

Vide poſt. 306.

An Indictment of Forcible Entry was quaſhed, becauſe it alledged the Party to be ſeiſed or poſſeſſed, and ſo uncertain which.

Monnington *verſus* William.

1 Lev. 308. 2 Keb. 693, 739. Raym. 200.

IN a Replevin the Defendant avowed for a Rent-charge, and ſet forth, That the Plaintiff granted a Rent to J. S. in Fee, who granted, bargained and ſold it una cum arreragiis to him, and ſhewed the Indenture to be inrolled within ſix Months, vir-

tute

tute cujus, and the Statute of Uſes, he was ſeiſed, and for a Year's Rent ſince the Aſſignment avowed.

The Plaintiff replies, and traverſes the Grant of J. S. prout, and found for the Avowant, and moved in Arreſt of Judgment by Jones.

Firſt, That here is an impoſſible Iſſue, which comprehends as well the Grant of the Arrears (which cannot be) as the Rent.

Secondly, He entitles himſelf by Bargain and Sale, and the Statute of Uſes, and doth not ſhew that it was in Conſideration of Money; and otherwiſe the Rent cannot paſs without Attornment. 3 Cro. 166.

But the Court gave Judgment for the Avowant.

As to the Firſt, The Pleading the Arrears to be granted is altogether void, and does no Harm, in regard the Avowry is expreſly for Rent arrear after the Grant.

And for the Second, The Court held the Pleading good after a Verdict; and it ſhall be intended, that Evidence was given of Money paid. As a Grant of a Reverſion pleaded, without Attornment; or a Grant of a Rent, and not expreſſed to be by Deed; yet a Verdict will help thoſe Defects. Hutton's Rep. 54. Farr. 86, 87. 1 Salk. 130. Poſt. 123.

Note, Twiſden ſaid, Where a Man in Pleading ſets forth his Title by a Conveyance, in which are the Words Give, Grant, Releaſe, Confirm, Bargain, Sell, &c. he muſt expreſs to which of them he will uſe it. So adjudg'd 2 Vent. 149. 260 266. Lade and Marſh.

Adams *verſus* Guy.

ERror to reverſe a Judgment given in the Court at Briſtol, in Debt againſt the Defendant as Executor to J. S. who declared upon a Mutuaſſet of him ſo much, becauſe Debt lies not againſt an Executor upon a ſimple Contract. 2 Saund. 291. 2 Keb. 746.

Sed non allocatur, He agreeing to the Action, and ſuffering Judgment to paſs againſt him. 1 Sid. 333.

Secondly, That he ſet forth, that the Teſtator Mutuaſſet, which properly ſignifies to lend and not to borrow, and it ought to have been Mutuatus eſſet.

But the Court affirmed the Judgment; and held, that either might be expounded to borrow.

Anonymus.

AN Adminiſtrator brought Trover and Converſion, and declared, That the Inteſtate at the Time of his Death was poſſeſſed of divers Goods, and that after his Death, and before Adminiſtration committed, they came to the Defendant's Hands, who converted them. 3 Lev. 60. contra. 2 Keb. 738. 1 Salk. 314. Eaves and Mocato.

Upon

Upon Not guilty it was found for the Defendant, and prayed that he might have Costs; and the Court held that he ought to have them, the Conversion being since the Death of the Intestate.

Antea 92.

Sir Thomas Pettus's *Case*.

2 Keb. 415, 705.

IT was moved to quash an Indictment of Manslaughter against him, for that it is said to be taken coram Coronatoribus Comitatus & Civitatis Norwici, at Buckthorp in the County of the City, per Juramentum hominum de Civitate Norwici;

Whereas the Jury ought to have come from the County and City of Norwich, for they shall not be intended to be co-existent, especially in an Indictment.

As if the Caption of an Indictment be at Dale, and the Jury come de Parochia de Dale, it is good Cause to quash it; yet in an Action they should be intended the same: So it is sufficient to put the County in the Margin of the Declaration in an Action, but not so in an Indictment. 1 Cro.

Again, By the Statute de Coronatoribus, the Jury ought to come from the four next Hills.

Of the first Exception the Court doubted.

But to the second Twisden said, It need not be returned upon the Indictment, that the Jury came from the four next Hills.

But they would not quash the Indictment upon Motion, for they said it was not their Course to do so in Case of Manslaughter; but ruled the Party to plead to it, tho' it was shewn he had been tried at the Assizes upon an Indictment of Murder, for the same Killing, and found Guilty of Manslaughter.

The King *versus* Clapham.

S. C. 1 Lev. 306. 2 Keb. 738, 742.

A Mandamus was prayed to the Lord President and Council of the Marches, to admit Clapham to the Exercise of the Office of Deputy Secretary.

Vide 1 Lev. 23, 65, 75, 123.

And it was returned quod tempore receptionis brevis non fuit constitutus Deputatus.

It was said, That one which claimed to be Deputy, his Authority being revocable, could not pray a Mandamus.

But to that it was answered, That the Mandamus was at the Suit of Mr. Win; and it set forth how he had the Office of Secretary, exercend' per se vel sufficientem Deputatum suum; and that they had refused this Clapham, whom he had appointed his Deputy.

And it was resolved, That the Mandamus was well awarded, for he had no other Remedy to have his Deputy admitted. And whereas it was said, being an Officer belonging to the Court, they are to judge of his Sufficiency, and so have Power to refuse him;

It was answered to, and so resolved, That then they ought to have returned, that he was insufficient.

And it was also resolved by all the Court, That the Return being, that non fuit tempore receptionis brevis Deputatus constitutus, was naught; for if he were made his Deputy before, the Return was true, unless he made him his Deputy at the very Instant of the Receipt of the Writ; and Returns must be certain, because there is nothing can be pleaded to them.

Anonymus.

AN Indictment for not performing an Order of the Justices, for Payment of a Poors Rate. Antea 108.

It was moved to quash it, because it did not conclude, Contra pacem: Sed non allocatur, because it was not for a Male-feasance, but a Non-feasance. Quære 2 Hawk. 242.

Horsam *versus* Turget.

Mich. 22 Car. 2. Rot. 687. Debt upon a Bond.

The Defendant demands Oyer of the Condition, which was to perform an Award; and sets forth, That there were divers Accounts, &c. between J. S. Testator of the Plaintiff, and the Defendant; and they submitted all Controversies to the Award of such an one, and that he awarded, that the Plaintiff should deliver certain Goods, of which the Testator died possessed, to the Defendant; and that the Defendant should pay unto the Plaintiff 320 l. And then sets forth the Custom of Foreign Attachments in London; that if a Suit were commenced against the Executor of any Person, any Debt which was due to the Testator tempore mortis suæ might be attached; and then sets forth according to the common Form, how this 300 l. was attached, &c. and avers, that there were no other Controversies, Differences, or Matters between the Plaintiff and Defendant, but what concerned the Testator of the Plaintiff and him as his Executor only. S. C. 2 Keb. 716, 731, 741. 2 Lutw. 985. 1 Lev. 306. N. Lutw. 310, 311. 10 Co. 103. Cro. El. 184, 691.

The Plaintiff replies, That the Defendant had not paid the 320 l. according to the Award, &c. upon which the Defendant demurred.

And whether this Money was attachable as a Debt due to the Testator tempore mortis suæ, was the Question.

It

It was argued by Winnington, That it was. For it appears by the Averment, that it was awarded to be paid meerly upon the Teſtator's Account, and it is but as it were a Reducing the Teſtator's Debt to a Certainty; for an Award being no Record or Specialty, will not alter the Nature of the Debt; and that clearly it ſhould be Aſſets in the Executor's Hands; and the Cuſtom of London was to have a liberal Conſtruction.

Pemberton contra. It doth not appear, That there was any Debt due to the Teſtator: There might be Covenants, or other Matters between them, which ſhall be rather intended than Debt, as ſtrongeſt againſt the Plaintiff; if there were, the Nature of the Debt is altered; for an Award may be pleaded in Bar to an Action brought upon the original Debt.

See 1 Sid. 226, 342, 379, & 397. 1 Lev. 256. 1 Saund. 216, 217, 238. N. Lutw. 148, 275. Cumberb. 38, 327. 1 Lev. 128, 130, 224.

Alſo this muſt have been ſued for in the Debet and Detinet, and not in the Detinet only; ſo it is not a Reducing the Debt to a Certainty; as where an Account is made upon Debts by ſimple Contracts; or where an Executor gives Time for Payment of a Bond due to the Teſtator, this is ſtill attachable. 1 Roll. 551.

He denied it to be Aſſets. If it were, the Adminiſtrator de bonis non might ſue for it after the Executor's Death, which clearly he could not do; and the Executor was chargeable only in Proportion to the Debt extinguiſhed, and not according to the Sum awarded, or at leaſt it could not be Aſſets before recovered: If it were Aſſets, it did not follow it ſhould be attachable; for if an Executor recovers in Treſpaſs, for Taking away the Teſtator's Goods, the Damages ſhall be Aſſets; yet they are not attachable: So Damages recovered upon Covenant made to the Teſtator.

He ſaid, It would be very inconvenient that this Money ſhould be attached, for the Executor was liable to a Devaſtavit upon this Matter, and yet ſhould have no Remedy for the Sum awarded.

Again, It would be attachable in two Reſpects, both as the Executor's Debt, (for ſo clearly it is) and as the Teſtator's Debt; and the Bond for Performance would be attachable for the Executor's Debt, and the Sum awarded for the Teſtator's. He ſaid, All Cuſtoms ought to be taken ſtrictly, and this was clearly out of the Words, as being no Debt due to the Teſtator tempore mortis ſuæ. And here it is pleaded, That it was commanded by the Court to the Officer to attach the Defendant by a Debt due to the Teſtator at the Time of his Death, ſo no Authority to attach this Debt; and if it were by Law attachable, the Command ought to have been ſpecial.

The Court were all of Opinion, That this was not attachable as the Teſtator's Debt, for then the Adminiſtrator de bonis non might ſue for it. And they held it to be like the Caſes where the Executor takes Bond for a Debt due to his Teſtator, or where he ſells the Goods, the Money for which they are ſold cannot be attached; and here the Award is made of this Sum, in Conſideration of conveying to the Defendant the Goods of the Teſtator, and releaſing of his Debts, which ſeems to be all one with the other Caſes.

And ſo they gave Judgment for the Plaintiff.

Termino Paſchæ, Anno 23 Car. II.

In Banco Regis.

Error.

A Judgment out of an inferior Court was reverſed, becauſe being by Default the Enquiry of Damages was only by two Jurors, and Cuſtom alledged to warrant it.

And it was reſolved by the Court, That there cannot be leſs than Twelve, though the Writ of Enquiry ſaith only per Sacramentum proborum & legalium hominum, and not duodecim as in a Venire.

Note, There were divers Recognizances taken before the Lord Chief Juſtice Kelynge; who died before his Hand was ſet to them. 2 Keb. 750. Cr. Car. 259, 260. 1 Sid. 233.

It was moved by Coleman, that they might be filed.

But the Court ſaid a Certiorari muſt go to his Executors to certify them, and doubted whether they were compleat Records.

If a Warrant of Attorney be given after the Continuance-day, to enter up a Judgment as of the Term preceding; this may be well enough, if it be dated within the Term; but it cannot be ſo, if ſuch a Warrant be given to confeſs a Judgment generally, and dated after the Term. 1 Sid. 222.

Anonymus.

2 Keb. 771. A Prohibition was prayed by one, who being a Church-warden, was tendred an Oath by the Court-Chriſtian, to preſent according to the Biſhop's Articles, which he refuſing to take, was excommunicated.

Poſtea 127. Now, for that ſome of the Articles enjoin to preſent Filthy Talkers, Revilers and common Sowers of Sedition amongſt Neighbours, which were general Terms, and might be underſtood to comprehend Things out of their Juriſdiction, the Court conceived a Prohibition ought to go as to them.

But he ſhould have firſt pleaded there, quod non tenetur reſpondere as to thoſe Matters, and upon their Refuſal to have prayed a Prohibition.

Elpicke *verſus* Acton.

2 Saund. 74, 174. 1 Lev. 301, 303. 2 Lev. 11, 176. Antea 71, 106. 2 Keb. 753, 767. 3 Cro. 837. 2 Sid. 174, 175. AN Action of Trover was brought de diverſis Veſtimentis.

And held not to be good, becauſe not expreſſed what Kind of Garments.

But 7 Jac. Emery's Caſe, where Trover was brought for a Library of Books, and held to be good without expreſſing what they were; becauſe to ſet down the particular Books, would make the Record too prolix. Vide 3 Cro. 164. and Pl. Com. where a Man pleaded that he was Knight of the Shire, per majorem numerum, and held to be good.

Barnard *verſus* Michel.

Vide 1 Salk. 138. 1 Lutw. 253. Poſtea 126. 2 Keb. 754, 766. IN an Action of Debt, the Plaintiff declared upon a Deed comprehending divers Covenants, for the Performance of which the Defendant obliged himſelf in the Penalty of 40 l. and ſets forth that the Defendant had broke the Covenants.

The Defendant pleaded Non eſt factum, and it was found for the Plaintiff.

And it was moved in Arreſt of Judgment, That though the Iſſue was found for the Plaintiff; yet he having aſſigned no Breach, no Cauſe of Action appeared upon the Record; ſo he could have no Judgment.

For if the Declaration be inſufficient, let the Defendant plead what he will, yet Judgment ſhall not be given againſt him.

Indeed if the Action had been brought upon a Bond conditioned for the Performance of Covenants, and Non eſt factum had been pleaded; no Breach needed to have been aſſigned: For then the Declaration is only upon the Bond, without mentioning any Thing of the Condition.

But here the Breach of the Covenant is, as it were, a Condition precedent, to entitle him to the Penalty; and here the Declaring that he broke the Covenants without ſhewing which, or how, is altogether inſufficient, though the Defendant, who pleads in the Negative, might have pleaded non infregit conventiones. Vide Raſtal's Entries 162. Pl. Com. 5. A Precedent juſt agreeing to this Caſe. Dyer 297, 298.

But the Opinion of the Court inclined for the Plaintiff here. Sed adjornatur. Vide poſtea 126.

Anonymus.

A Mandamus was prayed to the Eccleſiaſtical Court, to ſwear two Church-wardens elected by the Pariſh, ſurmiſing that ſo was the Cuſtom in that Place; but that the Biſhop's Officers had refuſed to admit them, upon Pretence that the Parſon ought to chuſe one. 2 Keb. 753. See 6 Mod. 891. Inſtit. Leg. 160.

And it was granted. Vide 2 Roll. 106, 107. 3 Cro. 551, 589. ſuch a Writ granted.

The Caſe of the City of London *and* Coates.

COates, who was impriſoned in Newgate by the Court of the Lord Mayor and Aldermen, brought an Habeas Corpus; and the Sheriffs returned, That the Cuſtom of the City was, That if any Freeman hath foreſtalled any Fiſh, coming to any Market within the City, and Complaint made thereof to the Court of Aldermen, and he appearing there confeſſing the ſame, and they ordain that he ſhall deſiſt from ſuch Foreſtalling, and he will not promiſe to obey; but declares in Court, That he will not obey their Order, That the Court there had Time out of Mind uſed to commit ſuch Freeman, until he ſignified to the ſaid Court, that he would conform himſelf. 2 Keb. 752. See 1 Sid. 250. Raym. 116. 1 Lev. 162. 2 Danv. 312.

Then it is returned, That Complaint was made to the ſaid Court, that this Coates had foreſtalled a great Number of Lobſters; whereupon they cauſed him to appear, which he did, and confeſſed the ſame, and they ordained, That he ſhould deſiſt from ſuch Foreſtalling; but he ſaid obſtinately and in Contempt of the Court, That he would not obey their Order; whereupon they committed him to Newgate, until he ſhould ſignify to the Court, that he would conform himſelf, or otherwiſe be delivered by due Courſe of Law.

The Return being filed,

It was moved by the Attorney General, That it was inſufficient; for a Cuſtom to commit a Man for Foreſtalling is void, and that Offence was always bailable, and ſo it appears by the

Regiſter; But here the Commitment is to remain in Priſon, without Bail or Mainprize.

Alſo the Commitment is upon a Complaint without Oath, which ought not to be; neither ought they to extort a Promiſe from him, to obſerve their Order, admitting it to be legal; for an Oath cannot be impoſed upon a Man to keep the Law.

Beſides, The Cuſtom is abſurd, to commit a Man to Priſon until he ſubmits to the Court; whereas a Man in Priſon cannot come into Court to make ſuch Submiſſion; and then ſuppoſe they will keep no Court, muſt a Man lie in Priſon whilſt they do?

Then the Cuſtom, as it is laid, reſerves the Diſcharge of him only to themſelves; tho' it is ſaid, or by due Courſe of Law.

This Impriſonment looks in the Face of Magna Charta, which ſaith, nullus liber homo impriſonetur, &c. In all Offences finable, the Impriſonment is only to be until the Fine is paid; if the Fine be tendred, there is to be no Impriſonment at all, and ſo reſolved in Parliament. Br. Tit. Impriſonment 100.

To this it was anſwered by Jones on the other Side, That the Impriſonment in this Caſe was not for Foreſtalling, but for the Contempt to the Court.

It is returned, That he confeſſed the Fact, and yet declared that he would not conform himſelf to the Order of the Court; the Proceeding is very mild, not to puniſh for an Offence unleſs committed after an Admonition in Court. It is implied in the Cuſtom, That he may be delivered by due Courſe of Law; it is ſufficient to expreſs that in the Commitment, and ſo it is.

Alſo he cannot be prejudiced by the Deferring of Courts, for the Cuſtom is returned to keep the Court of Aldermen twice a Week.

It is not that he ſhall come in Perſon and ſubmit to the Court, but that he ſhall ſignify his Conformity to the Court, which may be done by Letter or Meſſage; and it is returned, That he did not by any Means ſubmit himſelf.

Twiſden. The Cuſtom doth not here come in Queſtion. The Commitment is returned to be for a Contempt to the Court; It
1 Mod. 10. muſt be allowed they have ſuch Power, for they are a Court of
1 Sid. 287. Record. Langham was committed for Refuſing to take the Oath uſually adminiſtred to Sheriffs; and reſolved to be good, becauſe it concerned the Government. The City hath the Regulation of Trade, and Orders made by them that one Man ſhould not uſe the Sign of another, and for diſtinguiſhing Trades, (viz.) That a Plaiſterer ſhould not uſe the Trade of a Bricklayer, and ſuch like, have been allowed.

Wherefore the Court remanded the Priſoner, he promiſing to make Submiſſion at the next Court, and the Sheriff promiſing he ſhould be diſcharged thereupon.

Phillips *verſus* Kingſton.

HIll. 22 & 23 Car. 2. In an Action of Slander the Words were, He hath broke three or four of his Father's Ribs, of which he ſhortly after died, and I will complain to a Juſtice of him: He may be hang'd for the Murder altho' it were done twenty Years ſince. Vide 1 Danv. 141.

After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that he did this Hurt to his Father againſt his Will, as it might be intended; and tho' the Defendant ſaid, He might be hanged for it, that is but his Judgment and Collection thereupon.

As Jacob and Mills's Caſe, 2 Cro. 343. where the Words were, Thou haſt poiſoned Smith, and it ſhall coſt me an hundred Pounds but I will have you hanged for it. And it was reſolved, That an Action did not lie, becauſe it might be unwillingly done. Poſtea 149. Hob. 6.

Alſo it is not averred that the Father was dead, and that is neceſſary; for otherwiſe it ſhall be taken that he is alive, and then 'tis no Slander; and ſo is Yelv. 21. and Hob. 6.

But the Court held, That the Plaintiff muſt have his Judgment; for Taking all the Words together, the Defendant muſt neceſſarily intend a murderous Killing; and for the not averring that he was dead, Twiſden ſaid, the later Opinions have all been, that this is not neceſſary; and the Action lies, unleſs it appears upon the Record that the Party is alive. 2 Sid. 53. 1 Keb. 141.

Todd *verſus* Haſtings.

IN an Action for Words the Plaintiff declared, That he was a Woollen-Draper; and the Defendant ſaid of him, You are a cheating Fellow, and keep a falſe Book. 2 Saund. 307. S.C. but differently reported.

After Verdict for the Plaintiff it was moved in Arreſt of Judgment, That the Words might not be intended to relate to his Trade; for they were capable of another Senſe, and there was no Colloquium of his Trade. 1 Lev. 280. Poſt. 263. 1 Danv. 111. 125, 126.

Sed non allocatur: For they muſt be intended of a Debt-Book which Shop-keepers keep, and to ſay ſuch an one keeps a falſe Book, it is a great Slander to him in his Trade. Vide 1 Cro. 403.

Twiſden cited a Caſe, Where Roberts an Attorney brought an Action for ſaying, Go tell the black Knave Roberts, That I will teach him, or any Attorney in England, to ſue out a Writ againſt me, and he had Judgment; for it was as much as to call him Knave Attorney. Hill. 22 & 23 Car. 2. Rot. 1426.

Methwin

Methwin *and* The Hundred of Thistleworth.

Postea 235. Raym. 221. 2 Keb. 760. 3 Keb. 115. 2 Lev. 4. Vid. 1 Saund. 285. 2 Saund. 207, 379, 380. 3 Lev. 320.

AN Action was brought upon the Statute of Winton.

The Defendants pleaded, That they made Hue and Cry, and that within forty Days they took one Dudley, which was one of them that did the Robbery, and had him in Custody.

The Plaintiff replied, That Dudley was not taken upon their fresh Pursuit modo & forma.

And upon this Issue the Jury find a Special Verdict to this Effect;

That the Hundred made Hue and Cry, and that Sir Joseph Ash finding Dudley in the Presence of Sir Philip Howard, a Justice of the Peace of Westminster, at his House in Westminster, the said Sir Joseph being an Inhabitant in the Hundred of Thistleworth, charged Dudley with this Robbery before Sir Philip, who promised he would appear at the Sessions at the Old Baily.

And whether this be such a Taking as is put in Issue, they referred to the Judgment of the Court.

Jones for the Plaintiff argued, That in this Case there doth not appear to be any Taking at all, but only a Discourse between Sir Joseph Ash and Sir Philip Howard. As admitting the Issue were, Whether a Man were arrested or no? And it should appear upon Evidence that one should come to the Sheriff and declare, That he had a Writ against such a Man then present; and upon this the Sheriff should say, I will take his Word for his Appearance; this clearly could not be taken for an Arrest.

Again, The Issue is, Whether he were taken upon the fresh Pursuit of the Hundred? And it doth not appear by the Verdict that there was any Hue and Cry made this Way, and it might be ceased before this Time: But it seems rather, that Sir Joseph Ash found him by Accident.

But the Opinion of Hale Chief Justice, Twisden, Rainsford and Moreton, was, That Judgment ought to be given for the Defendant: For the Charging of Dudley with the Robbery in the Presence of a Justice of the Peace was clearly a Taking within the Statute.

For being in the Presence, which the Law construes to be under the Power or Custody of the Magistrate, it would have been vain and impertinent to have laid hold of him; and it shall be intended, that this was upon fresh Pursuit: For when the Verdict refers one special Point to the Judgment of the Court, all other Matters shall be intended. Postea 235.

And the Chief Juſtice ſaid, That if the Hue and Cry was made towards one Part of the County, and an Inhabitant of the Hundred apprehended one of the Robbers within another; yet this was a Taking within the Statute.

Hornſey (Adminiſtrator of Jane Lane) *verſus* Dimocke.

THE Plaintiff, as Adminiſtrator of Jane Lane, brought an Aſſumpſit, and declared, That he had formerly depoſited ſuch a Sum in the Defendant's Hands, for the Uſe of the Inteſtate Jane Lane; in Conſideration whereof the Defendant promiſed to the Plaintiff, that he would pay it her; or if ſhe died before eighteen Years of Age, that he would pay it to her Executors: And ſhews, That ſhe died before eighteen, and that he had not paid it to the Plaintiff, her Adminiſtrator, licet ſæpius requiſitus.

Upon Non Aſſumpſit, a Verdict was for the Plaintiff.

It was moved in Arreſt of Judgment, That the Plaintiff brought this Action as Adminiſtrator, which ought to have been in his own Right; for the Promiſe was made to him. Moor 887.

Sed non allocatur: For if a Man names himſelf Executor or Adminiſtrator, and it appears that the Cauſe of Action is in his own Right, it ſhall be well enough, and he calling himſelf Executor, &c. is but Surpluſage. Hob. 288. But here it ſeemeth Jane Lane might have brought an Aſſumpſit, becauſe ſhe was the Party to whom the Money was to be paid. So it is good either Way. Bendloe in Kell. 277, 6.

It was further objected, That it was not averred, that the Defendant did not pay the Money to Jane Lane during her Life.

Sed non allocatur: For 'tis aided by the Verdict. As the Chief Juſtice ſaid a Caſe was adjudged, where an Aſſumpſit was brought upon a Promiſe to pay Money to Two or either of them; and declared that the Money was not paid to the Two, and not ſaid, or either of them; yet reſolved to be good after Verdict. Vide 1 Salk. 140. Poſt. 137.

Matthews *verſus* Croſſe.

IN Debt for Rent the Plaintiff declared, That by an Indenture made in the Pariſh of St. Mary Underſhaft, London, he let an Houſe to the Defendant, ſituate in parvo Turris monte, reſerving ſo much Rent, &c. 2 Keb. 762. Vide antea 2.

The Defendant pleads, That before the Rent incurred, the Plaintiff entred into a certain Room of the ſaid Houſe, apud parvum Turris montem prædict', and ſo ſuſpended his Rent, upon which it was demurred.

And

And it was ſhewn for Cauſe, That no Place was alledged where the Entry was, but ſaid to be at Little Tower-Hill, which cannot be intended a Will. And a Caſe was cited of an Indictment in this Court, of a Fact laid to be done at Whitehall, and quaſhed for Want of Place. And to this the Court inclined; but the Matter was ended by Compromiſe.

Anonymus.

2 Keb. 760.

A Prohibition was prayed to a Suit for a Penſion in the Eccleſiaſtical Court, ſurmiſing that the Lands out of which it was demanded were Monaſtery Lands, which came to the King; and that he granted the Lands, &c. under which Grant the Plaintiff claims; and that he covenanted to diſcharge the ſaid Lands of all Penſions, &c. and this upon the Statute of 34 H. 8. cap. 19. which appoints the Suit to be for Penſions in ſuch Caſes in the Court of Augmentations, and not elſewhere.

But the Court would not grant it, until the Letters Patents of Diſcharge were produced, being a Matter of Record.

But where the Surmiſe is of Matter of Fact, it is ſufficient to ſuggeſt it.

And it was ſaid by the Court, That Penſions, whether by Preſcription or otherwiſe, might be ſued for in the Eccleſiaſtical Court; but if by Preſcription, then there was alſo Remedy at the Common Law. F. N. B. 50. 1 Cro. 675.

Antea 3. 1 Mod. 218. Poſtea 265, 274, 335.

Davis *verſus* Wright & al'.

2 Lev. 3. 2 Keb. 744, 758. Raym. 211, 212. 1 Danv. 53. 1 Sid. 243.

Hill. 22 & 23 Car. 2. Rot. 701. In an Aſſumpſit the Plaintiff declared, That his Father gave him by his Will 3 l. per Annum during his Life, and that he was about to ſue for it; and that the Defendants being Executors to the Father, in Conſideration that the Plaintiff would forbear to commence a Suit againſt them for it, promiſed to pay him.

The Defendants plead, That the Teſtator was indebted in divers Sums, and ultra to pay them they had no Aſſets.

To this the Plaintiff demurred; for that by this Promiſe the Defendants have made it their proper Debt.

1 Cro. 104. Yelv. 84, 184. Poſtea 159.

But it was ſaid on the other Side, That if there were no Aſſets there was no Cauſe for the Plaintiff to have commenced a Suit: And to ſtay a cauſeleſs Suit can be no Conſideration, as the Caſe of Smith and Jones, 2 Cro. 257. where one having married an Executrix, after her Deceaſe promiſed J. S. that if he would forbear a Suit againſt him for a Legacy, he would pay it.

It was held to be a void Promiſe, being in no wiſe liable to be ſued after the Death of his Wife: And the Opinion of my Lord Coke, 9 Rep. 94. in Bane's Caſe is, That an Executor ſhall not be charged with ſuch Promiſe, unleſs he hath Aſſets.

But the Court reſolved for the Plaintiff: For it is not material whether the Defendants had Aſſets or not at the Time of the Promiſe; for by the Promiſe they cauſed the Plaintiff to deſiſt, who peradventure at that Time was prepared to prove Aſſets; and relying upon ſuch Promiſe might be much to his Prejudice, if he could not afterwards recover upon it.

But the Chief Juſtice ſaid, If it had appeared upon the Declaration that there were no Aſſets, the Plaintiff by ſhewing that would have deſtroyed his Action.

Vere *verſus* Smith.

IN Debt upon an Obligation.

The Condition recited, That the Defendant ſerved the Plaintiff as a Brewer's Clerk, and that if he perform'd ſuch Covenants, &c. S. C. 2 Keb. 761, 779, 830. 2 Lev. 5. Vide 6 Mod. 139.

The Defendant pleads, performavit omnia.

The Plaintiff replies, That one of the Covenants was to give the Plaintiff a true Account of all ſuch Monies as the Defendant ſhould receive, &c. whenſoever he ſhould be thereunto requeſted; and alledged, That 30 l. came to his hands, and that he requeſted him to give an Account of it, which he refuſed to do.

The Defendant rejoins, confeſſing the Receipt of the ſaid Money, but ſaith, That before Requeſt made by the Plaintiff, he laid it up in the Plaintiff's Warehouſe, and that certain Malefactors (to the Defendant unknown) ſtole it away, & hoc paratus eſt verificare. And to this the Plaintiff demurs generally.

And Jones argued, That the Matter contained in the Rejoinder was a Departure from the Bar, for it doth not amount to an Account, but rather an Excuſe or Diſcharge of himſelf, why he ſhould not account.

Again, he ought not to have averred his Plea, but to have concluded to the Country: For the Plaintiff in his Replication having alledged, That he gave no Account, and the Defendant in his Rejoinder ſetting forth, That he did give an Account, there is an Iſſue joined; wherefore it ought to have been concluded, & de hoc ponit ſe ſuper Patriam.

But theſe Matters were over-ruled.

For as to the firſt, the Court held it no Departure, but a Fortification of the Bar; for Shewing that he was robbed, is Giving an Account.

And as to the ſecond, the Concluſion is proper; becauſe the Defendant alledges new Matter, and therefore ought to give the Plaintiff Liberty to come in with a Surrejoinder and anſwer to it; for he doth not only ſay, that he gave an Account, but ſets forth the ſpecial Matter how.

Wherefore the Court gave Judgment for the Plaintiff.

Note, A Clerk of the Court muſt appear de die in diem to any Matters againſt him on the Crown-Side, as well as on the Plea-Side.

Reynell *verſus* Heale.

2 Keb. 764, 776, 788, 877.

AN Information was brought upon the new Statute againſt Conventicles; for that the Defendant being a Juſtice of the Peace in Devonſhire, and Complaint being made to him by Reynell of a Conventicle, he refuſed to go to the Place to ſuppreſs it; and ſets forth three Omiſſions of that Kind, and that the Statute enacts, That a Juſtice of Peace, for every ſuch Neglect of doing his Duty, ſhall forfeit 100 l. the one Moiety to the King, the other to the Informer; *& unde actio accrevit* for 100 l. to the King and himſelf.

The Defendant pleads non debet the ſaid 100 l. to the Informer, nec aliquam inde parcellam, & de hoc ponit ſe ſuper Patriam, & prædict' Reynell ſimiliter.

And upon this Iſſue was given to the Informer.

Jones moved in Arreſt of Judgment, that he conceived there were no Words in the Act to oblige the Juſtice of the Peace upon ſuch Information, to go in Perſon to the Place where ſuch Meeting is; and 'tis not ſaid here, that he refuſed to grant a Warrant, or the like.

But he did not much inſiſt upon that, but moved that the Iſſue was not well joined; for it is only between the Informer and the Defendant, and ſo the Plea is quod non debet to the Informer, and no Mention of the King; whereas the Action is qui tam, and the Act gives the Moiety of the Penalty to the King.

The Court ſaid nothing to the firſt Matter, but held clearly that the Iſſue was misjoined; and ſaid, That a Repleader ought to be awarded.

Pollexfen *and* Aſhford *verſus* Criſpin.

2 Keb. 757, 765.

TRIN. 22 & 23 Car. 2. Rot. 225. The Plaintiffs brought Treſpaſs, Quare piſces ſuos cepit in ſeparali Piſcaria.

Upon Not Guilty pleaded, and Verdict for the Plaintiffs, it was moved in Arreſt of Judgment, That the Plaintiffs ought not to have call'd them Piſces ſuos, unleſs they had been in a Trunk or Pond:

For

For there is no more Property in Fiſhes in a ſeveral Piſcary, than in a free Piſcary.

In an Action for taking Conies in a Warren, he ſhall not ſay Cuniculos ſuos; and this is ſuch a Default as the Verdict ſhall not aid. Sed non allocatur. 53 Co. 34, b. F. N. B. 192, 193. 2 Cro. 195.

For the Chief Juſtice ſaid, It might be intended a Stew-Pond, which is a Man's ſeveral Piſcary; and after a Verdict the Court ſhall admit any Intendment to make the Caſe good.

And Twiſden cited a Caſe which was in Treſpaſs; Quare Phaſianos ſuos cepit, and the Plaintiff had Judgment after Verdict; for it ſhall be intended they were dead Pheaſants. And the Caſe of Child and Greenhill, 2 Cro. 553. is the ſame with this. Raym. 16.

But the Court held, That it had been good upon a Demurrer, by Reaſon of the local Property; and ſo is the Regiſter. 1 Jones 440.

Hoskins *verſus* Robbins.

IN Replevin the Defendant avowed for Damage feaſant.

The Plaintiff replies and ſaith, That the Place Where is Parcel of the Waſte of ſuch a Manor, within which Manor there are Copyholds demiſable Time out of Mind; and that the Copyholders have had Time out of Mind the ſole Feeding of the ſaid Waſte; and that J. S. being a Copyholder of the ſaid Manor, licenced him to put in his Cattle. Poſtea 163. 2 Saund. 324. 1 Mod. 74. 2 Keb. 757, 842. 2 Lev. 2. 1 Lev. 269. 1 Cro. 434. 2 Cro. 256.

The Defendant traverſes the Preſcription, and it was found for the Plaintiff.

Levinz moved in Arreſt of Judgment, that Preſcription to have the ſole Feeding, whereby the Lord ſhall be excluded from all the Benefit of his Soil, is not allowable; and the Lord cannot in this Caſe ever make any Profit of the Mines, for he may not dig. Vide poſtea 384. Raym. 171. Vaug. 253. 3 Lev. 98.

'Tis true, a Preſcription may be to have the ſole Feeding from ſuch a Day; for there the Owner hath his Time alſo.

Again, he alledges a Cuſtom of Demiſing Copyholds, and doth not ſay for what Eſtate, neither doth he name any Copyholders; alſo he ſhould have averred, That the Beaſts were levant and couchant. See 1 Lev. 253, 268, &c. ibid.

One preſcribed to have omnes Spinas, yet laid them to be ſpent in a certain Houſe. And the Verdict ſhall not help the Defect, as this Caſe is; but if the Copyholder had pleaded ſo himſelf, it ſhould: For after a Verdict it is intended they were levant and couchant; but that cannot be in Caſe of a Stranger juſtifying by Licence.

He took another Exception alſo, That a Licence was pleaded here, and not ſhewn to be by Deed, as it appears it ought to be. 2 Cro. 575. Antea 109.

As to the firſt it was anſwered, That this Preſcription did not take all the Profit from the Owner of the Soil, for there might be Trees and Buſhes growing; and if any one ſhould dig the Soil and diſcover Mines, the Lord would recover Damage in Reſpect of the Mines. Such an Intereſt as this might commence by Grant, and therefore lies in Preſcription. The ſame Opinion might be made againſt the ſole Feeding for ſome Part of the Year; for the Property of the Soil remains in the Lord at that Time alſo, when the Profit is divided from him, and it may be as well allowed for a longer as a ſhorter Time; this is no more than the Herbage or Eſture of the Land. And Preſcription to dig Turfs cuts as deep into the Profits, and yet that may be in one, and the Soil in another.

As to the ſecond, It is not needful to ſhew for what Eſtates the Copyholds have been demiſed; for it is not laid by Way of Preſcription in them (for then it would be material to ſhew that they had ſuch Eſtates, as might ſupport a Preſcription) but as a Cuſtom in the Manor; and to have named them would have made a Repugnancy, (viz.) that ſuch particular Copyholders had the ſole Feeding Time out of Mind. 3 Cro. 211.

Yelv. 187. Neither is it needful to alledge, That the Beaſts were levant and couchant, in Regard that he claims the ſole Feeding, which may therefore be with what Beaſts he pleaſeth.

And it is not needful, That the Licence ſhould in this Caſe be by Deed; for it paſſeth no Intereſt, and ſerves but for an Excuſe of the Treſpaſs; and 'tis for no certain Time, but only pro hac vice.

Antea 25. Poſtea 163, 165. The Opinion of the Court inclined for the Plaintiff. Sed adjornatur. Vide poſtea 183.

The Duke of Richmond *verſus* Wiſe.

2 Keb. 759, 767. IN an Ejectment the Parties had a Trial at Bar, and a Verdict for the Plaintiff.

The Court were moved to ſet aſide this Verdict, upon an Affidavit made of theſe Miſdemeanors in the Jury, (viz.) That they had Bottles of Wine brought them before they had given their Verdict, which were put in a Bill together with Wine and other Things, which were eat and drunk by the Servants of the Jury, and the Tipſtaffs that attended them at the Tavern where they were conſulting their Verdict.

But this Bill (after the Verdict given) was paid by the Plaintiff's Solicitor; and after that they had given up their Priv Verdict, they were treated at the Tavern by the Plaintiff's Solicitor, before their Affirmance of it in Court.

Counſel being heard on both Sides, in theſe Matters, the Court delivered their Opinions ſeriatim, that the Verdict ſhould ſtand.

They ſaid they were not upon a diſcretionary ſetting aſide of the Verdict, as when the Jury goes againſt Evidence; but whether theſe Miſcarriages ſhall avoid it in Point of Law.

They all agreed, That if the Jury eat or drank at the Charge of the Party for whom they find the Verdict, it diſannuls the Verdict; but here it doth not appear, that the Wine they drank was had by the Order of the Plaintiff, or any Agent for him.

'Tis true, in Regard his Solicitor paid for it afterwards, it doth induce a Preſumption that he beſpoke it; but that again is extenuated by its being put into a Bill with other Things that were allowable; and if the Verdict ſhould be quaſhed for this Cauſe, it muſt be entred upon the Roll, that it was for drinking at the Plaintiff's Charge, and it is not proved, that this Wine was provided by him. 1 Cro. 6. 6.

And as to the other Matter, That they received a Treat from the Plaintiff after their Privy Verdict given, and before it was given up in Court, that ſhall not avoid their Verdict.

But if the Defendant had treated them, and they had changed their Verdict, as they might have done in Court, it ſhould then have been void. Co. Lit. 227. b. If after the Jury be agreed on their Verdict, (which the Chief Juſtice ſaid muſt be intended, ſuch an Agreement as hath the Signature of the Court put upon it, viz. A Privy Verdict) they eat and drink at the Charge of him for whom they do paſs it, it ſhall not avoid the Verdict; and if it ſhould, the Court ſaid moſt Verdicts given at the Aſſizes would be void; for there 'tis uſual for the Jury to receive a Collation after their Privy Verdict given, from him for whom they find. But ſuch Practice ought not to be, and if any of the Parties, their Attorneys or Solitors, ſpeak any thing to the Jury, before they are agreed relating to the Cauſe, (viz.) That it is a clear Cauſe, or I hope you will find for ſuch an one, or the like, and they find accordingly, it ſhall avoid the Verdict; but if Words of Salutation, or the like, paſs between them; (as was endeavoured to be proved in this Caſe) they ſhall not. Alſo if after they depart from the Bar, any Matter of Evidence be given them, as Depoſitions or the like, tho' the Jury ſwear they never looked on them, yet that ſhall quaſh their Verdict. But they all held in this Caſe, That though there was great Matter of Suſpicion, yet there was not Matter of clear Proof (as there ought to be) ſufficient to diſannul this Verdict; but they ſaid it was a great Miſdemeanour in the Jury, for which they ought to be fined, and that the Plaintiff's Solicitor had carried himſelf with much Blame and Indiſcretion; and the two Tipſtaffs which attended the Jury, for that they were not more careful, but connived at theſe Matters, were fined, the one 40 Shillings, (who appeared to be moſt in Fault) and the other 20 Shillings.

Barnard

Barnard *verſus* Michel.

Antea 114. 1 Salk. 138. 1 Lutw. 253. Het. 114, 115. 3 Salk. 108. Poſtea 148, 185.

HILL. 22 & 23 Car. 2. Rot. 865. The Caſe was moved again, and by the Opinion of all the Court, Judgment was given for the Plaintiff, being after a Verdict.

For though the Pleading, That he broke all the Covenants, would not have been good upon a Demurrer, as they ſaid, for two Reaſons.

Firſt, For that it would have been double, in Regard that the Breach of any one of them would have intitled the Plaintiff to the Penalty.

Secondly, For that ſome of the Covenants were ſuch as he ought to have aſſigned a ſpecial Breach upon, that it might have been in the Judgment of the Court; yet now the Verdict hath aided theſe Defects. See now the Statutes 8, 9 *W.* 3. c. 10. (& 4, 5 *Annæ*, c. 16.) That the Plaintiff may aſſign as many Breaches as he pleaſes, on Bonds to perform Covenants, *&c.*

Pellow *verſus* Kingsford.

2 Lev. 1. 2 Keb. 756.

IN an Action of Debt ſur l' Eſtatute 2 E. 6. for not ſetting out of Tithes. After Verdict for the Plaintiff it was moved in Arreſt of Judgment.

Vide 2 Cro. 68. Yelv. 63.

That the Lands out of which the Tithes were demanded, were ſhewn in the Declaration to lie in two Pariſhes; ſo that the Plaintiff ought to have made ſeveral Titles, and alſo to have ſhewn how the Tithes ſhould have been ſet out upon the Land, (viz.) how much in one Pariſh, and how much in the other.

But it was held to be well enough; for this Action is but in the Nature of Treſpaſs, and to puniſh the Tort in not performing the Statute.

Anonymus.

2 Keb. 761, 763.

IN an Information upon the Statute of Uſury. After Verdict at the Aſſizes for the King, it was moved in Arreſt of Judgment, That the Venire was not well awarded, for it was entred ideo ven' inde jur'; whereas it ſhould have been præceptum eſt Vicecomiti, *&c.*

The Court commanded to ſearch Precedents, and were informed that they were generally ſo.

Anonymus.

A Prohibition was prayed on the Behalf of a Church-warden, to the Eccleſiaſtical Court, for that they tendered him an Oath upon theſe Articles following. Antea 114. 2 Keb. 771.

Firſt, Whether any Perſon within this Pariſh hath encroached upon the Church-yard?

Secondly, Whether any Perſon within this Pariſh were an Adulterer, or filthy Talker, Sower of Sedition, Faction, or Diſcord amongſt their Neighbours?

Thirdly, Whether there were any that did not reſort to their Pariſh Church, receive the Sacraments, &c.

It was ſaid to the firſt of theſe, That it concerned Matter of Freehold. But this was over-ruled, for they may take Notice of Encroachments upon the Church-yard.

And to the ſecond, Sowing of Sedition amongſt Neighbours is inquirable in the Leet, and the Biſhop's Court hath nothing to do with it. Beſides this Oath would oblige him to charge himſelf criminally; for it is whether any Perſon within the Pariſh, &c. ſo that himſelf is included.

And as to the Sowing of Diſcord, the Court held it did not belong to them. Antea 114.

But they held, That the general Words would not extend to the Church-warden himſelf; but intended to relate only to the reſt of the Pariſh.

But upon Examination of the Matter it appeared, That the Oath tendered was in general Words, (viz.) To make Preſentations according to the King's Eccleſiaſtical Law. And theſe Articles were offered only by Way of Direction, & quaſi a Charge. Wherefore the Court denied the Prohibition.

Anonymus.

IN Replevin of Beaſts taken at D. the Defendant pleads in Abatement, That they were taken at another Place; abſque hoc, that they were taken at D. Et pro Return' habend', he avows for Rent reſerved upon a Leaſe. The Plaintiff replies, and traverſes the Leaſe, which ſhould not be; for though the Defendant when he pleads ſuch a Plea in Abatement, muſt alſo avow to have a Return; yet the Plaintiff cannot anſwer to it, but muſt take Iſſue upon the other Matter. Poſtea 249. Trin. 9 W. in B. R. 1 Cro. 896.

Sir

Sir William Smith *verſus* Wheeler.

1 Mod. 16, 38. 2 Keb. 564, 608, &c. 1 Lev. 279.

IN Erroꝛ upon a Judgment in the Common Pleas in Ejectment foꝛ the Rectoꝛy of Hadnam in the County of Bucks, where the Jury found as to a third Part of the Rectoꝛy, the Defendant Not Guilty.

And to the other two Parts, a Special Verdict to this Effect.

Vide 7 Co. 11, 12, &c. 2 Cro. 512. Lane 42.

That Simon Maine was poſſeſſed of the two Parts of the Rectoꝛy foꝛ 80 Yeaꝛs, and in the Yeaꝛ 1643. made by Indenture an Aſſignment of them to Crook and Bleak upon theſe Truſts following, (viz.) In Truſt for himſelf for Life, and after his Deceaſe for the Payment of his Debts, and for the raiſing ſeveral Sums to be paid to divers of his Kindred. Proviſo, That if he ſhall at the Time of his Death leave a Child, or his Wife *Enſeint*, then that it ſhall be to ſuch Truſt and Uſe as he ſhall limit and appoint by his Will, and if he made no ſuch Appointment, then to be in Truſt for ſuch his Iſſue. Provided further, That if *Simon Maine* ſhould be minded, or willing at any Time to make void the preſent Indenture, or to fruſtrate any Uſe or Truſt therein, or create any new, or to diſpoſe the Eſtate to any other Perſon, or any other Way, and ſuch his Purpoſe ſhall declare by Writing, under his Hand and Seal before Witneſs, *&c.* that then, and thenceforth the Truſts therein, *&c.* or ſo many of them, *&c.* ſhould be void, *&c.*

Then they find that in 1644. he had Iſſue a Son, and that he took the Profits thereof during his Life, and made ſeveral Leaſes of the Premiſſes.

That the Aſſignees had no Notice of this Truſt during his Life, and that after his Death one of them aſſented, and the other diſſented to it.

They find that in 1648. he committed Treaſon, and was thereof attainted.

They find the Act 12 Car. nunc, cap. 30. whereby it is enacted, That all Manors, Lands, *&c.* Leaſes for Years, *&c.* which he or any to his Uſe, or in Truſt for him, had, 25 *Mar.* 1646. or at any Time ſince, ſhall ſtand and be forfeited, *&c.* and alſo all Rights and Conditions, *&c.*

They find that the ſaid Simon Maine died in 1661, and that the King made a Grant to Sir William Smith the Plaintiff.

It was adjudged foꝛ Wheeler in the Common Pleas, Paſch. 20. Car. 2. by Tyrrel and Archer, who were then the only Judges in the Court; and Sir William Smith brought a Writ of Erroꝛ in this Court, and after divers Arguments at the Bar, the Judgment was affirmed this Term, by the Opinion of the whole Court.

I

Moreton

Moreton. I ſhall ſay nothing to the Marks of Fraud found in the Verdict; for tho' at firſt the Counſel of the Plaintiff inſiſted, That the Court ought thereupon to adjudge the Settlement fraudulent; yet it hath been ſince by them declined, wherefore I ſhall waive that.

The Matter is, Whether there be any Thing forfeited longer than the Life of Maine?

It hath been objected, That in Regard Simon Maine hath a Power of altering the Truſts and diſpoſing of them otherwiſe, that this ſhould amount to an implied Truſt in him of the whole Term; but that cannot be, for after his Deceaſe, the Truſt is expreſly limited to others.

'Tis true, he had a Power of diſpoſing, but that was to be executed at Election, and by ſuch Circumſtances as were individually privy to himſelf.

For it was to be done by his Will, according to the firſt Proviſo; and by the Second, to be done by Writing under his Hand and Seal; ſo not like to Englefield's Caſe, in 7 Co. 11. b. where the Power of Revocation was to be executed by the Tender of a Ring, which any one might do as well as the Party himſelf.

But indeed this is the ſame Caſe with the Duke of Norfolk's, cited in the ſame Report; and the Statute of 33 H. 8. of Forfeiture upon that Atainder, was penned as amply as this of 12 Car. and the Caſe of Warner and Harding, Latch 25. is very like this: W. Shelley enfeoffed divers to the Uſe of himſelf for Life, and afterwards to divers others upon Condition, That if a Ring were delivered by the ſaid W. Shelley, declaring that he intended thoſe Uſes ſhould be void, that then, &c. It was reſolved, That nothing was forfeited, but during his Life.

7 Co. 12. c. 13. b. Moor 307, 323, 336. 4 Leon. 176. Latch 30, 70, 107. 1 Jon. 135. Palm. 435.

Rainsford. I ſhall ſpeak nothing to the Fraud, becauſe that is a pure Matter of Fact, which is to be found by the Jury, and cannot in any Caſe be preſumed by the Court.

I am of Opinion, That the Judgment ought to be affirmed.

The Power of altering the Truſts reſerved by the firſt Proviſo, is inſeparable from the Perſon of Simon Maine, for it is to be by his Will. In Moor 193. the Lord Paget's Caſe, it is reſolved, That inſeparable Powers are not forfeited upon like Words as are in this Act, and ſo the ſecond Proviſo limits to him a double Power,

Firſt, Of revoking the old Truſts;

Secondly, Of limiting new. But this is to be done by Writing, under his Hand and Seal in the Preſence of two Witneſſes; ſo the Performance of this alſo is perſonal.

The Duke of Norfolk's Caſe is the very ſame, unleſs for that it was there under his proper Hand and Seal, and here under his Hand and Seal, which certainly is all one.

But admitting this Power were forfeited, yet it is not found that ever it was executed after it came to the King, which must be before any Estate could come to the King; therefore in Englefield's Case it was found, that a Ring was tendred in the Behalf of the Queen.

And whereas it was objected, That he had jus disponendi, and therefore might forfeit, as a Man shall a Term which he hath in Right of his Wife, as Dame Hale's Case in Plowden is resolved; I answer, That here he hath not jus disponendi, but rather potestatem disponendi, but that is qualified, and to be executed by certain Circumstances, which must be performed to give it Effect.

Twisden. As to the Fraud, I cannot see how the Jury could have found this a fraudulent Settlement, made to prevent a Forfeiture enacted by Parliament twenty Years after, which surely could not be without the Spirit of Prophecy.

Lane 47.

I am of the same Opinion, as to the Matter, with my two Brothers,

That Simon Maine had only a Trust in him during his own Life; and if he had brought a Bill in Equity, he could have had the Estate executed no further, and therefore can forfeit no more by this Act; and it is not always, that a Man that hath Power over Land, hath a Trust, as we may see in Cranmer's Case, Dyer 308, 309. There were as large Words in the Act of his Attainder as here.

Indeed the Argument in Englefield's Case, 7 Co. rules thus; for if a Trust had been implied in the Power of Revocation, they needed to have argued, that it should have been forfeited as a Condition; so the Duke of Norfolk's Case; for tho' the Word Use is in that Act, and not Trust as in this, yet it makes no Difference, for an Use was then the same with what a Trust is now; and tho' the Word Power had been in this Act, yet there should have been no Forfeiture in this Case, because the Execution of it is so personal and individual.

Neither is there found, That ever there was any Execution, and at most the Forfeiture could only be of what was in Simon Maine; neither can Smith execute it by Virtue of his Grant from the King; for the King's Patent conveys nothing by Implication, and shall never work to a double Intent.

Hale Chief Justice of the same Opinion.

First, Crooke is a good Lesson, for the other Trustee's Disagreement makes the Estate wholly his.

Secondly, For the Circumstances of Fraud, they are not material to be considered.

Thirdly, The Trust is wholly disposed of after the Death of Simon Maine, so that he had nothing but during his Life.

Fourthly, Then what is operated by the Attainder? Why the Truſt during Life is forfeited. Vide the Earl of Somerſet's Caſe, Hob. 214. 2 Cro. 512. But then this Truſt muſt have been executed by the Court of Revenue. 'Tis true, the Act doth not only give the Truſt, but the Term it ſelf to the King, that is, during the Life of Simon Maine: So that by this Act, ſo much of the Term is drawn out of the Truſtees, as ſerved the Truſt which S. M. had, but leaves the Reſidue of the Term to ſerve the other Truſts; ſo that the Poſſibility of the Term returns to the Truſtees, after the Death of S. M. and this appears by the Body of the Act.

Alſo this appears by the Saving in the Act. The firſt Saving, which ſaves all the Conveyances, made by the Feoffor before 29 Sept. 1659, indeed might not help, becauſe Conveyances made to the Wives, Children or Heirs, are therein excepted. But there the other Proviſo ſaves the Right, Intereſt, &c. of all Perſons whatſoever, both in Law and Equity, not derived from the Offenders ſince 25 Mar. 1646. and therein the Intereſt of Wife or Children and all are ſaved; now this Eſtate was created before, (viz.) 1643. I come now to the Proviſo's.

The firſt Proviſo determines nothing till the Time of Simon Maine's Death; and conſequently this can veſt no more to M. than he had before. For the Condition is in Expectation till he have a Son living at the Time of his Death; why then, by this there comes nothing to S. M. ſo much as in Point of Execution during his Life: By his Will he might have limited new Uſes, but he made none; and 'tis perſonal: No other Man can make his Will.

Why then all ſtands as it did, and nothing is made void till the Time of his Death, and then all is immediately executed to the Son, by Force of the firſt Conveyance. But if the Proviſo had been, That if S. M. had a Son, there all had veſted in S. M. and might have been forfeited.

The laſt Proviſo doth not create a Truſt to him, for if he had not been attainted, the Truſt ſhould not have gone to his Executors, &c. No, it creates a perſonal Power of fetching back the Former, and declaring new Truſts, obſerving the Circumſtances; upon the ſame Reaſon that this Eſtate can be forfeited, a bare Executor, (I mean, without a Deviſe of the Reſidue) might forfeit his Eſtate; this is Power, yea, and 'tis a manacled Power, it is a Kind of Truſt that he may revoke.

The Duke of Norfolk's Caſe is the ſame with this: So Harding and Warner's Caſe which was adjudged in C. Banco. tho' there were there Two to Two, and it was confeſſed by the King's Attorney in Scaccario, and the King's Attorney doth not uſe to confeſs Judgment in Caſes of great Moment, without Conſultation of the Judges. This Power was not, nor could be paſſed to the King by general Words of all Lands, &c. Conditions, &c. 3 Co. 2. a. b. See 1 Lev. 279, 280. Larch 25. Q. Palm. 429.

2. a. b. much leſs could it paſs from the King, (if it could paſs at all) by general Words; but I reſt upon this,

Firſt, That it is a Power or Kind of Truſt to revoke, but no Condition.

Secondly, At leaſt not ſuch a Condition as is given to the King.

Thirdly, If it were, it ought to have been executed by the ſame Means, as it ſhould have been by S. M.

In Englefield's Caſe there was no Pretence to have more than to execute the Condition; it ought here to have been executed in the Life of S. M. and ſo it appears to be done in Englefield's Caſe, and Harding and Warner's Caſe, for I cauſed the Caſes to be ſearched. This is like the Caſe of the Statutes of 15 R. 2. cap. 5. 1 R. 3. cap. 1. 19 H. 7. cap. 15. Theſe Statutes give the ſame Advantage to Lords, &c. where Perſons have Uſes in Lands reſpectively, as if they had the very Lands; but the Lords, &c. cannot thereby claim any greater Intereſt than the Ceſtui que Uſes had reſpectively in the Uſes.

Now in this Caſe, the Body of the Act and the Proviſo fetch back and ſave the Truſts for all but S. M. As to the Execution for the King's Debts it differs for the Proceſs; for they ever did, and do run de terris de quibus illi aut aliquis ad eorum uſum, &c. 'Tis true, in Sir Charles Hatton's Caſe it was reſolved, That the King's Debt ſhould be executed upon Land wherein he had a Power of Revocation. Vide Chirton's Caſe. 11 Co. 92. And ſo Judgment was affirmed per totam Curiam.

Termino Sanctæ Trinitatis, Anno 23 Car. II.

In Banco Regis.

Anonymus.

Amendment. 1 Danv. 338. pl. 10. 348. l. 2.

IN Debt upon a Bond. After a Verdict for the Plaintiff, the Judgment was entred quod recuperet the Sum pro miſis & cuſtag' inſtead of pro debito præd'. But this was ordered to be amended, as the Default of the Clerk, tho' in another Term; the Court having Power over their own Entries and Judgments.

Anonymus.

IN an Account it was held by the Court, That if a Man delivers Money to his Bailiff or Factor, to lay out for him in Commodities, he cannot bring an Assumpsit, but only his Action of Account.

1 Salk. 9. where there is express Promise, Assumpsit lies as well as Account.

For the Chief Justice said, That he knew such an Action once brought, and the Jury that were to try the Cause informed him, That if they should examine all the Accounts which were between the Plaintiff and Defendant, it would take up three or four Days Time. So that it hath been holden, that in such Case he should be driven to his proper Remedy, which is an Action of Account; and it may be the Factor hath laid out more Money than he received.

Eaton *versus* Barker.

IN an Action upon the Statute 17 Car. nunc, for residing in a Place where he had formerly kept a Conventicle, and demands the 40 l. Penalty.

2 Keb. 781, 788. Postea 134, 135.

After a Verdict for the Plaintiff, it was moved by him, That he might have his Costs tax'd him; for where a Statute gives a certain Penalty, if this be not paid upon Demand, he that sues for it shall recover his Costs and Damages; as North and Wingate's Case in 3 Cro. 559. is.

But the Court held, That they ought not to be given in Actions Popular, whether the Forfeiture be certain or not; but where a certain Penalty is given to the Party grieved, there he shall recover his Costs and Damages. 10 Co. 116. Vide postea 134, 135.

1 Lutw. 200. Sedgwick and Richardson. Hutt. 22. 1 Salk. 206. Shore and Maddison.

Pollexfen *versus* Pollexfen.

IN a Prohibition; the Case was, That Henry Pollexfen died Intestate.

2 Keb. 768, 778, 779. 2 Lev. 6.

Andrew, his Brother, gets Letters of Administration in the inferior Diocese.

One who pretended to be the Wife of H. surmising Bona notabilia, procured Administration from the Prerogative Court.

Andrew appeals to the Delegates, and dies.

Henry, his Son and Heir, comes in, and gets the Administration (committed in the Prerogative Court) repealed, and hath Letters granted to himself.

Upon this the Wife prayed a Prohibition, supposing that the Delegates could not proceed after the Death of Andrew; but that their Commission was determined: For their Authority is by that, to proceed in a Case between such Parties, one of which is dead.

To which it is answered, That the Commission is to hear and determine the Cause. And both in the Civil and Ecclesiastical Law, the Suit shall continue after the Death of either Party for those which shall be concerned, as appears by the Bishop of Carlisle's Case, in 2 Cro. 483. And in 1 Leon. 117 and 178, it is said, That if one Party dies ante litis contestationem, then it shall abate; but if after, it is otherwise. And there are a Number of Precedents of this Nature both in the Arches and Admiralty-Courts, &c. And in this very Case Henry Pollexfen having obtained Administration de bonis non of his Uncle Andrew in the Country, the now Plaintiff got it set aside by the Delegates, because granted while an Appeal was depending, and that upon full Debate before them, who would yet now suggest that the Appeal was determined by the Death of Andrew.

5 Co. 653, 679. Het. 107.

The Court were of Opinion, That no Prohibition was to be granted, and that the Delegates Authority to proceed in that Case continued, notwithstanding the Death of Andrew: For the Commission is to proceed in causa Administration', &c. una cum suis incidentibus vel annexis qualitercunque, &c. summarie & juxta Juris exigentiam. So that the Ecclesiastical Law is appointed to be their Rule, by the Course of which a Suit doth not abate by the Death of the Parties.

And Hale said, The Appeal is to the King in Chancery, and it is by Reason of his original Jurisdiction, and thereupon he grants a Commission to hear it. Now if he could hear it in Person, none could object but that he might determine the Cause after the Death of the Parties; and by the same Reason they may, to whom he hath delegated his Authority.

But the Attorney General coming in, and desiring to be heard in it for the Plaintiff, the Court gave further Time.

Eaton *versus* Barker.

Vide antea 133.

THE Case was now moved again upon the Statute, for coming to a Place where he had formerly preached in a Conventicle. And Exception was taken to the Declaration,

For that it was not averred, That the Defendant was in Holy Orders: For the Words of the Statute are, That if any one that hath been Parson, Vicar, Lecturer, *&c.* or within Holy Orders; and have taken upon them to preach, *&c.*

But to this it was answered, That there is another Clause in the Act, That all such Persons as shall take upon them to preach, *&c.* which is general and extends to all Men, whether in Orders or no, which have been Preachers. And of that Opinion were the Court.

It was also objected, That there was no Averment: That the Defendant was not there upon Summons, Subpœna, &c. for if so, then it is no Offence by the Act.

To which it was answered, That if the Body of the Act were, That all Persons which should resort to such Place, which were not summoned or subpena'd thither, should forfeit, &c. then 'tis true, it must be averred: But that Matter comes in a Proviso of the Act, (viz.) That it shall not extend to such Cases; and therefore if there were any such Thing, the Defendant is to plead it.

Wherefore the Court ordered Judgment to be entered for the Plaintiff. Antea 133.

Tatlow *versus* Bateman.

IN an Action of Trover and Conversion: After a Verdict for the Plaintiff, it was moved in Arrest of Judgment, That the Action was commenced in Hillary-Term, and the Conversion alledged to be the 3d of February in the same Term; and the Bill filed relates to the first Day of the Term, so before the Cause of Action. 2 Lev. 13. 2 Keb. 790. See 2 Lev. 141, 176. 2 Saund. 74, &c. 1 Danv. 24, 85.

But it was resolved by the Court, That if the Bail were entred after the 3d Day of February, it is well enough; for it is that which gives this Court Jurisdiction.

So an Ejectment may be brought upon a Lease made in the same Term: So the Statute of Limitations may be pleaded to an Action, if the Time be elapsed before the Day wherein the Bail is filed, tho' not before the first Day of the Term wherein the Action is brought: For the Action shall not be said to be depending until the Bail is filed. And upon Search it was found, That the Bail was filed the last Day of the Term.

Putt *versus* Nosworthy.

IN Debt, the Plaintiff declared upon certain Articles, whereby the Plaintiff covenanted to convey certain Lands to the Defendant, and in Consideration thereof the Defendant covenanted to pay a certain Sum to the Plaintiff. Vide antea 34, 76. 2 Keb. 795, 810.

After a General Imparlance the Defendant prayed Oyer of the Deed, whereby it appeared that the Defendant and one Vincent covenanted, that he or Vincent should pay the said Sum. And he avers, That Vincent sealed and delivered the Deed, and demands Judgment of the Bill, Et si actionem poterit habere versus eum solummodo.

To this the Plaintiff demurred; which was entred thus: Et dicit quod ab actione prædicta præcludi non debet, quia materia insufficiens, &c.

And the Defendant joins, Quod materia præallegat' sufficiens, &c. prædict' le Plaintiff ab actione prædict' præcludere.

Jones

1 Lev. 312. It was said per Holt, that a Plea which begins in Abatement and concludes in Bar, is a Plea in Bar; and a Plea which concludes in Abatement, tho' it begins in Bar, is a Plea in Abatement. 1 Show. 4.

Jones moved for the Plaintiff, That the Defendant's Plea being in Abatement, could not be admitted after an Imparlance, and that a peremptory Judgment ought to be here given; because he had concluded in Bar, as well as Abatement. For he doth not only demand Judgment of the Bill, but he saith, actionem habere non debet; and the Demurrer is joined as upon a Plea in Bar.

And it was agreed, That if a Man concludes a Plea in Abatement, as in Bar; if it be against him that pleads it, Judgment peremptory is to be given. But here the Conclusion is not actionem habere non debet; but 'tis added, versus eum solummodo. So if a Man begins a Plea in Abatement, actio non, &c. Judgment peremptory ought to be thereupon given.

But then it was said, That although it were too late to urge this Matter in Abatement; yet it appeared upon the Deed shewn, That the Plaintiff's Declaration was insufficient: For it being, If the Defendant, or one Vincent should pay; and the Plaintiff alledging, that the Defendant had not paid, is not enough to intitle him to his Action, albeit that Vincent were no Covenantee, or had ever sealed and delivered.

To which it was answered, and so resolved by the Court, That it appeared by the Frame of the Deed, that Vincent was as well Party, as the Defendant; and it is too late now to aver, that he did seal and deliver; so it shall be taken that he did not, and then it remains the sole Covenant of the Defendant.

And though the Words are, That the Defendant or Vincent shall pay; that is no more than the Law would have implied, if Vincent had sealed.

Postea 162. 2 Keb. 795.

And the Chief Justice cited one Cartwright's Case, in Debt for Rent, where the Indenture of Lease was a Demise from Cartwright, and another Jointenant with him, reserving a certain Rent to them both; but the other never sealed. Cartwright brought Debt, and declared of a Demise of the Moiety, and Reservation of the Moiety of the Rent. And upon Nil debet the Matter aforesaid was specially found: And it was moved,

First, That the Lease being by Indenture, Whether the whole Rent were not well reserved to Cartwright, as by Estoppel, or whether it were not good to him, as to a Stranger, for one Moiety? or whether it should not be good to him as an intire Thing, which was reserved to him as well as the other.

But the Court resolved, That it was good only for a Moiety as he had declared: For there being an Expectation of the other's Sealing, which never was done, the Deed, as to one Moiety of the Land, and the Rent reserved, had no Effect. And where one declares against one upon a Deed, whereby it appears that another was bound with him, it shall not be intended that the

other ſealed, unleſs averred on the Defendant's Side. Otherwiſe where the Declaration is upon Matter of Record.

And it was held by the Court, That if the Declaration were defective in this, yet it was but in Matter of Form: For he ſaith, That the Defendant did not pay, ſed adhuc injuſte detinet, which is an Averment, tho' unformal, that the Money is not yet paid neither by the one nor other. And ſo it hath been held, where in Debt againſt the Executor it is averred, That the Executor did not pay it, & adhuc injuſte detinet, and not averred, that the Teſtator had not paid in his Life-time, that after a Verdict this is aided. Demurrer in Bar to a Plea in Abatement makes a Diſcontinuance. 1 Salk. 218. 1 Show. 255. Parter and Davey. Antea 119.

And they held, That a Judgment ought to be given quod reſpondeat ouſter; for the Joining Demurrer as upon a Plea in Bar, is not material; beſides the Fault begun on the Plaintiff's Part. Antea 77. 1 Lutw. 197.

Tailour *verſus* Fitzgerald.

ERror upon a Judgment given in the King's Bench in Ireland, in Ejectment; where the Plaintiff declared, That J. S. demiſed to him per quoddam Scriptum obligatorium, &c. habend' a die datus Indenturæ prædict'. 2 Keb. 796.

And upon Not guilty pleaded, it was found for the Plaintiff, and he had his Judgment.

It was aſſigned for Error, That there was no Time when this Leaſe ſhould commence; for it was Habend' after the Date of the aforeſaid Indenture, and there was none before, it being Scriptum obligatorium, and not Indenturam.

But the Court reſolved, That the Writing ſhould be intended an Indenture, and tho' called Scriptum obligatorium, which is improper; yet it may be ſaid every Deed obligeth, or if it ſhall not be intended Indented, then the Leaſe ſhall commence preſently, as if it had been Habend' from the 40th of September. Antea 83, 84.

Croſſing *verſus* Scudamore. Trin. 22 Car. 2. Rot. 871. in Banco Regis.

IN Treſpaſs, Quare clauſum fregit, the Defendant pleaded, that the Place where was the Freehold of Sir Thomas Hooks, and that by his Command he entred. 1 Mod. Rep. 175. Carter 137. 2 Vent. 348.

The Plaintiff traverſeth, That it was the Freehold of Sir T. H. And thereupon this Special Verdict was found. 2 Keb. 754, 784. 2 Lev. 9.

That Nicholas Heale was ſeiſed in Fee, and that 16 Dec. 1640. he made a Deed to Jane Heale, enrolled within ſix Months, by which the ſaid Nicholas did (for and in Conſideration of Natural Love, Augmentation of her Portion, and Preferment of her in Marriage, and other good and valuable Conſiderations) give, grant, bargain, ſell, alien, enfeoff and confirm unto the ſaid Jane Heale, and her Heirs. Then they found there was a Covenant, 3 Lev. 372. Oſman and Sheafe. See 1 Lev. 213, 225, &c. N. Lutw. 243. Poſt. 372, &c. ib.

that the ſaid Jane Heale ſhould, after due Execution, &c. quietly enjoy, &c. and alſo a ſpecial Clauſe of Warranty. And that the Deed was enrolled within ſix Months, and that there was no other Conſideration of Making the Indenture than what was expreſſed. And if it were ſufficient to convey the Premiſſes to the ſaid Jane, they found for the Plaintiff; if not, for the Defendant.

And it was argued by Winnington for the Plaintiff. He agreed that it could not take Effect as a Bargain and Sale, becauſe no Money was paid; but argued, that the Deed ſhould enure as a Covenant to ſtand ſeiſed.

It is a Ground in the Law, That the Intention of the Parties ought to guide the Raiſing of Uſes, and the Conſtruction how they ſhall enure. Co. Lit. 49. Roll. 2d Part 789. and to give the Effect the Words ſhall be diſpoſed to other Conſtruction than what otherwiſe they would import. As if a Man demiſes grants, and to Farm lets certain Lands in Conſideration of Money, and the Deed is enrolled; this is a good Bargain and Sale. So if a Man covenants in Conſideration of Money, to ſtand ſeiſed
7 Co. 40. c. to the Uſe of his Son. 8 Co. 93. Fox's Caſe, 2 Roll 789. It is ſaid, Nota per Curiam, if it appears that it was the Intent of him that made the Deed, to paſs the Eſtate, according to Rules of Law, it ſhall paſs though there be not formal Words.

Again, The Conſideration expreſſed in this Deed, is purely applicable to a Covenant to ſtand ſeiſed, and a Deed ſhall enure upon the Conſideration expreſſed rather than upon one that is implied. As in Bedell's Caſe, 7 Co. 40. If the Father, in Conſi-
Winch 60. deration of 100 l. paid, covenants to ſtand ſeiſed to the Uſe of his Son, and the Deed is not enrolled, nothing ſhall paſs: But where there are two Conſiderations expreſſed, there the Uſe may ariſe upon either. As if the Father in Conſideration of Blood and 100 l. paid by the Son, covenants to ſtand ſeiſed, &c. and the Deed is not enrolled; yet the Uſe ſhall ariſe, as upon a Covenant to ſtand ſeiſed. Pl. Com. 305. And ſo it was adjudged between Watſon and Dicks in the Common Pleas, 1656. The Father by Deed in Conſideration of Love and 100 l. paid by the Son, conveyed Land to him, with a Letter of Attorney in the Deed to make Livery; in that Caſe the Son hath his Election to take by the Enrolment or Livery, which ſhall be firſt executed. 2 Roll. 787. pl. 25.

But it hath been objected here, That there is a Clauſe of Warranty in the Deed, which ſhews that the Parties intended a Conveyance at the Common Law; for if it enure by Way of Covenant to ſtand ſeiſed, the Warrant can have no Effect but to rebut. Alſo there is a Covenant for quiet Enjoyment after Sealing and Delivery of the Deed, and due Execution of the ſame;

which shews the Parties had a Prospect of Executing it by Livery, &c.

To which he answered, That such remote Implications as those shall never make a Deed void against an express Consideration, upon the which an Use may arise. 'Tis true, if there had been a Letter of Attorney in the Deed, it might have been void, unless Livery had followed. As if the Father by Deed grants Land to the Son, and a Letter of Attorney in it to make Livery; if none be made, nothing passes. Co. Lit. 40. a. The Authorities which have been cited on the other Side are, first Pitfield and Pierce's Case, 2 Roll. 789. where the Father by Deed-Poll, in Consideration of Blood, did give, grant, &c. (as in our Case) to his Son, Habend' after his Decease, and a Proviso in it, That the Son should pay a Rent during the Father's Life. March Rep. 53.

It was adjudged, That the Lands should not pass in that Case by Way of Covenant to stand seised. But in that Case the Conveyance was repugnant to the Rules of Law, for that it was Habend' the Land after the Death of the Grantor, and also repugnant in it self. For notwithstanding that it reserves the Land to the Father during his Life, yet it provides for a Payment of Rent to him; wherefore the Law would not help out a Deed so contradictory and repugnant by Way of raising an Use.

The other Case relied upon, is between Foster and Foster, Hill. 13 of this King, in this Court, in Ejectment. The Case was; The Mother, for divers good Considerations and 20l. paid, did by a Deed which was entitled, Articles of Agreement, demise, grant, bargain, sell, assign and set over, to the Son and his Heirs for ever, certain Lands; the said Margery the Mother quietly enjoying the Premisses during her Life. 1 Lev. 55. 1 Sid. 82. Raym. 43.

The Court resolved, That it should not amount to a Covenant to stand seised; for they were but intended as Articles of Agreement, and preparatory for a further Conveyance. So the Case differs very much from ours, as also that it reserves the Land to the Mother during her Life.

The Case also of Osborn and Bradshaw in 2 Cro. 127. hath been cited, Where the Father, in Consideration of Love which he bears to his Son, and for natural Affection to him, bargained and sold, gave, granted and confirmed Land to him and his Heirs; the Deed was enrolled. It was held, The Land should not pass unless Money had been paid, or the Estate executed. This Case cannot be urged as any great Authority; for it appears that the Son was in Possession. Therefore the Court adjudged, That the Deed should be a Confirmation: And it being clear that Way, they had not much Occasion to insist upon or debate the other Point. And he relied upon Tebb and Peplewell's Case, as an Authority in the Point. 2 Roll. 786. where there was a Clause of Warranty in the Deed, and an Enrolment within six

Months, as in the Case at Bar: But they resolved there, If a Letter of Attorney had been in the Deed, it should not have been construed a Covenant to stand seised; and therefore he prayed Judgment for the Plaintiff.

Raym. 46. 1 Sid. 26. Finch, Attorney General, contra. The Lands here cannot pass by Bargain and Sale, there being no Money paid, which I find is admitted by the other Side; neither shall it amount to a Covenant to stand seised. There are five Things necessary to raise an Use by Way of Covenant:

First, A sufficient Consideration.

Secondly, A Deed; as in Callard and Callard's Case, in 3 Cro. and in Popham's Reports; and hath been often resolved since.

Winch. 59, 60.

Thirdly, A Seisin in the Covenantor, of the Lands at the Time of the Deed: For a Man cannot covenant to stand seised to an Use, of Lands which he shall after Purchase.

Fourthly, A clear and apparent Intent.

Fifthly, Apt and proper Words. And the Two last Things are wanting in our Case.

1 Mod. 178. I agree, the Word Covenant is not necessary, so there be other Words sufficient in Law, and to declare the Party's Intent; for all Words will not serve. A Man covenanted upon good Consideration, that his Feoffees should stand seised: It was resolved, That no Use should arise upon it, 1 Cro. 856. So Sir Thomas Seymour's Case, where a Covenant was upon good Consideration to levy a Fine to certain Uses, and no Fine was after levied: It was resolved, That the Covenant did not raise any Use, Dyer 96. Therefore 'tis usual to express in such Deeds of Covenant, that if the Conveyances therein contained be not executed, that then the Party shall from henceforth stand seised. And where it is said in Vivian's Case, Dyer 302. One having given, granted and released to his Brother and his Heirs certain Manors, and no Livery made, that Plowden would have averred that the Deed was made pro fraterno amore, and so should raise an Use; under the Favour of the Court I deny that Opinion of Plowden to be Law. And in Tebb and Peplewell's Case it is said, That the Land was enjoyed against the Release. And in Moor, pl. 267. One covenanted in Consideration of Marriage, to let his Land descend, remain or come to his Daughter: It was resolved, No Use did arise thereupon.

Winch. 61.

3 Lev. 126. Hale versus Cockerill so resolv'd.

In this Conveyance there are not any Words that sound in Covenant; the only Word that looks towards an Use is the Words Bargain and Sell. And in Ward and Lambert's Case, in 3 Cro. 394, it is held, That if one gives, or bargains and sells Land to his Son, it shall not amount to a Covenant to stand seised, for Want of apt Words.

Now the other are all Words of Common Law, Give, Grant, Alien, Enfeoff and Confirm. There is also a Clause of Special Warranty in the Deed, and a Covenant to make further Assurance by Fine, Recovery, &c. as great a Preparation at Common Law as could be. And if the Parties intend the Land shall pass at the Common Law by Transmutation of Possession, there shall no Use arise. Co. Lit. 49. Charter of Feoffment to the Son, it shall raise no Use if no Livery be made.

The Word Dedi in this Deed imports a General Warranty, which is not qualified by the Special Warranty after; yet if the Land pass by Way of Covenant to stand seised, there can be only a Rebutter, and so no use of the General Warranty. The Authorities since have not been concurrent with Tebb and Peplewell's Case, but contrary to it. And I rely upon the Cases of Pitfield and Pierce, and Forster and Forster in this Court, which have been remembred on the other Side, but not answered. And whereas it is said, That the Habend. is after the Death of them which conveyed the Land; they are in that Respect stronger than the Case at Bar; for by that it appears, they could not intend a Conveyance at the Common Law, which doth not allow such Kind of Limitations, therefore it must be by Way of Use, or no Way: Yet it was resolved they should not pass so.

It would introduce universal Ignorance and Carelesness, in such as draw Conveyances, if the Court should apply their Art to give them Effect, however they were penned, and it is a Rule, Politia legibus, non leges politiis adaptantur.

The Court after the Hearing the Case twice argued, were all of Opinion, That the Land should pass by Way of Covenant to stand seised; and Hale cited Hob. 277. who doth there commend the Judges who are curious, and almost subtil to invent Reasons and Means to make Acts effectual, according to the just Intent of the Parties. 2 Vent. 318, 149, 260, 266. 1 Mod. 178.

They all held clearly, That Words proper for a Conveyance at Common Law would raise an Use, as Demise and Grant have been adjudged to amount to a Bargain and Sale without other Words; And they said Pitfield and Pierce's Case was adjudged upon the absurd Contrivance of the Conveyance, and so Forster and Forster's Case in this Court; and for that in that Case the Deed was Articles of Agreement, preparatory to what the Parties intended after, and the Case in Moor, Pl. 267. where there was a Covenant in Consideration of Marriage, to suffer the Land to remain, descend or come to the Daughter; no Use did arise there, for the Incertainty how it was intended the Daughter should take.

And

And they said, That if they should not construe an Use to arise by such Conveyance, as in the Case at Bar, it would overthrow all Conveyances by Lease and Release.

And for the Objection of the Warranty in the Deed, it is well known there is so in most Conveyances to Uses. Wherefore they gave Judgment for the Plaintiff.

1 Mod. 175, 179. Note, This Judgment was afterwards affirmed upon Error brought in the Exchequer-Chamber.

Anonymus.

See 1 Salk. 370, 373, 380. AN Indictment was brought, for using of a Trade to which he had not been bound an Apprentice.

4 Mod. 145, 146. 5 Mod. 425. 6 Mod. 220. It was moved to quash it, because it was not alledged, That he did use the Trade, 5 Eliz. for if he did, he is excepted out of the Statute.

But the Court did not much regard that Exception, tho' they said it had been often allowed; but it cannot here be intended, it being so long since the Statute was made.

Secondly, It was for using the Trade Aromatarii, without an Anglice; so it could not be known what Trade was meant, and tho' that Word is often used for a Grocer, yet it must be so Englished, or else it shall not be taken for that Trade more than another.

And for this Cause, the Court quashed the Indictment.

Raym. 58. 1 Sid. 90, 154. Note, If a Man be taken up on a Warrant de securitate pacis, or any criminal Cause, he is not to be charged with Actions, unless the Court gives Leave, which they will rarely do.

The Case of the Heirs of the Earl of Southampton.

2 Keb. 806. KIng James by his Letters Patents enrolled in this Court, granted to the Earl of Southampton, all Deodands within the Manor of Ditchfield.

An Inquisition was certified here, That a Deodand was forfeited within the said Manor, and Process went out thereupon.

Vide Stat. 4 & 5 W. & M. Car. 22. which directs how these Grants shall be pleaded. The Court were moved in Behalf of the Daughters and Heirs of the Earl, whether they should be driven to set forth their Title in Pleading; for if so, the Charges would far exceed the Value of the Deodand, and it would be very inconvenient, that every new Heir should be forced to plead upon every Deodand that happens.

But the Court said, In regard the Letters Patents are here enrolled, and that it appeared by the Inquisition, that this Deodand was forfeited within the Manor; it should suffice without Pleading, if the Heirs satisfied the Office of their Title without Pleading; as where Conusance of Pleas have been once allowed, it is sufficient

cient in another Action to shew the former Roll where it was allowed.

Nota. An Indictment for a Nusance in the Highway. The Court will not quash this Indictment upon Motion, unless certified that the Nusance is removed. 1 Salk. 358. 6 Mod. 163. 1 Hawk. c. 76. per totum.

But they will reverse it upon a Writ of Error, (if there be Error in it) without any such Certificate. 2 Hawk. c. 25. §. 148, 149, &c. c. 34. §. 1.

Ile's *Case*.

A Mandamus was prayed to the Church-wardens of the Parish of Kinsmere in Hampton, to restore John Ile to the Place of Sexton there, and it was granted. Postea 153. Raym. 211. 2 Keb. 802, 807, 820.

And so the Court said it hath been for a Parish-Clerk, Church-wardens, and a Scavenger. 3 Mod. 335. 2 Sid. 112.

But it was denied to one, who pretended to be Waiter of the Lord Mayor's Waterhouse; for that they said was not an Office, but a Service. 2 Sid. 112. 2 Lev. 18.

Anonymus.

A Fine was levied of Lands in Blandford Forum.

Resolved, That this should not pass Lands in a Hamlet of that Town, there being Constables distinct in Blandford Forum from others that were in the Hamlet; so that they were as two Mills. 2 Mod. Rep. from 233 to 239. 47, 49. Postea 170, 171.

But if a Fine be levied of Lands in a Parish, it shall extend to all the Mills within the Parish. 2 Vent. 31. 2 Cro. 120. 1 Mod. 78, 117, 118, 206.

The Lord Hawley's *Case*.

A Mandamus was granted to restore him to the Recordership of Bath. 2 Keb. 770, 796. 2 Salk. 430.

The Corporation returned, That they were incorporated by Letters Patents of Queen Elizabeth, which empowered them to chuse probum & discretum hominem in legibus Angliæ peritum to be their Recorder, and to hold a Court twice every Week before the Mayor, Aldermen and Recorder, or any Two of them, whereof the Mayor to be one.

That the 1st of August 15th of this King he was made Recorder by the Committee, upon the Act of this King for regulating of Corporations; and that he continued in the Office secundum locationem illam until the 25th of December, 21st of the King, and that from the 1st of August, 15th of the King, to August 21. he absented himself by the Space of five Years without any reasonable Cause, and that he is nullo modo peritus in lege; and that at a Court,

Court, Auguſt the 21ſt, they ſummoned him to appear ſome Days before, and he not coming, they amoved him from his Office, the 30th Day of the ſaid Auguſt.

After this Return filed it was moved,

Firſt, That it was repugnant, for they returned, That the Lord Hawley continued in his Office until the 25th of December, 21ſt of the King, and after that they amoved him in Auguſt, 21ſt of the King. To which it was anſwered, That in regard upon the whole Return it appears, that he was amoved, though it be ſaid he continued after, that is not material but Surpluſage: As where a Jury gives a general Verdict, and yet diſcloſes ſpecial Matter diſagreeing to it; the Court judges according to the Special Matter; or elſe they might mean that though he were turned out, yet he did continue exerciſing it de facto. And the Court were of Opinion, That the Contradiction in the Return was not material: For Hale ſaid, If it ſhall be taken that he is yet in, then there is no Need of a Mandamus.

Again, it was ſaid, That the Matter of Abſence was not ſufficiently returned; for it appears by the Charter, that the Preſence of the Recorder is not neceſſary to the Holding of the Court; for it is to be held before the Mayor, Aldermen and Recorder, or any Two of them, whereof the Mayor to be one. Then they have not returned, that they held a Court in all that Time, neither have they returned, that any Miſchief, or Inconvenience happened to them by his Abſence.

A Park-keeper ſhall not forfeit his Office for Non-attendance, unleſs a Deer be killed, or the like, in his Abſence. Alſo it is returned from the 1ſt of Auguſt 15 Car. to the 1ſt of Auguſt 21, he abſented himſelf for five Years, and he might be out of Town five Years in ſix Years Time, and yet be there every Court-day.

And for the other Cauſe of Removal, that he was not peritus in lege; it was ſaid, That the Corporation being Laymen, could not return a Thing whereof they were not Judges: That the Return was too general, nullo modo peritus; but ought to have ſet forth ſome ſpecial Fact, whereby it might appear to the Court.

Alſo, They could not remove him for a Cauſe which they could not examine; he was put in by Commiſſioners, authorized by Act of Parliament, which it was ſaid did capacitate implicitely him; at leaſt their Act ſupplied the Election of the Town, which if it had been, would have diſpenſed with his Diſability. And the Caſe of Bernardiſton, Recorder of Colcheſter was much relied upon, who in 1655, brought a Mandamus to be reſtored to his Office. And it was returned, That he was not learned in the Law, and that one being indicted before him, upon the Statute of 1 Jac. of having two Wives, and convicted, he denied him

Clergy; and alſo they returned, That he abſented himſelf for nine Months; and notwithſtanding, by the Judgment of the Court he was reſtored.

It was ſaid by Sir William Jones on the other Side, That the Abſence as it was returned, was a ſufficient Cauſe to remove him; for it is returned, That without any reaſonable Cauſe ſeipſum elongavit by the Space of five Years, which muſt be intended five Years continued, and not made up by Fractions; (and ſo held the Court in that Caſe) and executionem officii ſui totaliter neglexit: Now, tho' his Preſence be not of abſolute Neceſſity to the holding of the Court, yet it is highly convenient that he ſhould be there, ſeeing the Charter gives ſuch large Juriſdictions, to determine all Cauſes, (excepting ſuch as concern Freehold) according to Law.

The Court here alſo muſt judicially take Notice, That the Office of Recorder is concerned in other Matters, beſides the Adminiſtration of Juſtice in the Court; for he is as it were the Common Counſel of the Corporation.

And whereas it hath been objected, That it is not returned, that they had held a Court during his Abſence, or that any Prejudice had enſued.

Alſo, That it muſt be intended that there were Courts, when they have returned the Charter, which empowers them to hold one twice every Week; and 'tis returned, that he abſented himſelf in regiminis civitatis detrimentum, &c. and it's apparent they muſt ſuffer Prejudice by his ſo long Abſence. If a Park-keeper ſhould deſert his Office for five Years, it would make a Forfeiture without Special Damage.

The other Matter returned alſo, That he is nullo modo peritus in lege, is good Cauſe; for the Charter appoints them to elect ſuch an one; ſo that one who is not ſo qualified is not capable, and the Act of this King authoriſes Commiſſioners but to do what the Corporation might have done.

It is apparent, That the Office requires an Officer who hath Skill in the Law; he hath no Power to make a Deputy by the Statute of 31 Jac.

Cauſes in many Caſes are not to be removed out of Corporation-Courts, where they are held before an Utter Barriſter; ſo that 'tis far better for the Corporation to have ſuch an one their Recorder. Style 452.

Twiſden ſaid, The Caſe of Bernardiſton differed, (beſides that, he apprehended he had much of the Favour of the Times in it,) for he that was tried before him for having two Wives, was arraigned before him, not as Recorder of Colcheſter, but as a Commiſſioner of the Gaol-Delivery; neither was it returned, That he was ſummoned, which was ſaid not to be material, becauſe they could not have examined the Matter. It was returned alſo, That he abſented himſelf for nine Months; but not ſet forth that

any Court was held during that Time, or any Occaſion for it.

He ſaid, That Cholmley, Recorder of Lincoln, was turned out of his Place, for trying the Acceſſary before the Principal; and altho' there be no Special Fact returned here, yet it may be tried in an Action upon the Caſe.

The Court ſaid, They would look upon Bernardiſton's Caſe. Et adjornatur.

Anonymus.

Antea 1. Lev. 60. 2 Keb. 779, Raym. 3. 1 Salk. 31. 2 Vent. 181. 6 Mod. 24, 25, 424. Stat. 4, 5 Annæ. §. 18, 19, 20.

A Prohibition ſhall not go to the Admiralty to ſtay a Suit there for Mariners Wages, tho' the Contract were upon the Land. For,

Firſt, It is more convenient for them to ſue there, becauſe they may all join.

Again, according to their Law, If the Ship periſh by the Mariners Default, they are to loſe their Wages; therefore in this ſpecial Caſe the Suit ſhall be ſuffered to proceed there.

Dyer *verſus* Eaſt.

3 Inſt. 177. Dyer 275. 3 Cro. 680.

Where by the Statute of E. 6. it is ordained, That ſtriking in the Church-yard ſhall be Excommunication ipſo facto, this tho' it takes away the Neceſſity of any Sentence of Excommunication, yet he that ſtrikes doth not ſtand excommunicated, until he be thereof convicted at Law, and this tranſmitted to the Ordinary.

Theodore Morris's *Caſe*.

2 Keb. 724, 797.

Certiorari. Antea 63, 93.

He was indicted of Murther in Denbigh, and obtained a Certiorari to remove it into this Court, in order to have it tried in an adjacent Engliſh County.

And it was moved whether by by Law it might be?

The Statute of 26 H. 8. cap. 6. empowers the next Engliſh County to take Indictments of Treaſons and Felonies committed in Wales, and to try them; but here the Indictment was taken in a Welſh County. Herbert's Caſe in Latch was cited, who was indicted at Montgomery, and tried at Salop; and Plowden, Matters del corone avenants a Salop; and Southley and Price's Caſe, 3 Cro. is, That the Statute doth not extend to a Trial upon an Appeal. In Chedley's Caſe a Certiorari was granted, as here, to remove an Indictment found in Angleſey, which was afterwards tried in the next Engliſh County, 3 Cro. 331.

And the Court held, that ſo it might be here. Antea 93.

Large

Large *verſus* Cheſhire.

HILL. 22. & 23 Car. 2. Rot. 520. In Covenant the Plaintiff declared upon Articles of Agreement, between him and the Defendant, whereby the Defendant covenanted to pay him ſuch a Sum, the Plaintiff making to him a ſufficient Eſtate in ſuch Lands before the Feaſt of St. Thomas next enſuing the Date of the Deed; and then he ſaith, That licet he the Plaintiff, ſemper a tempore confectionis ſcripti paratus fuit ad performand' all the Agreement of his Part uſque ad diem exhibitionis billæ, the Defendant had not paid him the Money. 2 Keb. 801. Vide 1 Lev. 274. Poll. 14. Raym. 183. 1 Saun. 319, 320. 2 Danv. 229.

The Defendant pleaded, quod ipſe obtulit ſolvere the Money aforeſaid, apud Derby, ſi le Plaintiff faceret ei bonum & ſufficient' Statum de & in Præmiſſis, *&c.*

The Plaintiff replied, Proteſtando that the Defendant did not offer the Money; pro placito that he the 21ſt of Decemb. apud Derby fecit & ſigillavit quandam Chartam Feoffamenti, whereby he conveyed the Premiſſes to the Defendant, and that he came to the Premiſſes an Hour before Sun-ſet the ſame Day, paratus ad deliberand' ſeiſinam, *&c.* & quod Defendens nec aliquis ex parte illius venit ad recipiend', *&c.* to which the Defendant demurred, and adjudged for him.

It was held, That theſe Words, ipſo faciente bonum ſtatum, were a Condition * precedent to the Payment of the Money; therefore the Plaintiff in his Declaration ſhould have averred the Performance of it particularly, and not by ſuch general Words, that he had done all on his Part. * 1 Lutw. 253. Poſtea 177. 1 Saund. 320. &c. ibid.

And it differs from the Caſe, where in Aſſumpſit the Plaintiff declared, That the Defendant in Conſideration the Plaintiff ſhould permit him to enjoy ſuch Land for ſeven Years, that he would pay him pro quolibet anno 20 s. and the Action was held well brought within the ſeven Years, for that it was an Executory Contract for every of the Years, according to the Intention of the Parties. 3 Salk. 95.

It was reſolved alſo, That the Replication was inſufficient; for that the Plaintiff having Election to make what Conveyance he pleaſed, he ought to have given Notice to the Defendant, that he would execute this Charter of Feoffment by Livery, for it might have been by Enrollment. But Hale ſaid, the Time When, in this Caſe, was not neceſſary to be in the Notice, becauſe the Charter was ſealed and delivered upon the extream Day limited by the Agreement, ſo the Defendant knew it muſt be upon that Day; ſo for the Place, becauſe it is a local Thing, and muſt be done upon the Land.

But because he had set forth no Notice given to the Defendant, that he would make Livery, the Replication is insufficient; as if a Man be bound to levy a Fine, he must shew whether he will do it in Court, or by Dedimus; and the Court said, If the Defendant had refused to accept of Livery, the Plaintiff might as well have brought the Action as if he had actually made it.

Sacheverel *versus* Frogate.

Postea 161. 2 Saund. 367, Raym. 213. 2 Keb. 798, 819, &c. 2 Lev. 13. Antea 126.

IN Covenant the Plaintiff declares, That Jacinth Sacheverel was seized in Fee, and demised to the Defendant certain Lands for 21 Years, rendering to him, his Executors, Administrators and Assigns 120 l. annually during the Term: By Force of which Lease the Defendant entred, and that J. S. devised the Reversion to the Plaintiff, and died; and for Non-payment of Rent accrued since his Death he brought the Action, and to this Declaration the Defendant demurred.

And it was argued by Winnington, That the Rent determined by the Death of the Lessor, as where the Lessor reserves the Rent only to himself, 1 E. 4. 18. 27 H. 8, 19. Dyer 45. Com. 171; the Heir shall not have it; for Reservations are taken strongliest against the Lessor; so where the Reservation is to the Lessor, his Executors and Assigns, it continues but for his Life. 1 Co. Lit. 47. a.

'Tis true, Here is also added durante Termino; and in Mallory's Case, 5 Co. where the Reservation was to the Abbot, or his Successors during the Term, it went to the Successor; but that was because they expounded the Word, OR, as a Conjunctive, for Antea 62. if Successor had been left out, I suppose it would have been resolved otherwise, Richmond and Butcher's Case, 1 Cro. 217, is in Point, That the Heir shall not have it. So 2 Roll. 451. and Doderidge gives the Reason, That the Party by his Words has abridg'd what otherwise the Law would make; and so it is held in Bland and Inman's Case, 3 Cro. 288; where a Man possessed of a Term for 100 Years, did join in a Lease with his Wife, solvendo so much Rent during the Term to him and his Wife, and the Survivor of them; that the Executors should not have this Rent.

Hunt contra. In the Reservation of a Rent, there is no Need of Words of Limitation: If the Words are Yielding and Paying generally, without saying to whom, it is a good Reservation to all those to whom the Reversion shall come; so if two Joint-Tenants reserve a Rent generally, it is good to both.

Here are sufficient Words to declare the Intent that the Rent should continue, and then they shall not be restrained by any affirmative Words after; and where Executors, Administrators and Assigns are named, that shall be taken as an Enumeration of some Particulars, without any Intent to exclude others; as where

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a Man made one his Executor of all his Corn and moveable Goods; this gave him an Intereſt as Executor in all his Chattels, as well as in thoſe which were named. 3 Cro. 292. Roſe and Bartlet's Caſe. 6 Co. Whitlock's Caſe. If the Reſervation be to ſuch Perſons to whom the Reverſion ſhall come, this is good to the Heir and all others. If a Leaſe be made, excepting a Chamber to the Leſſor; this remains excepted after the Death of the Leſſor. 7 H. 8, 19.

Hale. If this were res integra, it might be a ſtrong Caſe for the Plaintiff; but the Authorities go the other Way. Sed adjornatur. *Vide* poſtea 161.

Termino Sanctæ Michaelis, Anno 23 Car. II.

In Banco Regis.

Dorrel *verſus* Jay.

THE Plaintiff declared, That Communication being between J. S. and the Defendant, of the laſt Will of John Rowe, Eſq; deceaſed, That the Defendant ſaid of the Plaintiff, He hath forged his Uncle *Rowe's* Will. Antea 117. Vide 1 Danv. 146.

After Verdict for the Plaintiff it was moved by Serjeant Ellis in Arreſt of Judgment, That it is not averred that John Rowe was dead at the Time of the ſpeaking of the Words. Sed non allocatur; Antea 117.

For it is ſaid, there was a Diſcourſe of the Will of John Rowe Eſq; defuncti, and there defuncti goeth to the Deſcription of his Perſon, and expreſſeth that he was then dead, and not only when the Action was brought.

Beſides the Words imply it; for if he were not dead, he could not forge his Will. Vide antea, Philips and Kingſton's Caſe. Paſch. 23. Car. Antea 117.

The Caſe of St. Katherine's Hoſpital.

THE Caſe, as it appeared upon the Evidence of a Trial at Bar in Ejectment, for Part of the Lands of the Hoſpital, between the Leſſee of Sir Robert Atkins the Queen's Solicitor, and George Mountague, Eſq; was this. T. Jones. 176. 2 Keb. 808, See 1 Chan. Caſes. 214, 215.

Eleanor, Queen Dowager of Henry the Third, in the Year 1273, founded (or at leaſt amply endowed) this Hoſpital, reſerving to her ſelf during her Life, & Reginis Angliæ nobis ſuccedentibus,

the Nomination of the Maſter to this Hoſpital; which was incorporated, and the Grants to it confirmed by the King's Letters Patents.

In the Year 1660. Henrietta Maria, Queen Mother, granted the Maſterſhip of this Hoſpital to H. Mountague for Life; and the King in the ſame Year reciting his Mother's Grant, and that the Right of it belonged unto her, confirmed it by his Letters Patents; and did further by the ſame Letters Patents grant unto the ſaid H. M. the ſaid Maſterſhip.

Afterwards the King married Katherine the now Queen Conſort, and ſhe granted the Maſterſhip to Sir Robert Atkins for his Life.

It was urged on the Part of the Plaintiff, That the Right of appointing the Maſter was only in the Queen Conſort; for Queen Eleanor reſerved it to her ſelf and her Succeſſors, Queens of England; and Queen of England is not Queen Dowager, but Queen Conſort. And tho' Land cannot be limited to deſcend in ſuch Manner without Act of Parliament, as is reſolved in the Prince's Caſe in 8 Co. yet ſuch a Deſultory Inheritance (as this was called) may be created of a Thing de novo: As a Rent may be granted and appointed to ceaſe during the Minority of the Heir; or upon the firſt Foundation of a Church, the Patronage may be reſerved to A. and if he preſents not within four Months, then to B. So in the Book of E. 3. it was limited, that the Chapter ſhould preſent while the Deanery was vacant. And to prove that this Clauſe had been conſtrued only to intend the Queen Conſort, a Record was ſhewn of a Caſe between Luttiſhall and Baſſe, in 4 E. 3. where

Luttiſhall exhibited a Petition to the King, which was intitled, To our Lord the King and his Council. Which Petition was ſent into the King's Bench under the Great Seal, in which Luttiſhall ſets forth, that Queen Iſabel, Mother to Edward the Third, had granted him the Maſterſhip of the Hoſpital for his Life, and that he was diſturbed by Baſſe; and Proceſs was iſſued out againſt Baſſe, who appeared and pleaded a Grant from Queen Philippa, Wife to Edward the Third; and a Writ came from the King, reciting, That the Nomination of the Maſter did belong to Queen Iſabel, and ſo three Writs more came after to the ſame Purpoſe, and expreſſing that the Matter was delayed ad ineſtimabile damnum Conſortis noſtræ; and in that Record, Iſabel (tho' living) is ſtyled nuper Regina, and Luttiſhall that claimed under her was barred.

On the other Side, Divers Grants were produced during the Time that there were no Queens, by the King, and ſometimes by a Queen Dowager, during the Time that there was a Queen Conſort, And theſe Points following were agreed by all the Court.

First, That an Inheritance might be limited in this Manner in a Thing de novo.

Secondly, That this Reservation being to Queen Eleanor, and her Successors, Queens of England, did not exclude Queen Dowagers, and extend only to Queen Consorts. For,

1. A Queen Dowager is Queen of England, and (as Hale said) hath the Prerogative to sue in the Exchequer.

2. When once she is so qualified as to have the Estate vest in her, it shall continue, tho' she doth not remain in the same Capacity.

As where one hath Power to limit an Estate to his Wife, it may very well continue to her after the Coverture.

Thirdly, It was much observed and relied upon, That Queen Eleanor was only Daughter at the Time of the Foundation, and so could never be intended to exclude such Queens as should succeed her in that Capacity.

Fourthly, During such Time that there should be no Queen, it was held, That the King was to constitute the Master; for he is Heir to Queen Eleanor. And whereas it was urged for the Plaintiff, That the King had not Power to dispose of the Place, but only by Way of Provision till such Time as a Queen should be; so as to commit the Care of the Power to one, but not the Interest of the Mastership;

It was clearly resolved, That the King might grant it, and that the Estate of the Grantee should continue, tho' the King's Interest devolved upon the succeeding Queen. And it was resembled to the Case of the Dutchy of Cornwal: If the King, while there is no Prince of Wales, makes a Lease of Lands belonging to that Dutchy, this shall determine upon the Birth of that Prince; but if he presents to a Church, the Incumbent shall not be removed; as in Case where the King presents to a Church by Reason of the Temporalities of a Bishoprick, the Bishop after created shall not remove the Clerk.

And the Chief Justice said in this Case, That the Interest of the Mastership did not properly pass from the King, so as it should have a Dependance upon the King's Estate; for the King doth but nominate, and the Master is intitled as from the first Foundation and Constitution.

It was further agreed, That a Thing of this Nature could not be granted in Reversion; for it is not like an Office, but rather as a Prebendary or Incumbency of a Church; and the Master, as Head of the Corporation, with his Brethren hath the whole Estate in him. 1 Chan. Cases. 215.

As to the Record in 4 Ed. 3. it was said, and so shewn out of Speed's Chronicles, produced in Court, That at that Time Queen Isabel was under great Calamity and Oppression, and what was then determined against her was not so much from the Right of Note, For Evidence. 1 Salk. 281, to 287, 555, 556, 690. 6 Mod. 149.

225. Dugdale's Baronage not allow'd Evidence to prove a Descent. 2 Jones 164.

the Thing, as the Iniquity of the Times; neither hath it been heard, that one who hath been Queen of England, ſhould be called nuper Regina in her Life-time: So that the Authority was much invalidated from the Circumſtance of the Time.

The Plaintiffs obſerving the Court thus clearly for the Defendant's Title, were Nonſuit.

Note, It was not reſolved, Whether if there had been a Queen Conſort at the Time of this Grant, it had been good to the Defendant: But the Judges rather inclined that it ſhould.

Daviſon *verſus* Haſlip.

Raym. 211. 2 Keb. 813. Poſtea 154. Antea 121. 2 Lev. 20. 1 Sid. 243. 1 Danv. 11, 31, 33, 53.

IN an Aſſumpſit the Plaintiff ſets forth, That J. S. owed him 20 l. for the Arrear of an Annuity, and that the Defendant was Receiver of the Rents of J. S. and appointed by J. S. to pay the Plaintiff his 20 l.

That the Defendant, in Conſideration that the Plaintiff would forbear him adtunc receptor' & ſerv' J. S. to ſuch a Time, that then he would pay him, if he lived and continued Receiver.

To this the Defendant pleaded non Aſſumpſit; and a Verdict was found for the Plaintiff.

It was moved in Arreſt of Judgment, That it did not appear that the Defendant had at the Time of the Promiſe any of the Rents of J. S. in his Hands; and then the Forbearing of him could be no Conſideration, becauſe not liable to any Suit. And tho' in Caſe of an Executor's Promiſe there need be no Averment of Aſſets; for notwithſtanding that he may be ſued, and the Plaintiff may have Judgment to recover when the Aſſets ſhall come, yet 'tis not ſo in this Caſe. Sed non allocatur.

For it being ſhewn, That he was Receiver at the Time of the Promiſe, and averred, That he ſo continued; 'tis a ſtrong Intendment that he had Effects in his Hands, eſpecially after a Verdict.

It was alſo ſaid, That the Taking of this Promiſe did not diſcharge the principal Debtor; but that there might be Reſort to him ſo long as the Money was unpaid.

Brown *verſus* London.

1 Lev. 298. 1 Mod. 285. Hard. 485. 2 Keb. 695, 713, 758, 822. Antea 45.

IN an Action upon the Caſe, the Plaintiff declared upon the Cuſtom of Merchants, That J. S. drew a Bill of Exchange upon the Defendant, to pay to the Plaintiff; which he accepted, and hath not paid him.

And declared further ſur Indebitat' upon ſuch a Sum; for that the Defendant accepted a Bill of Exchange from him, &c.

Upon

Upon non Aſſumpſit a Verdict was found for the Plaintiff, and entire Damages given. See 1 Lev. 280, 298. Hard. 485.

And it was moved in Arreſt of Judgment, That an Aſſumpſit ſur Indebitat' did not lie upon this Matter, but only an Action upon the Caſe, as it was laid in the firſt Part of the Declaration, where the Cuſtom of Merchants is ſet forth, and that the Defendant by Reaſon thereof is chargeable; and this is not to be involved in a general Indebitatus Aſſumpſit. N. Lutw. 510. 1 Danv. 27. pl. 5.

And of that Opinion were Hale and Rainsford, who ſaid it had been ſo adjudged in the Exchequer ſince the King's Return. Hardr. 485, 486.

But they ſaid, If A. delivers Money to B. to pay to C. and gives C. a Bill of Exchange drawn upon B. and B. accepts the Bill, and doth not pay it, C. may bring an Indebitatus aſſumpſit againſt B. as having received Money to his Uſe: But then he muſt not declare only upon a Bill of Exchange accepted, as the Caſe at Bar is.

So by their Opinions the Judgment was ſtayed, hæſitante Twiſden; for he conceived that the Cuſtom made it a Debt for him that accepted the Bill.

Ile's *Caſe*.

A Mandamus was prayed to reſtore a Sexton. The Court at firſt doubted whether they ſhould grant it; becauſe he was rather a Servant to the Pariſh, than an Officer, or one that had a Freehold in his Place. But upon a Certificate ſhewn from the Miniſter, and divers of the Pariſh, That the Cuſtom was there to chooſe a Sexton, and that he held it for his Life; and that he had 2 d. a Year of every Houſe within the Pariſh; they granted a Mandamus, and it was directed to the Church-wardens. Antea 143. 2 Lev. 18. 2 Keb. 802, 807, 820. Dev. 143.

Twiſden ſaid, that it was ruled in 1652, in this Court, That a Mandamus did not lie to be reſtored to a Stewardſhip of a Court-Baron, but of a Court-Leet it did; for there the Steward is Judge, but of a Court-Baron the Suitors are Judges. 1 Sid. 40, 169. 3 Mod. 334. Raym. 12.

But Hale ſaid, he was of another Opinion, for the Steward is Judge of that Part of the Court which concerns the Copyholds, and is Regiſter of the other. Antea 143.

Oble *verſus* Dittlesfield.

IN an Aſſumpſit the Plaintiff ſets forth, That J. S. was indebted to him in 40 l. and that the Defendant was indebted in the like Sum to J. S. and that J. S did appoint him to receive this 40 l. from the Defendant in Satisfaction for the Debt due to him from J. S. Which he ſignifying to the Defendant, he in conſidera-

tione præmiſſorum, and that the Plaintiff would forbear him a Quarter of a Year, promiſed that he would then pay him.

To this the Defendant pleaded non Aſſumpſit, and a Verdict was found for the Plaintiff.

T. Jones 87. It was moved in Arreſt of Judgment, That here was no ſufficient Conſideration; for it doth not appear that the Defendant was Party to this Agreement, whereby he ſhould become chargeable by the Plaintiff, and then the Forbearance is not material, and in the mean Time he is ſuable by J. S. his Creditor. And Antea 9, 10. Clipſham and Morris's Caſe was cited, which was adjudged in this Court, Hill. 20 & 21 Car. 2. where the Plaintiff in an Aſſumpſit declared, That J. S. was indebted to him in 50 l. and gave 1 Mod. 12. him a Note, directed to the Defendant, whereby he required the Defendant to pay him; who upon View of the Note, in Conſideration that the Plaintiff would accept of his Promiſe, and forbear him a Fortnight, promiſed to pay him the Money. There (after Verdict for the Plaintiff) Judgment was arreſted, becauſe that was held no Conſideration. Sed non allocatur;

For Hale ſaid, When Aſſumpſits grew firſt into Practice, they uſed to ſet out the Matter at large, (viz.) in ſuch a Caſe as this, Quod mutuo agreatum fuit inter eos, &c. and they ſhould be diſ- 1 Saund. 210. charged one againſt the other; but ſince it hath been the Way to Antea 152. declare more conciſely. And upon the whole Matter here it appears, That the Defendant agreed to this Transferring of the Debt of J. S. to the Plaintiff; and that it was agreed, that he ſhould be diſcharged againſt J. S. And he ſaid, That the Caſe of Antea 9, 10. Daviſon and Haſlip (hoc Termino antea) was to the ſame Effect: And for Clipſham's Caſe, that was ſaid to be good in Law; for there it did not appear that the Defendant was at all indebted to him that ſent the Note.

Sir William Hicks's *Caſe.*

2 Keb. 824. 1 Salk. 6. 6 Mod. 105. DEbt was brought againſt him by the Name of Sir William Hicks, Knight and Baronet.

He pleaded in Abatement, That he was never Knighted.

The Plaintiff moved, That he might amend, and that he had put in Bail by the Name of Knight and Baronet, ſo that he could not alledge this Matter; which the Court agreed if it were ſo: But it was found to be entred for William Hicks, Baronet only. So they ſaid, they could not permit any Amendment: But the Plaintiff muſt of Neceſſity arreſt him over again.

Fiſher *verſus* Batten.

A Bill was exhibited in the Dutchy-Court, to be relieved a- 2 Keb. 822.
gainſt the Forfeiture of a Mortgage of Lands lying within 2 Lev. 24.
the County of Lancaſter.

The Defendant prayed a Prohibition, ſurmiſing, That the Lands in Queſtion were not the King's Lands, or holden of him, and therefore he ought not to anſwer in the Dutchy-Court. And the Court appointed to hear Counſel on both Sides, whether or no this Prohibition were to be granted?

And it was argued by Sir William Jones for the Prohibition, That a Court of Equity muſt begin by Preſcription or Act of Parliament.

That there can be no Preſcription in this Caſe; for both the 4 Inſt. 199, Dutchy and County Palatine of Lancaſter began within Time of 200, 204. Hob. 77. Memory. Henry Father-in-Law to John of Gaunt, was the firſt Roll. Prohib. Duke of Lancaſter, and he was made ſo in Edward the Third's 314, 317. Time; and then Lancaſter was made a County Palatine.

The Act of Parliament upon which this Caſe muſt depend, is that of 1 Ed. 4. which takes Notice, That the Dutchy and County Palatine of Lancaſter were forfeited to the Crown by the Attainder of H. 6. and enacts, That they ſhall be ſeparate and diſtinguiſhed from other Inheritances of the Crown; and appoints a Chancellor for the County Palatine, and a Chancellor for the Dutchy, and that each ſhould have his Seal; ſo that the Chancellor of the Dutchy is not to intermeddle in the County Palatine, which hath a Chancellor of its own for Matters there.

Counties Palatine had their Original from a politick Reaſon, and Lancaſter, Durham and Cheſter were made ſo, probably becauſe they were adjacent to Enemies Countries; (viz.) the Two firſt to Scotland, and Cheſter to Wales; ſo that the Inhabitants having Adminiſtration of Juſtice at home, and not being obliged to attend other Courts, thoſe Parts ſhould not be diſfurniſhed of Inhabitants, that might ſecure the Country from Incurſions.

'Tis true, of a long Time the Chancellorſhip both of County and Dutchy have been in one Perſon; but 'tis the ſame Thing as if there were Two, for the ſeveral Capacities remain diſtinct in him.

The firſt Patent that made it a County Palatine, ordained, that it ſhould have Jura regalia ad Comitatum Palatinum pertinen' Com. 215. adeo libere & integre, ſicut Comes Ceſtriæ infra eundem Comitat' Ceſtriæ dignoſcitur obtinere, &c. So that by that the Juriſdiction ought to be exerciſed within the County.

They have shewn indeed a Multitude of Precedents, but I can hear but of one, for the first Fifty Years after 1 Edw. 4. most of the other are of personal Things; and of the rest, divers began in the County Palatine, and were transmitted to the Dutchy-Court: As they may send Causes out of the Courts there to be argued in the King's Bench; but doubtful whether the Court here can give Judgment?

They have very few Precedents of Causes which commenced originally in the Dutchy-Court, which is but a Court of Revenue, 4 Inst. The Court of Requests had a Multitude of Precedents, but could not thereby gain it self any Jurisdiction, 4 Inst. 97. Holt's Case. Hob. 77. A Bill was exhibited to be relieved against the Penalty of a Bond, which concerned an Extent of Lands within the County Palatine, and a Prohibition was granted; for the Dutchy-Court is said there to have nothing to do but with the King's Land and his Revenue. Vide Roll. 317. accordingly.

Weston contra. We cannot pretend to a Court of Equity by Prescription: But we have Precedents for above two hundred Years last past, as well of Bills retained, which commenced originally here, as of those transmitted; and that of Transmission is agreed on the other Side, which proves the Jurisdiction. For if a Certiorari, or Corpus cum causa should go out of the King's Bench, Conusance of Pleas might be demanded, and so to stop the Removing of the Cause out of the inferior Court.

We maintain our Jurisdiction upon the Statute of 1 Ed. 4. before which the County Palatine and Dutchy of Lancaster were distinct, as they were 1 H. 4. by which Act they were both severed from the Possessions of the Crown: But now, 1 Ed. 4. makes one Body of these distinct Bodies, and gives a Superiority to the Dutchy over the County Palatine; for that is annexed unto, and made Parcel of, the Dutchy, as the supream Name of Corporation.

The Words of the Act are: That our Liege and Sovereign Lord, King Edward the Fourth, and his Heirs, have as Parcel of the Dutchy the County of Lancaster, and County Palatine: And there is a Chancellor and Seal appointed for the County Palatine, and a Seal also for the Dutchy, and a Chancellor there for the Keeping thereof; and Officers and Counsellors for the Guidance and Governance of the same Dutchy, and of the particular Officers, Ministers, Tenants, and Inhabitants thereof.

So that the Act having constituted a Chancellor indefinitely over the Dutchy, and not circumscribing his Power, it is not Reason to exempt any Part of the Dutchy; and that the County is, by Force of this Act; in 4 Inst. 119. it is said, That seeing there hath been Time out of Mind a Chancellor of the Exchequer, that there should be also in the Exchequer a Court of Equity. So the Book of 2 H. 8. and Roll. Tit. Prohibition to the Chancery,

That where there is a Chancellor Time out of Mind, a Court of Equity follows of Consequence. 4 Inst. 212. it is said, That the Chamberlain of Chester hath the Jurisdiction of a Chancellor within the County Palatine of Chester; as the Chancellor of the Dutchy of Lancaster hath lawfully used and executed within the County Palatine of Lancaster.

Hale Chief Justice. The County Palatine of Lancaster is by Act of Parliament, and therefore Outlawry there is a good Plea in Disability; but an Outlawry in Chester is not pleadable here, for that is a County Palatine by Prescription. 2 Sid. 146.

The Possessions of the Duke of Lancaster were not made a Ducatus, until 2 H. 5. In the Parliament-Roll for that Year 'tis entred, Quod sigilla pro Ducatu Lancastriæ allocentur, and that it should be governed per Ministros Ducatus.

By the Parliament-Roll, 39 H. 6. amongst the Tower-Records it appears, That there was appointed a Chancellor of the Dutchy, an Attorney, Auditor, a Steward, and a General Receiver; also a Chancellor and the like Officers for the County Palatine.

So that before the Statute of 1 Ed. 4. there was a Chancellor of the Dutchy.

I do not think the bare Granting of a Chancellor will incidently give a Court of Equity, nor is such a Court incident to a County Palatine, tho' there is a general Grant of Jura regalia; but the main Matter is upon the Statute of 1 Ed. 4. which enacts, That the County of Lancaster be a County Palatine, (which perhaps would have otherwise determined by the Attainder) and that it be Parcel of the Dutchy, and that there be Officers and Counsellors for the Guiding of the same Dutchy, and of the particular Officers, Ministers and Tenants, and Inhabitants thereof, in as great, ample and large Form, as Henry calling himself King Henry the 5th, at any Time herein had used and enjoyed lawfully; and further, That in the same Dutchy be used, had and occupied all such Freedoms, Liberties, Franchises, Privileges, Customs and Jurisdictions as were used therein lawfully. These Words would not of themselves give a Court of Equity, but are relative to what was formerly; and the Precedents that have been produced, are an Evidence that there was such a Jurisdiction exercised before this Act, which is confirmed and established by it.

We have no full Account of its Original, but there are such Prints and Footsteps of it, that we must presume it lawful; or otherwise, 'tis not to be thought that the Act should refer to it. Holt's Case agrees, That they have a Court of Equity, and so as 'tis reported in Rolle, tho' there is a Mistake in the Report, where 'tis said, That the Dutchy have no Jurisdiction of such Lands as lie out of the County Palatine, tho' holden of the King; but possibly they may extend their Jurisdiction too far, when they retain

Bills

Bills concerning Lands lying out of the County Palatine, within the Precinct of the Dutchy, but not holden. But that Matter is not now in Question.

I think no Prohibition ought to go in this Case;

First, Because the Statute of 1 Ed. 4. makes the County Palatine Parcel of the Dutchy.

Secondly, For that the Statute refers to the Jurisdiction formerly exercised, and appoints the Tenants and Inhabitants of the Dutchy to be under the same Regulation. And for that, there are such Multitude of Precedents of Proceedings in this Nature, (and allowing Transmission of Causes yields them a Jurisdiction) for the Space of 200 Years, and so many Mens Estates depend upon their Decrees, which have been made with the Assistance of so many learned Judges, which at all Times have been called to assist in this Court, that it would be very unreasonable and inconvenient to unsettle them.

Upon a Quo Warranto the Matter might be more strictly examined, than it is fit to do upon a Prohibition.

And Twisden and Rainsford concurred, That no Prohibition ought to go.

It was then objected, That this Bill was not well exhibited, for it was directed Cancellario only; whereas the Court is holden coram Cancellario & Concilio.

Hale said, That would not be material, for in Ed. 1st's Time the Style of the King's Bench was coram Rege & Concilio, and the Writ de Ideota examinando, commands the Ideot to be brought coram nobis & Concilio nostro apud Westmon'; and anciently Bills were so directed in Chancery, but since have been altered.

Maddy's *Case*.

Raym. 212. 2 Keb. 829. Kelynge 137.

JOhn Maddy was indicted, for that he ex malitia sua præcogitat' felonice murdravit Franc' Mavers, upon which he was arraigned at the Assizes in Southwark, and pleaded Not guilty; and the Jury found a Special Verdict, by the Direction of Justice Twisden, then Judge of Assize there, which was to this Effect:

That Maddy coming into his House, found Mavers in the Act of Adultery with his the said Maddy's Wife, and he immediately took up a Stool and struck Mavers on the Head, so that he instantly died.

They found that Maddy had no precedent Malice towards him, and so left it to the Judgment of the Court, whether this were Murder or Manslaughter?

The Record was this Term removed into the King's Bench by Certiorari, and Maddy brought by Habeas Corpus. And the Court were all of Opinion that it was but Manslaughter, the Provocation being exceeding great, and found that there was no pre-

cedent Malice; and it was taken to be a much ſtronger Caſe than Royley's Caſe, 2 Cro. 296. where the Son of Royley coming home with a bloody Noſe, and telling his Father that ſuch an one beat him in ſuch a Field, to which Field (which was a Mile off) the Father immediately run, and found him that had beat his Son there, and killed him, all which was found upon a Special Verdict, and reſolved to be but Manſlaughter.

But Twiſden ſaid, There was a Caſe found before Juſtice Jones, which was the ſame with this, only it was found, That the Priſoner, being informed of the Adulterer's Familiarity with his Wife, ſaid, he would be revenged of him, and after Finding him in the Act, killed him, which was held by Jones to be Murder. Which the Court ſaid might be ſo, by Reaſon of the former Declaration of his Intent; but no ſuch Thing is found in the preſent Caſe.

Barber *verſus* Fox.

TRin. 22 Car. 2. Rot. 855. In an Aſſumpſit the Plaintiff declared, That the Anceſtor of the Defendant became bounden to him in a certain Sum, and afterwards died, and that he demanded it of the Defendant being his Heir; and the Defendant, in Conſideration that the Plaintiff would forbear to ſue him for ſuch a Time, promiſed he would pay him. 2 Saund. 136. 2 Keb. 811. See 1 Salk. 23, 25. Far. 13. 1 Lev. 165. N. Lutw. 148. 1 Sid. 31, 248.

To this the Defendant pleaded Non Aſſumpſit, and a Verdict was found for the Plaintiff.

It was moved in Arreſt of Judgment, for that at the Time of the Promiſe there doth not appear, that there was any Cauſe of Suit againſt the Heir; for 'tis not ſet forth, that the Anceſtor did bind his Heirs, and the Conſideration is not here to forbear to ſue generally, but to ſtay a Suit againſt the Defendant, whom he could not ſue. 1 Sid. 248. 1 Lev. 165. Raym. 125.

To which it was anſwered, That after a Verdict it ſhall be intended there was Cauſe of Suit, as Hob. 216. Bidwell and Catton's Caſe, An Attorney brought an Aſſumpſit upon a Promiſe made to him, in Conſideration that he would ſtay the Proſecution of an Attachment of Privilege; and there held, That it need not appear that there was Cauſe of Suit, for the Promiſe argues it, and it will be preſumed. And here 'tis a ſtrong Intendment, that the Bond was made in common Form, which binds the Heirs. Antea 120. Raym. 127, 128.

But Judgment was given againſt the Plaintiff; for the Court ſaid it might be intended, that there was Cauſe of Action, if the contrary did not appear, which it doth in this Caſe, for the Bond cannot be intended otherwiſe than the Plaintiff himſelf hath expreſſed it, which ſhews only, That the Anceſtor was bound. And whereas it was ſaid by the Plaintiff's Counſel, That this would attaint the Jury, they finding Aſſumpſit upon a void Promiſe;

Hale

Hale ſaid there was no Colour for that Conceit, the Plaintiff having proved his Promiſe and Conſideration as 'twas laid in the Declaration, which is the only Thing within their Charge upon non Aſſumpſit, modo & forma.

Bulmer *verſus* Charles Pawlet, Lord Saint John.

2 Keb. 824. IN an Ejectment upon a Trial at Bar this Queſtion aroſe upon the Evidence.

Tenant for Life, Remainder in Tail to J. S. join in a Fine. J. S. dies without Iſſue; Whether the Conuſee ſhould hold the Land for the Life of the Tenant for Life?

Serjeant Ellis preſſed to have it found Specially, tho' it is reſolved in Bredon's Caſe, That the Eſtate of the Conuſee ſhall have Continuance; but he ſaid it was a ſtrange Eſtate, that ſhould be both a determinable Fee, and an Eſtate pur auter vie; and he cited 3 Cro. 285. Major and Talbot's Caſe, where in Covenant the Plaintiff ſets forth, That a Feme Tenant for Life, Remainder in Fee to her Husband, made a Leaſe to the Defendant for Years, wherein the Defendant covenanted with the Leſſors, their Heirs and Aſſigns, to repair; and they conveyed the Reverſion to the Plaintiff, and for Default of Reparations, the Plaintiff brought his Action as Aſſignee to the Husband: And reſolved to be well brought, becauſe the Wife's Eſtate paſſed as drowned in the Fee.

The Court ſaid, Bredon's Caſe was full in the Point; but the Reaſon there given, Hale ſaid, made againſt the Reſolution; for 'tis ſaid, That the Remainder in Tail paſſes firſt, which if it does, the Freehold muſt go by Way of Surrender and ſo drown; but they ſhall rather be conſtrued to paſs inſimul & uno flatu, Hob. 277. In Engliſh's Caſe it was reſolved, If Tenant for Life, Remainder in Tail to an Infant join in a Fine, if the Infant after reverſe the Fine, yet the Conuſee ſhall hold it for the Life of the Conuſor, 1 Co. in Bredon's Caſe, and he reſembled it to the Caſe in 1 Inſt. A Man ſeized in the Right of his Wife, and entitled to be Tenant by the Curteſy, joins in a Feoffment with his Wife, the Heir of his Wife ſhall not avoid this during the Husband's Life.

Nevertheleſs he told Ellis, That he would never deny a Special Verdict at the Requeſt of a learned Man; but it appearing, that the Plaintiff had a good Title after the Life ſhould fall, the Defendant bought it of him, and the Jury were diſcharged.

Sacheverel *verſus* Frogate.

PAſ. 23 Car. 2. Rot. 590. In Covenant the Plaintiff declared, That Jacinth Sacheverel, ſeiſed in Fee, demiſed to the Defendant certain Lands for Years, reſerving 120 l. Rent. And therein was a Covenant, That the Defendant ſhould Yearly, and every Year during the ſaid Term, pay unto the Leſſor, his Executors, Adminiſtrators and Aſſigns the ſaid Rent; and ſets forth, how that the Leſſor deviſed the Reverſion to the Plaintiff, and for 120 l. Rent ſince his Deceaſe he brought the Action. Antea 148. 2 Saund. 367. Raym. 213. 1 Lev. 13. 2 Keb. 798, 819, 833, 839. Vide antea 14.

The Defendant demanded Oyer of the Indenture, wherein the Reſervation of the Rent was Yearly during the Term to the Leſſor, his Executors, Adminiſtrators and Aſſigns, and after a Covenant prout the Plaintiff declared, and to this the Defendant demurred.

It was twice argued at the Bar, and was now ſet down for the Reſolution of the Court, which Hale delivered with the Reaſons.

He ſaid, They were all of Opinion for the Plaintiff. For what Intereſt a Man hath, he hath it in a double Capacity, either as a Chattel, and ſo tranſmiſſible to the Executors and Adminiſtrators, or as an Inheritance, and ſo in Capacity of tranſmitting it to his Heir. 2 Lev. 13.

Then if Tenant in Fee makes a Leaſe, and reſerves the Rent to him and his Executors, the Rent cannot go to them, for there is no Teſtamentary Eſtate. On the other Side, If Leſſee for 100 Years ſhould make a Leaſe for 40 Years, reſerving Rent to him and his Heirs, that would be void to the Heir.

Now a Reſervation is but a Return of ſomewhat back in Retribution of what paſſes; and therefore muſt be carried over to the Party which ſhould have ſucceeded in the Eſtate if no Leaſe had been made, and that has been always held, where the Reſervation is general.

So, tho' it doth not properly create a Fee, yet 'tis a deſcendible Eſtate; becauſe it comes in lieu of what would have deſcended; therefore Conſtructions of Reſervations have been ever according to the Reaſon and Equity of the Thing.

If two Joint-Tenants make a Leaſe, and reſerve the Rent to one of them, this is good to both, unleſs the Leaſe be by Indenture, becauſe of the Eſtoppel; which is not in our Caſe, for the Executors are Strangers to the Deed. Co. Lit. 47. a. 2 R. Ab. 448.

'Tis true, if A. and B. join in a Leaſe of Land, wherein A. hath nothing, reſerving the Rent to A. by Indenture, this is good by Eſtoppel to A. But in the Earl of Clare's Caſe it was reſolved, That where he and his Wife made a Leaſe reſerving a Rent to

himſelf and his Wife and his Heirs, that he might bring Debt for the Rent; and declare as of a Leaſe made by himſelf alone, and the Reſervation to himſelf; for being in the Caſe of a Feme Covert, there could be no Eſtoppel, altho' ſhe ſigned and ſealed the Leaſe.

There was an Indenture of Demiſe from two Joint-Tenants reſerving 20 l. Rent to them both; one only ſealed and delivered the Deed, and brought Debt for the Rent, and declared of a Demiſe of the Moiety, and a Reſervation of 10 l. Rent to him. And reſolved that he might. Between Bond and Cartwright (which ſee before) and in the Common Pleas, Paſ. 40. Eliz. Tenant in Tail made a Leaſe reſerving a Rent to him and his Heirs. It was reſolved a good Leaſe to bind the Entail, for the Rent ſhall go to the Heir in Tail along with the Reverſion; tho' the Reſervation were to the Heirs generally. For the Law uſes all Induſtry imaginable, to conform the Reſervation to the Eſtate. Whitlocke's Caſe, 8 Co. is very full to this, where Tenant for Life, the Remainder over ſo ſettled by Limitation of Uſes, with Power to the Tenant for Life to make Leaſes, who made a Leaſe reſerving Rent to him, his Heirs and Aſſigns.

Antea 138. Hardreſs 89.

Reſolved, That he in the Remainder might have the Rent upon this Reſervation.

So put the Caſe, That Leſſee for 100 Years ſhould let for 50, reſerving a Rent to him and his Heirs during the Term; I conceive this would go to the Executor. 'Tis true, if the Leſſor reſerves the Rent to himſelf; 'tis held, it will neither go to the Heir or Executor: But in 27 H. 8, 19. where the Reſervation is to him and his Aſſigns, it is ſaid, that it will go to the Heir. And in the Caſe at Bar the Words, Executors and Adminiſtrators are void; then 'tis as much as if reſerved to him and his Aſſigns during the Term, which are expreſs Words declaring the Intent, and muſt govern any implied Conſtruction, which is the true and particular Reaſon in this Caſe.

Hard. 92, 23, 94, 95.

The old Books that have been cited have not the Words, during the Term. Vid. Lane 256. Richmond and Butcher's Caſe indeed is judged contrary in Point, 3 Cro. 217. but that went upon a miſtaken Ground, which was the Manuſcript Report, 12 E. 2. Where as I ſuppoſe the Book intended was, 11 E. 3. Fitz. Aſſize, 86. for I have appointed the Manuſcript of E. 2. (which is in Lincolns Inn Library) to be ſearched, and there is no ſuch Caſe in that Year of E. 2 The Caſe in the 12 E. 3. is, A Man ſeiſed of two Acres, let one reſerving Rent to him and let the other, reſerving Rent to him and his Heirs; and reſolved That the firſt Reſervation ſhould determine with his Life, for the Antitheſis in the Reſervation makes a ſtrong Implication that he intended ſo. In Wotton and Edwin's Caſe, 5 Jac. the Words of Reſervation were, Yielding and paying to the

6 Co. 62.

Leſſor, and his Aſſigns. And reſolved, That the Rent determined upon his Death. In that Caſe there wanted the effectual and operative Clauſe, during the Term.

The Caſe of Sury and Brown is the ſame with ours in the Words of Reſervation; and the Aſſignee of the Reverſion brought Debt, and did not aver the Life of the Leſſor. And the Opinion of Jones, Croke and Doderidge was for the Plaintiff; Latch's Rep. 99. Lane 255.

The Law will not ſuffer any Conſtruction to take away the Energy of theſe Words, during the Term.

If a Man reſerves a Rent to him or his Heirs, 'tis void to the Heir, 2 Inſt. 214. a. But in Mallory's Caſe, 5 Co. where an Abbot reſerved a Rent during the Term to him or his Succeſſors, it was reſolved good to the Succeſſor.

It is ſaid in Brudenel's Caſe, 5 Co. That if a Leaſe be made for Years, if A. and B. ſo long live, if one of them dies, the Leaſe determines, becauſe not ſaid, If either of them ſo long lives. So it is in Point of Grant. But it is not ſo in Point of Reverſion, for Paſ. 4 Jac. in the Common Pleas between Hill and Hill, the Caſe was a Copyholder in Fee, (where the Cuſtom was for a Widow's Eſtate) made a Leaſe by Licence, reſerving Rent to him and his Wife during their Lives, (and did not ſay, Or either of them,) and to his Heirs. It was reſolved, Co. Inſt. 123, 124, 125.

Firſt, That the Wife might have this Rent, tho' not Party to the Leaſe.

Secondly, That tho' the Rent were reſerved during their Lives, yet it ſhould continue for the Life of either of them; for the Reverſion, if poſſible, will attract the Rent to it, as it were, by a kind of Magnetiſm. Antea 148.

Hoskins *verſus* Robins.

A Replevin for ſix Sheep. The Defendant makes Conuſance, &c. for Damage Feſant: The Plaintiff replied, That the Place where was a great Waſte, Parcel of ſuch a Manor, within which there were Time out of Mind Copyhold Tenants, and that there was a Cuſtom in the Manor, that the ſaid Tenants ſhould have the ſole and ſeveral Paſture of the Waſte, as belonging to their Tenements, and ſhews that the Tenants licenced him to put in his Beaſts. Pollexfen 13, 14. Antea 123. 2 Saund. 324. 1 Mod. 74. 2 Lev. 2. 2 Keb. 557, 842. 1 Lev. 253, 268.

The Defendant traverſes the Cuſtom, and found for the Plaintiff. The Exceptions, moved in Arreſt of Judgment, were now ſpoken to again.

Firſt, That the Cuſtom to have the ſole Paſture, and thereby to exclude the Lord, is not allowable. It hath been ever held, That ſuch a Preſcription for Common is not good, and why ſhould the ſame Thing in Effect be gained by the Change of the Name? Poſtea 384. Vaugh. 251, &c. 1 Saund. 347, &c. 350. 2 Keb. 513, 517.

That Preſcription for Paſture, and Preſcription for Common is the ſame Thing, vid. 3 Cro. Daniel v. Count de Hertford 542. And Rolle Tit. Preſcription, 267, it is held, A Man may claim Common for half a Year, excluding the Lord; and that one cannot preſcribe to have it always ſo, is not becauſe of the Contradiction of the Term; for if the ſole Feeding be but for half a Year, 'tis as improper to call it common; but the true Reaſon ſeems to be, becauſe it ſhould in a Manner take away the whole Profit of the Soil from the Lord, and he ſhould by ſuch Uſage loſe his greateſt Evidence to prove his Title; for it would appear that the Land was always fed by the Beaſts of others; it would be very miſchievous to Lords, who live remote from their Waſtes, or that ſeldom put their Beaſts there (as many Times they do not) ſo that by the Tenants ſolely uſing to feed it, they ſhould loſe their Improvements provided for the Lords by the Statute, and ſo come at laſt for want of Evidence to loſe the Soil it ſelf.

Secondly, This Cuſtom is laid, To have the ſole Feeding belonging to their Tenements, and 'tis not ſaid for Beaſts levant and couchant, or averred that the Beaſts taken were ſo. 15 E. 4, 32. and Roll. Tit. Common 398. Fitz. Tit. Preſcription 51. A Man cannot preſcribe to take Eſtovers as belonging to his Houſe, unleſs he avers them to be ſpent in his Houſe, Noy 145. So 2 Cro. 256. tho' the Preſcription was there to take omnes Spinas, for it is neceſſary to apply it to ſomething which agrees in Nature to the Thing. Brownlow 35.

Thirdly, Here the Plaintiff juſtifies the Putting in his Beaſts by a Licence, and doth not ſay it was by Deed, whereas it could not be without Deed; and ſo is the 2 Cro. 575.

Fourthly, Thoſe Defects are not aided by the Verdict, for they are in the Right and of Subſtance. But the Court were all of Opinion for the Plaintiff.

2 Saund. 326. First, They held the Preſcription to be good, and being laid as a Cuſtom in the Manor, it was not needful to expreſs the Copyhold Eſtates: It doth not take away all the Profit of the Land from the Lord; for his Intereſt in the Trees, Mines, Buſhes, &c. continues. Co. Inſt. 122. a. is expreſs, That a Preſcription may be for ſola & ſeparalis paſtura; and if it may be for half a Year, upon the ſame Reaſon it may be for ever. An Intereſt of this Nature might have commenced by Grant. 18 E. 3. The Lord granted to the Tenant that he would not improve; tho' it may be ſuch a Grant were not good at this Day.

Poſtea 390. The Court were agreed in this Point, in the Caſe between Potter and North brought here about three Years ſince; the principal Doubt in that Caſe was, Whether the Freeholders and Copyholders could in Pleading alledge a joint Preſcription for the ſole Paſture? And for the Miſchief alledged, that this might be obtained from every Lord, that had not of a great many Years uſed his Common;

Hale

Hale ſaid, It would not be ſufficient to prove an Uſage for the ſole Paſture, to ſhew that the Tenants had only fed it; unleſs it were proved alſo, that the Lord had been oppoſed in putting in of his Cattle, and the Cattle impounded from Time to Time.

To the ſecond Objection: They held that Levancy was not material in this Caſe, becauſe the ſole Feeding is claimed. So where Common for a certain Number of Beaſts is claimed, 'tis poſſible between the Tenants there may be ſome proportioning of it, that one may not eat up all from the reſt; but 'tis not material to the Owner of the Soil. And Twiſden ſaid, It was reſolved in this Court, between Stonell and Maſſelden, That the want of Averment of Levancy and Couchancy was aided by a Verdict. 1 Saund. 326, 327.

Thirdly, Tho' the Licence is not ſhewn to be by Deed, they reſolved it was well enough. 'Tis true, if the Licence were to make Title againſt the Party which gave it, there would be greater Queſtion: For 'tis nothing to the Plaintiff, who it appears had no Damage; at the moſt, it is but a Miſpleading aided by 32 H. 8. And the Plantiff waved this Matter, and took Iſſue upon the Cuſtom, which is the material Point, and it is found againſt him. There might have been more Colour upon a Demurrer. Antea 123. *Pollexfen* was againſt this Judgment, as may be ſeen in his Report, and held the Cuſtom was void. 13, 14, *&c.* Antea 25, 124. 2 Saund. 327, 328. Vide 2 Cro. 377.

Anonymus.

A Prohibition was granted to a Suit for Fees in the Eccleſiaſtical Court by an Apparitor, upon a Suggeſtion, That there were no ſuch Fees due by Cuſtom. 1 Mod. 161, 167. 2 Keb. 810, 845.

For that is triable by Law, and not by a decimaria or vicenaria Præſcriptio, which is allowed in their Courts: But they may ſue there for their due and cuſtomary Fees. 4 Mod. 244. 5 Mod. 238, 9. 1 Salk. 330, 333.

Brell *verſus* Richards.

ERror upon a Judgment in the Common Pleas, in an Ejectment againſt eight Defendants, and the Writ was, Ad grave dampnum ipſorum; the Judgment was only againſt three, and the other five were acquitted. The Error was aſſigned in the Nonage of the three. 2 Keb. 823, 844.

It was moved, Whether the Writ of Error was well brought; or whether the Judgment ſhould be reverſed in toto?

The Court reſolved, That the Writ was good, tho' it might be alſo ad damnum only of thoſe convicted: But being only in the Nature of a Commiſſion, whereby the King commands the Errors to be examined, this Matter is not material. Cro. El. 762. 2 Cro. 138. Hob. 70, Yelv. 209.

And Twiſden ſaid, That the conſtant Practice is for all to join: And they all held, That the Judgment ought to be reverſed againſt all.

Sir Anthony Bateman's *Caſe.*

Antea 5, 10. 1 Mod. 76.

UPon a Trial at Bar, the Queſtion was, Whether he were a Bankrupt or no?

It was proved that he was a Turky Merchant, and traded in the Year 1656, but it was not proved, That he had afterwards imported or exported any Thing, but having the Effects of his former Trade by him to a great Value, he ſhewed them to ſeveral, and obtained the Loan of divers Sums of Money upon the Credit of them.

Antea 29. 1 Sid. 411.

The Court held, That this brought him within the Statute, for ſuch Debts as he contracted after 1656, otherwiſe the Miſchief would be great; for Men cannot take Notice when another withdraws his Trade, or when he commands his Factors beyond Sea to deal no further for him; but they ſeeing great Quantities of Goods and Merchandize in his Hands, are apt to truſt him: Wherefore 'tis fit that they ſhould be relieved by the Statute.

Legg *and* Richards.

1 Mod. 77.

AN Adminiſtrator brought a Writ of Error upon a Judgment given in an Ejectment againſt the Inteſtate.

It was held, That he ſhould pay no Coſts, tho' the Judgment were affirmed, and the Writ brought in dilatione Executionis.

The Biſhop of Exeter *verſus* Starr.

Raym. 225. 2 Keb. 814, &c. 2 Lev. 36. 3 Keb. 219, 286.

IN Debt upon a Bond, the Condition recited, That whereas the Obligor was excommunicated for not coming to Church, and that the now Plaintiff at his Inſtance and Requeſt had abſolved him: That if he ſhould obey all the lawful Commands of the Church, that then, &c.

The Defendant demurred, ſuppoſing the Condition to be againſt Law, and ſo the Bond void.

Hale ſaid, If a Man were excommunicated, there was a Writ De cautione admittenda; and ſometimes they took an Oath of the Party, ad parendum omnibus Eccleſiæ mandatis licitis & honeſtis; and that was called Cautio juratoris; and ſometimes Cautio pignoratitia was given.

1 Bulſt. 422.

He ſaid alſo, It was held 8 Car. in Com' Banco, that where the Eccleſiaſtical Court took a Bond of an Adminiſtrator, to make Diſtribution of what remained of the Inteſtate's Eſtate after Debts and Legacies ſatisfied, or to diſpoſe ſo much to pious Uſes, that

the Bond was void; for they presumed the Party in such Cases to be under a Kind of Coercion. Et adjornatur.

Isaac *versus* Ledgingham.

IN a Replevin, the Defendant avowed for a Suit of Court. The Plaintiff replies; and confesseth himself Tenant of the Manor; and saith, That there are very many Tenants of the Manor, and that there is a Custom, That if those Copyholders which live remote from the Manor, pay Eight Pence to the Steward of the Court for the Lord, and 1 d. to himself for the entring of it, that they should be excused of doing their Suit for one Year after the said Payment; and alledgeth, That he lives 10 Miles from the Manor, and that he tendred the 8 d. and 1 d. and both were refused. 1 Mod. 77. 1 Sid. 361. 2 Keb. 847. See 1 Sid. 361. 5 Mod. 25, 71, &c. N. Lutw. 47, 373.

To this the Avowant demurred:

First, The Custom is unreasonable; for by Means of it no Court can be kept, if so be all the Tenants live remote.

Secondly, The Plaintiff hath not brought himself within the Custom; for that is to be discharged upon Payment, and not upon Tender and Refusal: And the Construction of Customs is always strict to the Words, and not with that Latitude as is used in Contracts.

Hale. 'Tis Custom gives the Suit, and consequently may qualify it: The Doubt arises, because the Plaintiff hath not alledg'd, that there are any Tenants live near or within the Manor; or whether that ought to be shewn on the other Side, if it be not so; because the Intendment is strong, that there are. Therefore a By-Law in a Manor binds the Tenants without Notice; because they are supposed to be within the Manor. Vid. 2 Vent. 291.

For the other Matter they all held, That Tender and Refusal was as much as Payment.

And Twisden said, It was resolved, where an Award was made that A. should pay B. 10 l. and that B. super receptionem decem librarum should release, that he was bound to release it, if the Money were offered, tho' he should refuse it. Wherefore they gave Judgment for the Plaintiff. 8 Co. 76. 1 Inst. 203. 1 Roll. 129. 9 Co. 79.

Sir John Coriton *and* Harvey *versus* Lithby.

PAsch. 22 Car. 2. Rot. 331. In an Action upon the Case the Plaintiffs declared, That there were four ancient Mills within the Manor. 2 Saund. 115. 2 Vent. 288, 291. 2 Keb. 803, &c. 2 Lev. 27.

And that J. C. was seised in Fee of two of the Mills, and J. H. of the other two; and laid a Prescription in each, That they had kept the Mills in Repair, and found Grinders, to the Intent that

that the Tenants of the Manor might grind at them; and that Time out of Mind the Tenants had ground omne frumentum, to be ſpent in their Houſes, at the Mills of J. C. or at the Mills of J. H. And for that the Defendant ſpent Corn which was ground at neither of the Mills, they brought this Action.

To this Declaration the Defendant demurred:

Firſt, For that they join in the Action, and ſo the one ſhall recover Damages for not Grinding at the other's Mill, which is no Loſs to him.

Hob. 189. Secondly, The Preſcription is for Grinding all the Corn to be ſpent in the Houſes of the Tenants, which is unreaſonable; for a great deal of Corn is uſed which is not proper to grind. So it was ſaid to be adjudged between Aylett and Charleſworth 1654. in B. R. that the Preſcription ought to be laid for all Corn, triturandum & conſumendum in their Houſes. And this laſt Exception was held to be material by all the Court.

But they conceived the Action might be brought by both; for otherwiſe there could be no Remedy upon the Preſcription. For ſingly they could not bring it, becauſe Grinding at any of the Mills would excuſe the Defendant.

But Hale ſaid, the Declaration was naught; becauſe it is, That the Defendant ought to grind at the Mills of J. C. or J. H. which is true, if either of them hath an ancient Mill, altho' the other hath no Pretence or Right upon the Preſcripton: And therefore it ought to have been laid thus; That ſuch Corn, &c. as was not ground at the Mills of J. C. ought to be ground at the Mills of J. H. and then have averred, That the Defendant's Corn was ground at neither of them. It was adjudged for the Defendant.

Skinner *verſus* Webb.

Vide 1 Salk. 263. 5 Mod. 229. ſimilis caſus & ſimile Judicium. 2 Keb. 849. Scire facias. 1 Mod. 79.

THE Caſe was this: A Judgment was recovered in this Court in an Action upon the Caſe upon a Bill of Exchange, and a Scire facias was brought Quare execution', &c. and a Judgment upon that; upon which a Writ of Error was brought in the Exchequer-Chamber, and the Judgment was affirmed; after which the Defendant died, and a Scire facias (reciting the Judgment, and Affirmance of it in the Exchequer-Chamber) was brought againſt the Adminiſtrator, and Judgment had upon that; and the Adminiſtrator brought Error upon the Judgment in the laſt Scire facias.

The Court were moved, not to allow this Writ of Error, or at leaſt not to ſuperſede Execution, by Reaſon of its being a ſecond Writ of Error.

And the Court held, that this Writ of Error did not lie into the Exchequer-Chamber; tho' it hath been reſolved, that ſuch Writ

of Error lies in the Exchequer-Chamber, (by the Statute of the 27th of Eliz.) upon a Judgment in a Scire facias, recover'd upon a Judgment in an Action brought by Bill in this Court; because 'tis in Execution of the Judgment, and is (as it were) a Piece of the first Action. Otherwise of a Judgment in a Scire facias upon a Recognizance, or the like. 1 Mod. 79. Antea 38. Hob. 72. 2 Cro. 171.

Now this Sci' fa' is brought upon a Judgment affirmed in the Exchequer-Chamber, which therefore is privileged from any other Writ of Error to be brought upon it there: So that this Writ of Error can be brought only upon the Judgment given in the Scire facias; and therefore it doth not lie into the Exchequer-Chamber.

Jacob Hall's *Case*.

COmplaint was made to the Lord Chief Justice by divers of the Inhabitants about Charing-Cross, That Jacob Hall was erecting of a great Booth in the Street there, intending to shew his Feats of Activity, and Dancing upon the Ropes there, to their great Annoyance, by Reason of the Crowd of idle and naughty People that would be drawn thither, and their Apprentices inveigled from their Shops. 1 Mod. 76. 5 Mod. 142. 2 Keb. 846.

Upon this the Chief Justice appointed him to be sent for into the Court, and that an Indictment should be presented to the Grand Jury of this Matter; and withal the Court warned him, that he should proceed no further.

But he being dismissed, they were presently after informed, That he caused his Workmen to go on. Whereupon they commanded the Marshal to fetch him into Court: And being brought in and demanded, How he durst go on in Contempt of the Court? He with great Impudence affirmed, That he had the King's Warrant for it, and Promise to bear him Harmless.

Then they required of him a Recognizance of 300 l. that he should cease further Building; which he obstinately refused, and was committed: And the Court caused a Record to be made of this Nusance, as upon their own View (it being in their Way to Westminster,) and awarded a Writ thereupon to the Sheriff of Middlesex, commanding him to prostrate the Building.

And the Court said, Things of this Nature ought not to be placed amongst Peoples Habitations, and that it was a Nusance to the King's Royal Palace; besides, that it straitned the Way, and was insufferable in that respect.

The King *versus* Wright.

AN Indictment was against him for Suffering of two Persons to escape, qui commissi fuerunt by the Justices of the Peace, for an Offence against the Statute of 8 H. 6. of Forcible Entry. Vide 5 Mod. 416. 3 Salk. 93.

After a Verdict for the Plaintiff, and Judgment, a Writ of Error was brought, and assigned for Error, That it was not expressed how the Commitment was, whether upon View of the Justices, or Verdict upon an Indictment; so that it doth not appear that they were legally committed, nothing of the Proceedings being set forth, and 'tis not so much as said, debito aut legitimo modo commissi fuerunt. If a Man be indicted of Perjury in his Oath sworn before a Master of Chancery; it must be shewn, that the Master had an Authority to take an Oath.

And the Court doubted at first, and commanded the Clerk of the Crown to search Precedents, and he found that they were most, debito modo commissi; but some without that Clause: And the Court held, it being but Inducement to the Offence whereupon this Indictment is, that it was well enough alledged, and after the Verdict they must intend the Commitment was legal. Vide Crompton's Justice of Peace 252. a. 255. There are two Precedents like this.

2 Lev. 144. Note, It was said by Hale, That upon non Assumpsit Infancy might be given in Evidence, tho' upon Non est factum it could not. So held by ten Judges in *Darby* and *Boucher*'s Case. 1 *Salk.* 279. That on *Non Assumpsit*, Infancy may be given in Evidence.

The King *versus* Alway and Dixon.

2 Saund. 393. 1 Mod. 82. ERror to reverse a Judgment upon an Indictment; because the Award of the Venire was entred, Præceptum fuit Vicecomiti, &c. which is more like an History of the Record, than the Record it self; for it ought to be Præceptum est, and so are the Precedents: And for this Cause it was reversed.

Waldron *versus* Ruscarit.

1 Mod. 206. 2 Mod. 47. HILL. ult. Rot. 225. In an Ejectment a Special Verdict was found, That one levied a Fine of all his Lands in St. Inderion in Cornwal, and that he had Lands in Portgwyn, and that the Constables of Saint Inderion exercised their Authority in Portgwyn; and that Portgwyn had a Tithing-man.

2 Keb. 802, 821, 848. Antea 143. 2 Mod. Rep. from 234, to 239, 47, 49. 2 Vent. 31. 2 Cro. 120. 1 Mod. 78, 117, 206, 250. Owen 60. Hutton 93. Li. R. 73. And whether this Fine conveyed the Lands in Portgwyn was left to the Judgment of the Court; and resolved that it did.

A Parish may contain ten Mills; and if a Fine be levied of the Lands in the Parish, this carries whatsoever is in any of those Mills. So where there are divers Mills, if the Constablewick of the one goes over all the rest, that is the Superior or Mother-Mill, and the Land which is the other shall pass per nomen of all the Lands in that: And tho' it be found that Portgwyn had a Tithing-man, Decenarius, which prima facie is the same with a Constable, and differed little in the Execution of that Office con-

cerning Keeping the Peace; Yet Hale said, He was not the same Officer; and 'tis found that the Constables of St. Inderion have a Superintendency over Portgwyn, and therefore 'tis but as an Hamlet of St. Inderion. But if found that they had distinct Constables, and could not interfere in their Authority, it would be otherwise. Owen 60.

Note, It was said by the Court, That if there be a Conviction of a Forcible Entry upon the View of the Justices of the Peace, no Writ of Error lies upon it; but it may be examined upon a Certiorari. Antea 30.

The King *versus* Green & al'.

They were indicted for refusing to take the Oath of Allegiance contained in the Statute of 3 Jac. tendered to them at the Sessions of the Peace. Raym. 212. 2 Saund. 389. 2 Keb. 825, 830. 2 Show. pl. 51.

One appeared, and the Entry was Nihil dicit, &c. ideo remansit Dom' Rex versus eundem indefensus.

And the others were convicted, and Judgment given quod forisfaciant omnia bona & catalla, terr' & tenementa Domino Regi & extra protectionem Dom' Regis ponantur & committuntur, & quilibet eorum committitur Gaolæ. They brought Error. And

First, It was moved, That the Indictment was for refusing the Oath contained in the Statute of 3 Jac. in his Anglicanis Verbis, (viz.) I do truly and sincerely acknowledge, *&c.* that our Sovereign Lord King Charles the Second is rightful King of this Realm, *&c.* Whereas the Stat. is King James; and the Words of the Stat. are, That the Justices of the Peace shall demand of such Persons there mentioned, to take the Oath hereafter following. So that 'tis tied up to that Oath in terminis, and then it cannot be administred after the Death of K. James. And the Diversity of the Penning of this Act of 3 Jac. and the Act of 7 Jac. was observed in the last; the Words are, Shall take and receive an Oath according to the Tenor and Effect of the Oath contained in 3 Jac. which is as much as to say, the same Oath in Substance. So the Act of 1 Eliz. cap. 1. is, That the Oath shall be taken according to the Tenor and Effect hereafter following. Therefore it was objected, That the Indictment might have been upon the Act of 7 Jac. but not upon 3 Jac. which, it was conceived, was tied up to the Person of K. James, and therefore determined by his Death. As if a Lease be made durante beneplacito Regis nunc, it doth end by the Demise of that King that made it: Otherwise, if it be durante beneplacito Regis, Moor pl. 311. And tho' these Statutes for the Oath of Allegiance be general Laws, and need not have been recited; yet when an Indictment is grounded upon an Act therein mentioned, which will not maintain it, it shall not be made good upon any other general Act.

Secondly, Another Matter inſiſted upon for Error, was in the Entry of the Nihil dicit, which was Ideo remanſit Dom' Rex verſus eundem indefenſus, whereas it ought to have been remanet, and ſo the Record it ſelf muſt expreſs: But as it is, 'tis but an Hiſtory of the Record, and therefore upon Indictments where the Award of the Venire is Præceptum fuit, 'tis not good, but ſhould be Præceptum eſt.

Thirdly, An Exception was taken to the Venire, which commands the Sheriff to return 12 probos & legales homines, qui nec Dom' Regem nec aliquam partem aliqua affinitate attingunt; whereas in the King's Caſes his Kindred may be returned, and therein no Challenge to the Favour, neither ought the Sheriff to be reſtrain'd from returning them.

Fourthly, The Judgment is Committuntur, & quilibet eorum committitur, which is an Execution of the Judgment that ſhould have been given, and not the Judgment it ſelf, which ought to have been Committantur, &c. as 'tis extra protectionem Domini Regis ponantur, and not ponuntur.

Fifthly, It was alledged, That the Statute was miſ-recited in two Places.

1. For See of Rome, it is written Sea of Rome; ſo inſtead of ſedes Romana, it is mare Romanum, which makes it to be no Senſe.

2. The Words of the Statute are, I do declare in my Conſcience before God, whereas the Indictment is, I do declare, &c. in Conſcience, and leaves out my.

It was alſo objected, That the Words of the Act being, That ſuch as refuſe the Oath ſhall incur the Danger and Penalty of Præmunire mentioned in the Statute of 16 R. 2. which enacts, That Proceſs ſhall be made againſt the Offenders therein mentioned by Præmunire facias, in Manner as 'tis ordained in other Statutes. And it appears that no ſuch Proceſs was made upon this Indictment; wherefore the Statute is not obſerved.

Curia. The firſt Error was diſallowed by all the Court, and held clearly, that the Judgment was well grounded upon the Statute of 3 Jac. For the Naming of the King is but an Inſtance of the Thing as it ſtands at preſent; and it might as well be objected, That the Oath in the Statute is, I A. B. do ſwear, &c. And tho' ſome Statutes ſay according to the Tenor and Effect, and this is the Oath hereafter following, it was held to be all one; for according to the Tenor and Effect, and according to the Words, are all one, as where a Certiorari is to certify Tenorem Recordi.

The Second was held to be Error, and that the Judgment given upon the Nihil dicit muſt be reverſed; for there were ſeveral Judgments given, viz. One upon that, and another given againſt the reſt, which therefore was not affected by that Error.

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The

The Fourth was over-ruled; for where the Party is present, the Judgment is always quod committitur, as appeared by the Precedents.

Fifthly, The Variances from the Statute were not held to be material; for in old Writings, 'tis witten Sea of Rome; and declaring in Conscience, and in my Conscience, are the same.

The sixth Error was also disallowed, for the Words of the Statute are, Shall incur the Danger and Penalty of Præmunire mentioned in 16 R. 2. which doth not necessarily bind up to the Process; but means that such Judgment and Forfeiture shall be; and it appearing that the Parties were present, there was no Need of any Process.

But as to the third Exception which was taken to the Venire, they said they would be advised until the next Term; and they told the Prisoners, (who were Quakers, and had brought a Paper which they said contained their Acknowledgment of the King's Authority, and Profession to submit to his Government; and that they had no Exception to the Matter contained in the Oath, but to the Circumstance only, and that they durst not take an Oath in any Cause, which they prayed might be read, but could not be permitted) that their best Course was to supplicate his Majesty in the mean Time for his Gracious Pardon. Vide 16 R. 2. 5. which makes this very clear.

Radly and Delbow *versus* Eglesfield and Whital.

IN an Action sur 13 R. 2. cap. 5. & 2 H. 4. cap. 11. for suing the Plaintiff in the Admiralty, for a Ship called the Malmoise, pretending she was taken piratice; whereas the Plaintiff bought her infra Corpus Com. It seems there was a Sentence of Adjudication of her, to be lawful Prize in Scotland in April 1667. as having carried bellicos apparatus, (i. e. Contraband Goods in the late Dutch War) and the Plaintiff bought her here under that Title. Admiral Jurisdiction. 2 Saund. 259. 2 Lev. 25. 2 Keb. 828. See 6 Mod. 11, 12. 1 Salk. 35. 3 Lev. 351. Antea 1, 47, 123. Post. 308.

The Libel was, That the Ship belonged to the Defendants, and about January 1665, was laden with Masts, and had Letters of Safe Conduct from the Duke of York to protect her from Concussion. &c. and that certain Scottish Privateers did practise to take the said Ship; and after the Defendants took her, and being requested, refused to deliver her, and that ratione lucri cessantis & damni emergentis, they suffered so much Loss, &c.

The Defendants pleaded Not guilty to this Action, and upon the Trial would not examine any Witnesses, but prayed the Opinion of the Court; who said there was good Cause upon the Libel, (which now they must take to be true) in the first Instance for the Admiralty to proceed. In 43 Eliz. it was resolved, If Goods are taken by Pirates on the Sea, tho' they are sold afterwards Raym. 473. 1 Sid. 320. 1 Cro. 685. Yelv. 125. Style 418.

at

1 Sid. 320. 1 Roll. 531. Hob. 78. Molloy 9, 10, 11. Yelv. 92. Cro. El. 92.

at Land, yet the Admiralty had Conuſance thereof; for that which is incident to the original Matter, ſhall not take away the Juriſdiction; and that is Law, tho' there were another Reſolution in Bingley's Caſe. 3 Jac. 7 Ed. 4. 14. and 22 Ed. 4. If Goods are taken by an Enemy, and retaken by an Engliſhman, the Property is changed: Otherwiſe, if by Pirates. And if in this Caſe the Taking were not piratice, it ought to have been alledged on the other Side. Had the Sentence in Scotland been pleaded in the Admiralty, the Court would have given Deference to it; as if a Man had Judgment in Communi Banco, and ſhould begin a Suit for the ſame in Banco Regis; This might be made a good Plea to the Suit, but not to the Juriſdiction; for, for ought appeared, this might have been the firſt Proſecution, and no Proceedings might have been in Scotland.

Poſtea 308.

This came to be tried at the Niſi prius before Hale, who was of the Opinion, ut ſupra, then. But becauſe it was a Cauſe of Weight, he ordered it to be tried at the Bar. And becauſe 'twas for his Satisfaction, and for a full Reſolution, the Jury was paid between the Parties. Note, A Proctor, ſworn a Witneſs, ſaid, When this Cauſe was in the Admiralty, there was a proviſionate Decree, as they call it, or primum Decretum, which is a Decree of the Poſſeſſion of the Ship, and upon that an Appeal to the Delegates; but my Lord Keeper being informed, That no Appeal to them lay upon it, becauſe it was but an interlocutory Decree, upon Hearing of Counſel he ſuperſeded the Commiſſion.

When a Ship is ſo ſeized, upon Security given, 'tis the Courſe of the Admiralty to ſuffer her to be hired out.

Watkins *verſus* Edwards.

1 Mod. 286. 2 Keb. 696, 745, &c. 5 Eliz. c. 4.

PAſch. 22 Car. 2. Rot. 408. An Action of Covenant was brought by an Infant per Guardianum ſuum, for that he being bound Apprentice to the Defendant by Indenture, &c. the Defendant did not keep, maintain, educate and teach him in his Trade of a Draper as he ought, but turned him away.

The Defendant pleads, That he was a Citizen and Freeman of Briſtol; and that at the General Seſſions of the Peace there, there was an Order made, That he ſhould be diſcharged of the Plaintiff for his diſorderly Living, and Beating of his Maſter and Miſtreſs; and that this Order was enrolled by the Clerk of the Peace, as it ought to be, &c. To this the Plaintiff demurs.

The firſt Queſtion was, Whether the Statute extends to all Apprentices, or only ſuch as are impoſed upon their Maſter by the Juſtices, and compellable to ſerve. And Hale and Moreton inclined, That it did not extend to all Apprentices. Twiſden and Rainsford contrary.

Power to diſcharge Apprentices, extend only to ſuch Trades as are particularly mention'd in 5 Eliz. 2 Salk. 470.

Secondly,

Secondly, Whether they had Power to discharge the Master of his Apprentice, as they might, & e converso.

Hale conceived they could not; but cause the Servant to have due Correction, in case the Master complained of him.

Twisden, Rainsford and Moreton, contra. For he may be so incorrigible, that the Master cannot keep him without standing in continual Fear; and in Mich. 21, and Hill. 21 & 22 Regis nunc, upon the Removal of an Order of Sessions from York, it was resolved, That the Master might be eased of his Apprentice by the Sessions upon just Cause. And Twisden said, Shelton, Clerk of the Peace for Middlesex, informed him, that such Orders are frequently made. Hankworthy's Case. 1 Saund. 313, 314, 315.

Thirdly, The great Question was, Whether the Defendant ought not to have applied himself to one Justice first, as the Statute directs; that he might (if he could) have settled the Business, and if not, then to go to the Sessions, and not to go thither per saltum, as upon the Statute of 18 Eliz. cap. 3? The Sessions cannot make an Order for Keeping of a Bastard, but upon an Appeal from the two Justices, who are first to make an Order. 1 Saund. 316. 1 Mod. 287.

Hale. This Case differs, for 18 Eliz. gives the first Man Power to make an Order, which shall bind the Parties until it is avoided by Appeal; but this Statute of 5 Eliz. gives no Jurisdiction to the first Man, for he is only to compound the Business if he can. 'Twas resolv'd, that a Complaint made originally at Sessions, without any previous Application to a single Justice out of Sessions, was good. 1 Salk. 68.

Twisden, The Discharge being set forth in an Order, we must intend it duly made; 'tis the common Practice to go to the Sessions first. It was moved at first, that it did not appear that the Plaintiff had Notice; but that Point was waived, for being in a judicial Proceeding, it shall be intended. Et adjornatur.

Lucy *versus* Levington.

PAsch. ult. Rot. 96. Covenant by the Plaintiff as Executor of J. S. for that the Defendant covenanted with J. S. his Heirs and Assigns, to levy a Fine, &c. and that they should enjoy the Lands against all other Persons claiming under Sir Peter Vanlore; and then he says, That Sir Robert Crooke and Abraham Vandebendy in the Testator's Life-time, did enter claiming under Sir P. Vanlore, &c. 2 Keb. 831. 2 Lev. 26.

The Defendant pleads, That he had a good and indefeasible Title in the Lands at the Time of the Covenant, by Virtue of certain Fines from Sir Ed. Powel and his Wife; but that in 13 Regis nunc, there was an Act of Parliament, by which these Fines were made, and declared to be, void, and that Sir R. C. and A. Vandebendy had Title, and entred by Reason of the Act, and not otherwise. (The Act which was pleaded in hæc verba recites, That certain Men came with armed Force, and thereby entered, and took the Fines, &c.) And to this the Plaintiff demurred.

It

It was urged for the Defendant, That this Title was by Matter ſubſequent to the Covenant, and not any Thing which was in Being then; as 9 Co. 106. Sir T. Greſham conveys Land to certain Uſes, with Power of Revocation, and then does revoke, and aliens and dies; the Revocation was not warranted by his Power, but was after made good by Act of Parliament, and then Proceſs went out againſt his Widow for a Fine, for the Alienation of Sir T. G. the Lands being of capite Tenure; but ſhe was diſcharged, becauſe the Alienation had its Effect by an Act of Parliament, which can do no Wrong.

Twiſden. 'Tis hard this ſhould be a Breach; for the Defendant cannot be intended to covenant againſt an Act of Parliament, a Thing out of his Power. Baron and Feme levied a Fine, J. S. covenants, That the Conuſee ſhall enjoy it, againſt all lawfully claiming from B. and F. brings Dower after the Death of B. the Conuſee does not plead the Fine, but ſuffers Judgment and brings Covenant againſt J. S. and adjudged againſt him; for the Covenant ſhall not extend to a Right which is barred, and beſides ſhe did not claim lawfully. There is an Old Book which ſays, That if an Attainder be reverſed by Parliament, the Perſon ſhall have Treſpaſs againſt him, which took the Profits of his Land in the Interim.

Hale. My Lady Greſham's Caſe is not like this; for there the Party was in by the Queen's Conſent to the Alienation by the Act ſhe paſſed; but here the Covenant is broken, as much as if a Man recover Land, and then ſell and covenant thus, and then it be evicted in a Writ of Right; for this is in the Nature of a Judgment. Tho' it be by the Legiſlative Power, it may be the Proſpect of this Act was the Reaſon of the Covenant; nor has the Defendant reaſon to complain, for the Act was made becauſe of his own Fraud and Force. Every Man is ſo far Party to a private Act of Parliament, as not to gainſay it, but not ſo as to give up his Intereſt; 'tis the great Queſtion in Barrington's Caſe, 8 Co. the Matter of the Act there directs it to be between the Foreſters and the Proprietors of the Soil; and therefore it ſhall not extend to the Commoners, to take away their Common. Suppoſe an Act ſays, Whereas there is a Controverſy concerning Land between A. and B. 'tis enacted, That A. ſhall enjoy it This does not bind others, tho' there be no Saving, becauſe it was only intended to end the Difference between them Two. Whereupon Judgment was given for the Plaintiff.

It was agreed by all the Juſtices, That tho' the Covenant were made only to J. S. his Heirs and Aſſigns, and it were an Eſtate of Inheritance; yet the Breach being in the Teſtator's Life-time, the Executor had well brought the Action for the Damages.

Peters *verſus* Opie.

IN an Aſſumpſit the Plaintiff declares, That there was an Agreement between him and the Defendant, that he (the Plaintiff) ſhould pull down two Walls and build an Houſe, &c. for the Defendant, and that the Defendant ſhould pay him pro labore ſuo in & circa diviſionem, *&c.* 8 l. and that in Conſideration that the Plaintiff aſſumed to perform his Part, the Defendant aſſumed to perform his: And the Plaintiff avers, that he was paratus to perform all on his Part, but that the Defendant had not paid him the Money: And after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, That he did not aver that he had done the Work. Vide 1 Salk. 171. 1 Lutw. 249. Thorpe, v. Thorpe. Poſtea 214. 2 Saund. 350. 2 Keb. 811, 836. 2 Lev. 23.

Hale. Pro labore here makes a Condition precedent, and therefore the Performance of the Work ought to have been averred; for tho' in Caſe of a Reciprocal Promiſe, Performance need not be averred, yet if the Promiſe refers to an Agreement, which contains a Condition precedent, the Performance of that muſt be averred; as if I ſhould promiſe one to go to York, and in Conſideration of that he promiſe to pay me 10 l. there needs no Averment of my going to York; otherwiſe, if the Counter-Promiſe were to pay 10 l. for my going to York. So if the Counter-Promiſe were to do a Thing after a Time (aſcertained or to be aſcertained) it muſt be averred that the Time is paſt. Therefore, that it is laid by Way of Reciprocal Promiſe will not concern much, for every Agreement is a Reciprocal Promiſe; but the Matter is, what the Agreement is. Here tho' the Reciprocal Promiſe be the Foundation of the Conſideration, yet 'tis to be conſidered, that it refers to a Conditional Promiſe or an Agreement, and the Promiſe obliges not the Defendant to do it otherwiſe than according to the Agreement. Now to ſhew this pro labore makes a Condition precedent, ſuppoſe the Agreement to be in Writing thus, Memorand' that J. S. agrees and promiſes to build, and J. N. promiſes to pay him ſo much for his Pains, it cannot be taken but that the Building muſt be precedent to the Payment. 'Tis the common Way of Bargaining, and in common Dealing Men do not uſe to Pay before the Work be done; it would be inconvenient to give croſs Actions in ſuch Caſes eſpecially, ſince 'tis likely that the Workman is a poor Man. 'Tis true, if there be a Time limited for the Payment, which Time may fall out before the Work or Thing be done, there the Doing it is not a precedent Condition. Vivian and Shipping, 3 Cro. An Award that one ſhould pay 10 l. and in Conſideration thereof, the other ſhould become bound, &c. adjudged the Paying the 10 l. was a Condition precedent (5 or 15 H. 7, 10.) is our Caſe in Point: If the Plaintiff had alledged that he had offered to work, and the Hob. 41, 42. 3 Salk. 95. Poſtea 214. Hob. 41, 42. Cr. Car. 385.

Defendant had hindred him, it had been good. The want of the Averment is not helped by the Verdict, for 32 H. 8. extends not to Declarations or Avowries, but only to Pleading; if otherwise, there had been no Need of 21 Jac. c. 13. to cure the want of averring the Party's Life.

Twisden contra. There is no Need of the Averment, there being Reciprocal Promises, upon which the Parties have mutual Remedies, and relied upon the Case, 1 Roll. 46.

Rainsford agreed with Hale. Et adjornatur. Postea 214.

Termino S. Hillarii Anno 23 & 24 Car. II.

In Banco Regis.

Harwood's *Case*.

1 Mod. 77, 79. Raym. 116. 1 Sid. 250. 2 Lev. 32. 2 Keb. 847, 855.

HE was committed to Newgate by the Court of Orphans; and upon a Habeas Corpus it was returned, That the City of London is an ancient City, and that Time out of Mind the Mayor and Aldermen have had the Custody of Orphans within the City, until the Age of 21 or Marriage, and that there hath been Time out of Mind a Court of Record, (called the Court of Orphans) holden before them, having Conusance of all Matters concerning Orphans, and that they had Power to give Licence to marry a Woman which was their Orphan, or to deny it upon reasonable Cause; and if any one did marry such Orphan without Licence first had from the said Court, that they might impose a reasonable Fine upon him; and if he should refuse to pay it, or to give Security, to commit him to Prison. It was also returned, That Harwood did marry such an Orphan without Licence first obtained, whereupon he being present in Court, they fined him 40 l. and he refusing to pay it, or give Security, was committed.

To this Return, First, it was objected, That this Custom shall not bind Strangers. In 1 Cro. 619. Dean's Case, who was imprisoned for refusing to find Sureties for the Good Behaviour, which was demanded of him, because he called an Alderman Fool, it was returned, That if a Freeman commit such an Offence, &c. So in Andrew's Case, in Hutton 30. one was imprisoned for not giving Security for the Payment of a Legacy, devised by his Testator to an Orphan, he is returned to be a Freeman.

Secondly, This Custom as returned is unreasonable, for it would oblige Strangers at what Distance soever from London, who cannot

cannot take Notice who are Orphans of the City; yet they should incur a Penalty by marrying them without Leave from the City, and they have not returned, that Harwood married the Orphan within the City; and therefore it must be intended that he did not, and in all other Points most advantageously for him, in regard he cannot shew the Truth of his Case by Pleading to the Return. In an Action upon the Statute of Labourers, the Plaintiff declared, That he retained a Servant at London, and that the Defendant retained him within the Term he had contracted with him for. The Defendant pleaded, that he found him vagrant in another County, and there retained him; and held that it was a good Plea, for he was not bound to take Notice of a Retainer by the Plaintiff, when it was in another County. 17 E. 4. 7. b. The Difference is taken between Customs general, such as Gavelkind, and private particular Customs, the one every one will take Notice of, but not the other, 1 Cro. 561. 3 Cro. Launder and Brook's Case. The Court of Orphans is a particular Jurisdiction, and not to be extended all over England; and it appears by the Books, that they may have a Ravishment of Ward, F. N. B. 142. B. Hob. 95. which therefore seems to be their proper Remedy, rather than the Course they have now taken.

Thirdly, The Custom is unreasonable, that they should impose the Fine who are to have it, and so to be Judges and Parties.

Fourthly, It was alledged, That the Fine was unreasonable, which is not to be proportioned to the Portion the Orphan is to have, (which was shewn in the Return to be 800 l.) but to the Crime, for it doth not appear, that the City is to have the Value of the Marriage, or any Benefit by it; and in this Case there was no Disparagement for his Quality deserved such a Portion, and he had the Consent of her Friends.

But notwithstanding these Exceptions to the Return, it was resolved by all the Court, that he should be remanded.

As to the 1st, That it is not returned that Harwood is a Freeman, the Court resolved, That it was not material, for in many Cases Strangers are bound by the Customs of London; as that of Foreign bought and Foreign sold was resolved to be a good Custom, 15 Car. 2. between Hutchins and Players, in Communi Banco.

2. Tho' it appears the Marriage was in a Foreign County, and not shewn that he had Notice, it is all one; for if that might be an Excuse, the Government of Orphans by the City of London would be utterly insignificant, for it would be only to seduce the Orphan out of the Liberties of the City, and whatever Practice there were to disparage her in her Marriage, it would be dispunishable by them; and Notice in this Case is impossible to be given, but most easie to be taken; for what more proper than for a Man to inform himself of the Condition of her, whom he intends to Postea 204.

make his Wife? And if Notice were requiſite, it muſt be given to all the Men in England capable of Marriage; and in what Manner ſhould that be? By firing it like a Proclamation to ſome notorious Place in the County? Yet it would be then hard to maintain, that a Man was bound to take Notice of ſuch a Thing. The Statute of this King, that takes away the Court of Wards, ſaves and confirms the Juriſdiction of the Court of Orphans in London, which being in a general Law is within every Man's Notice; for the Caſe of taking away a Man's Servant in a Foreign County to that he was retained in, is not like to this, for if he be detained after Demand made, he which firſt retained him may have an Action, and ſo is at no Loſs; but here there is no Remedy by undoing the Marriage, and therefore 'tis fit the Raſhneſs of it ſhould be puniſhed. This Cuſtom concerning Orphans is not confined to the Walls of London in many Particulars. All the Children of a Freeman, tho' he dies, and they were born out of London, ſhall yet be Orphans; If a Legacy be bequeathed to a City Orphan in any Foreign County, the Executor, &c. ſhall be compelled to give Security to the Court of Orphans for the Payment of it. Et vid. Luch's Caſe, in Hob. 247. The Intereſt of the City adheres to the Perſon of the Orphan where-ever he is; as a Citizen of London ſhall have his Perſonal Privileges in all Places, as Exemption from Toll, Priſage, (Quære the laſt) (per Hale.) And as well as they may have a Raviſhment de gard in what County ſoever the Orphan was taken, ſo they may puniſh an unlicenced Marriage. Waller's Caſe, 22 Jac. was the ſame with this which was reſolved for the City. It appears by the Return that Harwood was preſent in Court; and Hale ſaid, they could not award Proceſs into a Foreign County.

3. It doth not appear by the Return, that the Mayor and Aldermen are to have the Fine, and then it ſhall not be ſo intended. But in Eaſtwick and Langham's Caſe, (which Langham was fined for refuſing the Office of a Sheriff, being a Freeman;) it was held they might ſet the Fine, tho. they were to have it themſelves.

4. It was held the Fine was not exceſſive: But in regard there was no Diſparagement by the Marriage, it was propounded by the Court, that upon the Submiſſion of Harwood to the Court of Orphans, that they ſhould do well to remit the Fine.

St. Aubin *verſus* Cox.

1 Show. 9. 3 Sal. 287. Raym. 189. Poſtea 274. 1 Mod. 66, 81. Antea 88. 2 Keb. 853, 854.

A Prohibition was prayed to the Court of the Compter in Woodſtreet London, to an Action of Debt there commenced; for that the Defendant had pleaded before any Imparlance taken, That the Cauſe of Action did ariſe at a Place out of their Juriſdiction, and offered to have ſworn his Plea, and they refuſed to accept this Plea.

Upon

Upon this Matter a Prohibition was granted; for Inferior Courts have not Cognizance of Transitory Things, which arise in Places out of their Jurisdiction, as F. N. B. 45. is: But then 'tis not sufficient to surmise such Matter for a Prohibition; but a Plea to that Effect must be tendred in the Inferior Court, and that before any Imparlance taken (whereby the Jurisdiction would be admitted) and it must be upon Oath; and then if refused, a Prohibition shall be granted; or upon such Refusal, a Bill of Exceptions may be made, and Error assigned. Fitz. N. B 21 N. 2 Mod. 273. Postea 333.

The King *versus* Serjeant and Annis.

They were indicted of Perjury committed in their Evidence, given upon an Indictment of Barretry against Nurse (the Record of which was recited in this Indictment, and therein it appeared that the Venire was made returnable coram J. S. & J. N. Justiciariis prædictis, and at a Day certain,) and Judgment given, and Error brought and assigned, that the Venire being returnable coram Justiciariis prædictis, none but the same Justices could proceed, and not those who sate the next Assizes by Virtue of a new Commission: And therefore the Proceedings before them were coram non Judice, and so no Perjury could be committed. 2 Keb. 713. 854.

Secondly, The Venire should not have been returnable at a Day certain, but ad proximas Assisas; because 'tis uncertain when the Assizes begin, and if they should fall out to begin upon the very Day, yet it would not help the Error in the first Award of the Venire. Sed non allocatur;

For the Statute of 1 & 2 E. 6. enables new Commissioners of Oyer and Terminer to proceed where the former left, before whom the Matter commenced.

And for the other Exception, it makes the Proceedings only erroneous; and while the Record stands unreversed, the Perjury may be well assigned. It was said at the same Assizes, that the Judges may adjourn to a Day certain; but if there be a Continuance over to the next Assizes, there must be no Day expressed. But Inferior Courts cannot make a Continuance ad proximam Curiam, but always to a Day certain. Raym. 74. 1 Sid. 148. Cr. Car. 254. contra. 2 Mod. 59. 1 Mod. 81. Raym. 205.

Stanlack's *Case*.

Upon an Inquisition super visum Corporis before the Coroner, it was found, That he died of a Megrim at Greenwich. 1 Mod. 82. 2 Keb. 859.

Sir Edward Thurland moved for a Melius Inquirendum, producing several Affidavits, That Stanlack was riding in the Highway, and a Coach with six Horses rushing by him, cast him from his Horse,

Horſe and kill'd him; and that divers offered to prove this before the Coroner, and he would not hear them: And if this Enquest ſhould ſtand, the King would loſe his Deodand; and alledged, that there were ſeveral Precedents of this Nature, as in one Michael Bartholomew's Caſe, and Toom's Caſe, who hanged himſelf at Hackney about 15 Years ſince.

The Court ſaid in thoſe Caſes it was proved, That there was Practice with the Coroner to ſuppreſs the King's Evidence, and ſo the Inquiſition was ſet aſide upon a Male ſe geſſit. If a Coroner omits to enquire, this Court, as ſupream Coroner throughout England, may enquire; or may make Commiſſioners to enquire; or Commiſſioners of Oyer and Terminer may enquire; but then it is not Super viſum corporis, and therefore may be traverſed. But Hale ſaid, Where a Coroner hath enquired, no Melius Inquirendum can go, as upon an Office found after the Death of the King's Tenant. For unleſs they could take ſome Exception to the Inquiſition to quaſh it, the Coroner could not enquire again; but if the Misdemeanor of the Coroner were ſomewhat more clearly made out, the Court ſaid they would ſet the Inquiſition aſide, and cauſe a new one to be made.

T. Jones 198. 2 Sid. 90, 101. 3 Mod 80, 100, 238. 2 Lev. 141. Poſtea 352.

Maynard's *Caſe*.

HE being produced as a Witneſs in an Action of Trover againſt Reynell, Corey and others, for 1200 l. which the Defendants were charged to have conveyed away, which was the Money of Mr. Luttrell, lately deceaſed, and belonged to Mrs. Luttrell, now Plaintiff, as Executrix, he ſwore, that the Defendants had the Money, and carried it out of the Houſe wherein Mr. Luttrell died; and upon his Evidence principally the Jury found the Defendants Guilty.

1 Mod. Rep. 283. 2 Keb. 873.

Now the laſt Eaſter-Term, which was about a Year and a half ſince the Trial, Maynard made an Affidavit in the Kings Bench, that Mrs. Luttrell had arreſted him among the reſt, for the taking away of this Money; and he being unable to put in Bail, and apprehenſive of the Ruin that Lying in Priſon would bring upon him, he applied himſelf to Mrs. Luttrell, who promiſed him Favour, ſo that he would accuſe Reynell and the other Defendants with the taking of the Money, and be a Witneſs againſt them; and that he was examined before a Juſtice of the Peace, (one A.) who did much urge him to depoſe againſt Reynell in this Matter. And that by their Threats and Promiſes he was brought to give Falſe Evidence, and that what he ſaid in his Teſtimony, relating to the Defendants taking away the Money, was untrue. After this Affidavit made he was indicted of Perjury, in what he witneſſed in the Action of Trover, and confeſſed the Indictment.

Mrs.

Mrs. Luttrell thinking this Matter might disparage her Verdict, brought an Information against him of Perjury committed in his Affidavit, to which he pleaded Not Guilty, but before the Trial made an Escape, so that at the Day the Enquest was taken by Default.

The Court were at first in Doubt, whether they should proceed upon the Information; the King having taken his Confession upon the first, it seemed contradictory and repugnant to prosecute him upon this: But in regard the Affidavit charged Mrs. Luttrell and others with having suborned him to perjure himself, he might be tried upon that as another distinct Perjury, if so be they should be clear of having practiced with him. And upon the Trial of this Information it did appear that he had charged them falsly, and so found Guilty.

Another Matter was moved, That the Indictment alledged the Perjury to be committed in Middlesex; whereas it appeared by the Affidavit produced, that it was taken at Justice Twisden's Chamber, in the Inner Temple; wherefore it ought to have been tried in London, where the Oath was taken; and though the Affidavit were filed in Court, that would not help it. But the Court agreed, If it had been in an Indictment it had been a good Objection, for there the Offence is local; but otherwise they said it had been held in an Information. And Twisden said, That if a Recognizance was taken at a Judge's Chamber in London, and after filed in Court, the Scire facias upon it shall go first into Middlesex. However the Court offered to have this Matter found Specially; but there being no Counsel for Maynard, and this Matter stirred only per amicum Curiæ, it went off.

Austin's *Case*

IN an Indictment for erecting of Posts and Rails in an Highway, it was held necessary to prove, that the Party indicted did set them up; for a Continuation of them, or not suffering them to be removed, would not serve. Postea 189.

Hale. If there be no Special Matter to fix it upon others, the Parish where the High-way is, ought to repair it of Common Right. (Sed Quære, Why not the County? as in the Case of Common Bridges, 2 Inst. 701.) Vide postea 189. Antea 90.

Butcher *versus* Cowper.

IN an Indebitat' Assumpsit, the Defendant pleads in Abatement, That the Promise was for carrying the Goods of the Defendant to a certain Place; and if there were any such Contract, it was made with the Plaintiff and a Stranger. Upon which it was de- 2 Keb. 177.

murred; because to plead, if there were any such Contract, is not good, and more like an Affidavit to change a Venue, than Pleading, and he ought to have averred that the Stranger was alive: Besides the Defendant had taken an Imparlance, and therefore could not plead an Abatement. Wherefore it was adjudged for the Plaintiff.

Smith *versus* Butterfield.

2 Keb. 878. Vid. 2 Lutw. 945, 1457. 2 Saund. 5. 3 Salk. 357.

IN Trespass Quare clausum fregit & bona asportavit; the Defendant pleaded Not Guilty to the Breaking of the Close, and justifies the Taking of the Goods at a Time varying from that alledged in the Declaration, and concludes Quæ est eadem transgressio, upon which it was demurred; because he did not traverse the Time before and after it; and it was adjudged for the Plaintiff.

Toll *versus* Dawson.

2 Keb. 878.

IN Debt upon a Bond conditioned to perform an Award. The Defendant pleaded Nullum fecerunt Arbitrium.

The Plaintiff replies, and sets forth the Award, which did express the Bond of Submission to be dated the 7th of February, whereas it was dated the 10th of February; and for that Misrecital the Defendant demurred.

But the Court held clearly, That it did not hurt the Award: And so if the Submission had been of divers particular Matters, yet if they had meddled only with the Things submitted, it had been well enough.

Proctor *versus* Newton.

2 Keb. 878. 3 Keb. 41. 2 Lev. 37.

IN Debt upon a Bond, the Defendant demanded Oyer of the Condition, which was to perform Covenants in an Indenture; which recited, That the Defendant had sold to the Plaintiff a certain House, and there was a Covenant that the Plaintiff pacifice gauderet domum prædict' absque legali interruptione disturbantia sive impedimento of the Defendant, or any claiming from or under him. Upon this Covenant the Plaintiff assigned the Breach thus: That J. S. habens jus & titulum virtute concessionis from J. N. ante tempus confectionis of the Bargain and Sale to him, did enter and expel him: Upon which it was demurred, because not shewn that J. S. had a lawful Title, and therefore not well applied to the Condition, which was so expressly penned. 2 Cro. 315.

2 Saun. 178. 1 Mod. 101. 1 Lev. 207.

Hale. Habens jus implies it was a lawful Eviction.

Twisden doubted, because it may be J. N. disseized the Defendant before the Bargain and Sale, and made a Lease to J. S. Et adjornatur. Judgment for the Plaintiff, 2 Lev. 37.

Freeman

Freeman *verſus* Boddington.

ERror of a Judgment in an Aſſumpſit againſt Baron and Feme, in Com' Banco. The Error aſſigned was; Hill. 21, 22. Rot. 126. 1 Show. 13. contra. 2 Keb. 878. 2 Lev. 38.

That the Feme was an Infant and appeared by Attorney; whereas the Court ought to have admitted her per Guardianum. But if the Wife be of Age, then the Baron makes an Attorney for her and himſelf, and the Entry is per Attornatum of the Baron and Feme, and not the Baron only: And for this Cauſe the Judgment was reverſed.

And Hale ſaid, That the Baron could not diſavow the Guardian made by the Court for his Feme.

Lewyn *verſus* Forth.

THE Caſe was, Magdalen College in Oxford being ſeiſed of an Houſe and a Mill, demiſed it to Lewyn for thirty-one Years: Lewyn let the Mill to J. S. for five Years, and after demiſed the Houſe and Mill to Forth by Indenture for thirty-one Years: Forth covenanted to repair the Premiſſes durante termino prædict' 31 annorum: J. S. refuſed to attorn; and whether Forth were bound to repair the Mill was the Queſtion; becauſe it was alledged, That the Covenant was to repair during the Term, and nothing in the Mill paſſed during the five Years for Want of Attornment. But it was reſolved, That he was bound to repair: For Hale ſaid, Tho' the Leaſe did not commence in Point of Intereſt, yet it did in Point of Computation; and this Covenant was to repair during the thirty-one Years. Covenant. 2 Keb. 879. Antea 126, 148.

Zouch *verſus* Clay.

TRin. ult. Rot. 787. In Debt upon a Bond, the Defendant pleaded, That at the Time that he ſealed and delivered the Bond, there was a Space left, wherein afterwards the Name of J. S. was put in, who alſo ſealed and delivered it; ſuppoſing that the Adding another Obligor, bound jointly and ſeverally with him, was an Alteration material to avoid the Bond, and rely'd upon Pigot's Caſe in 11 Co. 2 Lev. 35. Mo. 619. 2 Keb. 872, 881. Kelleway 162, 164. 1 Cro. 627. Mo. 547.

But the Court held, That the Bond remained the ſame as to him, and he could not take Advantage of this Matter; and 'tis the common Practice of Sheriffs, to make their Bonds for Appearance in this Manner.

Sands *verſus* Rudd.

IN Debt upon a Bond, conditioned to give Security by a certain Day, as the Chamberlain of London ſhall appoint.

The Defendant pleaded, That there was no Chamberlain of London at the Day. Upon which it was demurred, and adjudged for the Defendant.

Parſons *verſus* Perus.

S. C. 1 Mod. 91. Pollexfen 45, 46. 2 Keb. 872, 880. 2 Lev. 34.

HILL. ult. Rot. 1051. In an Ejectment, upon a Special Verdict the Caſe appeared to be thus: Two Women were Jointenants in Fee; one of them made a Charter of Feoffment to J. S. and Livery within the View, and after (before it was executed) married him.

And it was objected, That this was not a good Feoffment. None will deny, but that the Death of either Party makes a Livery within View (if not executed by Entry) ineffectual. And in Mo. 85. Dyer 5. If there be not an Entry immediately, a Livery within the View is not good; and in this Caſe, by the Marriage, he becomes ſeiſed in the Right of his Wife, and cannot by his own Act deveſt himſelf of that Eſtate, or work a Prejudice to his Wife, by putting the Eſtate out of her. Which makes it differ from the Caſe of 38 E. 3. 11. b. where a Man made Livery of the Land within View to a Woman; and before ſhe entred, married her, and claimed the Eſtate in Right of his Wife; there held to be a good Feoffment: For in that Caſe, there is no Alteration of the Eſtate conſequent upon the Intermarriage. Neither is it like the Caſe of 2 R. 2. quoted in Forſe and Hemling's Caſe in 4 Co. where a Woman grants a Reverſion to a Man, and they intermarry before Attornment: For there the Grant is to be perfected by the Act of a Stranger, which in Reaſon ſhould be more available to a Man than his own Act.

But it was reſolved by all the Court, That this Livery was well executed after the Marriage: For an Intereſt paſſeth by the Livery in View, which cannot be countermanded. The effectual Part of it, (viz.) Go enter, and take Poſſeſſion, was before the Marriage, tho' the Eſtate is not in the Feme while Entry. She hath done all on her Part to be done, and hath put it meerly in the Feoffor's Power, and when he enters it hath a ſtrong Retroſpect to the Livery, and ſhall be pleaded as a Feoffment when ſhe was ſole. If two Women exchange Lands, and one marries before Entry, this ſhall not defeat the Exchange. The Caſe of 2 R. 2. and 38 E. 3. are as ſtrong.

1 Mod. 91.

Emerſon *verſus* Emerſon.

TRin. ult. Rot. 1389. Erroꝛ of a Judgment in the Common Pleas, in an Action of Treſpaſs by the Plaintiff as Executoꝛ, upon the Statute of 4 E. 3. De bonis aſportatis in vita Teſtatoris. The Plaintiff declared, That the Defendant blada creſcentia upon the Freehold of the Teſtatoꝛ, meſſuit, defalcavit, cepit & aſportavit. 2 Keb. 874. 3 Salk. 161.

Upon Not guilty pleaded, a Verdict and Judgment was foꝛ the Plaintiff, and aſſigned foꝛ Erroꝛ, That no Action lay foꝛ Cutting of the Coꝛn; foꝛ that is a Treſpaſs done to the Freehold of the Teſtatoꝛ, foꝛ which the Statute gives the Executoꝛ no Action, and while the Coꝛn ſtands, 'tis to many Purpoſes Parcel of the Freehold. So that if a Man cuts Coꝛn and carries it away preſently, tho' with a felonious Intent, 'tis no Felony: Otherwiſe, if he let it lie after 'tis cut, and at another Time comes and ſteals it. So that it appears foꝛ Parcel of the Treſpaſs no Action lies; then entire Damages being given as well foꝛ the Cutting, as Carrying away of the Coꝛn, the Judgment is erroneous. 1 Mod. Rep. 89. 2 Keb. 875.

But all the Court were of another Opinion; foꝛ 'tis but one entire Treſpaſs; the Declaration only deſcribes the Manner of Taking it away. Indeed, if it had been quare clauſum fregit & blada aſportavit, it had been naught; oꝛ if he had cut the Coꝛn and let it lie, no Action would have lain foꝛ the Executoꝛ. So if the Gꝛaſs of the Teſtatoꝛ be cut, and carried away at the ſame Time; becauſe the Gꝛaſs is Part of the Freehold, but Coꝛn growing is a Chattel. The Statute of 4 Ed. 3. hath been always expounded largely. 9 Co. 78.

Mr. Amhurſt's *Caſe of* Gray's-Inn.

SErjeant Maynard moved foꝛ a mandatoꝛy Writ to the Mayoꝛ and Court of Aldermen of London, upon the Statute of 13 Car. 2. c. 11. to give Judgment accoꝛding to the late Act of 22 nunc Regis. The Caſe was, That the Act appoints a Market to be on certain Gꝛound ſet out in New-Market; and in all ſuch Caſes, foꝛ the Satisfaction of the Owners of the Gꝛound, (if the City cannot agree with them foꝛ it) it empowers the Mayoꝛ and Aldermen to empanel a Jury, who ſhall aſſeſs and adjudge what Satisfaction and Recompenſe ſhall be given to the Owners; and ſays, That the Verdict of ſuch Jury on that Behalf to be taken, and the Judgment of the ſaid Mayoꝛ and Court of Aldermen thereupon, and the Payment of the Money ſo awarded oꝛ adjudged, &c. ſhall be binding and concluſive to and againſt the Owners, &c. Raym. 214. 2 Keb. 871.

Now there was Fifteen thousand Foot of Amhurst's Ground taken away for this Purpose, and a Jury had been empanelled, and had assessed and awarded him two Shillings a Foot; but the Mayor and Court of Aldermen refused to give Sentence or Judgment thereupon: This, says he, is a ministerial Thing, and this Court will interpose when any Officers will not do Justice, or will out-go their Authority: For there is the same Reason to command to do Justice, as to prohibit Injustice. A Bishop of Exon had fallen out with a Town in Cornwal, and denied them Christm; and a Mandamus went hence, to command him to give it them. Mr. Noy brought in a Copy of it.

Sir William Jones. This somewhat resembles a Procedendo ad Judicium; this is stronger than the Case of commanding a Bishop to grant Administration; there this Court commands them to observe a Statute, tho' it be in a Matter this Court has no Cognizance of. We cannot have an Action on the Case.

Hale. If they do not make you Satisfaction, your Interest is not bound.

Maynard. But that is taken away by the same Act, (Page 143, 4.) We are Lessee to the Dean and Chapter of St. Paul's.

Hale. 'Tis not enacted, That they shall give Judgment; but that is implied: I never knew a Writ, commanding to grant Administration, tho' the Opinion has been so.

Sir William Jones. That was done in Sir G. Sandys's Case, after great Debate.

Then a Rule was made to shew Cause why a Writ should not go.

Afterwards the Court granted a Writ, but willed them to consider well of the Form, and to whom to direct it.

Lloyd *versus* Brooking.

2 Salk. 576. Thomson and Leach. 2 Keb. 872, 881. 2 Lev. 35.

Purefoy v. Rogers. 2 Saund. 382. 1 Mod. 92.

2 Sid. 65.

Trin. ult. 1046. The Case was, Tenant for Life, Remainder to his first Son in Tail, Remainder to J. S. for Life, Remainder to his first Son in Tail, &c. Tenant for Life after the Birth of his first Son, accepts a Fine from J. S. to certain Uses; and then makes a Feoffment, after which the Son of J. S. is born; and whether his contingent Remainder were destroyed, or should vest in him, was the Question? And it was resolved by the whole Court, upon the first Opening, That the contingent Remainder was not destroyed; the Acceptance of the Fine displaced nothing, the Feoffment devested all the Estates, but the Right left in the first Son in Remainder, supported the contingent Remainders. By Lord Coke's Case, 2 Roll. 796, 797. is stronger: He covenanted to stand seised to the Use of himself for Life, Remainder to his Wife for Life, Remainder to his Daughter for Life, (when born) Remainder to her first Son in Tail: And minding

minding to diſturb the Ariſing of the contingent Eſtates, attempted it by theſe two Means:

Firſt, He grants the Reverſion, and in the Grant recites the former Settlement; which Grant was without Conſideration;

And Secondly, makes a Feoffment: And it was reſolved, That the Grant ſhould not hinder the Ariſing of the contingent Uſe, becauſe the Grantee had Notice, and was therefore ſubject to the Covenant, to ſtand ſeiſed by the Grantor; and that the Feoffment ſhould not deſtroy the contingent Eſtate, becauſe the Right of Remainder for Life in the Daughter, upon which ſhe might have entred for the Forfeiture, did ſupport it, tho' indeed the Remainder for Life in the Wife would not; for the Feoffment by the Huſband tolls her Right during the Coverture, cui contradicere non poteſt; upon which Reaſon is Biggot and Smith's Caſe adjudged, 3 Cro. Now this is ſtronger than the Caſe at Bar, becauſe the Settlement was by Way of Uſe, but here by Act executed. The Caſe of my Lord Coke was adjudged by Rolle in Banco Regis, and after by Glyn. It hath been the moſt common Way of Conveyancing, to prevent the Diſappointing contingent Eſtates, to make Feoffments, &c. to the Uſe of the Husband, &c. for Life, Remainder to the Uſe of the Feoffees for the Life of the Husband, and ſo on to contingent Remainders; and the more modern Ways have been to make the firſt Eſtate but for Years; but in both Caſes, he which hath the firſt Eſtate, cannot deſtroy the Remainders. It hath been a Queſtion, Whether a Right of Action would ſupport a contingent Eſtate? But never doubted but that a Right of Entry would. Vide Archer's Caſe, 1 Co. 66.

Car. 102.

1 Saund. 382. 'Twas held per Cur', that a Right of Action could not ſupport a contingent Remainder, but there muſt be a particular Eſtate actually in Being, or a preſent Right of Entry; and that a future Right of Entry would not ſupport a contingent Remainder. 2 Salk. 576, 577. Thompſon v. Leach.

Katherine Auſtin's *Caſe*.

AN Indictment was found againſt her, that ſhe vi & armis a certain Part of the King's Highway, (leading from Shoreditch Church to Stoke Newington through Hogſdon) poſtibus & repagulis incluſit, &c.

Antea 90, 183. 2 Vent. 186. 3 Salk. 393.

Upon a Trial at Bar, the principal Queſtion was, Whether the Place where the Obſtruction was, were an Highway?

Hale ſaid, If a Way lead to a Market, and were a Way for all Travellers, and did communicate with a great Road, &c. it is an Highway; but if it lead only to a Church, to a private Houſe or Village, or to Fields, there it is a private Way. But 'tis a Matter of Fact, and much depends upon common Reputation. If it be a publick Way of common Right, the Pariſh is to repair it, unleſs a particular Perſon be obliged by Preſcription or Cuſtom. Private Ways are to be repaired by the Village or Hamlet, or ſometimes by a particular Perſon. In the Caſe at Bar, it was found no Highway. Antea 90, 183.

Caſtilian

Caſtilian *verſus* Platt.

2 Keb. 877. ERror of a Judgment in Communi Banco, in a Scire facias againſt three Executors, the Error aſſigned was, That one was an Infant.

Hale. No Doubt a Scire facias lies againſt him; and ſeeing this Caſe is, That he did not appear, Judgment was well given againſt him.

Simon Morſe *verſus* William Slue.

Poſtea 238. Raym. 220. 1 Mod. 85. 2 Keb. 806. 3 Keb. 72, &c. Molloy 209, 210. 2 Lev. 69. MIchael. ult. Rot. 421. An Action upon the Caſe was brought by the Plaintiff againſt the Defendant; and he declared, That whereas according to the Law and Cuſtom of England, Maſters and Governors of Ships which go from London beyond Sea and take upon them to carry Goods beyond Sea, are bound to keep ſafely Day and Night the ſame Goods, without Loſs or Subſtraction, ita quod pro defectu of them, they may not come to any Damage; and whereas the 15th of May laſt, the Defendant was Maſter of a certain Ship called the William and John, then Riding at the Port of London, and the Plaintiff had cauſed to be laden on Board her three Trunks, and therein 400 Pair of Silk Stockings, and 174 Pounds of Silk, by him to be tranſported for a reaſonable Reward of Freight to be paid, and he then and there did receive them, and ought to have tranſported them, &c. but he did ſo negligently keep them, that in Default of ſufficient Care and Cuſtody of him and his Servants, 17 May, the ſame were totally loſt out of the ſaid Ship.

Upon Not guilty pleaded, a Special Verdict was found, (viz.) That the Ship lay in the River of Thames, in the Port of London, in the Pariſh of Stepney, in the County of Middleſex, prout, &c.

That the Goods were delivered by the Plaintiff on Board the Ship, prout, &c. to be tranſported to Cadiz in Spain.

That the Goods being on Board, there were a ſufficient Number of Men for to look after and attend her, left in her.

That in the Night came eleven Perſons on Pretence of Preſſing of Seamen for the King's Service, and by Force ſeized on theſe Men (which were four or five, found to be ſufficient as before) and took the Goods.

That the Maſter was to have Wages from the Owners, and the Mariners from the Maſter,

That ſhe was of the Burthen of 150 Tun, &c.

So the Queſtion was upon a Trial at Bar, Whether the Maſter were chargeable upon this Matter?

It was inſiſted on for the Plaintiff, That he who took Goods to carry them for Profit, ought to keep them at his Peril.

To which it was answered, That there was no Negligence appear'd in the Master. By the Civil Law, if Goods were taken by Pirates, the Master shall not answer for them; and this is not the Case of a Carrier, for tho' here the Goods are received at Land, yet they are to be transported, and being one intire Contract, they shall not be under one Law in the Port and another at Sea; the Master is not liable in Case of Fire or Sinking the Ship; every one knows the Ship is liable to inevitable Accidents, and there is no Case of this Nature in Experience. And Serjeant Maynard added, That this differed from the Case of a Carrier, for that he is paid by the Owner of the Goods; but here the Master is Servant to the Owner of the Ship, and he pays him, and not the Merchant. Owen 57

The Court inclined strongly for the Defendant, there being not the least Negligence in him: But it was appointed to be argued, but since I've heard it was compounded. It was agreed on all Hands, that the Master should have answered, in Case there had been any Default in him, or his Mariners. Postea 238. Raym. 210. That Judgment was given for the Plaintiff.

Anonymus.

UPon a Motion for Restitution after the Reversal of an Outlawry, Hale said, that he must plead the Reversal to the Seisure in Scaccario. 2 Keb. 871.

Puckle *versus* Moor.

MIchael. ult. Rot. 461. A Promise was made seven Years since, to pay Money within three Months after. 1 Mod. 71, 89. Cr. Car. 139.

The Defendant pleaded Non Assumpsit infra sex annos ante exhibitionem Billæ, whereas it should have been causa Actionis non accrevit infra sex annos; Tho' in this Case it appears within the Declaration, that the Time of Payment was not within six Years before; yet because the Defendant had not pleaded it, he cannot have Advantage of it. 2 Keb. 874.

Goff *versus* Lloyd.

MIchael. ult. Rot. 268. Trespass quare domum fregit, and took away so many Nails, &c. 2 Keb. 829, 880.

The Defendant pleads Specially, and sets forth the two Acts for Hearth-money, 14 Car. nunc cap. 10. and 16 Car. nunc cap. 3. in Pursuance of which he distrained the said Nails, for the Duty due by those Acts out of a Smith's Forge, &c. Postea 311, 312.

The Plaintiff demurred: So the sole Question was, Whether a Smith's Forge were within the Acts? It being once argued the last Term, the Court now gave their Opinion.

Moreton.

Moreton. I think a Smith's Forge ought to pay; 'tis a great Part of the King's Revenue, almost in every Village there is one; We should explain the Act liberally for the King.

Rainsford of the same Opinion: 'Tis within the Words, (scilicet) an Hearth whereon Fire is used, and within the Meaning, for there is an Exception of Things not so properly Fire-hearths as this, (viz.) private Ovens. Where the Act excepts Blowing-Houses, I take it is meant Glass-Houses, and the Houses at Iron-works; by Stamps I think is meant Presses, Calenders for Cloaths; by the very Words, Houses that are not Dwelling-Houses are charged. The Objection that it is his Trade, is answered by the Instance of Cooks, Chandlers, Common Ovens, Hearths of Tripe-women, who boil Neats-Feet.

Twisden of the same Opinion. The Words are general, yet I would not extend it to every Hearth that has a Fire upon it, as Stills and Alembicks, for so we might extend it to a Chafing-Dish of Coals; but we must take it for a Rule, to extend it to those Things which are most general. A Smith's Forge is of such Use, that 'tis found almost in every Village; therefore 'twas reckoned a great Piece of Hardship and Slavery upon the Children of Israel, that they were not permitted a Thing so useful amongst them. The Exceptions enumerate Particulars, therefore it excludes whatever is not expressed.

Hale. I would fain know how the Fact is. Do Silver-Smiths, &c. pay? It were too narrow to extend it only to common Chimneys, and too great a Latitude to extend it to every Place where Fire is, where a Man can but warm his Hands. I suppose Boilers in Cooks Chimneys, and the Fire-places of Worsted-combers do not pay. Common Ovens should have paid, tho' there were no Exception of private Ovens; for they never are, or can be without a Chimney. This is Matter of Fact I have not enquired into, and I would be loath to deliver an Opinion without much Inquiry; but 'tis very probable that they are Fire-hearths, and not excepted; but it appears plainly upon the Record, that 'tis a Fire-hearth, and by the general Demurrer 'tis admitted.

Note, There was a Special Rule, That no Advantage should be taken of the Pleading by either Side. But Hale said, he did not know how they were bound by that Rule.

Termino Paſchæ, Anno 24 Car. II.

In Banco Regis.

Monk *verſus* Morris and Clayton.

THE Plaintiff after he had obtained a Judgment in Debt became Bankrupt, and the Defendants brought a Writ of Error. 1 Mod. 93. 3 Keb. 1, 14, 68. Vide 1 Lev. 8, 33. 2 Lev. 49. 1 Jon. 203. 1 Salk. 108, 109.

The Judgment was affirmed in the Exchequer-Chamber, and the Record ſent back.

Then a Commiſſion of Bankrupts is ſued out, and the Commiſſioners aſſign this Judgment.

The Plaintiff ſues out Execution, and the Money is levied by the Sheriff and brought into Court.

The Aſſignee moves, That it may not be delivered to the Plaintiff, ſurmiſing that the Judgment was aſſigned to him, ut antea.

The Court ſaid, They might have brought a ſpecial Scire facias, which they having delayed, and that it would be hard to ſtay the Money in Court upon a bare Surmiſe, and for ought appeared it was the Plaintiff's Due. But however, becauſe it might be hazardous to deliver it to him, they conſented to detain it, ſo that the Aſſignee forthwith took out a Scire facias againſt the Defendant, in order to try the Bankrupcy; or otherwiſe, that it ſhould be delivered to the Plaintiff.

Sir Ralph Bovy's *Caſe.*

IN an Ejectment upon a Trial at Bar, the Caſe appeared to be this; Sir William Drake was ſeized in Fee of the Lands in Queſtion, and 19 Car. 1. infeoffed Sir William Spring, and five others, to ſuch Uſes as he ſhould declare by his Will in Writing, or by his Deed ſubſcribed by three Witneſſes. In Auguſt 20 Car. 1. by his Deed, ut ſupra, he limits the Uſe of the ſaid Lands to his Brother Francis Drake for ninety Years, and declares, That the Feoffees ſhould be ſeized to their own Uſe, in Truſt for the ſaid Francis Drake and his Heirs, with a Power to Francis Drake to alter and limit the Truſt as he ſhould think fit. 1 Sid. Jennet and Coole's Caſe, 223, 244, 262. 3 Keb. 6.

In the ſame Month there is a Treaty of Marriage between F. D. and the Daughter of Sir William Spring; and it was agreed by certain Articles between F. D. and Sir W. S. &c. reciting that he ſhould receive 2500l. with his intended Wife, (which Money was proved to be paid) that F. D. ſhould convey the Lands in

Queſtion to himſelf and his Wife, and the Heirs Males of their two Bodies, &c. for the Jointure of the Wife.

The Marriage afterwards in 20 Car. takes Effect, and ſoon after the ſame Year F. D. by Indenture between him, Sir W. S. and another, reciting the Articles of Marriage, aſſigns his Term of ninety Years to Sir W. S. and the other in Truſt to himſelf for Life, the Remainder to his Wife for Life, and after to the Heirs Males of their two Bodies; and by the ſame Deed limits the Truſt of the Inheritance of the Lands in the ſame Manner.

Afterwards in 23 Car. 1. he in Conſideration of 6000 l. (proved to be paid) grants out of the ſaid Lands a Rent of 400 l. per Annum, to Sir Ralph Bovy and his Heirs, with Power to enter into the Land, in Caſe the Rent was not paid, and to retain it until Satisfaction.

Afterwards F. D. and his Wife die, the Rent was arrear. Sir R. Bovy enters, Sir W. Spring and the other Truſtees aſſign the Term of ninety Years to Sir W. Drake, Heir Male of F. D. and his Wife the Leſſor of the Plaintiff. In this Caſe, theſe Points were agreed by the Court.

Cro. Car. 39. First, That when Sir W. D. enfeoffed divers to ſuch Uſes, as he ſhould declare by his Will in Writing; That if he had in Purſuance of that Feoffment limited the Uſes by his Will, that the Will had been but Declaratory, tho' if he had made a Feoffment to the Uſe of his Will, it had been otherwiſe, according to Sir Ed. Cleer's Caſe, 6 Co. 18. And Hale ſaid, my Lord Coke made a Feoffment, (provided that he might diſpoſe by his Will) to the Uſe of the Feoffee and his Heirs; and reſolved in that Caſe he might declare the Uſe by his Will, which ſhould ariſe out of the Feoffment.

2 Cro. 153, 454. Secondly, That this Settlement being in Purſuance of Articles made precedent to the Marriage, had not the leaſt Colour of Fraud, whereby a Purchaſer might avoid it; and if there had been but a verbal Agreement for ſuch a Settlement, it would have ſerved the Turn. And the Court ſaid, If there had been no precedent Agreement, ſo that it had been a voluntary Conveyance, tho' every ſuch an one carries an Evidence of Fraud; yet is not upon that Account only always to be reckoned fraudulent, or to be avoided by a Purchaſer upon a valuable Conſideration.

1 Mod. 119. Thirdly, Whereas it was objected, That the Truſt of the Term, which was but a Chattel, could not be entailed, and therefore the Term was liable to the Rent notwithſtanding the Aſſignment of it, and Limiting the Truſt as before.

It was anſwered and reſolved by the Court; That if it had been a Term in Groſs in F. D. the Truſt of it could have been no more entailed than the Term it ſelf, but F. D. having the Term in Point of Intereſt, and at the ſame Time the Truſt of the Inheritance, might entail the Truſt of the Term to wait upon the Inheritance;

ritance; and that the Chancery does every Day allow, which they ſhould take Notice of. 2 Vent. 213, 214. 2 Cro. 68.

But then it was objected, That he ought to have limited the Truſt of the Inheritance, and of the Term both together; but F. D. by a diſtinct Clauſe in the Deed limits the Truſt of the Term which divides it, and makes it independent upon the Inheritance, the Truſt of which he limits by another Clauſe.

To that it was ſaid by the Court, That tho' the Limitations were by ſeveral Clauſes, yet all muſt be taken as one entire Conveyance. And Hale ſaid, That in 1646, a Leaſe for Years was aſſigned, and the Truſt of it entailed, and two Days after the Truſt of the Inheritance entailed in the ſame Manner; and it was held by the beſt Counſel then in England, That tho' this were done by ſeveral Deeds, and at ſeveral Times, yet being in Purſuance of one Agreement, that all was to be taken as one entire Act, according to the Caſe of 17 Jac. where a Fine was levied to Leſſee for Years, with an Intent that he ſhould ſuffer a Recovery, which was had the Term following, and reſolved, That his Term was not drowned. The Jury hearing the Opinion of the Court, found for the Plaintiff for all, ſave a 12th Part, for ſo much was drowned and ſurrendred by the Aſſignment of F. D. to Sir W. S. one of the ſix Jointenants of the Reverſion. Poſtea 280. Cro. Jac. 643. 7 Co. 38. 2 Lev. 126. 1 Mod. 107. 1 Salk. 241.

Wood *verſus* Coat.

AN Action for Words, That the Defendant being indicted of a forcible Entry at the Seſſions, and the Plaintiff produced as a Witneſs for the King, and ſwore nothing but what was true; the Defendant after habens colloquium of the ſaid Oath ſaid, The Plaintiff took a falſe Oath againſt me at the Seſſions, innuendo the ſaid Oath, *&c.*

After Verdict for the Plaintiff it was moved, That the Action did not lie, for the Defendant might mean an extrajudicial Oath. In Pritchard's Caſe, 2 Rolle, where one ſaid of him, He took a falſe Oath againſt me at the Aſſizes, it was held, That the Action did not lie. Sed non allocatur; for in that Caſe there was no Colloquium laid, which is alledged in this Caſe, and ſhews to what the Words ſpoken did relate.

Broadnox's *Caſe*.

A Habeas Corpus was brought to remove the Body of Broadnox, who was taken by Proceſs upon a Plaint exhibited in the Court of the Sheriffs in London, and it was returned, That Time out of Mind the Mayor, Aldermen and Common Council of the City, have had the Government and Regulation of Trade Raym. 289. 3 Keb. 10.

within the City, and Power to make By-laws concerning the ſame; and that they had made a By-law, that there ſhould be but 420 Carrs allowed to work within the City, all which ſhould be licenced by the Preſident of Chriſt's Church Hoſpital, and that there ſhould be paid for the Licence of every Carr 1 l. Fine, and 17 s. per Annum to the ſaid Preſident, to be employed for the Uſe of the Poor within the Hoſpital; and that none ſhould uſe a Carr without ſuch Licence, under a certain Penalty to be recovered, &c. Provided, That all Perſons may ſend their own Carrs to the Wharfs, &c. and carry Goods in their own Carrs from Wharfs, except ſuch as ſhall be Traders or Retailers in Fuel.

That B. without ſuch Licence wrought with a Carr pro lucro ſuo proprio, and for the Penalty forfeited thereupon, a Plaint was levied againſt him, &c.

1 Sid. 284. Antea 21. 2 Keb. 27. 873.

It was prayed, That there might be no Procedendo in this Caſe; for tho' the By-law ſhould be admitted to be good, having Cuſtom to warrant it, as was adjudged in this Court, 19 Car. nunc between Player and Jenkins; yet it appears that the Plaint is inſufficient, for in that, no Cuſtom is alledged; and in 1 Roll. 364. ſuch a By-law to limit the Number of Carrs was held void, for there no Cuſtom is alledged to ground it upon; and then a By-law cannot reſtrain Trade.

Again, 'Tis unreaſonable that ſuch as trade in Fuel ſhould not be permitted to bring home the Wood, which they buy in the Country in their own Carts, or to carry it out to their Cuſtomers; for tho' they might limit the Number of Carmen, which in too great a Multitude would be a Nuſance, and infeſt the Streets, yet they cannot reſtrain a Man from uſing his own Carrs, to carry his own Commodities.

Poſtea 256. 1 Mod. 96.

As to the firſt the Court were of Opinion, That it was not neceſſary to mention the Cuſtom in the Plaint, for 'tis Lex loci, and they take Notice of their own Cuſtoms in their own Courts; As in Norwich the Cuſtom is, That in Debt upon a Specialty the Debtor fatetur ſcriptum, ſed petit quod inquiratur de debito, and no Cuſtom is ſet forth in the Record to warrant that. But here in the Habeas Corpus they have returned the Cuſtom, which ſhews they had good Cauſe to proceed upon their Plaint; for it hath been often reſolved, that Cuſtom may create a Monopoly, as the Caſe in the Regiſter is; a Cuſtom was, That none ſhould exerciſe the Trade of a Dyer in Rippon, without the Archbiſhop of York's Licence.

As to the Second the Court doubted, Whether this By-law could be adjudged reaſonable or good, becauſe it would reſtrain the Woodmongers from bringing their Wood, &c. home in their own Carrs; ſo that tho' they brought it in the Country-Carts as far as the Liberties of the City, they muſt then unload and put it in City-Carrs, which would be extreamly inconvenient, and ſo it

would be if they ſhould ſend City Carrs to fetch it; and tho' it might be reaſonable to prohibit their Carrying of their Commodities out in their own Carrs, that they might not have ſo great an Opportunity to cheat in their Meaſures; yet there could be no Colour to reſtrain them from bringing them in. Et adjornatur. Raym. 288. 324.

Cuts *verſus* Pickering.

UPon a Trial at Bar, one Baker (who had been Solicitor for Pickering) was produced as a Witneſs concerning the Razure of a Clauſe in a Will, ſuppoſed to be done by Pickering. 3 Keb. 2.

The Court were moved, Whether he could be examined touching this, becauſe having been retained his Solicitor, he ſhould by Reaſon of that be obliged to keep his Secrets: But it appearing that B. had made this Diſcovery to him, (of which he was now about to give Evidence) before ſuch Time as he had retained him, the Court were of Opinion, that he might be ſworn. Otherwiſe if he had been retained his Solicitor before: The ſame Law of an Attorney or Counſel. Poſtea, the next Caſe.

Sir Samuel Jones *verſus The Counteſs of* Mancheſter.

IN an Ejectment upon a Trial at the Bar, the Evidences which (as the Plaintiff pretended) would have made out his Title, and would have avoided the Settlement in Jointure, which the Counteſs of Mancheſter claimed, were locked up in a Box, which was in the Cuſtody of a Stranger, who before the Trial delivered the Key to the Earl of Bedford, Brother to the Counteſs of Mancheſter, and Truſtee for her; who being preſent in Court, and requeſted to deliver the Key, that the Box might be opened, which was brought into Court: He ſaid, Being a Truſtee in the Behalf of his Siſter, he conceived, he was not obliged to ſhew forth any Writings that might impeach her Eſtate; and if he ſhould, it would be a Breach of the Truſt repoſed in him, which he held ſacred and inviolable.

The Court told him, That they could not compel him to deliver the Key: But Hale ſaid, It were more adviſable for him to do it. For he held, tho' it is againſt the Duty of a Counſellor or Solicitor, &c. to diſcover the Evidence, which he who retains him, acquaints him with; yet a Truſtee may and ought to produce Writings, &c. But they could not rule him to do it here; and the Earl declaring his Reſolution not to do it, the Plaintiff's Counſel deſired Leave of the Court to break open the Box. Vide the next Caſe ſupra.

The

The Court said, That they would make no Order in it, nor would determine how far the Title to the Writings drew in the Property of the Box; or whether the Delivering the Key to the Earl did not amount to a Pledge of the Box?

Serjeant Maynard said, It was the Course of the Chancery, when a Bill was exhibited against a Jointress, to discover Writings, not to compel her to do it till such Time as the Plaintiff agrees to confirm her Jointure. And he knew a Bill of Discovery brought against a Purchaser upon a valuable Consideration; and the Court would not compel him to answer, tho' it was prayed there was a Deed and a real Settlement.

Upon opening the Evidence in the Case at Bar, these Points were stirred and resolved by the Court.

1 Sid. 343, 344. 1 Mod. 40. That where a Man makes a Feoffment, &c. to Uses, with Power of Revocation, when he hath executed that Power, he cannot limit new Uses; but if it had been with a Power to revoke and limit new, then he might revoke and limit new, with a Power of Revocation annexed to those new; which if he doth afterwards revoke, he may again limit new Uses according to the first Power, and so in infinitum: But always the new Uses must correspond to those Circumstances, &c. which the first Power appoints, for that is the Foundation. 2 Roll. 262. Becket's Case.

The Plaintiff being at a Loss for his Writings, was nonsuit.

Seaman *versus* Dee.

2 Lev. 39. 2 Keb. 860, 879. 2 Keb. 39. 3 Keb. 15. See 1 Sid. 429. 1 Lev. 261. 3 Lev. 311. AN Indebitat' Assumpsit, as Executor of S. was brought against the Defendant by the Plaintiff, as an Attorney of this Court, by Original.

The Defendant pleads four Judgments against him; one in an Action of Debt, (upon which the Question was) for Money borrowed by the Testator upon Interest, which Debt with the Interest, at the Time of the Action brought, amounted to such a Sum, which was recovered against him: And pleads three Judgments besides, ultra quæ he had not to satisfy.

The Plaintiff demurs, and after being divers Times spoken to, the Court resolved for the Plaintiff.

1 Lutw. 274. First for that as Hale said, No Action of Debt lies for the Interest of Money, tho' he which borrows it promises to pay after the Rate of 6 l. per Cent. for it; but it is to be recovered by Assumpsit in Damages. So where by Deed the Party covenants or binds himself to pay the Principal with Interest, the Interest is not to be included with the Principal in an Action of Debt, but shall be turned into Damages, which the Jury is to Measure to what the Interest amounts to, which is allowed to be done; tho' indeed the Statutes (which permit the Taking of Interest) say,

That Uſury is damned, and forbidden by the Law of God. And tho' it was objected, That the Judgment is but erroneous, and the Executor liable while reverſed; and it cannot be ſaid, it was the Executor's Fault to ſuffer it: For an Executor may plead a Judgment againſt him in Debt upon a ſimple Contract; tho' it could not have been recovered if he had pleaded to the Action, or without his voluntary Conſent; Vaugh. 93, 94, 95. 2 Saund. 49.

To that Hale ſaid, That Debt upon a ſimple Contract lies againſt an Executor, if he pleaſe; nay, it hath been adjudged, that an Executor may retain for a Debt due to him from the Teſtator, upon a ſimple Contract: But in this Caſe no Action lies by the Law, nor any Admiſſion of the Executor can make it good. Vide Vaugh. 93. 8 Co. 132. Turner's Caſe contra. 2 Vent. 40.

Secondly, It appears, That Part of the Intereſt accrued after the Teſtator's Death, which is the Executor's proper Debt, being his own Default to ſuffer the Intereſt to run on: Then the Action being brought, both for that which is due in the Teſtator's Time, and for that which grew due ſince, is manifeſtly erroneous; and there is nothing in the Defendant's Plea to take away the Intendment, that he had Aſſets to ſatisfy at the Teſtator's Death.

To the Objection, That the Plaintiff had abated his Writ; for that he declares by Privilege as an Attorney of the Court.

It was anſwered, That the Alledging of his Poſſeſſion and Privilege in the Declaration, was Surpluſage and an impertinent Flouriſh, and that being rejected, the Declaration is ſufficient upon the Writ; and an Attorney is at Election to ſue, either by Original, or by Privilege. Wherefore the Rule was, That the Plaintiff ſhould have his Judgment.

The Lady Anne Fry's *Caſe*.

IN an Ejectment by Williams, Leſſee of George Porter Eſquire, againſt the Lady Anne Fry. The Caſe appeared to be this, upon a Special Verdict. Raym. 236. 3 Mod. 28. Mallon v. Fitzgerald.

That Mountjoy, Earl of Newport, was ſeiſed of a Houſe called Newport-houſe, in the County of Middleſex, and had three Sons, who are yet living, and had two Daughters. Iſabel married to the Earl of Banbury, by whom ſhe had Iſſue Anne the Defendant; and Anne married to Porter, by whom ſhe had Iſſue George Porter Leſſor of the Plaintiff, and made his Will in this Manner: 1 Mod. 86, 300. 2 Keb. 756, 787. 2 Lev. 21. 3 Keb. 19. Caſ. Canc. 138. 2 Rep. Canc. 26.

I give and bequeath to my dear Wife, the Lady Anne, Counteſs of Newport, all that my Houſe called Newport-houſe, and all other my Lands, &c. in the County of Middleſex, for her Life; and after her Death I give and bequeath the Premiſſes to my Grand-

Vide 1 Mod. 86. 300. 3 Mod. 20. 2 Salk. 570, 571. Poſt. 203, 204. 2 Danv. 109. 10 Co. 41. 1 Leon. 283.

Grand-child Anne Knolles (viz. the Defendant) and the Heirs of her Body: Provided always, and upon Condition, That ſhe marries with the Conſent of my ſaid Wife, and the Earl of Warwick, and the Earl of Mancheſter, or the major Part of them: And in Caſe ſhe marries without ſuch Conſent, or happen to die without Iſſue, then I give and bequeath it to George Porter, (viz. the Leſſor of the Plaintiff.)

The Earl of Newport dies, and the Lady Anne Knolles being of the Age of fourteen Years, marries with Fry without the Conſent of her Grandmother, or either of the Earls; and it was found, that ſhe had no Notice of the Will until after the Marriage, and that George Porter at that Time was of the Age of eight Years; and that after the Death of the Counteſs ſhe entred, and George Porter entred upon her, and made the Leaſe to the Plaintiff.

This Caſe having been twice argued at the Bar, (viz.) in Michaelmas-Term by Sir William Jones for the Plaintiff, and Winnington for the Defendant: And in Hillary-Term laſt by Finch, Attorney General, for the Plaintiff, and Sir Francis North, Solicitor General, for the Defendant;

It was this Term reſolved by the Court, (viz.) Hale, Twiſden and Rainsford, (Moreton being abſent) for the Plaintiff, upon theſe Reaſons.

Rainsford. Here have been three Queſtions made.

Firſt, Whether the Words in the Will, whereby the Marriage of the Defendant is reſtrained, make a Condition or Limitation? If a Condition, then none but the Heir can enter for the Breach. But 'tis clear, that they muſt be taken as a Limitation, to ſupport the Intent of the Deviſor, and to let in the Remainder which he limits over. 1 Roll. 411.

Poſtea 322. Cart. 171.

Secondly, Whether the Infancy of the Defendant ſhall excuſe her in this Breach? And clearly it cannot: For a Condition in Fact obliges Infants as much as others, (Vide 8 Co. Whittingham's Caſe, the Difference between Conditions in Fact and Conditions in Law,) eſpecially in this Caſe, the Nature of the Condition ſhewing it to be therefore impoſed upon her, becauſe ſhe was an Infant.

3 Mod. 29, 34.

Thirdly, (and the main Point of the Caſe,) Whether the Want of Notice ſhall ſave the Forfeiture of the Eſtate? As to that, let the Rules of Law concerning Notice be conſidered.

First, I take a Difference where the Deviſee, who is to perform the Condition, is Heir at Law; and where a Stranger. The Heir muſt have Notice, becauſe he having a Title by Deſcent, need not take Notice of any Will, unleſs it be ſignified to him. And ſo is Fraunce's Caſe, 8 Co. where the Heir was Deviſee for 60 Years, upon Condition not to diſturb the Executor in removing the

Vide Cart. 171.

Goods; and reſolved that he ſhould not loſe his Eſtate upon a Diſturbance, before he had Notice of the Will. But where the Deviſee is not Heir, (as in this Caſe) he muſt inform himſelf of the Eſtate deviſed to him, and upon what Terms.

Another Rule is, When one of the Parties is more privy than the other, Notice muſt be given; but where the Privity is equal, Notice muſt be taken by the Party concerned. A Bargainee ſhall not enter for a Condition broken before Notice, for the Bargain and Sale lies in his Cognizance, and not the Leſſee's; So if a Leaſe be made to commence after the End of the former, if the firſt be ſurrendred, the Leſſor ſhall not enter for a Condition broken for Non-Payment of Rent, until Notice given of the Surrender, 3 Leon. 95. And therefore there ſhall be no Lapſe to the Ordinary upon a Reſignation, without Notice. If a Man makes a Feoffment upon Condition to enter upon Payment of ſuch a Sum at a Place certain, he muſt give Notice to the Feoffee when he will tender the Money, Co. Lit. 211. a. Dyer 354. And upon this Reaſon is Molineux's Caſe, 2 Cro. 144. where a Deviſe was, that his Heir ſhould pay ſuch Rents, and if he made Default, then his Executors ſhould have the Lands, paying the ſaid Rents; and if they failed of Payment, then he deviſed the Land to his younger Children, to whom the Rents were to be paid. It was reſolved, Non-Payment by the Executors ſhould be no Breach, until they had Notice that the Heir had failed, which was a Thing that the younger Children muſt be privy to. But in 22 E. 4. 27, 28. Tenant for Life lets for Years, and dies; the Leſſee muſt remove in convenient Time, to be reckoned from the Death of the Tenant, whether he had Notice of it or not: For he in Reverſion is preſumed to be no more privy to it than himſelf. So Gymlet and Sands's Caſe, 3 Cro. 391. and 1 Roll. 856. where Baron and Feme were Tenants for Life, Remainder to the Son in Tail, Remainder to the right Heirs of the Baron; the Baron makes a Feoffment with Warranty and dies, then the Feme and Son join in a Feoffment; this is a Forfeiture of the Eſtate of F. tho' ſhe had no Notice of the Feoffment or Warranty, whereby the Right of the Son was bound. So Spring and Cæſar's Caſe, 1 Roll. 469. A. and B. join in a Fine, to the Uſe of A. in Fee, if B. do not pay 10 l. to A. before Michaelmas; and if he doth, then to the Uſe of A. for Life, Remainder to B. B. dies before Michaelmas, the Heir of B. is bound to pay the 10 l. without any Notice given by A. The Reaſon given (which comes home to our Caſe) is, For that none is bound to give Notice, and then it muſt be taken; though indeed a ſecond be added, For that B. (from whom his Heir derives) had Notice. The Mayor and Commonalty of London againſt Alford, 1 Cro. where a Deviſe was to ſix Perſons, to pay certain Sums for the Maintenance of an Alms-houſe, &c. and if through Obliviouſneſs, or other

Cr. Car. 132. 1 Roll. 464. N. 23. 2 Sid. 115, 116. Hardreſs 42, 43.

Kell. 49. b.

Cr. Car. 575, 576, 577.

Cause, the Trusts were not performed, then to J. S. upon the same Condition; and if he failed by two Months, then to the Mayor and Commonalty of London upon the same Trusts. The Six did not perform the Trusts, J. S. enters, J. N. enters upon him, and a Fine with Proclamations was levied, and five Years passed; and the better Opinion was, That the Mayor and Commonalty of London were bound to pay the Money appointed by the Will, altho' they had no Notice that the six Persons or J. S. had failed; tho' indeed the Case is adjudged against them, as being barred by the Fine and Non-claim. Sir Andrew Corbet's Case, 4 Co. is very strong to this Purpose; where a Devise is to J. S. until he shall or may raise such a Sum out of the Profits of the Land: If a Stranger enters after the Death of the Devisor, tho' the Devisee had no Notice of the Will, yet the Time shall run on, as much as if he had the Land in his own Possession.

These Rules being applied to the present Case, it will appear no Notice is to be given.

First, The Defendant is as privy to the Will as any one else, (viz.) as George Porter, who is found also to be an Infant. It is not found whether there were any Executors; if it had, they were not concerned to give Notice, nor did it import the Heir: For he could have neither Benefit or Loss by the Condition.

The two Cases which have been chiefly relied upon for the Defendant were, first, France's Case, which differs, because it was in Case of an Heir. Secondly, the Case of Saunders and Carwell, 8 Jac. in a private Report of Sir Geoffry Palmer, the Attorney General, in which there is no clear Account of the Case, and we cannot find the Roll: It was a Devise to his Wife for Life, Remainder to the Daughter in Tail, upon Condition to pay Money; and it was held that the Non-Payment would be no Breach unless she had Notice.

Palmer's R. 164, 165.

First, It was an Opinion only upon Evidence, and Lea and Chamberlain only in Court.

Secondly, For ought appears the Daughter might be Heir, and then 'tis good Law.

Thirdly, It appears there was a foul Concealment of the Will for four Years Time; within which Time (for ought appears) the Condition was to have been performed.

Twisden was of the same Opinion; but I omit his Argument, because I could not hear him perfectly.

Hale was of the same Opinion. As to the first Point, I shall discharge the Case of it, as not fit to be called in Question: For without peradventure though the Word Condition be used, yet Limiting a Remainder over, makes it a Limitation; for so 'tis plain the Testator meant, and 'tis as much as if he had said, And if she marries, &c. then to remain, without the Word Condition.

And

And this hath received as many Reſolutions as ever any Point did, (viz.) Wiſeman and Baldwin's Caſe, 18 Eliz. 1 Roll. 412. 2 Leon. 51. Hainſworth and Pretty's, 3 Cro. 833. and 2 Cro. Pell. and Brown's Caſe, with a great many more; and nothing but the Opinion in Mary Portington's Caſe, 10 Co. 41. againſt it. Owen 412. 1 Leon. 383.

When Finch, Attorney General, argued this Caſe, he obſerved that Coke himſelf was of another Opinion in the 3d Report, in Wellock and Hammond's Caſe, cited in Boraſton's Caſe: For tho' there 'tis the Word Paying only, which is adjudged a Limitation; yet Coke ſaith, The Quære in Dyer 317. is upon that well reſolved, and the Caſe in Dyer is upon the Word Condition expreſs.

Then to proceed to the other Matters. Here is an Eſtate-Tail deviſed to the Defendant, ſubject to Limitations, the one of Law, viz. dying without Iſſue; the other expreſs and in Fact, (viz.) marrying without the Conſent, &c. and both are coupled together; ſo that whenever ſhe marries without Conſent, &c. her Eſtate determines and is transferred to him in the Remainder, without either Entry or Claim. 'Tis all one as if the Eſtate had been deviſed to her for Life, and if ſhe marries, then to remain, which had been but an Eſtate quamdiu ſola vixerit: And it is to be obſerved, that if her Marriage here be no Breach of the conditional Limitation (for ſo 'tis properly called) becauſe ſhe had no Notice, then it can never be broken: So that the Queſtion muſt be, Whether ſuch a Marriage ſhall diſcharge the Eſtate of it, and make it become abſolute.

'Tis true, Where the Condition requires ſuch an Act to be done, as may be done after Notice, it hath been queſtioned, Whether the Law ſhall not protract the Time limited for Performance, until Notice be had, 1 Cro. Alford's Caſe. which was a Condition for Cr. Car. 573. Payment of Money: But this is a Thing of that Nature, that being done, no ſubſequent Notice can ever retrieve.

Then 'tis to enquire, How far the Want of Notice will excuſe: It muſt be conſidered, That 'tis a Will made by a Perſon now dead, who can give no Notice, neither can any come to the Knowledge of it without Enquiry, and one hath the ſame Means to obtain it with another; and the Perſon who would take Advantage of it, muſt make the beſt Enquiry he can. If a Deviſe were made to the Defendant, it was her Concern to enquire upon what Terms; until then, how can it be aſcertain'd whether ſhe will take it? And ſo it was Porter's Buſineſs to enquire; no Difference between them in this Reſpect. So that upon theſe five Accounts, it will appear, that no Notice is requiſite to be given in this Caſe.

Firſt, Becauſe the Teſtator hath not appointed any Notice to be given, for he which was the Diſpoſer might give upon what Terms he pleaſed; and this Matter of Notice ſhall not be added unleſs it were in a Caſe wherein the Law would very ſtrongly require it.

Secondly, Becauſe there is no Perſon who can reaſonably be engaged to give Notice, (viz.) not the Heir, for he is diſinherited; not the Executors, for they are not concerned in the Freehold; nor the Truſtees, for they have but their Labour for their Pains; nor Porter, for he is no more bound to give than ſhe to take Notice.

Thirdly, Becauſe each Party have the ſame Means of Informing themſelves of the Will, (i. e) by Enquiry.

Fourthly, It more imported the Defendant to know it, as relating to her own Intereſt; the Will which gives the Eſtate, gives it upon this Conditional Limitation. Corbet's Caſe, 4 Co. comes very cloſe; where, if the Deviſee ſtays while the Time wherein the Money might be raiſed is elapſed, he ſhall never raiſe it after. Sup-
Yelv. 103. poſe a Man dies poſſeſſed of a Term upon which a great Rent is reſerved; ſhall the Executor, after that he hath proved the Will, throw up the Term, as pretending not to have known of it? An Eſtate is deviſed to one durante Viduitate; ſhall ſhe marry, and becauſe ſhe had no Notice of the Will, hold the Eſtate abſolutely for her Life? There is the ſame Reaſon in this Caſe; for this Proviſo is a Part of the Limitation of the Eſtate it ſelf. No Man is preſumed to be ignorant of his own Intereſt; and as he muſt take Notice to acquire, ſo alſo of the Manner of the Eſtate he gains. But he that gave it thus, was not obliged to do ſo much.

Fifthly, It was not impoſſible for the Defendant to have made Enquiry, and ſhe muſt not take Advantage of her Laches. A Bond with Condition to pay 50 l when the Obligee ſhall marry the Obli-
1 Sid. 36. gor's Kinſwoman; in Debt upon this, it was reſolved, That the Obligee was not bound to give Notice of the Marriage, tho' it lay in his own Privity; becauſe the Obligor might have known it by other Means, Hill. 1650. Between Try and .... Rot. 1081. B. R. It was proper for the Defendant to have enquired, whether her Grandfather gave her any Thing: And ſo it was for him that
Antea 36, 78, 178. ſhould marry her. Harwood's Caſe adjudged here (Hill. ult.) was
1 Roll. 463. upon this Reaſon: He married a City-Orphan in Kent, and was
2 Cro. 182, 328. fined by the Court of Orphans, becauſe he had not firſt applied himſelf to them for their Licence, &c. according to the Cuſtom of the City: And the Fine was reſolved here to be well impoſed, tho' he had no Notice that ſhe whom he married was an Orphan; becauſe it was his Buſineſs to enquire of the Condition of her whom he will make his Wife.

The

The next Thing to be conſidered is the Infancy of the Defendant, and that is nothing in this Caſe. Porter who was the probableſt Perſon to give Notice is found to be an Infant too. Conditions in Fact bind Infants. Again, the Condition here relates to an Act, which ſhe is capable of doing. The Statute of Merton, which enacts, Non currant uſuræ; *&c.* whereby Infants are exempted from Penalties; yet in another Chapter gives the Forfeiture of the ſaid double Value to the Lord where his Ward marries without his Conſent. 'Tis a Reſtraint laid upon her in a Matter proper for her Condition, and with reſpect to her Condition, that being an Infant, ſhe might adviſe with her Friends about her Marriage. The Caſes which have been objected do not come to this Caſe, as the Opinion in Saunders and Carwell's Caſe, which might be good in Law, if it could be known what that Caſe was, for the Words might either explicitly or implicitly require Notice, as if it were, if he refuſed to pay, *&c.* or it may be no Time might be ſet for Payment; for in Molineux's Caſe, there Rents were granted, and after a Deviſe for the Payment of them which naturally lie in Demand. Co. Lit. 246. b. Palm. 164, 165.

Secondly, There it concerned the younger Children to give Notice; for the Rents were not only to be paid to them, but upon Failure of Payment the Land was deviſed to them; ſo that was a Concurrence of Concern in them, as to the Performance of the Condition, and the Eſtate they ſhould acquire by the Breach. Whereas the Plaintiff in this Caſe is not concerned in the Performance of the Condition.

Thirdly, The Penning of the Condition there quite differs; for 'tis upon Default of Payment, which implies Notice muſt be firſt had. In France's Caſe, there would have been no Need of Notice, if the Deviſe had not been to the Heir, which is the only Thing wherein it differs materially from this Caſe. In Alford's Caſe, the Debate was occaſioned by the ſpecial Penning; for it was thus, that if through Obliviouſneſs, the Truſts ſhould not happen to be performed. Now there could be no Oblivion of that they never knew; therefore there is ſome Opinion there, that the Mayor and Citizens of L. ought to have had a precedent Notice; yet the Judgment is contrary, for they could not have been barred by the Fine and Non-claim, if Notice had been neceſſary to the Commencement of their Title; and 'tis not found, Whether thoſe to whom the Eſtate was deviſed before, had Notice; ſo that this Cauſe proves rather, that there needs no Notice in this Caſe, than otherwiſe. Wherefore the Plaintiff muſt have his Judgment. 3 Mod. 29, 34. Cr. Car. 575.

When my Lord Chief Juſtice had concluded, Rainsford ſaid, he had ſpoken with Juſtice Moreton, who declared to him, that he was of the ſame Opinion.

I

Fitzgerald

Fitzgerald *verſus* Marſhall.

3 Keb. 44.
1 Mod. 90.
2 Keb. 875.
1 Show. 3.

ERror of a Judgment given in the King's Bench in Ireland, in Affirmance of a Judgment removed thither by Error out of the Common Pleas in Ireland.

By the Record it appeared, That the Writ of Error to the Common Bench was directed Rob. Booth, Militi & Sociis ſuis, quia in Recordo & proceſſu ac in redditione Judicii loquelæ quæ fuit coram vobis & Sociis veſtris. And the Judgment, certified, appeared to be in an Action commenced in the Time of Sir R. Smith who died, and Sir R. Booth made Chief Juſtice in his Place before Judgment given. And the Court here were of Opinion, That the Record was not well removed into the King's Bench here, by that Writ, which commanded them to remove Recordum loquelæ coram R Booth: Whereas the loquela commenced before R. Smith, and the Titling of the Record is in ſuch Caſe placita coram R. Smith, *&c.* though ſome of the Continuances might be entred coram R. Booth, and the Judgment given in his Time: And for this Cauſe, the Judgment given in Affirmance in the King's Bench there was reverſed.

Sir Samuel Sterling *verſus* Turner.

2 Ven. 25. the Report of this Caſe upon the Action in the Common Pleas.
3 Keb. 26, 32.
2 Lev. 50. Vide 2 Lev. 114, 250.
6 Mod. 48, 100.
3 Salk. 20.
2 Salk. 502, 504.

ERror of a Judgment in the Common Bench, in an Action upon the Caſe, where the Plaintiff declared upon the Cuſtom of London, of electing two Men into the Office of Bridge-Maſters every Year by the Citizens aſſembled in a Common Hall; and a Cuſtom that if two be Competitors, he that is choſen by the greateſt Number of Votes is duly elected; and that if one in ſuch Caſe deſire the Poll to be numbered, the Mayor ought to grant the Poll. And ſhews that there was a Common Hall aſſembled, the 18th of October 22 Regis nunc, Sterling being Mayor, and that then the Plaintiff and one Allet ſtood as Competitors to be choſen to that Office, and avers that he had the greateſt Number of Voices, and that he affirmed then and there, that he had the greateſt Number; which the other denying, he requeſted the Mayor, that according to the Cuſtom they might go to the Poll; and the Defendant not minding the Execution of his Office, but violating the Law and Cuſtom of the City, then and there did maliciouſly refuſe the Numbering of the Poll, but immediately made Proclamation, and diſmiſſed the Court, by which he loſt the Fees and Profits of the Place, which he averred belonged unto it.

Upon Not guilty pleaded, and Verdict for the Plaintiff, after it had been ſeveral Times argued in Arreſt of Judgment, That this Action did not lie, it was adjudged for the Plaintiff, by Tyrrel, Archer and Wylde, Vaughan diſſenting. And now Error was brought

and aſſigned in the Matter of Law, and argued for that it was incertain, whether the Plaintiff ſhould have been elected; and that he could not bring an Action for a Poſſibility of Damage, and this was no more, not being decided who had the greateſt Number of Voices.

But the Court were clear of Opinion, That the Judgment ſhould be affirmed; for the Defendant deprived the Plaintiff of the Means, whereby it ſhould appear, whether he had the greateſt Number of Electors or no. And Hale ſaid, It was a very good Precedent, and ſo it was adjudged by both Courts.

One D. of Bedfordſhire, Eſquire, was indicted of High Treaſon, for Coining a great Number of counterfeit Pieces of Guineas of Gold, 23 Regis nunc, and being arraigned at the Bar, he pleaded the King's Pardon; which was of all Treaſons, and of this in particular, but did not mention that he ſtood indicted. Pardon. 3 Keb. 30, Sec 1 Hawk. c. 17. §. 64. 2 Hawk. c. 37. per totum.

Twiſden ſaid, That my Lord Kelynge was of Opinion, That ſuch a Pardon was not good. But Hale ſaid, It might be well enough in this Caſe, but in Caſe of Murther it is neceſſary to recite it, becauſe of the Statute of * 27 E. 3. 2. (vid. 10 E. 3. 2. 14 E. 3, 15.) and ſo it was allowed. 2 Jones 56. * 14 Ed. 3. 1 Hawk. pa. 78.

The Lady Cheſter's *Caſe*.

A Prohibition was prayed to the Prerogative Court of Canterbury. Sir Henry Wood having deviſed the Guardianſhip of his Daughter by his Will in Writing, according to the Act of this King, to the Lady Cheſter his Siſter; the Dutcheſs of Cleveland, to whoſe Son this Daughter, being about 8 Years old, was contracted, pretending that Sir Henry Wood by Word revoked this Diſpoſition of the Guardianſhip, ſued in the Prerogative Court, to have this nuncupative Codicil proved; and the Court granted a Prohibition, for they are not to prove a Will concerning the Guardianſhip of a Child, which is a Thing conuſable here, and to be judged whether it be deviſed purſuant to the Statute. And Hale ſaid, That they may prove a Will which contains Goods and Lands, tho' formerly a Prohibition uſed to go quoad the Lands. Vid. 1 Cro. Netter and Percivall's Caſe. 3 Keb. 30, St. 12. Ca. 2. cap. 24. 1 Mod. Rep. 90. 2 Sid. 143. Hard. 131.

Prior *verſus* .....

Error was brought of a Judgment in this Court into the Exchequer-Chamber, and Error in Fact was then aſſigned; and the Court being there of Opinion, That Error in Fact could not be aſſigned there, they affirmed the Judgment; upon which the Record with the Affirmation was remitted hither, and a Writ of Error was brought 2 Lev. 38. 3 Keb. 28. Vide 6 Mod. 59.

2 Cro. 620. 1 Lev. 49. brought here, coram vobis reſident. (as is uſual for Error in Fact.) It was prayed, that upon putting in of Bail, this new Writ of Error might be a Superſedeas to the Execution. But the Court held, That this Writ was not to be allowed in this Caſe, for the Judgment given in this Court, being affirmed in the Exchequer-Chamber, tranſit in rem judicatam there, and a Writ of Error cannot be brought here upon a Judgment there; and 'tis always the Courſe in Writs of Error to recite all the Proceedings that have been in the Matter; as if a Judgment be removed hither, by Error out of the Common Pleas, and here affirmed and then brought into Parliament, the laſt Writ muſt recite both the Judgment in Communi Banco, and the Affirmation here. And whereas this Writ goes by the Judgment into the Exchequer-Chamber, and mentions only the Judgment here, it muſt therefore be quaſhed: And it is the Courſe, if a Writ of Error be brought here upon Error in Fact of a Judgment here, that the Writ ſhould be allow'd in Court. And the Court ſaid, they would allow none in this Caſe.

Thrower's *Caſe.*

3 Keb. 28. * See 1 Hawk. c. 76. §. 89. HE was indicted at the Seſſions of the Peace at Ipſwich for ſtopping communem viam pedeſtrem ad Eccleſiam de Witby. It was removed hither by Certiorari, and the Court were moved to quaſh it, for it was objected, That an Indictment would not lie for a Nuſance in a Church Path; but Suit might be in the Eccleſiaſtical Court. Beſides the Damage is private, and concerns only the Pariſhioners. Where there is a Foot-way to a Common, every Commoner may bring his Action if it be ſtopped, but in ſuch Caſe there can be no Indictment.

Hale ſaid, If this were alledged to be communis via pedeſtris ad Eccleſiam pro parochianis, the Indictment would not be good, for then the Nuſance would extend no further than the Pariſhioners, for which they have their particular Suits; but for ought appears this is a common Foot-way, and the Church is only the Terminus ad quem, and it may lead further; the Church being expreſſed only to aſcertain it, and 'tis ſaid ad commune nocumentum; wherefore the Rule was, that he ſhould plead to it.

The Lady Prettyman's *Caſe.*

2 Keb. 13, 27. A Judgment was had in a Scire facias brought againſt her upon a former Judgment, upon two Nihils returned. And the Court was moved to ſet it aſide, for that it was alledged, That before the Scire facias brought, ſhe was married to Sir John Prettyman, and that it was brought againſt her as ſole, by Contrivance between the Plaintiff and her Husband to oppreſs her, and lay her up

up in Priſon; and it was ſhewn that the Plaintiff knew of the Marriage, for he (being an Attorney) had proſecuted another Action before the Return of the Scire facias againſt her and her Huſband, and that ſhe could not help her ſelf by Error, or Audita Querela, becauſe her Husband would releaſe.

The Court ſaid, They might ſet aſide the Judgment for the Misdemeanor of the Plaintiff: But becauſe they were informed, that this Marriage was under Debate in the Eccleſiaſtical Court, and near to Sentence, they ſuſpended Making any Rule in this, while that was determined.

Twiſden ſaid, He had a Caſe from my Lord Kelynge, where a Feme Covert Infant levied a Fine, and her Friends got a Writ of Error in her Husband's and her Name, that the Court would not ſuffer the Husband to releaſe. But Hale ſaid, He could not ſee how that could be avoided; but he had known, that in ſuch Caſe the Court would not permit the Husband to diſavow the Guardian, which they admitted for the Wife.

How's *Caſe*.

HE was indicted of an Aſſault, Battery and Wounding of Thomas Maſters Eſquire, and found Guilty at the Aſſizes in Glouceſterſhire. Now the Attorney General moved the Court to ſet a Fine, and ſuch an one as might be exemplary, according to the Demerit of the Fact; for he ſhewed, That a great Part of the Gentry of Glouceſter, amongſt which were How and Maſters, being aſſembled at Cirenceſter, about the Election of a Burgeſs for that Town; How without any Provocation, ſtruck Maſters on the Cheek with the End of his Cane, which had an iron Pike at it; and that if Maſters had not governed himſelf with much Moderation and Prudence, it had in all Probability engaged the whole Aſſembly in a dangerous Quarrel, they being both Men of great Eſtates and Quality in the Country. And the Attorney ſaid, There was nothing more neceſſary than that ſomewhat of a limited Star-Chamber ſhould be exerciſed in this Court, for the due Puniſhment of ſuch enormous Crimes as theſe.

Fine. See 1 Salk. 56, 400. Raym. 376, 377. Cumberb. 10, 36, 77.

Hale ſaid, That they were much diſcouraged from ſetting Fines, for the new Act binds them to eſtreat them into the Exchequer; and then it was well known whither they went, (Meaning to ſuch as farmed them from the King by Patent.) The Attorney replied, That the Legality of ſuch Patents was to be queſtioned; and that one which was granted to the Earl of Berkſhire, was now like to be reſumed, and it was fit it ſhould, ſeeing it was like to prove an Obſtruction to the publick Juſtice.

7 Co. Penal Statutes.

3 Salk. 53. 2 Hawk. c. 48. §. 17 & 20. Judgment of corporal Puniſhment can't be given againſt a Man in his Abſence. 1 Salk. 400.

Then it was doubted, Whether the Fine could be ſet, How not being preſent? But held it might, but the Courſe is not to hear any Thing moved in Mitigation of the Fine, unleſs the Party be preſent, and he was fined 500 Marks.

Ward *verſus* Forth.

3 Keb. 26, 30. 1 Salk. 274. Farr. 51. 3.

IN Debt upon a Bond, the Defendant pleads, That he delivered the Deed as an Eſcrow to J. S. &c. & hoc paratus eſt verificare. There muſt be a Concluſion to the Country.

To this it was demurred; For that he ought to have concluded, & iſſint dient ſon fait, for this Matter amounts to a Special Non eſt factum, and the Plaintiff cannot reply, That he delivered it as his Deed, abſque hoc that he delivered it as an Eſcrow, and ſo ſaid the Court.

Sherman's *Caſe*.

2 Keb. 23. 1 Salk. 121, 124, and 2 Salk. 478.

BY Certiorari, an Order for the Keeping of a Baſtard-Child by the Juſtices of the Peace, in Purſuance of the Statute of 18 Eliz. was removed into this Court, which was excepted to.

Firſt, For that they had appointed the Father to allow 4 s. to the Midwife; whereas it did not appear, that the Pariſh had procured her, or that they were chargeable with it.

Secondly, For that they ordered 7 s. a Week, to be allowed for the Nurſing, Clothes, &c. of the Child, until it ſhould be able to get its Living by Working; which was ſaid to be exceſſive in the Sum, and uncertain for the Time, for it ſhould have been for ſo long Time as ſhall be chargeable to the Pariſh.

Hale ſaid, That they could make no Allowance to the Midwife, unleſs in Diſcharge of the Pariſh.

1 Mod. 20. Blackerby's Caſes 40.

Twiſden ſaid, That they could not order the 7 s. a Week to be paid, until it ſhould be able to get its Living, for perhaps the Father would take it away and maintain it himſelf, which he may do if he pleaſe; but that the Order may be quaſhed without more Delay, and the Matter remanded to farther Examination, Sherman conſented to pay all the Arrears of the 7 s. a Week, and the Coſts that had been expended in Maintenance of this Order, or what more ſhould be laid out, in Caſe he ſhould be again found the reputed Father of the Child, for he ſaid it was impoſed upon him by Combination, whereupon it was quaſhed. Poſt. 336.

Sir Ralph Bovy's *Caſe.*

AN Action was brought upon an Eſcape, for that he being Sheriff of Surrey, voluntarily ſuffered J. S. whom he had in Execution to eſcape. Poſtea 217. 3 Keb. 55.

He pleads, That he made freſh Purſuit and took him again, and doth not traverſe the voluntary Eſcape, to which it was demurred. Et adjornatur. Poſtea 217.

Anonymus.

A Scire facias againſt the Conuſee of a Statute, who had extended, ſuppoſing that he was ſatisfied. He pleads, That before the Scire facias brought he had aſſigned over all his Intereſt, and prays Judgment of the Writ. 2 Keb. 27, 15.

Hale ſaid, That the Writ was good, ſeeing he was a Party to the Record; the Plaintiff need not take Notice of the Aſſignee unleſs he pleaſe, and if there be Part of the Debt unſatisfied, that is to be tendered to the Conuſee.

In a Writ of Diſceit, to reverſe a Fine of Land in antient Demeſne; after Aſſignment, the Conuſee ſhall be made Party. So in a Writ of Error, tho' the Terre-tenant ſhall not be turned out of Poſſeſſion without a Scire facias.

Dioniſe *verſus* Curtis.

TRover de duabus Centenis Plumbi uræ, Anglice, two hundred Weight of Lead Ore. See 1 Lev. 301, 303. 2 Lev. 11.

It was objected, That Centena ſignifies an Hundred in a County, and 'tis uncertain here of what it ſhould be underſtood; but the Court ſaid it was good with the Anglice, and to be underſtood by the ſubject Matter. Trover de duobus ponderibus caſei, Anglice, two Weighs of Cheeſe, hath been held good. So de duobus oneribus Cupri, Anglice, two Horſe-loads of Copper. 176. Antea 114. 71, 105. 3 Keb. 14. 6 Mod. 87. 1 Mod. 46, 294. 3 Salk. 366.

Evans, *&c.*

IN an Action upon the Caſe, whereas he pretended Title to certain Goods in the Cuſtody of one Suſan Pricket, and claimed them to be his own, intending to remove them; the Defendant, in Conſideration that he would ſuffer them to continue there, aſſumed to ſee them forth-coming, and that they ſhould not be imbezilled, but ſafely kept to the Uſe of the Plaintiff, and ſhews that afterwards the Goods were eloigned, &c.

Upon Non Aſſumpſit and Verdict for the Plaintiff, it was moved to ſtay Judgment; That it doth not appear, that the Property of theſe Goods was in the Plaintiff, for it is alledged only, that he pretended to them, and claimed them to be his own: Sed non allocatur.

For the Declaration is full enough, at leaſt muſt be intended he proved they were his own, or the Jury would not have found for him.

Anonymus.

IN Debt upon a Record in an inferior Court, upon Nul Tiel Record pleaded, they ſhall certify only tenorem Recordi, and grant Execution afterwards.

2 Lev. 231, 236. Hale ſaid, That he had ſeen a Certiorari to certify tenorem Recordi, upon a Trial at Bar concerning the Toll of Uxbridge, the Town pretending to be incorporated, and to have a Right to the Toll: And it was reſolved, That no Burgh-holder could be a Witneſs for the Town.

Termino Sanctæ Trinitatis, Anno 24 Car. II.

In Banco Regis.

Mekins *verſus* Minſhaw.

Poſtea 330. A Prohibition was prayed to the Court of the Chamberlain of Cheſter, where an Engliſh Bill was preferred, ſetting forth, That J. S. being indebted to the Plaintiff, the De-

3 Keb. 33, 51. fendant upon good Conſideration promiſed, That if J. S. did not pay it, he would; and that he wanted ſuch preciſe Proof of the Promiſe as the Law required. Wherefore he prayed to be relieved by the Equity of the Court.

The Defendant confeſſed the Promiſe in his Anſwer, and alledged further, That he had paid the Money. And a Prohibition was granted; for the Plaintiff had now obtained the End of his Suit, and might have Remedy at Law upon the Evidence of the Defendant's Anſwer.

Watts *verſus* Rymes.

AN Action was brought for theſe Words: The Defendant ſaid of the Plaintiff, That he had picked his Pocket againſt his Will; and at the ſame Time de ulteriori malitia ſaid, He was a Pick-pocket. 2 Lev. 51. 3 Keb. 34. See 2 Salk. 694, 695.

The Defendant juſtified, but in ſuch Manner as it was ruled againſt him.

Then he moved to ſtay Judgment upon the Inſufficiency of the Declaration: And the Court were of Opinion that the Words were not actionable, as carrying with them no neceſſary Implication of Felony, and might mean only Treſpaſs. And Hale ſaid, he would not improve Actions for Words further than they are.

Forteſcue *verſus* Holt.

A Scire facias was brought upon a Judgment of 1000 l. as Adminiſtrator of J. S. 3 Keb. 46.

The Defendant pleaded, That before the Adminiſtration committed to the Plaintiff, (viz.) ſuch a Day, &c. Adminiſtration was granted to J. N. who is ſtill alive at D. And demanded Judgment of the Writ.

The Plaintiff replies, J. N. died, &c. & de hoc ponit ſe ſuper Patriam. And to that the Defendant demurs;

For that he ought to have traverſed abſque hoc, that he was alive: For tho' the Matter contradicts, yet an apt Iſſue is not formed without an Affirmative and a Negative; and ſo ſaid the Court. And alſo that the Defendant's Plea was bad, being concluded in Abatement; whereas it goes in Bar, which was ſo palpable, as made it evident to be uſed only for Delay. Which Hale obſerving, he did exceedingly blame the bad Practice that is amongſt Counſel in Adviſing ſuch Pleas, and ſaid it was within the Penalty of Weſtm. 1. Serjeants, Compters, &c. and ſaid, Tho' Counſel were obliged to be faithful to their Clients; yet not to manage their Cauſes in ſuch a Manner, as Juſtice ſhould be delayed, or Truth ſuppreſſed; to promote which was as much the Duty of their Calling, as it was the Office of the Judges; tho' not in ſo eminent a Degree. 1 Lutw. 15.

In this Caſe it was doubted, Whether Judgment final ſhould be given, or a Reſpondeas Ouſter: But becauſe the Plaintiff ſaid, he would be content with the later, that was not reſolved.

Anonymus.

Anonymus.

Farr. 104. 1 Salk. 4.

IN Treſpaſs Quare clauſum fregit, 'tis a Plea in Abatement to ſay, That the Plaintiff is Tenant in Common with another: But cannot be given in Evidence upon Not guilty, as it may where one Tenant in Common brings Treſpaſs againſt the other.

Peters *verſus* Opie.

Vide antea 147, 177. 1 Lutw. 398, 497, 570, 257. 1 Salk. 171. 2 Lev. 23. 2 Saund. 350.

THE Caſe was moved again, and Hale held clearly, That the Promiſe being pro labore (tho' there was alſo a Counter-Promiſe) did carry in it a Condition precedent, (viz.) That the Work ſhould be done firſt. And he ſaid, That in Caſes tried before him, where the Declaration was upon reciprocal Promiſes, if it appeared upon the Evidence, that the Intention was, That the Plaintiff's Part was to be performed before the Defendant's, he directed againſt the Plaintiff, and would not have the Defendant driven to his croſs Action.

Twiſden ſtrongly to the contrary. Pro labore (ſays he) is no more than would have been implied if thoſe Words had been omitted; then 'tis within the Caſe of reciprocal Promiſes, The Caſe cited in Ughtred's Caſe, 7 Co. A. covenants to B. to ſerve him in the Wars, B. covenants to pay him ſo much for it; an Action lies for the Money without Averment of the Service done, becauſe of the mutual Remedy.

Hale was now of Opinion, That the Plaintiff's Saying, parat' fuit & obtulit to do the Work; tho' he did not ſay, and the other refuſed, yet it was a ſufficient Averment after a Verdict. The Caſe of Vivian and Shipping, 4 Co. 384. in an Aſſumpſit upon a Promiſe to perform an Award, the Plaintiff ſaid licet he had performed all on his Part, &c. which tho' no good Averment in Form, yet held it aided by the Verdict.

Wherefore tho' they could not agree in the other Matter, yet Judgment was given for the Plaintiff. Antea 177.

King *verſus* Melling.

Pollexf. 101. 2 Lev. 58. Apres 229. 3 Keb. 42, 52, 95. Poſtea 225. Lev. Ent. 98.

IN an Ejectment, the Caſe was thus found in a Special Verdict.

John Melling was ſeiſed in Fee, and had Iſſue Bernard and John, and by his Will in Writing deviſed to Bernard for and during his natural Life, and after his Deceaſe to ſuch Iſſue as he ſhould have of the Body of his ſecond Wife, (his firſt then being alive;) and if no ſuch Iſſue happen'd, then to John Melling; provided that Bernard might make a Jointure to his Wife, which

ſhe ſhould enjoy for her Life. The Deviſor dies. Bernard ſuffers a Recovery to the Uſe of himſelf in Fee, and after covenanted to ſtand ſeiſed to the Uſe of his Wife for her Jointure for Life, and died without Iſſue by any ſecond Wife. The Queſtion was, Whether the Wife had a good Eſtate, or that J. Melling in Remainder had the Right?

It was argued for John Melling; Firſt, That Bernard Melling had only an Eſtate for Life by this Deviſe. Indeed if it had been to him and his Iſſue which he ſhould have by the ſecond Wife, that would have been an Entail; but here 'tis expreſly given to him for his Life. The Caſe of Wiat Wield, 8 Co. 78. b. is full to this: A Deviſe to a Man and his Children is an Eſtate-tail, if he hath none at the Time; But if the Deviſe were to a Man for his Life, and after his Deceaſe to his Children; there, whether he had Children or no at the Time, they take by Way of Remainder, either contingent or veſted. So Archer's Caſe, 1 Co. 1 Roll. 837. A Deviſe to his Son for Life, the Remainder to the Sons of his Body lawfully begotten; the Son takes only an Eſtate for Life, becauſe ſo expreſly limited. Then the Recovery deſtroys this contingent Remainder, and ſo alſo the Power of appointing a Jointure to his Wife: For 'tis not a bare collateral Power, but annexed to his Eſtate, and therefore extinguiſhes in the Conveyance of it. Wild's Caſe, 6 Co. 16. b.

But admitting it were ſtill in him, yet he did not well execute it, which ſhould have been in ſuch Manner as it might have taken Effect by the Will, and not to ariſe upon a Covenant to ſtand ſeiſed.

On the other Side it was argued, That it was an Eſtate-tail in Bernard Melling, and no Remainder contingent to the Iſſue: For there a Remainder is ſaid to be contingent where the firſt Eſtate may fail before 'tis aſcertain'd whether the Contingency will happen or no? Here if it be an Entail, Bernard Melling hath it for his Life, and the Iſſue had nothing until after his Deceaſe. So 'tis but an Expreſſio eorum quæ tacite inſunt.

Again, The Power remains notwithſtanding the Recovery; for 'tis collateral to the Eſtate. If Executors have Authority to make a Feoffment for the Payment of the Teſtator's Debts, if they ſhould firſt make a Feoffment to another Purpoſe, this would not determine their Power, but they might afterwards execute it in Performance of the Will. 1 Co. in Albany's Caſe.

Hale. It ſeems very ſtrong upon Wield's Caſe, That Bernard Melling hath but an Eſtate for Life; if it were deviſed to him, and after his Deceaſe to his Iſſue, I would think that to be an Eſtate-tail; but here the expreſs Words are for his Life. A Deviſe to one for his Life, and after his Deceaſe to his Heir, that hath been held a Fee; for Heir is nomen Collectivum. But Archer's Caſe, 3 Salk. 126. Poſt. 225, 228, 230, 232.

Caſe, 1 Co. is a Deviſe to A. for his Life, and after to his Heir, and the Heirs of that Heir; there becauſe the Words of Limitation were put to the Heir; therefore Heirs were taken to be but deſignatio perſonæ, and reſolved he ſhould take by Purchaſe. Vide Anderſon 110. Conſtruction muſt be according to the expreſs Words of the Will. A Deviſe to Two equally to be divided between them, and to the Survivor of them, makes a Jointenancy upon the expreſs Import of the laſt Words.

Twiſden. A Deviſe to one for Life in Perpetuity, makes but an Eſtate for Life only, 15 H. 8.

Hale. 'Tis conſiderable alſo, that he adds a Power to make a Jointure, which would have been uſeleſs if he had intended him an Eſtate-tail: And this Power is in the Nature of an Emolument annexed to his Eſtate, which ſeems to be deſtroyed by the Recovery, neither hath he well executed his Power; for after the Recovery he became ſeiſed in Fee, ſo the Covenant to ſtand ſeiſed may work upon that Eſtate, and ſo ſhall not be taken in Purſuance of his Authority, which poſſibly it might have been if he had but an Eſtate for Life; for without Reference to that, it would have been ineffectual; & quando non valet quod ago, ut ago, valeat quantum valere poteſt. And this is agreeable to the Learning in Sir Edward Clere's Caſe in 6 Co.

The Court ſeemed pretty clear in theſe Points; but becauſe it was upon the firſt Argument, they gave Leave to the Parties to ſpeak to it again, if they thought fit. Et adjornatur. Poſt. 225.

Goffe's *Caſe.*

A Trial at Bar was had upon an Indictment of Murder. The Caſe appeared to be thus:

Goffe (being a Collector of the King's Duty of Chimney-Money) came with a Conſtable to the Houſe of one Weſt in Southwark, to demand Money due upon that Account, and entred the Houſe, there being only a Maid-Servant at home; who telling them, That her Maſter was from home, and that ſhe could not tell where to find him, or come at any Money to pay them, they preſently diſtrained a ſilver Cup which ſtood by. The Maid thinking to prevent the Carrying of it away, ſtands againſt the Door where they were to have gone out, and Goffe took her by the Arm and beat her Head and Back againſt the Door-Poſt divers Times, of which ſhe died within three Weeks after.

The Court was of Opinion, That this was but Homicide, and directed the Jury to find it ſo; for Hindering their Paſſage out, to go away with the Diſtreſs, was a Provocation. And 'twas found accordingly.

Meredith's *Case*.

ERror of a Judgment given in the King's Bench in Ireland, where Robert Meredith was Plaintiff, and that Judgment was entred, Quod prædict' Carolus Meredith recuperet. Amendment.

And the Court held it amendable, as the Default of the Clerk, tho' in the Judgment; the Miſpriſion being only in the Name, which was right in the reſt of the Record that was before the Clerk, and ſhould have directed him.

Sir Ralph Bovy's *Case*.

IN Debt upon an Eſcape, the Plaintiff ſets forth in his Declaration a voluntary Eſcape. Antea 211. 3 Keb. 55. 1 Lutw. 382.

The Defendant proteſting that he did not let him voluntarily eſcape, pleads, That he took him upon freſh Purſuit. To which it was demurred, Becauſe he did not traverſe the voluntary Eſcape; and reſolved for the Defendant: For it is impertinent for the Plaintiff to alledge it, and no Ways neceſſary to his Action. 'Tis out of Time to ſet it forth in the Declaration; but it ſhould have come in the Replication. 'Tis like Leaping (as Hale Chief Juſtice ſaid) before one come to the Stile: As if in Debt upon a Bond the Plaintiff ſhould declare, That at the Time of Sealing and Delivery of the Bond the Defendant was of full Age; and the Defendant ſhould plead deins age, without Traverſing the Plaintiff's Allegation. Whiting and Sir G. Reynell's Caſe 657. in 2 Cro. ſeems to be againſt it: But Harvey and Sir G. Reynell's 2 Car. in Latch, is reſolved, That no Traverſe is to be taken. Antea 211.

Thomas *verſus* Butler.

A Prohibition was prayed to the Eccleſiaſtical Court, where the Caſe was thus: 3 Keb. 23, 27, &c. 2 Lev. 55.

Sir R. Aſhton made his Will, and therein gave divers Legacies, and the Reſidue of his Goods and Chattels (after his Debts and Legacies paid) he bequeathed to his Wife, and made three Executors and died, whereof one only proved the Will, and afterwards died Inteſtate. V. Finch 171.

The Daughter of Sir R. Aſhton procures Letters of Adminiſtration (the Wife uncalled) and above five Years after the Lady Butler, the Relict of Sir R. Aſhton, and reſiduary Legatee, ſues to have them repealed: And whether there ſhould be any Prohibition to that Suit, the Court thought fit to adviſe. For it was ſuggeſted, That there was not Aſſets to pay the Debts and Legacies, and ſo there could be no Reſiduum. And Sir Walter

Walker (a Doctor of the Civil Law) came to inform the Court what had been their Course in such Cases; and he affirmed, That the Law was positive, absque aliqua distinctione, Assets or not Assets, That Administration should be committed to the residuary
Dy. 372. a. Legatee. And so Dr. Denny declared in Eastwick and Standen's Case in Dyer. And in one Button's Case (which goes also by the Name of Cotton's Case) 17 Jac. this Point was much debated, where the next of Kin obtained Administration, the Residuum being devised to another, who afterwards got it repealed; and the first Administrator appealed to the Delegates, who confirmed the Repeal. Where the Residuum is devised, the Law judges those Words tantamount to the Making of him Executor, and it would be very inconvenient that an Allegation, That there is no Residuum, should be admitted; for that may be offered in every Case, and until that is tried, Administration would not be granted, which might bring much Damage to the Estate of the Intestate. 'Tis also against a strong Presumption, (viz.) That every Man leaves as much as will satisfy his Will. He said also, Seeing committing Administration was of the Cognizance of their Courts, he conceived they were to determine all Matters concerning them; and cited the Register, where 'tis said, Cognitio principalis trahit ad se accessorium.

2 Ven. 15, 22. Hob. 84. T. Jones 132. 1 Sid. 181. Vaugh. 207. Here Hale interrupted him, and said, Since the Statutes had made Provision in those Cases, they were to expound them, and also to whom the Right of Administration appertained; and if the Ecclesiastical Court did not commit it accordingly, they used to prohibit them; and that the Court desired only to know from them, what their Usage had been. He also asked him, If it had been pleaded in their Court, That there was no Residuum, what they would have done?

To this he answered, That they should have received it as a Plea; but would have over-ruled it as insufficient: As was done in the Countess of Lincoln's Case, in 1655.

Dr. Masters contra. In this Case the Daughter was Legatee of an 100 l. In the Case of the next of Kin, one may be preferred before another; so why not one Legatee before another? Qui prior est tempore, potior est jure in æquali jure, they which first come, should be first served; and vigilantibus, non dormientibus jura subveniunt. For Button's Case he said, That there the Party to whom Administration was first granted, was no Legatee. So it was in the Countess of Lincoln's Case; neither was there a Sentence in that Case, but ended by Composition. In the Case between Blunt and Taylor, in 1670, where one Hall having made his Will, and made the Wife of Blunt Executrix, and devised to her the Residuum, she proved the Will and died. Blunt administers to her de bonis non of Hall; and the Grandchild of Hall

(being next of Kin) cites Blunt to repeal his Administration; and obtained a Repeal, which was confirmed upon an Appeal to the Delegates. But Sir William Wylde denied the Case to be so; for he said, That the Administration was not repealed, as unduly granted at first; but for a male Administration: For Blunt being cited, denied either to pay the Legacy devised to the Grandchild, or bring in an Inventory, and the Case was debated upon that Point only before the Delegates; and he said, That it was their Course to repeal an Administration tho' granted to the next of Kin, in Case of Abuse.

But Hale said, That therein they exceeded their Power, and a Prohibition ought to go, and that they ought to take sufficient Caution at first to prevent male Administration. Cr. Car. 63. Raym. 93. 1 Sid. 179.

The Court strongly inclined, That no Prohibition ought to go in this Case; for the Reason that 21 H. 8. requires that Administration should be granted to the next of Kin was, upon the Presumption, That the Intestate intended to prefer him: But now the Presumption is here taken away, the Residuum being disposed of to another; and to what Purpose should the next of Kin have it, when no Benefit can accrue to him by it? And 'tis reasonable that he should have the Management of the Estate, who is to have what remains of it after the Debts and Legacies paid. And the Averment, That there is no Residuum, is not material; for being once out of the Statute, upon Construction of the Words of the Will, there is nothing ex post facto can bring it within it. And there are certain Administrations which have been always ruled to be out of the Statute, as Administrations during Minority, and pendente lite, which need not be granted to the next of Kin, and granting it to the Husband comes not within the Words of the Statute. But because in this Case Administration had been granted so long before the residuary Legatee came in, and the Administrators by Decrees in Chancery had got in great Part of the Estate, and still there were Suits depending there for obtaining of the rest, which were near their Effect; which would be abated and set aside, if the Administration were now repealed. 1 Sid. 281.

The Court proposed an Accommodation, as most useful to either of the Parties and advantageous to the Estate; which was accepted.

The Civilians said, That a Legatee that had got Administration, tho' it were after repealed upon a Citation, should yet retain for his Legacy. Otherwise upon an Appeal; for there the Administration is avoided ab initio. Vide Blackman's Case, 6 Co. Post. 307, 316.

Bedniff & Ux' *verſus* Pople & Ux'.

3 Keb. 58. Antea 7, 61. Poſtea 343. 1 Mod. 21. 2 Lev. 63.

A Prohibition was prayed to ſtay a Suit for Defamation in the Eccleſiaſtical Court, for Words ſpoken to the Servant of the Plaintiff, (viz.) Go tell thy Miſtreſs Whore, ſhe is a Whore, and I will prove it. It was ſaid, they were common Words of Brabbling, and not importing any ſuch Slander for which Suit could be there. 3 Cro. 393. Dimmock *verſus* Fawcet, and 3 Cro. 456. Pewe and his Wife *verſus* Jeffreys.

Hale. Theſe cannot be ſaid to be Words of Heat, as if ſpoken when the Parties are Scolding together; but were uttered deliberately in the Party's Abſence to her Servant. Formerly they would prohibit, unleſs the Words implied ſome Act to have been done: Vide Eaton *verſus* Ayloff, 3 Cro. 110. But 'tis Reaſon the Suit ſhould proceed in this Caſe, ſeeing it is for Matter of Slander, which is puniſhed by publick Penance. Therefore Suit lies in London for calling Whore; becauſe by the Cuſtom there, Whores are to be carted.

Wherefore the Court denied a Prohibition.

Read *verſus* Wilmot.

2 Lutw. 1565.

IN Falſe Impriſonment, the Defendant juſtified by a Capias, directed to him upon a Suit commenced againſt the Plaintiff in an inferior Court; to which the Plaintiff demurred; becauſe it was not ſhewn that a Summons was iſſued firſt, and inferior Courts can award no Capias, but upon a Summons firſt returned. To which it was anſwered, That this being admitted, yet it is but an erroneous Proceſs, in the Execution of which the Officer is excuſed, who is not to be puniſhed when the Court proceeds inverſo ordine.

Hale ſaid, It was a great Abuſe in thoſe Courts, their ordinary Practice being to grant a Capias without any Summons, ſo that the Party is driven to Bail in every trivial Action; and that tho' upon a Writ of Error this Matter is not aſſignable, becauſe a Fault in the Proceſs is aided by Appearance, &c. yet Falſe Impriſonment lies upon it, and the Officer cannot juſtify here, as upon Proceſs out of the Courts of Weſtminſter. For ſuppoſe an Attachment ſhould go out of the County Court without a Plaint, could he that executes it, juſtify? Yet a Sheriff may juſtify an Arreſt upon a Capias out of the Common Pleas, tho' there were no Original: But Miniſters to the Courts below muſt ſee that Things be duly done. Wherefore the Plaintiff muſt have Judgment.

1 Roll. Ab. 780. 2 Lutw. 953. Poſtea 249. And Hodſon and Cook, Poſtea 369. 10 Co. 76, 3 Cro. 446. Kelle. 99. a.

Monk's *Case*.

A Debt was recovered against him in this Court, and the Money levied by the Sheriff, which he did not deliver, but was ordered to bring it into Court, until a Difference that arose about it was determined.

Monk being indebted to the King, a Writ was issued out to enquire what Goods and Chattels he had.

The King's Attorney moved, That they might have Leave to find this Money; the Court conceived, That the Money being but as a Depositum there, they might find it; and that the Court did not protect it from the Inquisition, as when Goods are under an Attachment they cannot be distrained; but they would not make any Direction for the Finding of it.

Blackamore *versus* Mercer.

IN a Judgment against an Executor, a Fieri facias issued out to the Sheriff, with a Scire fieri Inquiry, and a Devastavit was found according to the common Course, the Return whereof was, quod diversa bona quæ fuerunt testatoris, &c. habuit quæ elongavit & in usum suum proprium convertit. Antea 20. 1 Saund. 307. 2 Saund. 402. 3 Keb. 62.

It was objected against this Return, That it was not said Devastavit, for in some Cases an Executor may justly convert the Goods to his own Use.

Hale said, Anciently, when the Sheriff returned a Devastavit, which was not found by any Inquisition, and to which there was no Answer, it was necessary to insert the Word Devastavit. But otherwise in a Return upon this Special Writ; for if the Case be, that he hath not wasted the Goods, but only eloigned them so as the Sheriff cannot come at them, the Executor is chargeable upon this Writ, de bonis propriis, and this Return answers the Writ.

Perrot *versus* Bridges.

IN Trespass, quare clausum fregit, and threw down his Fences.

The Defendant pleaded Not guilty to all, but the Breaking of the Fences, and for that he justifies; for that he was possessed of certain Corn in the Place where, as of his proper Goods, and made a Breach in the Fence, as was necessary for the Carrying of it away. 2 Saund. 401. 3 Keb. 61.

The Plaintiff demurs specially, because he did not shew by what Title he was possessed of the Corn. And the Court were of Opinion, that for that Cause the Plea was insufficient; for if a Man enters upon another's Land and sows it, 'tis his Corn while he that hath Right

Right re-enters; ſo if Tenant at Will ſows the Ground, and then determines his own Will, he cannot break the Hedges to carry the Corn away. And Twiſden ſaid, If the Sheriff upon a Fieri facias ſells Corn growing, the Vendee cannot juſtify an Entry upon the Land to reap it, until ſuch Time as the Corn is ripe.

Anonymus.

3 Keb. 61. Vide Stat. 4, 5 Annæ, cap. 16.

IF an Adminiſtrator brings an Action, the Declaring hic in Curia prolat' of the Letters of Adminiſtration is but Matter of Form, tho' it hath been held otherwiſe. For Hale ſaid, 'Tis not Part of the Declaration as a Specialty is, upon which Debt, Covenant, &c. is brought, but only ſhewn upon the Declaration, to enable the Plaintiff to bring his Action.

Note, This is aided by a late Act of Parliament, i. e. 4, 5 Ann.

Jay *verſus* Bond.

3 Keb. 17, 60, 63.

IN Treſpaſs the Defendant pleads, That ante Quinden' Sancti Martini præd' Jay excommunicatus fuit & adhuc exiſtit, & protulit hic in Cur' literas teſtamentarias Epiſcopi Sarum quæ notum faciunt univerſis quod ſcrutatis Regiſteriis invenitur contineri quod excommunicatus fuit, &c. pro contumacia in non comparendo to a Suit of Tithes, &c. in cujus rei Teſtimonium præd' Epiſcopus Sigillum appoſuit.

It was objected, That ſuch a Kind of Certificate of Excommunication as this is, was not allowable; for it ought to be poſitive, and under the Seal of the Ordinary; whereas this is only a Relation of what is found in their Regiſter. Sed non allocatur; for tho' ſuch a Form of Pleading would be altogether inſufficient in our Law; yet their Courſe is ſometimes to certify Excommunication, ſub ſigillo Ordinarii, and ſometimes per literas Teſtamentarias, as here.

Hale ſaid, To plead Letters Patents without ſaying ſub magno ſigillo is naught, and that becauſe the King has divers Seals.

Vide Inſtit. Leg. 485, 486.

Note, The Entry was here quod Defendens venit & dicit, &c. Hale doubted, Whether he ought not to have made ſome Kind of Defence, tho' no full Defence is to be made, when Excommengement in the Plaintiff is pleaded.

Owen *verſus* Lewyn.

THE Plaintiff declared in an Action upon the Caſe, upon the Cuſtom of the Realm againſt a Common Carrier, and alſo ſur Trover and Converſion. Poſtea 365, 366. 3 Keb. 59.

Hale ſaid, So he might, for Not guilty anſwers both; but if a Carrier loſeth Goods committed to him, a general Action of Trover doth not lie againſt him.

Termino Sancti Michaelis, Anno 24 Car. II.

In Banco Regis.

Davenant *verſus* The Biſhop of Salisbury.

IN Covenant, the Plaintiff declared, That the Biſhop of Salisbury the Defendant's Predeceſſor, being ſeiſed in Fee, demiſed unto him certain Lands for twenty-one Years, reſerving the antient Rent, &c. and covenanted for him and his Succeſſors, to diſcharge all publick Taxes aſſeſſed upon the Land; and that ſince the Defendant was made Biſhop, a certain Tax was aſſeſſed upon the Land by Virtue of an Act of Parliament, and that the Plaintiff was forced to pay it, the Defendant refuſing to diſcharge it, unde Actio accrevit, &c. 3 Keb. 69. 2 Lev. 68. 2 Danv. 56. pl. 1.

The Defendant demurred, firſt to the Form, For that 'tis ſaid that the Predeceſſor Biſhop was ſeized, and doth not ſay in jure Epiſcopatus. But Hale ſaid the Old Books were, That where it was pleaded, that J. S. Epiſcopus was ſeiſed, that it implies Seiſin in the Right of the Biſhoprick, which is true if he were a Corporation capable only in his politick Capacity, or as an Abbot, &c. but in Regard he might alſo be ſeiſed in his natural Capacity, the Declaration was for this Cauſe held to be ill. The Matter in Law was, Whether this were ſuch a Covenant as ſhould bind the Succeſſor as incident to a Leaſe, which the Biſhop is impowered to make by 32 H. 8? For 'tis clear, if a Biſhop had made a Covenant or Warranty, this had not bound the Succeſſor at the Common Law, without the Conſent of the Dean and Chapter; and if it ſhould be now taken, that every Covenant would bind the Succeſſor, then the Statute of 1 Eliz. would be of no Effect: But Hale ſaid, Admitting this were an antient Covenant, (and if ſo, it ſhould have been averred to have been uſed in former Leaſes,) to diſcharge ordinary Payments, as Penſions or Tenths

Tenths granted by the Clergy, then it might bind the Succeſſor, by 32 H. 8. But it were hard to extend it to new Charges: And we all know how lately this Way of Taxes came in.

But the Court ſaid, That the Declaration being inſufficient for the other Matter, they would not determine this. But they held, That however this Covenant ſhould prove, it would not avoid the Leaſe. Vide Gee, Biſhop of Chicheſter, and Freeland's Caſe. 3 Cro. 47.

2 Ven. 171. T. Jones 39.

Note, Hale ſaid, That antiently when the Sheriff returned a Reſcous upon a Man, he was admitted to plead to it as to an Indictment. But the Courſe of the Court of later Times has been not to admit of any Plea to it, but to drive the Party to his Action upon the Caſe, as upon the Return of a Devaſtavit, &c.

Cole *verſus* Levingſton.

2 Keb. 700, 856. 2 Keb. 2, 35, 83, 90, 100, 124.

IN Ejectment, upon a long and intricate Special Verdict, (the Chief Juſtice ſaid, Never was the like in Weſtminſter-Hall) theſe following Points were reſolved by the Court, and declared by Hale as the Opinion of himſelf and the reſt of the Judges.

Firſt, That where one covenants to ſtand ſeiſed to the Uſe of A. and B. and the Heirs of their Bodies, of Part of his Land, and if they die without Iſſue of their Bodies, then that it ſhall remain, &c. and of another Part of his Land to the Uſe of C. D. and E. and the Heirs of their Bodies, and if they die without Iſſue of their Bodies, then to remain, &c. that here there are no croſs Remainders created by Implication, for there ſhall never be ſuch Remainders upon Conſtruction of a Deed, tho' ſometimes there are in Caſe of a Will. 1 Roll. 837.

Holmes and Meynel. Trin. 31 Car. 2 Roll. 1102. in B. R. Ch. Juſt. T. Jones Rep. 172, 173, 174, 179, 180.

Secondly, As this Caſe is, there would be no croſs Remainders if it were in a Will, for croſs Remainders ſhall not riſe between Three unleſs the Words do very plainly expreſs the Intent of the Deviſor to be ſo; as where black Acre is deviſed to A. white Acre to B. and green Acre to C. and if they die without Iſſue of their Bodies vel alterius eorum; then to remain; there by Reaſon of the Words alterius eor', croſs Remainders ſhall be, Dyer 330. But otherwiſe there would not; Gilbert v. Witty and others, 2 Cro. 655. And in this Caſe, tho' ſome of the Limitations are between Two, there ſhall be no croſs Remainders in them, becauſe there are others between Three; and the Intent ſhall be taken to be the ſame in all.

The Dean and Chapter of Durham *verſus* the Lord Archbiſhop of York.

IN a Prohibition the Archbiſhop pleaded a Preſcription, That he and his Predeceſſors have Time out of Mind been Guardians of the Spiritualties of the Biſhoprick of Durham, Sede vacante; and Iſſue was joined thereupon, and tried at the Bar this Term. Poſtea 234. 3 Keb. 17, 91.

Hale ſaid, De jure communi the Dean and Chapter were Guardians of the Spiritualties, during the Vacancy as to Matters of Jurisdiction; but for Ordination they are to call in the Aid of a neighbouring Biſhop, and ſo is Linwood: But the Uſage here in England is, That the Archbiſhop is Guardian of the Spiritualties in the Suffragan Dioceſe, and therefore it was proper here to join the Iſſue upon the Uſage.

There was much Evidence given, That anciently during the Vacancy of Durham, the Archbiſhop had exerciſed Jurisdiction, both ſententious, and other, as Guardian of the Spiritualties: But ſince H. 8. Time, it had been for the moſt Part adminiſtred by the Dean and Chapter; and the Verdict was here for the Dean and Chapter.

King *verſus* Melling.

IN an Ejectment, upon a Special Verdict the Caſe was this; R. Melling ſeized in Fee, having Iſſue four Sons, William, Robert, Bernard and John, deviſed the Land in Queſtion in this Manner. S. C. Antea 214. Pollexfen 101. 2 Lev. 58. 3 Keb. 42, 52, 95. Vide 3 Lev. 431. 1 Salk. 224. Loddington and Kime. 3 Salk. 296. Antea 214.

I give my Land to my Son *Bernard* for his natural Life, and after his Deceaſe, I give the ſame to the Iſſue of his Body lawfully begotten on a ſecond Wife, and for want of ſuch Iſſue to *John Melling* and his Heirs for ever. Provided, that *Bernard* may make a Jointure of all the Premiſſes to ſuch ſecond Wife, which ſhe may enjoy during her Life.

R. M. dies, Bernard in the Life of his firſt Wife ſuffered a Recovery to the Uſe of himſelf in Fee; and after her Deceaſe marries a ſecond Wife, and then by Indenture covenants to ſtand ſeized to the Uſe of himſelf for Life, and after to the Uſe of his Wife for her Life, for her Jointure, and dies.

J. M. enters, and makes a Leaſe to the Plaintiff: And this Term after Arguments at the Bar, the Court gave their Opinions.

Rainsford for the Plaintiff. Firſt, I hold in this Caſe, that B. M. takes but an Eſtate for Life, with a contingent Remainder to the Iſſue by his ſecond Wife, for the Deviſe is by expreſs Words for Life; as in Archer's Caſe, 1 Co. A Deviſe to R. A. for Life, and after to the next Heir Male of R. and the Heirs Males of that Heir Male; reſolved to create but an Eſtate for Life to R. A. I rely

mainly upon Wild's Case, 6 Co. which was brought before all the Judges of England; where the Devise was to a Man and his Wife, and after their Decease to the Children: And resolved to be but an Estate for Life; 'Tis true, there were Children at the Time of the Devise, but in the End of the Case 'tis said, that in such Case if there were no Children, the Children born after, might take by Remainder, and the first Estate to be but for Life. Clerk v. Day, 1 Cro. 313. The Devise to Rose his Daughter for Life, and that if she married after his Death and had Heir of her Body, then, that the Heir after his Daughter's Death should have the Land, and to the Heirs of their Body begotten, and if his Daughter died without Issue, then to a Stranger. It was held by Gawdy and Fenner, that Rose had but an Estate for Life in this Case. 1 Roll. 837. Devise to his eldest Son for Life, and after his Decease to the Sons of his Body lawfully begotten; the Son resolved to have but an Estate for Life.

The second Point; Whether the Power to make a Jointure be destroyed by the Common Recovery? These Powers to make Estates are of two Sorts, either collateral, as when Executors have Power by a Will to sell Land, and such a Power cannot be destroyed, as appears in Diggs's Case, 1 Co. Or Powers appendant to Estates, as to make Leases, which shall continue after the Estate, to which the Power is annexed, determines; and the Power in the Case at Bar to make a Jointure is of this second Sort, and is destroyed by the Alteration of the Estate to which it is annexed in Privity, as 1 Co. Albany's Case is; so that the Common Recovery being a Forfeiture of the Estate for Life, by Consequence 'tis an Extinguishment of the Power.

Thirdly; But admitting the Power continues, whether it be well executed? And I hold that it is not; for being seized in Fee at the Time of the Covenant to stand seized to the Use of his Wife for her Jointure; and this without any Reference to his Power, the Use shall arise out of his Interest, and not to be executed by Virtue of his Power, according to the Resolution in Sir Ed. Cleer's Case, 6 Co.

Twisden of the same Opinion. As to the first Point it must be agreed, that these Words, Issue of the Body, ex vi termini make not an Entail, if they were in a Conveyance by Act executed, no more than Children, as the Words were in Wild's Case. 'Tis true, in a Will a Devise of Land to a Man and his Issue creates an Entail, if the Devisee had no Issue at that Time, for otherwise those Words would be void; for in regard they are limited to take presently, the Issue born after cannot take as by Remainder, there being none to take in præsenti, they must be intended to be Words of Limitation; as a Devise to a Man and his Heirs Males makes an Entail, or otherwise the Word Males must be rejected; then seeing the Words in themselves are not proper to make an Entail, the

next

next Thing to be considered is the Intention, which is to be known by the Expressions in the Will, and not any Averment dehors. The Words are, I will give my Lands to my Son for Life, and after his Decease I will give the same to the Issue, &c. so that the Land is given to him expressly for Life. Devise of Land in perpetuum makes a Fee; but if Land be given by Deed in perpetuum, there an Estate only for Life will pass. 15 H. 7. A Devise to one paying 10 l. this is a Fee. 6 Co. Collier's Case: But a Devise to one for Life paying 10 l. makes but an Estate for Life. The Case of Furse and Winter was Mich. or Trin. 13 Regis Caroli Rot. 1339. A Devise to his two Daughters equally to be divided between them, and to the Survivor of them, and to the Heirs of the Body of the Survivor. This was so expressly to the Survivor, that it was resolv'd to be a Joint Estate, and not in Common. The Words here are after the Decease of Bernard, I give the same to the Issue of his Body, &c. implying that the Issue should take by Purchase as a Gift, and not by Descent.

Again, The Power given to Bernard to make a Jointure shews, that he could not do it by Virtue of his Estate, and therefore needed a Power to be annexed. And tho' such Powers are usually affixed to Estates-tail; yet when the Construction is doubtful, what Estate shall pass, the Giving such a Power is an Argument, that 'tis such an Estate, that cannot make a Jointure, or the like, by any other Means. The Words go further, and for want of such Issue, then to J. M. 'Tis true, if Land be devised to a Man, and if he dies without Issue then to remain over, the Devisee shall have an Entail. Owen 29. But it shall not be so in this Case, because that Clause is crowded in with other Clauses directly to the contrary. I rely mainly upon Wild's Case, 6 Co. and the Case quoted out of Benloe in the End of that Case: A Devise to Baron and Feme, and to the Men Children of their Bodies begotten; because it did not appear that there were any more Children at that Time, this made an Estate-tail. But if it had been, and after their Decease to their Children, then the Children should take by Purchase tho' born after. 'Tis true, that Case is variously reported in the Books, but I adhere to my Lord Coke, presuming, that that being brought before all the Judges in the Argument of Wild's Case, it was a true Report. Postea 231.

As for the second Point 'tis plain, That the Power is extinguished; for by the Recovery, the Estate for Life to which it was annexed in Privity is gone and forfeited, so that 'tis not necessary to dispute the third Point, Whether well executed or no? But upon the Whole I agree with my Brother Rainsford, that the Plaintiff ought to have Judgment.

Hale. I differ from my two Brothers, and tho' I was of their Opinion at the finding of the Special Verdict, yet upon very great Consideration of the Case, I am of Opinion for the Defendant. I shall proceed in a different Method from my Brothers, and

begin with that Point which they made laſt; and I agree with them, admitting that Bernard had but an Eſtate for Life, that the Power was deſtroyed; alſo here the Recovery does not only bar the Eſtate, but all Powers annexed to it; for the Recompence in Value is of ſuch ſtrong Conſideration, that it ſerves as well for Rents, Poſſibilities, &c. going out of and depending upon the Land, as for the Land it ſelf: So Fines and Feoffments do ranſack the whole Eſtate, and paſs, or extinguiſh, &c. all Rights, Conditions, Powers, &c. belonging to the Land, as well as the Land it ſelf.

Secondly, I agree with my Brother Rainsford, that if Bernard had but an Eſtate for Life by the Deviſe, the Power was not well executed. Where Tenant for Life has a Power to make Leaſes, 'tis not always neceſſary to recite his Power when he makes a Leaſe; but if he makes a Leaſe, which will not have an effectual Continuance, if it be directed out of his Intereſt, there it ſhall be as made by Virtue of his Power; and ſo it was reſolved in one Rogers's Caſe, in which I was Counſel.

Again, Tho' it be here by Covenant to ſtand ſeized, (an improper Way to execute his Power) yet it might be conſtrued an Execution of it. Mich. 51. in this Court, Stapleton's Caſe; where a Deviſe was to A. for Life, Remainder to B. for Life, Remainder to C. in Fee, with Power to B. to make his Wife a Jointure. B. covenanted to ſtand ſeized for the Jointure of his Wife, reciting his Power; tho' this could not make a legal Jointure, yet it was reſolved to enure by Virtue of his Power; Quando non valet quod ago ut ago, valeat quantum valere poteſt. But in this Caſe Bernard has got a new Fee, which tho' it be defeaſible to him in Remainder; yet the Covenant to ſtand ſeized ſhall enure thereupon, and the Uſe ſhall ariſe out of the Fee.

Thirdly, I was at the firſt opening of the Caſe of Opinion, that Bernard had but an Eſtate for Life; but upon deep Examination of the Will, and of the Authority, and Conſiderations of the Conſequences of the Caſe, I hold it to be an Eſtate-tail.

And firſt, To eaſe that Point of all Difficulties, it cannot be denied, but a Deviſe to a Man, and the Heirs of his Body by a ſecond Wife, makes an Eſtate-tail executed, tho' the Deviſee had a Wife at the Time. As the Caſe often cited, where Land is given to a married Man and a married Woman, and the Heirs of their Bodies. We are here in Caſe of the Creation of an Eſtate-tail, where Intention has ſome Influence (voluntas donatoris, &c.) and may help Words which are not exactly according to legal Form. 39 Aſſ. 20. Land given to a Man and his Wife, & hæredi de corpore & uni hæredi tantum, this judged an Entail. Again, we are in Caſe of an Eſtate-tail to be created by a Will, and the Intention of the Teſtator is the Law to expound the Teſtament; therefore a Deviſe to a

1 Leon. 212.
2 And. 138.

Man

Man and his Heirs Males, or a Devise to a Man, and if he dies without Issue, &c. are always construed to make an Entail. It must be admitted, that if the Devise were to B. and the Issue of his Body, having no Issue at that Time, it would be an Estate-tail; for the Law will carry over the Word Issue, not only to his immediate Issue, but to all that shall descend from him: I agree it would be otherwise, if there were Issue at that Time. Tayler and Sayer, 41 Eliz. Rot. 541. a Devise to his Wife for Life, Remainder to his Issue, (having two Children) it was held the Remainder was void, being to the Issue in the singular Number, for Incertainty which should take. But that was a little too rank, for Issue is nomen collectivum. 1 Sid. 47.

Again, I agree, if a Devise be made to a Man, and after his Death to his Issue (or Children,) having Issue at that Time, they take by Way of Remainder. And that was the only Point adjudged in Wild's Case, and there also against the Opinion of Popham and Gawdy. 1 Cro. 742. Raym. 83. 2 And. 134.

This Way being made, I come to the Case it self, and shall briefly give my Reasons, why I hold Bernard has an Estate-tail.

First, because the Word Issue is nomen collectivum, and takes in the whole Generation ex vi termini; and so the Case is stronger than if it were Children: And where it is said, to the Issue that he shall have of the Body of the second Wife, that is, all that shall come of the second Wife: For so 'tis understood in common Parlance. Pollex. 117.

Secondly, In all Acts of Parliament, Exitus is as comprehensive as Heirs of the Body. In Westm. 2. de donis, Issue is made a Term of Equivalence to Heirs of the Body; for where it speaks of the Alienation of the Donee, 'tis said, quo minus ad exitum descenderet. So in 34 H. 8. of Entails settled by the Crown.

'Tis true, in Conveyances, &c. the Wisdom of the Law has appropriated the Word Heirs as a Term of Art. In Clerk's Case, a Lease was made to commence after the Death of his Son without Issue; the Son had a Son and died, and then that Son died without Issue. It was resolved both in the King's Bench and the Exchequer, That the Lease should commence; for Issue being nomen collectivum, whenever the Issue of the Son failed, the Term of Commencement did happen. 3 Lev. 99. 1 Sid. 102. 2 Keb. 462. 1 Lev. 36. Pollexfen 117.

But now to see the Difference: Tyler's Case, Mich. 24 Eliz. B. R. He had Issue A. B. C. and D. and devised to his Wife for Life, and after her Death to B. his Son in Tail, and if he dies without Issue, then to his Children. A. had Issue a Son and died, and B. died without Issue. 2 Chan. ca. 210.

Resolved,

Reſolved, That the Son of A. ſhould not take as one of the Children of the Teſtator. Which Caſe I cite, to ſhew the Odds between the Word Iſſue and the Word Children.

My ſecond Reaſon is from the Manner of the Limitation, which is to his Iſſue, and of his Body lawfully begotten upon the ſecond Wife; Phraſes agreeable to an Eſtate-tail; and the Meaning of a Teſtator is to be ſpelled out by little Hints. It is admitted in Wild's Caſe in 6 Co. 17. that if the Deviſe had been to the Children of their Bodies, it would have been an Entail.

Thirdly, It appears by the Deviſe, that the Teſtator knew there could be no Children at that Time, and ſhall not be ſuppoſed to intend a contingent Remainder.

Fourthly, It appears that the Teſtator did not intend to prefer the Children of the firſt Wife of Bernard, but did the Children of the ſecond, and therefore cannot be thought to mean, that John, the younger Brother of Bernard, ſhould take before Failure of the Iſſue which Bernard ſhould have by his ſecond Wife. And to this Purpoſe is Spalding's Caſe 3 Cro. 185. A Deviſe to his eldeſt Son and the Heirs of his Body after the Death of his Wife; and if he died living the Wife, then to his Son N. And deviſed other Lands to another Son, and the Heirs of his Body; and if he died without Iſſue, then to remain, &c. The firſt Son died living the Wife: It was ſtrongly urged that his Eſtate ſhould ceaſe; for being ſaid, If he died living the Wife, this was a Corrective of what went before. But 'twas ruled by all the Court, That it was an abſolute Eſtate-tail in the firſt Son, as if the Words had been, If he died without Iſſue living the Wife; for he could not be thought to intend to prefer a younger Son before the Iſſue of his eldeſt.

1 Bulſt. 219. 1 Roll. 836. N. 11. Fifthly, The Words are further, And for want of ſuch Iſſue, then to John; which Words in a Will do often make an Eſtate-tail by Implication: As 4 Jac. Robinſon's Caſe: A Deviſe to A. for Life, and if he died without Iſſue, then to remain; A. took an Entail. So Burley's Caſe, 43 Eliz. A Deviſe to A. for Life, Remainder to the next Heir Male; and for Default of ſuch Heir Male, then to remain. Adjudged an Eſtate-tail. 'Tis true, Dyer 171. is, where Lands were deviſed to a Man and the Heirs Males of his Body, and if he died without Iſſue, &c. theſe laſt Words did not make a Tail General to the Diviſee: For an Implication of an Eſtate of Inheritance ſhall never ride over an expreſs Limitation of an Inheritance before; being 'tis ſaid here, for want of ſuch Iſſue the Land ſhould remain, 'tis plainly meant, That it ſhould not before the Iſſue failed, and then the Iſſue muſt have ſo long, (for none elſe can) and ſo 'tis an Eſtate-tail.

T. Jones 172, 173. 2 Cro. 656. 1 Mod. 189. Vaugh. 263, 264, 265, 266, 267.

I come now to Authorities: 6 Eliz. Anderſon, num. 86. Moor pl. 397. A Deviſe to his eldeſt Son for Life, and after his Deceaſe to the Men Children of his Body, ſaid to be an Eſtate-tail; and ſo cited by Coke in that Book, and ſo contrary to his Report of it in Wild's Caſe, Benloe num. 124. But that Caſe is not ſo ſtrong as this; for Children is not ſo operative a Word as Iſſue. Rolle 839. A Deviſe to his eldeſt Son for Life, & non aliter, (for ſo were the Words, tho' not printed in the Book) and after his Deceaſe to the Sons of his Body; it was but an Eſtate for Life, by Reaſon of the Words Non aliter. Hill. 13. Car. 2. Rot. 121. Wedgward's Caſe; A Deviſe to his Son Thomas for Life, and after his Deceaſe (if he died without Iſſue living at his Death) then to the Daughter, &c. it was held to be an Eſtate for Life. But were it an Eſtate-tail or no, it was not neceſſary to be reſolved, the Caſe depending upon the Deſtruction or Continuance of a contingent Remainder, which would have been gone had the Deviſe made an Eſtate-tail; again, there being an expreſs Deviſe for Life, they would not raiſe a larger Eſtate by Implication.

1 And. 43. Ben. 30.

Antea 227. A. devis'd Lands to his eldeſt Son, and if he die without Heirs Males, then to his 2d Son; this is an Eſtate-tail to the eldeſt. 3 Mod. 123.

Deviſe to A. for Life without Impeachment of Waſte, and in caſe without Iſſue Male, to ſuch Iſſue Male and his Heirs for ever; but if he dies without Iſſue Male, then to B. in Fee. Adjudged that A. took only an Eſtate for Life. 3 Lev. 431. 1 Salk. 224, 225. Loddington and Kime.

Again, Wild's Caſe, where Lands were deviſed to A. for Life, Remainder to B. and the Heirs of his Body, Remainder to Wild and his Wife, and after their Deceaſe to their Children. And the Court of King's Bench were at firſt divided: Indeed it was afterwards adjudged an Eſtate for Life to Wild and his Wife;

Firſt, Becauſe having limited a Remainder in Tail to B. by the expreſs and uſual Words; if he had meant the ſame Eſtate in the ſecond Remainder, 'tis like he would have uſed the ſame Words.

Secondly, It was not, after their Deceaſe to the Children of their Bodies; for then there would be an Eye of an Eſtate-tail.

Thirdly, The main Reaſon was, becauſe there were Children at the Time of the Deviſe; and that was the only Reaſon the Reſolution went upon in the Exchequer-Chamber. And tho' it be ſaid in the later end of the Caſe, That if there were no Children at that Time, every Child born after might take by Remainder; 'tis not ſaid poſitively that they ſhould take: And it ſeems to be in Oppoſition to their Taking preſently; but however that be, it comes not to this Caſe: For tho' the Word Children may be made nomen collectivum, the Word Iſſue is nomen collectivum it ſelf. Hill. 42 and 43 Eliz. Bifield's Caſe: A Deviſe to A. and if he dies not having a Son, then to remain to the Heirs of the Teſtator. Son was there taken to be uſed as nomen collectivum, and held an Entail.

I come now to anſwer Objections:

Firſt, 'Tis objected, that in this Caſe the Limitation is expreſly for Life, and in that Reſpect ſtronger than Wild's Caſe: And this is the great Difficulty.

But I anſwer;

That tho' theſe Words do weigh the Intention that Way, yet they are balanced by an apparent Intention that weighs as much on the other Side; which is, That as long as Bernard ſhould have Children, that the Land ſhould never go over to John; for there was as much Reaſon to provide for the Iſſue of the Iſſue, as the firſt Iſſue.

Again, A Tenant in Tail has to many Purpoſes but an Eſtate for Life.

Again, 'Tis poſſible that he did intend him but an Eſtate for Life, and 'tis by Conſequence and Operation of Law only that it becomes an Eſtate-tail. 1651. Hanſy and Lowther: The Caſe was, A Copyholder ſurrendred to the Uſe of his Will, and deviſed to his firſt Son for Life, and after his Deceaſe to the Heir Male of his Body, &c. This was ruled to be an Eſtate-tail; and this differs from Archer's Caſe in the 1ſt of Co. for that the Deviſe there was for Life, and after to the Heir Male, and the Heirs of the Body of that Heir Male: There Words of Limitation being grafted upon the Word Heir, it ſhews that the Word Heir was uſed as Deſignatio perſonæ, and not for the Limitation of the Eſtate. So is the Caſe of Clerk and Day, 1 Cro. 313.

Another Objection was, That there being a Power appointed to Bernard to make his Wife a Jointure, it ſhews, that it was intended he ſhould have but an Eſtate for Life, which needed ſuch a Power, and not an Eſtate-tail; for then he might have made a Jointure without it.

2 Salk. 675. Lutw. 823.

I anſwer, That Tenant in Tail cannot by Virtue of ſuch Eſtate, make a Jointure, without diſcontinuing or deſtroying his Eſtate. Sed Judicium pro Quer'. there being Juſtice Twiſden and Juſtice Rainsford againſt the Chief Juſtice. Antea 215.

[This Judgment was afterwards reverſed in the Exchequer-Chamber. 2 Lev. 58.]

Deviſe to J. for Life, and after his Deceaſe to the Uſe of the Heirs of his Body; this, tho' limited to him for Life, was held to be an Eſtate-tail. *Cart.* 171. *Randal* verſus *Eely*. See 3 *Sal.* 126. *antea* 215.

I

Termino

Termino Sancti Hillarii, Anno 24 & 25 Car. II.

In Banco Regis.

Anonymus.

A Prohibition was prayed to the Eccleſiaſtical Court, for that they cited one out of a Dioceſe to anſwer a Suit for a Legacy: But it was denied, becauſe it was in the Court where the Probate of the Will was. For tho' it were before Commiſſioners appointed for the Probate of Wills in the late Times; yet now all their Proceedings in ſuch Caſes are tranſmitted into the Prerogative Court. And therefore Suits for the Legacies contained in ſuch Wills ought to be in the Archbiſhop's Court; for there the Executor muſt give Account and be diſcharged, &c. Stat. 23 H. 8. cap. 9. 4 Mod. 234. 5 Mod. 238. 1 Saund. 402. 1 Lev. 193. 2 Lev. 90. 173. 1 Salk. 40, 41. 330, 3.

Note, When a Man is in Cuſtodia Mareſcalli, any Man may declare againſt him in a perſonal Action; and if he be bailed out, he is ſtill in Cuſtodia to this Purpoſe, (viz.) quoad Declarations brought in againſt him that Term: For the Bail are (as it were) delegated by the Court to have him in Priſon. Hob. 1 Mod. 16. Cr. Jac. 568.

Error is not well aſſigned, That there was no Bail filed; unleſs added, That the Defendant was not in Cuſtodia. Hob. 264.

Mildmay *and* Caſe.

IN an Action of Debt upon a Sheriff's Bond, the Caſe was thus: Raym. 220. 3 Keb. 111.

A Man was arreſted upon a Latitat, in placito Tranſgr' ac etiam billæ pro 40 l. de debito. And the Condition of the Bond given to the Sheriff was, To appear at the Day of the Return of the Writ, to anſwer to the Plaint in pl'ito debiti. And it was urged, that this made the Bond void by the Statute of 23 H. 6. for the Condition ſhould have been to appear at the Day, to anſwer in the Action upon which the Proceſs went out, and that was in this Caſe but an Action of Treſpaſs, and the Adding the Ac etiam debiti, &c. is but to ſatisfy the late Act, and for Direction to the Sheriff, to what Value he ſhall require Bail. And it was uſual to endorſe the Cauſe of Action before the Statute upon the Latitats, that the Sheriff might inſiſt upon Bail accordingly. So this is a material Variance from the Statute, and not like ſome of theſe which are remembred in Beaufage's Caſe in 10 Co. and Dyer 364. And to this the Court inclined. 3 Cro. 286.

And Hale cited a Caſe between Button and Low, adjudged Mich. 1649. An Attachment went out of Chancery to anſwer coram nobis in Cancellaria ubicunque, &c. and the Sheriff took a Bond, conditioned to appear coram Rege in Cancellaria ubicunque, &c. apud Weſtmonaſterium: And for the Addition of Weſtminſter, the Bond was held to be void.

2 Vent. 238. contra.

Dean and Chapter of Durham's *Caſe*.

Antea 225.

THE Court was moved for a Prohibition to the Archbiſhop's Court, to ſtop their Proceedings in a Cauſe belonging to the Juriſdiction of Durham, upon a Suggeſtion, that the Dean and Chapter of Durham, Sede vacante, have Cognizance there, as Guardians of the Spiritualties.

And the Court granted a Prohibition; for the Right of Juriſdiction was tried between the Archbiſhop and Dean and Chapter the laſt Term, and found againſt the Archbiſhop; and therefore he was concluded by that Verdict, until the Record was reverſed by Error or Attaint.

Thody's *Caſe*.

3 Keb. 111. 117, 370. Antea 12, 18, 19. 3 Mod. 220. 5 Mod. 349, 405. Inſt. Legal. 299, 301. Raym. 118, 176. 6 Mod. 31. 3 Salk. 97.

THody and Two others were indicted, for that Conſpiratione inter eos habita, they enticed J. S. to play, and cheated him with falſe Dice.

Thody pleaded, and was found Guilty; the others not having pleaded. It was moved, that Judgment might not be entred againſt him until the others came in; for being laid by Way of Conſpiracy, if the reſt ſhould chance to be acquitted, no Judgment could be given againſt him: And ſo is 14 H. 6. 25.

Hale ſaid, If one be acquitted in an Action of Conſpiracy, the other cannot be guilty: But where one is found Guilty, and the other comes not in upon Proceſs, or if he dies hanging the Suit, yet Judgment ſhall be upon the Verdict againſt the other. And ſo is 18 E. 3. 1. and 24 E. 3. 34.

1 Saund. 229, 230.

Wylde ſaid, The Difference was, where the Suit was upon Conſpiracy wherein the villanous Judgment was to be given, and where the Conſpiracy is laid only by Way of Aggravation, as in this Caſe.

Vide poſt. 304, 305. Antea 12, 18, 19.

Hale ſaid, It would be the ſame in an Action againſt Two upon the Caſe for Conſpiracy; but not in ſuch Actions, where tho' there be a Charge of Conſpiracy, yet the Giſt of the Action is upon another Matter.

But the Court ſaid, They would give him two or three Days for the Bringing in of the other Two, and defer the Entry of the Judgment in the mean Time.

Methwyn *verſus* The Hundred of Thiſtleworth.

THE Caſe was moved again by North, Solicitor. He urged for the Plaintiff, That the Iſſue being, Whether they took the Felon upon freſh Suit? It being not found that there was any actual Taking, or that the freſh Suit continued until Sir J. Aſh found the Felon in the Preſence of Sir P. Warwick. Alſo, it was found that Sir J. Aſh was a Juſtice of Peace, and therefore it was his Duty to apprehend him. Antea 118. Raym. 221. 2 Lev. 4. 2 Keb. 769. 3 Keb. 115.

To this it was anſwered,

That the Statute of Winton (upon which the Action is founded, and not upon 27 Eliz. and therefore it is ill if it concludes contra formam Statutorum) doth not ſay ſhall Take, but ſhall Anſwer the Bodies of the Offenders; which is, Anſwer them to Juſtice: And therefore if the Felon be taken upon another Account, and the Country finding him in Priſon, cauſe him to be indicted, this ſatisfies the Statute. Goldsb. 55.

Again, It was more decent for Sir John Aſh being concerned as an Inhabitant of the Hundred to leave this Matter to the other Juſtices of the Peace; for it has been known, that Juſtices of the Peace have been cenſured in the Star-Chamber, for being too forward to interpoſe in their own Buſineſs: But if it were an Omiſſion of the Duty of his Office, that could not be objected to him as an Inhabitant, having done enough to ſatisfy the Statute of Winton.

Wylde ſaid, That the Defendant ſhould have demurred, becauſe the Iſſue is ill joined, (viz.) abſque hoc that he took him ſuper eadem recenti inſecutione: For if he were not immediately taken upon freſh Purſuit it were ſufficient; but the Verdict finding freſh Suit was made, it may be taken by Intendment, (which ſhall help out a Special Verdict) that it was directed this Way, and continued until the Finding of him in the Preſence of Sir P. Warwick. Et ſic Judicium pro Def. Antea 118.

Dacres *verſus* Duncomb.

IN Trover, after Imparlance the Defendant pleaded, That the Plaintiff (with Two others) brought Trover for the ſame Goods before, which Action is ſtill depending: And demanded Judgment of the Writ. 2 Lev. 82. 3 Keb. 127. Poſtea 249.

The Plaintiff replied, That the other Two died before this Action was brought, and ſo that Writ abated. To which it was demurred, and Judgment quod reſpondeat ouſter: For in all Actions, where one Plaintiff dies, the Writ abates; ſave in an Action brought by two Executors.) And Hale ſaid, So it ry much in theſe Caſes. The Title of the Act is, For the better preventing of frivolous and vexatious Suits. See now a new Statute made about 8 & 9 W. which alters the Law ve-

ſhould in a Quare Impedit; but that it is revivable by Journey's Accounts.

Wylde ſaid, That the Pleading, That the Two died before the Action brought, was double.

Hale. No, for he muſt ſhew both were dead to enable him to bring this Action alone.

Twiſden. How comes this Plea in Abatement after an Imparlance?

1 Cro. 9. contra. 1 Sid. 319.

Hale. Tho' after an Imparlance the Defendant cannot plead a Miſnomer, or the like, or Ancient Demeſne; becauſe he admits he ought to anſwer the Writ; yet ſuch a Plea in Abatement as this he may. But that comes not in Queſtion; becauſe the Plaintiff replied to it, and did not demur.

2 Lev. 80. 3 Keb. 135. 1 Saund. 238. 1 Sid. 240, 266.

Nota, Debt for Rent in the Detinet againſt an Executor, may be brought where the Leaſe was made; becauſe 'tis for the Arrears in the Teſtator's Time: But where 'tis in the Debet and Detinet, (viz.) for Rent incurred in the Executor's Time, it muſt be where the Land lies. And ſo agreed by the Court.

Nota, No Tithes to be paid for Paſture wherein the Plow-Horſes are fed.

And Hale ſaid, So it is of Saddle-Horſes.

Anonymus.

5 Mod. 75, 92, &c. See 1 Saund. 67. 1 Sid. 362. 1 Show. 11. 2 Show. 506. Cro. El. 409. 598. 691. 843.

A Foreign Attachment in an inferior Court was pleaded in this Manner: That by Cuſtom (Time out of Mind) whoever levied a Plaint, pro aliquo debito, againſt another, upon Surmize, That a Stranger was indebted to the Defendant, that Proceſs iſſued forth to attach, &c.

Againſt this Pemberton objected, That it was not ſaid pro aliquo debito which did ariſe infra Juriſdictionem Curiæ.

Poſt. 243. Antea 2, 72, &c.

The Court ſaid, That they need not expreſs that the Debt did ariſe infra Juriſdictionem; for perhaps it did not. And yet, if an Action be brought in ſuch Caſe, and the Debt be laid to be contracted infra Juriſdictionem Curiæ, if the Defendant will plead to it he may; but he ſhall never be admitted to aſſign for Error in Fact, that the Debt did ariſe extra Juriſdictionem Curiæ. But if he had tendred ſuch a Plea in the inferior Court upon Oath; then, if they had refuſed it, it would have been Error. Poſtea 369. Vaugh. 405. Kelle. 55. a. 1 Mod. 81.

Wherefore 'tis enough in this Caſe to ſay, If a Plaint were levied pro aliquo debito infra Juriſdictionem without averring that the Debt did ariſe within the Juriſdiction. Alſo there cannot be a Cuſtom for a foreign Attachment, before there be ſome Default in the Defendant. Wherefore the Pleading was there held to be ill.

Moſdel, the Marſhal of the Court, *verſus* Middleton.

IN Debt upon a Bond with Condition to be a true Priſoner, and to pay him ſo much by the Week for Chamber-Rent. Raym. 221.

To this was pleaded the Statute of 23 H. 6. And the Court reſolved, It was void by that Statute. 1 Saund. 16, 318. 1 Lev. 86, 209, 254. 2 Lev. 103. 3 Keb. 133. Hard. 464. 1 Sid. 96, 383, 384, &c.

Hale ſaid, A Bond for true Impriſonment is good prima facie; but the Defendant may aver, that it was alſo for Eaſe and Favour. And ſo it was adjudged in Sir John Lenthal's Time, who brought Debt upon a Bond of 2000 l. and the Party pleaded, That it was taken for Eaſe and Favour; and upon the Trial it appeared, That after the Bond entred into, the Defendant was permitted ſometimes to go into the Country with a Keeper, whereas before he was kept ſtrait Priſoner; and upon this Matter the Bond was ruled to be void.

Twiſden cited my Lord Hob. That a Gaoler could not take a Bond of his Priſoner for a juſt Debt.

Hale. That ſeems hard, becauſe he takes it in another Capacity. But he cannot take a Bond for his Fees, becauſe it would give him Opportunity to extort. Alſo, here Part being againſt the Statute it avoids all, but the Condition of a Bond or Covenant may in Part be againſt the Common Law, and ſtand good in the other Part. So adjudg'd in Cart. 229. Pearſon v. Humes.

Cox *verſus* Matthews.

IN an Action for a Nuſance, in Stopping of the Lights of his Houſe; 3 Keb. 133. Show. 7, 64. 3 Mod. 48. 3 Lev. 133. 2 Salk. 459. 6 Mod. 116, 313, 314. Poſtea 239, 248.

Exception was taken to the Declaration, For that he did not ſay antiquum Meſſuagium; and yet it was ruled to be good enough, for perhaps the Houſe was new built: And the Truth of this Caſe was ſaid to be, That the Defendant had built the Houſe and let it to the Plaintiff, and would now go to ſtop up the Lights.

Hale ſaid, If a Man hath a Water-courſe running thorough his Ground, and erects a Mill upon it, he may bring his Action for Diverting the Stream, and not ſay antiquum molendinum; and upon the Evidence it will appear, Whether the Defendant hath Ground thorough which the Stream runs before the Plaintiff's, and that he uſed to turn the Stream as he ſaw Cauſe, for otherwiſe he cannot juſtify it, though the Mill be newly erected.

Watſon

Watſon *verſus* Snaed.

IN Debt for 20 l. the Plaintiff declared, That the Defendant conceſſit ſe teneri per ſcriptum ſuum obligatorium, &c. the Words of the Deed were, I do acknowledge to *Edward Watſon* by me twenty Pounds upon Demand, for doing the Work in my Garden.

Upon a Demurrer to the Declaration, it was adjudged a good Bond.

Morſe *verſus* Slue.

2 Lev. 69. 3 Lev. 268. Show. 29. Dev. 190. Raym. 220. 1 Mod. 85. 3 Keb. 72, 112, 135. 2 Keb. 866. Molloy 4, 9, 10, 11, 203.

THE Caſe was argued two ſeveral Terms at the Bar, by Mr. Holt for the Plaintiff, and Sir Francis Winnington for the Defendant; and Mr. Molloy for the Plaintiff, and Mr. Wallop for the Defendant; and by the Opinion of the whole Court, Judgment was given this Term for the Plaintiff.

Hale delivered the Reaſons as followeth:

Firſt, By the Admiral Civil Law the Maſter is not chargeable, pro damno fatali, as in Caſe of Pirates, Storm, &c. but where there is any Negligence in him he is.

Molloy 209.

Secondly, This Caſe is not to be meaſured by the Rules of the Admiral Law, becauſe the Ship was infra Corpus Comitatus.

Then the firſt Reaſon wherefore the Maſter is liable is, becauſe he takes a Reward; and the Uſage is, That half Wages is paid him before he goes out of the Country.

4 Co. Southcote's Caſe.

Secondly, If the Maſter would, he might have made a Caution for himſelf, which he omitting and taking in the Goods generally, he ſhall anſwer for what happens. There was a Caſe (not long ſince) when one brought a Box to a Carrier, in which there was a great Sum of Money, and the Carrier demanded of the Owner what was in it, he anſwered, That it was filled with Silks and ſuch like Goods of mean Value; upon which the Carrier took it, and was robbed. And reſolved that he was liable. But if the Carrier had told the Owner, That it was a dangerous Time, and if there were Money in it, he durſt not take Charge of it; and the Owner had anſwered as before, this Matter would have excuſed the Carrier.

Molloy 205. 1 Roll. 530. Molloy 9, 10, 208. 2 Cro. 330. Hob. 11.

Thirdly, He that would take off the Maſter in this Caſe from the Action muſt aſſign a Difference between it, and the Caſe of a Hoyman, Common Carrier or Innholder.

'Tis objected, That the Maſter is but a Servant to the Owners.

Anſwer. The Law takes Notice of him as more than a Servant. 'Tis known, that he may impawn the Ship if Occaſion be, and ſell bona peritura: He is rather an Officer than a Servant. In an Eſcape the Gaoler may be charged, tho' the Sheriff is alſo liable;

for respondeat superior. But the Turnkey cannot be sued, for he is but a meer Servant: By the Civil Law the Master or Owner is chargeable at the Election of the Merchant.

'Tis further objected, That he receives Wages from the Owners. Molloy 210.

Answer. In Effect the Merchant pays him, for he pays the Owner's Fraight, so that 'tis but handed over by them to the Master: If the Fraight be lost, the Wages are lost too; for the Rule is, Fraight is the Mother of Wages; therefore tho' the Declaration is, That the Master received Wages of the Merchant, and the Verdict is, That the Owners pay it, 'tis no material Variance.

Objection. 'Tis found, that there were the usual Number of Men to guard the Ship. Molloy 209.

Answer. True, for the Ship, but not with Reference to the Goods, for the Number ought to be more or less as the Port is dangerous, and the Goods of Value. 33 H. 6. 1. If Rebels break a Gaol, so that the Prisoners escape, the Gaoler is liable; but it is otherwise of Enemies; so the Master is not chargeable, where the Ship is spoiled by Pirates. And if a Carrier be robbed by an hundred Men, he is never the more excused. Antea 190. Owen 58. 4 Co. 84. 1 Roll. Ab. 808. Molloy 211. Molloy 209.

Case may be brought against the Owners, but then they must all be charged, because the Contract is joint. 3 *Lev.* 268. *Show.* 29. *Boson* v. *Sandford.*

Cox *versus* Matthews.

THE Case was moved again, and Hale said, That if a Man builds an House upon his own Ground, he that hath the contiguous Ground may build upon it also, tho' he doth thereby stop the Lights of the other House; for cujus est solum ejus est usque ad cœlum; and this holds, unless there be a Custom to the contrary, as in London. But in an Action for Stopping of his Light, a Man need not declare of an antient House; for if a Man should build an House upon his own Ground, and then grant the House to A. and grants certain Lands adjoining to B. B. could not build to the Stopping of A.'s Lights in that Case, 1 Cro. Sands and Trefuses 575. But the Case at Bar is without Question, for he declares, That the Defendant fixed Boards to the Windows of the Plaintiff's House. Postea 248. Antea 237. Poph. 170. 1 Sid. 167. Raym. 87. Hob. 131.

Anonymus.

UPon a Motion to set aside an Inquisition taken before the Coroner, super visum corporis, certified into this Court, that J. S. killed himself, and was Non compos mentis, Hale said, Such an Inquisition that finds a Man Felo de se is traversable, but no Traverse can be taken to make a Man Felo de se; but fugam fecit is never traversable. Postea 278. Post. 278. Farsl. 16. 2 Lev. 140, 152. 1 Sid. 90. & 101, contr.

Clue

Clue *verſus* Baily.

3 Keb. 127, 139.

IN Replevin the Defendant made Conuſance as Bailiff to J. S. who demiſed the Place where, under a certain Rent, &c.

The Plaintiff traverſes the Demiſe, and concluded, & hoc paratus eſt verificare. To which the Defendant demurred generally. And the Court were in Doubt, Whether this ill Concluſion of the Plea were not helped upon a general Demurrer?

Vide Stat. 4, 5 Annæ, cap. 16. 5 Mod. 8. Inſtit. Leg. 526, 527.

Hale. It were well the Cauſes of Demurrer were always aſſigned ſpecially; and not to ſay only, incertum & dubium & caret forma, &c. The old Way was, when Pleadings were drawn at the Bar, to make the Exception immediately, and the other Party might mend, if he pleaſed, or might demur, if he durſt venture it. And tho' now they are but in Paper, yet ſuch a Courſe ſhould be obſerved; for Demurrers were not deſigned to catch Men: This not concluding to the Country ſeems to be but Matter of Form, and the Demurrer ſhould have been quia non bene concludit. Here the Defendant pleads, that J. S. demiſed the Land for Life, without expreſſing the Place of the Demiſe, becauſe of Neceſſity it muſt be upon the Land.

Blake *verſus* —— or Blacket *verſus* Lumley.

3 Keb. 103, 116. Q. 1 Sid. 406. Raym. 217.

ERror of a Judgment in Replevin in the Manor-Court of Hexam in Northumberland, where the Defendant avowed for Damage-feaſant.

The Plaintiff replied, That J. S. was ſeiſed of the Manor of Tallowfield in D. and that Time out of Mind he had Common, &c. in the Place where, and ſhewed himſelf to be Tenant, and juſtified the putting in of his Beaſts for Common; and the Preſcription being traverſed, it was found for the Avowant. The Errors aſſigned were.

Firſt, In the Venire, which was, quia nec the Plaintiff, nec the Defendant, aliqua affinitate attingunt, inſtead of qui nec. Hale ſaid, It was aided by the Statute of 8 H. 6. that helps Error in Proceſs. But Twiſden ſaid, That Statute did not extend to inferior Courts.

Another Error inſiſted on was, That the Avowant did not ſhew that the Manor of Tallowfield was infra Juriſdictionem Curiæ: But the Venire was, extra vill' & Manerium de Tallowfield, infra Juriſdictionem Curiæ. But the Court held, That that was not ſufficient to intimate that it was within the Juriſdiction, but muſt have been ſhewn in Pleading. And Hale ſaid, Seeing the Plaintiff had omitted to do it, the Avowant might in his Rejoinder have alledged Tallowfield to have been within the Juriſdiction, as where one pleads a Plea without a Place, the other is not bound to

demur, but for his Expedition may ſhew the Place in his Replication. Then Wylde ſaid, This ſeems to be aided by the Statute of 21 Jac. which enacteth, That if the Jury comes out of any one of the Places, it ſufficeth; and here the Jury came as well out of the Hill where the Beaſts were taken, (ſhewn to be within the Juriſdiction) as the Manor of Tallowfield.

Hale. That will not ſerve in this Caſe; for the Court could not award a Venire to a Place out of the Juriſdiction, nor Jurors could not be returned out of ſuch a Place to try a Cauſe there.

Another Error aſſigned was, That the Award of the Venire was præceptum eſt per Seneſchallum, and not ſaid in eadem Curia.

To which it was anſwered,

That being on the ſame Day upon which the Court was ſaid to be held, it muſt be intended ſo.

Wylde held, The Judgment ought to be reverſed for the laſt Cauſe.

Twiſden, principally for the firſt; for he held that the Statute of 8 H. 6. aided not Proceſs in inferior Courts, therefore, where in the Award of the Venire it has been per quos rei veritas melius Scire poterit inſtead of Sciri, the Judgment has been reverſed.

Hale ſaid, That it ought to be Sciri, for ſo it is in the Regiſter, and in the Statute of Eliz. that ſets the Eſtate of Jurors at 4 l. per Annum. But for the ſecond Error, he held that the Judgment ought be reverſed.

See 1 Sid. 406. 1 Keb. 554. 3 Keb. 128. Lutw. 954. N. Lutw. 102.

Whaley *verſus* Tancred.

TRin. 23 Car. 2. Rot. 1513. In an Ejectment the Caſe was this; Leſſee for Years makes a Feoffment and levies a Fine, five Years paſt; Whether the Leſſor ſhould have five Years after the Term expired was the Queſtion. And after the hearing of Argument the Court reſolved, That he ſhould, as well as when Leſſee for Life levies a Fine, which differs not in Reaſon from this Caſe; for there the Leſſor may have his Writ de conſimili caſu præſently, as here he may bring his Aſſize. And though in 9 Co. Podger's Caſe, 'tis ſaid, That where Leſſee for Years is ouſted by a Diſſeiſor, who levies a Fine, if five Years paſs without Claim the Leſſor is barred, that is not the ſame with this Caſe; for the Diſſeiſor comes in without the Conſent of the Leſſee, and of his own Wrong; and if he can defend his Poſſeſſion five Years, he ſhall hold it; but here all is done with the Privity, and by the Means of the Leſſee who is truſted with the Poſſeſſion, and it would be of moſt miſchievous Import to Mens Inheritances, if they ſhould not have five Years after the Leaſe ended; and it being put of a Diſſeiſin in Podger's Caſe, ſeems to imply the contrary in other Caſes; and tho' there were many notorious Circumſtan-

Raym. 219. 2 Lev. 52, 55. 2 Vent. 334. 3 Keb. 37. 3 Keb. 30, 37, 110. Len. Ent. 104.

ces of Fraud in Fermour's Case, which Co. in his Report of it lays much Weight upon; yet it does not thence follow, that the Law is not the same where there are not such Evidences of Fraud. In other Books where that Case is reported, the Resolution does not seem to go so much upon the Particularities of the Fraud. 'Tis Fraud apparent in the Lessee.

Wilston *versus* Pilkney.

2 Lev. 80. Raym. 212. 3 Keb. 131, 137. Postea 272.

IN Debt for Rent the Plaintiff declared, That the Dean and Chapter of, &c. demised to the Defendant for Life; by Force of which he entred and demised the Land to the Plaintiff for Years, by Virtue of which he was possessed, and afterward granted to the Defendant, reserving a Rent, for which he brings his Action.

To this Declaration the Defendant demurs.

First, Because he doth not say of the Dean's Demise hic in Curia prolat', which Demise must be by Deed.

Secondly, he says, That the Defendant entred by Force thereof, which is impertinent to be alledged upon a Lease for Life, because Livery implies it.

Thirdly, As to the Matter, that the Reservation was void, it being upon a Surrender by Parol. A Rent cannot be reserved upon a Feoffment by Parol; so where Lessee for Life or Years assigns over his whole Interest, 12 H. 4, 14. 9 H. 6, 43. 12 H. 4, 17. Also no Rent can be reserved upon a Conveyance that works an Extinguishment, unless by Deed, where it is good upon the Contract. Peto's Case, 3 Cro. 101. is, that a Surrender drowns the Interest to all Intents and Purposes between the Parties. Dyer 251. The Tenant for Life agreed with him in Reversion, that he should have his Land for the Annual Rent of 20 s. 'tis doubted there whether this amounts to a Surrender, there being no Deed or Livery. 1 Roll. 448, 449. But in 2 Roll. 497. 'tis said, If it had been a Surrender the Reservation had been void.

Hale. I do most doubt of the first Exception, because the 2 Mod 174, 175. Deed was not produced. And for the second it were better Pleading to have said by Force of which he was seised; but that's not of Necessity. And as to the Matter, the Court resolved for the Plaintiff. For

1. The Reservation was good by the Contract, tho' without Deed. And so it was adjudged in this Court in Manly's Case, that Tenant for Years might assign his whole Term by Parol, rendering Rent; so in the Case of Purcas and Owen, 23 Car. But 14 H. 7. 2. b. it was doubted, whether an Action would lie until the last Day were past. 'Tis all one where the Grant is made to him in Reversion, which is not actually, but consequentially a Surrender by Operation of Law, before which the Contract is perfected, upon which the

Rent ariſes. 7 E. 4 is, that the Leſſee may ſurrender upon Condition; and there is no Reaſon, why a Rent cannot be created upon it as well as a Condition. If it were in the Caſe of Tenant for Life, a Deed were requiſite, as well for a Rent as a Condition, in reſpect of the Freehold, but that is not ſo in the Caſe of Tenant for Years. Vide poſtea Cartwright and Pinkney. Poſtea 272.

Termino Sanctæ Trinitatis, Anno 25 Car. II.

In Banco Regis.

Hanſlap *verſus* Cater.

IN Error upon a Judgment in the Court of Coventry, where Plaintiff Cater declared, That the Defendant being indebted to him infra Juriſdictionem Curiæ, pro diverſis Bonis & Merci-moniis ante tunc venditis & deliberatis, did then and there aſſume, &c. Upon Non Aſſumpſit pleaded, and a Verdict and Judgment for the Plaintiff, the Error aſſigned was, That the Goods were not alledged to be ſold within the Juriſdiction of the Court. 2 Lev. 87. 3 Keb. 164. Vide antea 2. & 72, &c. ib. 236. T. Jones 230. Raym. 75. 1 Sid. 87.

Hale and Wilde ſeemed to be of Opinion, That it was well enough, the being indebted and the Promiſe being laid to be within the Juriſdiction.

Twiſden contra, and ſaid, He had known many Judgments reverſed for the ſame Cauſe.

It being moved again this Term, Hale conſented that it ſhould be reverſed according as the later Precedents have been; for he ſaid it was his Rule, Stare deciſis; Parſons and Muden, Paſch. 22. Car. 2. Rot. Out of Barnſtaple Court.

John Brown's *Caſe*.

HE was indicted upon the Statute of 3 H. 7. cap. 2. for the forcibly taking away and marrying one Lucy Ramſy, of the Age of Fourteen Years, having to her Portion 5000 l. He was tried at the Bar, and the Fact appeared upon the Evidence to be thus; She was inveigled into Hide-Park by one Mrs. P. Confederate with Brown, (who had prepared a Coach for that Purpoſe) to take the Air in an Evening, about the later End of May laſt, and being in the Park, the Coachman drove away from the reſt of the Company, which gave Opportunity to Brown, who came to the Coach-ſide in a Viſard-Maſk, and addreſſing himſelf firſt to Mrs. P. 3 Keb. 193. Vide 3 Inſt. 61.

ſoon perſwaded her out of the Coach, and then pulls out a Maid-Servant there attending Mrs. Ramſy; and then gets himſelf into the Coach, and there detains her until the Coachman carried them to his Lodgings in the Strand, where the next Morning he prevails upon her, (having firſt threatned to carry her beyond Sea if ſhe refuſed) to marry him, but was the ſame Day apprehended in the ſame Houſe.

It was at firſt doubted, Whether the Evidence of Lucy Ramſy was to be admitted, becauſe ſhe was his Wife de facto, tho' not de jure. But the Court ſeriatim deliver'd their Opinions, That ſhe was to be admitted a Witneſs.

Firſt, For that there was one continuing Force upon her, from the Beginning to the Marriage; wherefore whatſoever was done while ſhe was under that Violence was not to be reſpected.

Secondly, As ſuch Caſes are generally contrived, ſo hainous a Crime would go unpuniſhed, unleſs the Teſtimony of the Woman ſhould be received.

Cro. Car. 483, 485, 488, 492.

Thirdly, In Fulwood's Caſe, reported in 1 Cro. (which was read in the Court) the Woman was a Witneſs, tho' married as here; and Rainsford cited my Lord Caſtlehaven's Caſe, where the Counteſs gave Evidence, That he aſſiſted the Committing a Rape upon her: But Hale ſaid he was not governed by that Caſe, becauſe there was a Wife de jure. The Evidence being clear as to all the Points of the Statute, viz.

Firſt, That the Taking was by Force.

Secondly, That the Woman had Subſtance according to the Statute.

Thirdly, That Marriage enſued, tho' it did not appear ſhe was deflowered, the Jury found him Guilty. Whereupon Judgment was given, and he was hanged.

Note. 39 Eliz. cap. 9. takes away Clergy for this Offence.

Bayly *verſus* Murin.

3 Keb. 46. 107, 193. 2 Lev. 61.

IN an Ejectment upon a Special Verdict, the Caſe was to this Effect.

One Cooper, Vicar of Cranbrook in Kent, being ſeiſed of an Houſe and Lands thereunto appertaining, Parcel of the Endowment of his Vicarage, ſituate in a Market-Town, in the Year 1672. lets it for three Years, and one Year of the ſaid Leaſe being expired the 11th of Sept. 1673, lets it for 21 Years, to begin from Michaelmas following, reſerving the Rent during the Term, payable at the uſual Feaſts, or within ten Days after; this Leaſe was confirmed by the Archbiſhop, (Patron of the Vicarage) and Dean and Chapter of Canterbury.

1 Inſt. 300. b.

Some Years after Cooper dies, and the Question was, Whether Buck (the succeeding Vicar) could avoid this Lease?

The first Point was, Whether the Lease came void within 80 Days after the Death of Cooper, by the Statute of Non residence? And as to that all the Justices were of Opinion, That Death would not make such a Non-residence as should avoid the Lease; for the Intention of the Statute was, to oblige the Incumbents to Residence. 13 Eliz. 20.

First, By imposing of the Forfeiture of a Year's Value of their Benefice, if they did not reside.

Secondly, By making their Lease void; which tho' prima facie seemed to be to their Advantage, yet was not so in the Consequence; for none would be induced to Farm their Lands, because it was in their Power to defeat their Leases by Non-residence.

Again, 'Tis plain the Statute meant a Wilful Absence, because it says, The Party so offending. The Statute of the 13th of Eliz. that allows Leases of Houses, &c. in Market-Towns for 40 Years, would be of no Effect, if Death should be interpreted a Non-residence, and the Confirmation of Patron and Ordinary would be to no Purpose. Butler and Goodale's Case in 6 Co. 21. b. is, that where the Incumbent is absent upon an Inhibition, or for the Sake of his Health, he is not within the Penalty of that Law. There is only one single Authority against this, (viz.) Mott and Hale's Case in 1 Cro. 123. which Twisden doubted, Whether it were so adjudg'd, because my Lord Coke mentions it no where, supposing so notable a Point would not have escaped his Observation, especially in a Case wherein he was Counsel. But Hale said, It was adjudged by the Opinion of three Judges; tho' in Moor 'tis said, the Court was divided; but it was a hard Opinion: And in the 38th of Eliz. B. R. Moor 606. the very Point was adjudg'd contrary.

The second Point, Whether it were void, because the Rent was reserved at the usual Feasts, or within ten Days after? For it was urged, That the Term ending at Michaelmas, would be expired before the last Payment; and for the other Payments, 'tis for the Successor's Advantage, because the Predecessor may die within the ten Days. But the Court were clear of Opinion, in regard the Reservation was during the Term, that there should be no ten Days given to the Lessee for the last Payment, according to Barwicke and Foster's Case in 2 Cro. 227, 233.

The third Point, Whether this were a Lease in Reversion, and so not warranted by the Statute of the 14th of Elizabeth? And all the Court held that it was. This Statute repeals that of the 13th of Eliz. as to Houses in Market-Towns, (which Liberty was given, as Twisden said to render those Places more populous;) but excepts Leases in Reversion, which this is, being to commence at a Day

Day to come, where a Power is annexed to an Estate for Life to make Leases in Possession. A Man cannot make a Lease to commence in futuro. In 6 Co. Fitz-William's Case, 4 E. 3. Tit. Waste 18. the Lessor made a Lease to commence after the Death of the Tenant for Life, and notwithstanding maintain'd an Action of Waste: And Co. Lit. citing that Case, distinguishes between a Grant of the Reversion, and a Lease in Reversion, as that Case was. In Plowden's Commentaries, Tracy's Case. A Lease made to commence at a Day to come, is given as a most proper Instance of a Lease in Reversion. In 1 Cro 546. Hunt and Singleton's Case, a Lease of an House for 40 Years (there being 10 Years unexpired of a former Lease) by the Dean and Chapter of St. Paul's, was held not warranted by the 14th of Eliz. The like was resolved in C. B. 14 Car. 2. in the Case of Wyn and Wild, of a Lease of the Dean and Chapter of Westminster, and there the Court denied the Opinion in Tomson and Trafford's Case, Poph. 9. And two of the Judges seemed to be of Opinion, (and Twisden strongly) That if the Lease in the Case at Bar had been made to commence presently, it yet would have been void, there being another Lease in Being; so that for so many Years as were to come of the former Lease, it would be a Lease in Reversion: And that the 18th of Eliz. that permits a concurrent Lease, so that there be not above three Years in Being, shall not in their Opinion, make any Alteration of the 14th of Eliz. but it only extends to the 13th of Eliz. because it recites that, but not the former. And so is the Opinion
Co.Lit. 45. a. of Hobart, in the Case of Crane and Taylour 269. and it hath been often held, That it does not extend to the Statute of 1 Eliz. concerning Bishops. But of this Hale doubted, and rather conceived the contrary, (viz.) That the Lease had been good, if it had been made to commence presently, there being less than three Years to come of the former Lease. And that of the 18th of Eliz. did give a Qualification to Leases made upon the 14th, as well as the 13th.

First, Because the 14th of Eliz. is a Kind of an Appendix to the 13th of Eliz. and does not repeal it, but sub modo a little enlarging it as to Houses in Market-Towns: Wherefore the 18th of Eliz. reciting the 13th, does by Consequence recite the 14th also.

Secondly, There is such a Connexion betwixt all the Statutes, concerning Leases of Ecclesiastical Persons, that they have been taken into the Construction of one another. The Statute of the 32d of H. 8. is not recited, neither in the 1st or the 13th of Eliz. yet a Lease is not warranted upon those Statutes, unless it hath the Qualifications required by the 32d of H. 8. And this Course is usual in the Construction of Statutes made in pari materia.

2

Thirdly,

Thirdly, It would make a great Romage in Leaſes, as he conceived, if a Leaſe ſhould be void, when there was never ſo little of a former Leaſe unexpired.

Fourthly, There is no Authority to the contrary. In Hunt and Singleton's Caſe, there was 10 Years of the former Leaſe in Being, and upon that lay the Weight of the Opinion. And Crane and Taylor's Caſe is concerning Covenants only; and the Reaſon that it doth not extend to the 1ſt of Eliz. is, becauſe the 18th of Eliz begins with inferior Eccleſiaſtical Perſons, and therefore cannot include Biſhops.

Termino Sancti Michaelis, Anno 25 Car. II.

In Banco Regis.

Anonymus.

PAyment is no good Plea to a Scire facias upon a Judgment: But in a Scire facias againſt the Bail, Hale ſaid, he might plead, That the Principal paid the Money. Poſtea 262. 3 Lev. 119. Kettleby v. Hales.

Hinchman *verſus* Iles.

IN a Replevin the Defendant avowed for Rent, upon a Leaſe made to the Plaintiff at Will. 2 Lev. 88. Raym. 224. 3 Keb. 166, 207.

The Plaintiff replies, That the Defendant, before the Diſtreſs taken, made a Leaſe for Years, by Virtue of which the Leſſee entred.

The Defendant rejoins, and confeſſes the making of the Leaſe; but ſays, That there was a ſpecial Agreement that the Leſſee ſhould not enter until a Time after; and traverſes the Entry.

The Plaintiff ſurrejoins, and traverſes the Agreement. To which the Defendant demurs ſpecially.

Hale. There are two Things conſiderable.

Firſt, Whether the Making of the Leaſe be a Determination of the Will before Entry.

Secondly, Whether there may be Traverſe upon a Traverſe in this Caſe?

As to the firſt: If the Leſſor does any Act inconſiſtent with the Continuance of the Eſtate at Will, it ſhall determine it from ſuch Time as the Tenant at Will takes Notice of it; tho' this may prove a miſchievous Caſe, in regard of the Frequency of Conveyancing by Leaſe

Lease and Release. An Outlawry of the Lessor shall not determine the Will until a Seizure, nor an Extent upon him until the Liberate. If the Lessor says, the Lessee shall hold it no longer, the Lessee (as soon as he knows of the Words) may take Advantage of them as a Determination of the Will. As where he in Reversion upon a Lease grants the Reversion, and brings Debt for the Rent; the Lessee, tho' before Attornment, may plead in Bar, that he hath granted away the Reversion: But this Plea will amount to an Attornment.

40 E. 3. 16. simile in Case de Waste.

Q. 3 Sal. 52. As to the second Point, Where a Traverse is not good without a Special Inducement, there a Traverse may be to that Inducement: As in Trespass, where the Justification is local by Virtue of his Office, or the like, and in Hobart in Digby and Fitzherbet's Case.

If the Lease were by Parol, here the collateral Agreement might be material. As if a Lease were made at Midsummer for 21 Years, and it were agreed, That the Lessee should enter but at Michaelmas, it would begin in Point of Computation at Midsummer; but in Point of Interest, not till Michaelmas.

Anonymus.

Antea 237. 239. IN a Suit for Tithes, the Defendant pleaded in the Spiritual Court, That the Tithes belonged to another, who was Rector, and not to the Plaintiff. Which Plea being refused, and Oath thereof made in this Court, a Prohibition was granted.

Anonymus.

Cr. Car. 325. Vide antea 237. IN an Action upon the Case for stopping of his Lights, the Plaintiff declared, that he was possessed for divers Years (and did not say how many) and that Time out of Mind the Light came in at the Windows, Which was allowed a good Form of alledging the Prescription.

Anonymus.

1 Salk. 246. 1 Saund. 319. Vide Postea 332. contr. 1 Sid. 223. IN an Ejectment, the Lessor of the Plaintiff had a Title to enter for a Condition broken for Non-Payment of Rent; Lease, Entry, and Ouster was confessed, and the Court was moved, That in regard the Lessor having such a special Title, and no Estate until Entry, whether such an Entry should be supplied by the general Confession, or that there should be an actual Entry? And it was held, that it should be supplied by the general Confession.

But Hale said, If A. lets to B. and B. to C. to try the Title; the Confession of the Lease, Entry and Ouster, extends only to the Lease made to C. and not to that to B.

Anonymus.

IN Treſpaſs againſt divers, one dies pending the Action, and notwithſtanding the Venire and Diſtringas mentions all, and the Verdict is againſt all: If this Matter be ſurmized before Judgment, ſo that the Judgment be againſt the Survivors, 'tis well enough. Antea 235. 1 Salk. 8. 1 Sid. 131, 1 Mod. 5, 6. 6 Mod. 142.

Anonymus.

ERror to reverſe a Judgment given in the Borough-Court of Shrewsbury, in an Action upon the Caſe, laid apud Villam Salopiæ in Warda Wallica ejuſdem Villæ. The Error aſſigned was;

Firſt, For that it appeared they awarded a Capias, which an inferior Court cannot do in an Action upon the Caſe. Vide Stat. of 19 H. 7. tho' it was ſaid to be uſual for the Palace-Court to do it. Vide Yelv. 1. But this was over-ruled; becauſe the Defendant appeared, which aids Diſcontinuance of Proceſs. Antea 220. 2 Cro. 222.

Secondly, For that the Venire was awarded de vicineto Wardæ. And it was urged, that a Jury ought not to come out of a Ward.

Hale. It hath been ſometimes ſo held; but it has been ſince adjudged good, 2 Cro. 222.

Thirdly, That in London the Venue uſually comes out of the Ward; but there the Cuſtom makes it good; here the Ward is intended leſſer than the Hill. And Wylde ſaid, a Caſe was not long ſince; A Perjury was laid apud Whitehall in Parochia Sanctæ *Margaretæ Weſtm'*, the Venue came out of the Pariſh, and held to be ill; for Whitehall was intended to be a Hill, and leſs than the Pariſh.

Wildman *verſus* Norton.

IN a Replevin the Defendant pleads in Bar, Property to the Defendant, and not to the Plaintiff. Upon which it was demurred, as ſuppoſing it amounted to the General Iſſue; as in Treſpaſs ſuch a Plea doth. 27 H. 8. 21. 2 Lev. 92. 3 Keb. 219, 232.

Hale. This Matter may be pleaded in Abatement, or in Bar. The General Iſſue in Replevin is, Non cepit; and if the Iſſue be Non cepit, Property cannot be given in Evidence: But if the Defendant pleads Property in a Stranger, then 'tis proper to conclude in Abatement. But the Difficulty in this Caſe is, That the Defendant ſhould regularly have claimed Property in the Country, and then the Sheriff could not have delivered them, but the Plaintiff muſt have brought his Writ de proprietat' proband': But yet this Plea ſerves as an Avowry, and the Defendant ſhall have a Return. 39 H. 6. 35. Antea 127. 1 Salk. 94. 2 Show. 400. 3 Lev. 204. Cro. Jac. 519. 2 R. Rep. 64.

Note, It was said, That if any one distrains for a Rent, and before the Avowry, the Estate upon which 'tis reserved determines; the Avowry shall be as if the Estate had continued; for the Avowant is to have the Rent notwithstanding. But if the Distress were for a personal Service, then the Defendant must have a special Justification; for he cannot have that Service in specie when the Estate is determined.

The Case of Captain C.

A Captain of a Company in Colonel Russel's Regiment of Foot-Guards, and a Serjeant of his Company, were brought into Court upon the Prosecution of the Sheriffs and other Citizens of London; and the Offence alledged and moved against them was this: That one Danbert, a Butcher and Freeman of London, (who had broke) having listed himself a Soldier in this Company, and being afterwards arrested in London for Debt, and laid in the Compter; and thereof he having given the Captain private Notice, the following Design was resolved upon and executed for his Rescue, (viz.) There being a Privilege belonging to the Freemen of London, that they may by a Customary Precept or Warrant, (called a Duci facias, but by the common People called a Horse) remove themselves from any other Prison (where they are) in London, to Ludgate, where it seems they have better Accommodation, (there being Maintenance allowed to the Prisoners of that Place,) such an one Danbert got, and gave Notice to the Captain, at what Time he should be carried from the Compter to Ludgate thereby. Before this Time the Captain commanded this Serjeant to take twenty or thirty Soldiers with him, and way-lay the Prisoner, and rescue him from the Bailiffs and Officers of the Compter, as they were bringing him along. Accordingly the Serjeant and Soldiers went, and lay in or near an Alehouse about Pope's Head Alley in Ambuscade, till the Prisoner should be brought by: And when they had Notice from one, (whom they had placed as Centinel) that he was coming, they sallied out and drew their Swords; (for the Serjeant had given them Order so to do, and if any Opposition were made they should kill the first Man:) And by this Means they rescued him and carried him away.

Hereupon Complaint being made to the Captain: He answered, That his Soldiers had done well, and he would justify it.

The Court asked him, what he had to say in his Justification?

He said, That he did not know the Law; but he ever thought that a Soldier could not be arrested without Leave of his Officer; and that there was an Agreement to that Purpose, between the late Lord General and the former Lord Chief Justice, and that he

knew one that had done the like Thing, and nothing was said to him for it.

Hale Chief Justice, (to whom the rest agreed) said, The more Wrong has been done. It seems you are grown very Headstrong; but you ought to know, that every Officer and Soldier is as liable to be arrested as a Tradesman or any other Person whatsoever; and you ought to give full Obedience to the King's Commands, signified by his Writs of Process.

Wylde said, That that may be served upon you, when you are at the Head of your Company.

Hale said further. You are the King's Servants, and intended for his Defence against his Enemies, and to preserve the Peace of the Kingdom; not to exempt your self from the Authority of the Laws. And indeed it were a vain Thing to talk of Courts and Laws, if military Men shall thus give the Law, and controul legal Proceedings; And for that Agreement you speak of, I know nothing of it; and if there were any such Thing, it could be nothing but a Civility. Whatever you military Men think, you shall find that you are under the civil Jurisdiction, and you but gnaw a File, you will break your Teeth ere you shall prevail against it. This is an outrageous Offence, and the Punishment of it has formerly gone high. Men have heretofore lost their Heads for Matters of such Nature; and one of the Crimes of the late London Apprentices was the Breaking of Prisons, and Delivering of Prisoners; for which they had Judgment of High Treason by the Advice of all the Judges. The Captain and Serjeant were committed to Newgate: And being brought up at another Time, Hale asked, Why an Information against these Persons was not exhibited? And told the City-Counsel, that if the Sheriffs did not prosecute this Business, they (the Court) would prosecute them; for this was a Matter of great Example, and ought not to be smothered; And further said, If that Men will take upon them to rescue all Soldiers that are committed, it may be within the Reach of High Treason; because of the Universality of the Design against the King's Authority: But this being but for one particular, it cannot be Treason; but 'tis a rank Misdemeanour. And he ordered, That as many of the rest of the Soldiers should be prosecuted as their Names could be learned. There must be one more to make a Riot, tho' however 'tis a Misdemeanour.

Wylde said, Tho' they cannot find out another Name; yet if it be set forth, and made out that there were others, 'tis enough to make a Riot.

Termino Sancti Hillarii, Anno 25 & 26 Car. II.

In Banco Regis.

Antea 5. 2 Salk. 553.

NOte, When a Prohibition is moved for, because a Copy of the Libel is denied to be delivered, the Court requires that Oath should be made of the Denial, and the Prohibition is but quousque a Copy be delivered.

Anonymus.

Postea 322.

AN Indebitat' Assumpsit was brought for Money lent.

The Defendant pleads a Tender, which being offered at first, before Action brought, and acknowledged by the Plaintiff, he can never recover any Costs.

The Plaintiff replies, That before the Tender, he brought an Assumpsit in the Sheriff's Court, upon a Plaint upon the same Cause of Action, which was removed hither.

The Defendant rejoins, That upon that Plaint he declared for a greater Sum.

To which the Plaintiff demurred: For tho' there be a Variance in the Sum; yet it might be averred to be the same Cause of Action. And so the Court agreed.

Post. 262, 268. 293. 311.

And Hale put this Case: A. in Consideration that B. would marry his Daughter promised to pay 100l. and in an Action brought, the Plaintiff was barred; and in another Action brought, The Promise was laid to pay the 100l. at Request, and held it could not be averred to be the same.

Anonymus.

Raym. 231. 2 Cro. 12, 19, 29.

NOte, Where Error is assigned in a Matter contrary to the Record, in nullo est erratum is a Demurrer. So where Matter of Fact is insufficiently alledged.

But if a Matter of Law and a Matter of Fact together (well set forth) be assigned (which ought not to be) there in nullo est erratum will be a Confession of the Matter of Fact, and not serve as a Demurrer for the Doubleness: Wherefore, in that Case the Defendant must demur.

Anonymus.

ONE having Rent payable half-yearly for a Term, whereof about six Years were to come, was content to release it upon a Bond entered into to him, conditioned for the Payment of the like Sum with the Rent, and at the same Times. And in

Debt upon the Bond after Failure of Payment, upon a Reference to the Secondary to state what was really due, he asked the Opinion of the Court, Whether there should be any Deduction for Taxes? And the Court said, It was equitable that they should be allowed, in regard the Money in the Condition was intended between the Parties to be but in Lieu of the Rent, which should have been chargeable with that Assessment.

Anonymus.

IN an Action upon the Statute of the 13th of this King, which imposes 6s. and 8d. Penalty upon any one that shall print another's Copy, whereof he hath made due Entry in the Register-Book of the Company of Stationers, without Licence of the Proprietor; it was set forth, That the Defendant had printed one thousand Parts of a Book, called The Young Clerk's Guide, after that the Plaintiff had made an Entry thereof in the Register-Book of the Company of Stationers. After a Verdict for the Plaintiff, as to one Book, which was all the Plaintiff could prove printed since the late Act of General Pardon;

See now the Stat. 8,9 Ann. cap. 19. for vesting the Property of Copies, &c.

It was moved in Arrest of Judgment, That the Plaintiff did not shew himself to be Proprietor of the Book before he made the Entry. Sed non allocatur: For the Statute gives the Action to him that has made an Entry in the Register-Book.

Secondly, It was objected, That the Plaintiff ought to have no Costs in this Action. But for that the Court said, The Plaintiff might release them. But it was to be considered whether the Costs were well given or no?

Hedgeborrow *versus* Rosenden.

IN Debt for 100l. the Plaintiff declared upon Articles of Agreement, purporting that the Plaintiff and Defendant should run an Horse for 100l. and if the Defendant lost, that he should pay the 100l. &c.

2 Lev. 92, 94. 3 Keb. 254, 259. 4 Mod. 409. 5 Mod. 4, 5. 1 Lutw. 484. 1 Salk. 344. 2 Mod. 54.

The Defendant pleaded the Statute of this King, concerning Gaming, which provides that all Securities given for Money lost at Play, exceeding 100l. shall be void. And sets forth, That in the Articles it was further agreed, That the Plaintiff and Defendant should run two, three or four Heats more at 20l. a Heat, if the Plaintiff required it; so that the whole amounted to more than 100l.

Holt argued for the Plaintiff.

First, The Statute (as appears by the Words) intended to avoid Securities given for Money lost at Play; but not where the Contract is precedent: For tho' Men, when they have lost their Money, are very rash in venturing further; yet what is done before they

enter

enter into play may be ſuppoſed to be done conſiderately: Sed non allocatur; For that Conſtruction would wholly elude the Statute, and let Men looſe to play for any great Sum, provided they ſecured it before-hand.

Secondly, It was objected, That the Statute did not intend to avoid the Security, when there was but 100l. loſt at a Time, and it does not appear here that the Plaintiff requeſted the Defendant to play any further: Sed non allocatur; For the Bargain being to play for more than 100l. 'tis void ab initio; and tho' the Plaintiff did not requeſt the Defendant, 'tis not material, no more than if one ſhould contract for more Intereſt than the Statute allows, if the Creditor requeſts it; tho' he never requeſts, yet 'tis within the Statute of Uſury; and the Court ſaid, They would extend this Statute as largely as might be in Suppreſſing of Gaming, which was ſo miſchievous.

Monſieur Bellew, Norman Senior *and* Norman Junior.

2 Lev. 98. 2 Jones 233. H.P.C. 19. Raym. 234. 3 Keb. 278.

THree Frenchmen were indicted of Treaſon, in Coining and Clipping the King's Money, by two ſeveral Indictments; and the Court doubted, Whether Judgment for the Clipping ſhould be Drawing, Hanging and Quartering, or Drawing and Hanging only? And having adviſed with all the Judges at Serjeants Inn, they reſolved, It ſhould be Drawing and Hanging only, tho' the Precedents are both Ways. And the Opinion of Coke 3 Inſt. 17. is, that a Clipper ſhould be drawn, hanged and quartered. But in regard the Statute of 3 H. 5. declared Clipping and Diminiſhing the King's Coin to be within the Statute of 25 E. 3. which mentions Coining only, that does not ſtand repealed by 1 Mar. that leaves all Treaſons within the Statute of 25 E. 3. as they were before, and ſo 1 Eliz. againſt Coining makes not a new Treaſon. And then, as Hale ſaid, Coining was eſteemed as an inferior Sort of Treaſon, in Compariſon of ſuch as concerned the King's Perſon; wherefore there was Drawing and Hanging only for that, and then by the ſame Reaſon for Clipping, which ſeems a leſs Degree of the ſame Kind of Treaſon.

3 Inſt. 17. H.P.C. 19.

The Stat. of 25 E. 3. is only declaratory of the Common Law; and by the Common Law the Counterfeiting of the Coin was only puniſhed with Drawing and Hanging. 3 Inſt. 17.

Then there was a Debate, Whether Twiſden being the antient Judge, or the Chief Juſtice, ſhould pronounce the Judgment?

Twiſden ſaid, In Caſe of Treaſon it belonged to the Chief Juſtice, tho' not in Felonies; and that the Lord Foſter did it in Sir Henry Vane's Caſe, in the 13th of this King.

Chief Judge gives Judgment in High Treaſon. Kelynge 11.

Hale thought the other was to do it; and therefore Twiſden gave the Judgment, ut ſupra; and to avoid Scruple, Hale pronounced it over again.

Baker *verſus* Bulſtrode.

IN Debt upon a Bond, conditioned to perform an Award; the Queſtion did ariſe upon one Part of the Award, (viz.) That the Defendant ſhould ſeal and execute ſuch a Releaſe to the Plaintiff, as ſhould be to the Satisfaction of the Plaintiff's Counſel, within the Space of ſeven Days, and which of the Parties was to tender the Releaſe was the Queſtion. And it was reſolved, that the Tender ought to come on the Defendant's Side, and not like the Caſe where ſuch Deed, &c. is to be made, as the Counſel for the other Party ſhall adviſe; for the Deed muſt be offered according as the Counſel does adviſe, and he to whom 'tis to be made is to do the firſt Act; but the Words here are of another Import. Vide Lamb's Caſe, 5 Co. 13, 23. 2 Lev. 95. Raym. 232. 3 Keb. 232, 257. 1 Mod. 104. 3 Mod. 191, 192. 1 Lutw. 529.

It was held by the Court, That a Writ of Error that bears Teſte before the Judgment given, is good to remove the Record, ſo as Judgment be given before the Return of it: And Hale ſaid, That about three Years ſince at Norfolk Aſſizes, the Defendant in an Indictment of Barretry brought a Writ of Error Teſte before the Aſſizes; and it was diſallowed, becauſe if ſuch Practice ſhould obtain, it would diſappoint all the Proceedings at the Aſſizes. And if the Plaintiff does not ſhew his Writ of Error to the other Party, or get it allowed by the Clerk, by endorſing a Recepi upon it within four Days, (which Time the Court gives, as convenient Time for putting in of Bail according to the Statute) the Writ of Error is no Superſedeas. Alſo, if before the Writ of Error the Sheriff returns a Fieri feci, and non inveni emptores, the Execution is not to be undone. 1 Mod. 112. 3 Keb. 294. 1 Mod. 112.

Termino

Termino Paſchæ, Anno 26 Car. II.

In Banco Regis.

Anonymus.

2 Lev. 102. 3 Keb. 283, 292, 303, 335.

IN an Aſſault and Battery, the Caſe upon the Evidence was this. The Defendant drew a Sword, and waived it in a menacing Manner againſt the Plaintiff, but did not touch him, ſo the Jury were ordered to find him Guilty as to the Aſſault, but not of the Battery. And the Opinion of the Court was, That the Plaintiff was to have no more Coſts than Damages; for the new Act excepts Actions of Aſſault and Battery, ſo that both muſt be proved.

Anonymus.

1 Mod. Rep. 3 Keb. 301. Show. 270. 4 Mod. 38. So held per Holt C. J.

IF a Pariſh, &c. be indicted for not Repairing of a Way within their Precinct, they cannot plead Not guilty, and give in Evidence that another by Preſcription or Tenure ought to repair it; for they are chargeable de communi Jure, and if they would diſcharge themſelves by laying it elſewhere, it muſt be pleaded.

Error.

Antea 196. 1 Mod. 96. 1 Lev. 102. 3 Keb. 301.

ERror to reverſe a Judgment in Debt upon a Bond, given in Norwich Court, where by the Cuſtom, the Plea of the Defendant was, quod non dedicit factum, ſed petit quod inquiratur de debito.

Firſt, It was moved to be Error, for that the Venire was XII Men, &c. in Figures; Sed non allocatur; for being in theſe Letters XII. and not in the Figures 12. it was well enough.

Secondly, It was ad triandum exitum; whereas there was no Iſſue joined, wherefore it ought to have been ad inquirend' de debito, &c. Sed non allocatur; for the Precedents are as the Caſe is here.

Thirdly, The Condition of the Bond was to pay at Aldborough, and that ought to have been ſhewn to be within the Juriſdiction of the Court: Sed non allocatur; for the Plea here is not Payment, ſecund' formam Conditionis, but the Jury is to inquire by the Cuſtom of all Manner of Payments and Diſcharges.

Fourthly, In the Record it was continued over to ſeveral Courts, and in the Court where the Judgment is given, 'tis ſaid in Curia prædicta, and ſo incertain which; but notwithſtanding theſe Matters, the Judgment was affirmed.

Anonymus.

THE Caſe upon Evidence at a Trial in Ejectment was this, A Dean and Chapter having a Right to certain Land, but being out of Poſſeſſion, ſealed a Leaſe with a Letter of Attorney, to deliver it upon the Land, which was done accordingly, and held to be a good Leaſe; for tho' the putting the Seal of a Corporation Aggregate to the Deed, carries with it a Delivery; yet the Letter of Attorney to deliver it upon the Land, ſhall ſuſpend the Operation of it while then. See 2 Danv. 757. 1 Lev. 46. 1 Sid. 8. Cart. 160. Q. 1 Sal. 255.

Tenant for Life being in Debt, to defraud his Creditors, commits a Forfeiture, to the End that he in Reverſion may enter, who is made privy to the Contrivance. The Opinion of Hale was, That the Creditors ſhould avoid this, as well as any fraudulent Conveyance.

Anonymus.

IN an Ejectment upon a Trial at Bar for Lands in ancient Demeſne, there was ſhewn a Recovery in the Court of ancient Demeſne, to cut off an Entail which had been ſuffered a long Time ſince, and the Poſſeſſion had gone accordingly. But there was now objected againſt it, 1 Mod. R. 117. 3 Keb. 310.

Firſt, That no ſufficient Evidence of it appeared, becauſe neither the Recovery it ſelf, nor a Copy of it was ſhewn; for in Truth it was loſt. But the Court did admit other Proof of it to be ſufficient; and ſaid, If a Record be loſt, it may be proved to a Jury by Teſtimony, as the Decree in H. 8. Time for Tithe in London is loſt, yet it hath been often allowed that there was one.

Secondly, It appeared that Part of the Land was leaſed for Life, and the Recovery with a ſingle Voucher was ſuffered by him in Reverſion, and ſo no Tenant to the Præcipe for thoſe Lands: But in regard the Poſſeſſion had followed it for ſo long a Time, the Court ſaid they would preſume a Surrender, as in an Appropriation of great Antiquity, there has been preſumed a Licence tho' none appeared.

Thirdly, It was objected, That the Tenant in Tail which ſuffered the Recovery, having firſt accepted of a Fine ſur Conuſance de droit come ceo, his Eſtate-tail was changed, for he was eſtopped during his Life, to ſay that he had any other Eſtate than Fee; then he being made Tenant to the Præcipe, the Recovery was not of the Eſtate-tail, and ſo ſhould not bind. But the Court held clearly, That the Acceptance of the Fine made no Alteration of his Eſtate. If Tenant for Life accepts ſuch a Fine, 'tis a Forfeiture, becauſe T. Jones 65.

he admits the Reverſion to be in a Stranger, but it does not change his Eſtate; ſo where two Joint-Tenants in Fee accept a Fine, which is to the Heirs of one of them, yet they continue Joint-Tenants in Fee as they were before.

Fourthly, The Writ of Right Cloſe did expreſs the Land to lie in ſuch a Manor; and a Præcipe that demands Lands ought to mention the Will in which they lie, for a Præcipe of Land in Parochia or in Manerio is not good. But this Exception was diſallowed by the Court, for Hale ſaid the Writ of Right Cloſe is directed Balivis Manerii, *&c.* quod plenum rectum teneant of the Land within the Precinct of the Manor, and it is not to be reſembled to another Præcipe. But if a Præcipe be Faulty in that Point, unleſs Exception be taken to it in Abatement, it cannot be aſſigned for Error; but if it were erroneous, the Recovery would bind until reverſed.

1 Mod 42. Note, After Judgment quod computet, tho' it be not the final Judgment; yet no Motion is to be admitted in Arreſt of Judgment, and after ſuch Judgment a Scire facias lies againſt the Executor of the Defendant.

1 Sid. 151. 1 Mod. 35. Note, In an Action of Debt againſt the Leſſee he may plead nil debet, and give the Expulſion in Evidence. Antea 1.

Anonymus.

2 Lev. 198. 2 Keb. 155. IN an Aſſumpſit the Conſideration appeared to be, That the Defendant promiſed to pay a Sum of Money which he owed: This is no good Conſideration tho' after a Verdict, unleſs it appeared, that the Debt was become remedileſs by the Statute of Limitations; but Payment of a Debt without Suit is a good Conſideration.

Anonymus.

A Juſtice of the Peace brought an Action of Slander, for that the Defendant ſaid, He was not worth a Groat, and that he was gone to the Dogs. And upon a Motion in Arreſt of Judgment, notwithſtanding that it was urged to maintain it, that the Statute of H. 6. requires that a Juſtice of Peace ſhall have 40 l. a Year: And therefore in regard an Eſtate was neceſſary to his Office, that the Action would lie; yet the Judgment was ſtayed, for ſuch Words will not bear an Action, unleſs the Perſon of whom they are ſpoken, lives by Buying and Selling.

Anonymus.

IT was returned upon Elegit, That the Sheriff had deliver'd medietatem Terrar' & Tenementorum in Extent; and after the Filing and Entry of it upon the Record, the Plaintiff moved to quash it becauſe it was inſufficient; for the Sheriff ought upon ſuch Execution to deliver the Poſſeſſion by Metes and Bounds.

Wylde held, That it being entred upon the Record, there was no Avoiding of it but by Writ of Error. But Hale held, That in regard it appeared by the Record to be void, it might be quaſhed; as if upon an Ejectment to recover Poſſeſſion, and upon ſuch a Return it appears upon the Evidence that there was more than the half of the Land delivered, this ſhall be avoided. So if a Fieri facias be not warranted by the Judgment upon which it is awarded, tho' the Sheriff ſhall be excuſed, yet 'tis meerly void as to the Party. Et adjornatur. 2 Salk. 563. 1 Roll. 305. 1 Sid. 91, 239.

Norton *verſus* Harvy.

THE Caſe was, An Executor being poſſeſſed of a Term, let Part of it, reſerving a Rent and died. And the Queſtion was, Whether his Executor ſhould have the Rent or the Adminiſtrator de bonis non? 2 Lev. 106. 3 Keb. 298, 427, 463, 495, 549. Poſtea Drue and Baily, 275.

It was argued for the Executor, That this Rent is meerly due by the Contract, and not incident to the Reverſion, and the Adminiſtrator is in Paramount, it being now as if the Teſtator had died inteſtate; and therefore, before the Statute of this King, ſuch Adminiſtrators could not have had a Scire facias upon a Judgment obtained by the Executor; tho' in the Caſe of Cleve and Vere, 3 Cro. 450, 457. 'tis held, That he may have a Liberate where the Executor had proceeded in the Execution of a Statute, ſo far as an Extent, for there the Thing is executed, and not meerly executory as a Judgment. If a Man that hath a Term in the Right of his Wife, lets Part of it, reſerving a Rent, the Wife ſurviving ſhall not have the Rent: On the other Side it was ſaid, That this Caſe differed from that, becauſe the Reſervation here is by him, that had the whole Right executed in him. Co. Lit. 46. b.

Another Objection againſt the Action was, That here in the Declaration, being in Covenant for Non-Payment of Rent, there is not any Demand alledged. But that was anſwered, becauſe the Covenant was to pay ſuch a Sum for the Rent expreſly; but if the Condition of a Bond be for Performance of Covenants expreſs'd in ſuch a Leaſe, one of which is for Payment of Rent, in that Caſe the Bond will not be forfeit without a Demand; and of that Opinion were the Court, and that the Executor ſhould have Cr. Car. 76, 77. 1 Roll. 460.

the Rent, but when recovered, Hale ſaid, it ſhould be Aſſets in his Hands. And accordingly Judgment was given for the Plaintiff. Poſtea 275.

Termino Sanctæ Trinitatis, Anno 26 Car. II.

In Banco Regis.

Silly *verſus* Silly.

3 Keb. 319, 348.

DOwer of 300 Acres of Land, 200 Acres of Paſture, 100 Acres of Meadow. The Tenant pleaded Non-tenure.

The Jury found him Tenant as to 320 Acres of Land, and as to the reſt that he was not Tenant: And the Judgment was, that the Demandant ſhould recover Dower out of the 320 Acres.

Error was aſſigned in this Court, That the Verdict and Judgment were for more Acres of Land than were demanded. But on the other Side it was ſaid, Land was a general Word, and might include Meadow and Paſture.

Poſtea 262.

Curia, In a Grant, Land will extend to Meadow, Paſture, &c. but in Pleading it ſignifies Arable only, and here in regard they are diſtinguiſhed in the Count, the Verdict and Judgment muſt be reverſed for the Whole. Tho' Hale ſaid, Anciently ſuch Judgment would have been reverſed but for the Surpluſage. Vid. Poſt. 262.

Batmore & *Uxor verſus* Graves.

2 Lev. 107. 3 Keb. 263, 329. 1 Mod. 102, 120.

TRover for 100 Loads of Wood; upon a ſpecial Verdict the Caſe was this, Copyhold Land was ſurrender'd to the Uſe of J. S. for Years, Remainder to the Brother of the Plaintiff's Wife, who died before the Term expired, and ſo was not admitted any otherwiſe, than by the Admiſſion of the Tenant for Years. And it was reſolved,

1 Mod. 102, 120.

Firſt, That the Admittance of him, that had the Eſtate for Years, was an Admittance for him in the Remainder, 4 Cro. 23. a. 3 Cro. 504. Fine ſur Grant and Render to A. for Life, Remainder to B. Execution ſued by A. ſerves for B. So an Attornment to Tenant for Life ſerves for him in Remainder, and this brings no Prejudice to the Lord; for a Fine is not due until after Admittance; and the Lord may aſſeſs one Fine for the particular Eſtate, and another Fine for the Remainder. But Wylde ſaid, He need not pay it until his Eſtate comes in Poſſeſſion; after a Surrender the Eſtate remains

Vide 3 Lev. 308. Barnes & Corke.

mains in the Surrender or before Admittance of the Cestuy que use; yet where Borough English Land was surrendred to the Use of J. S. and his Heirs, and he died before Admittance, it was held, That the younger Son should have it. 1 R. 58. a. 1 Mod. 102. 2 Sid. 61. Style 146.

Secondly, It was resolved, That the Possession of the Tenant for Years was so the Possession of him in Remainder, as to make a Possessio Fratris. But then it was moved, That the Conversion was laid after the Marriage, and so the Feme ought not to have joined with her Husband in the Action. But the Court held, That in regard the Trover was laid to be before the Marriage, which was the Inception of the Cause of the Action, the Wife might be joined; as if one has the Custody of a Woman's Goods, and afterward marries her, she may join in Detinue with her Husband; for in Case of Bailment the Proprietor is to some Purposes in Possession, and to some out of Possession. Hale said, In this Case the Husband might bring the Action alone, or jointly with his Wife; and so Judgment was given for the Plaintiff. 1 Mod. 120. Yelv. 165. 166. 1 Sid. 172.

Anonymus.

IN Debt upon a Bond, the Condition was to save the Obligee harmless from another Bond.

The Defendant pleaded, Non damnificatus.

The Plaintiff replies, That the Money was not paid at the Day, and he devenit onerabilis, and could not attend his Business for Fear of an Arrest.

The Defendant rejoins, That he tendered the Money at the Day, absque hoc, that the Plaintiff devenit onerabilis; to which it was demurred, and the Judgment was given for the Plaintiff, for the Money not being paid at the Day, the Counter-Bond is forfeited, 5 Co. 24. and the Traverse in this Case is naught. Vid. Cro. 1. 672.

The Mayor and Commonalty of London *versus* Dupester.

IN Debt for a Duty, accruing to the City for Timber imported, called Scavage. The Declaration was, That they were and had been a Corporation Time out of Mind, and their Customs were confirmed by Act of Parliament, Temp. R. 2. *&c.* 2 Lev. 106. 3 Keb. 337. 491.

The Defendant tendered his Law, and Co. Entries 118. was cited; where in Debt for an Amerciament in a Court Baron, tho' the Imposing of it was grounded upon a Prescription, yet Wager of Law was admitted. But notwithstanding, in this Case the Court over-ruled the Wager of Law; for here the Duty it self is by Prescription, and that confirmed by Act of Parliament: Debt for a Duty growing by a By-Law, if the By-Law be authorised by Letters Patents, no Wager of Law lies: So in Debt for Toll granted by Letters Patents. 20 H. 7. Holt per J. said this Case was not Law. Vid. 2 Salk. 682. 1 Mod. 121.

Termino

Termino Sancti Michaelis, Anno 26 Car. II.

In Banco Regis.

Silly *verſus* Silly.

Antea 260. THE Caſe was moved again; and the Court ſaid, That the Demandant might have taken Judgment for the 300 Acres only, habito nullo reſpectu to the reſt, and releaſed all the Damages: But this was not proper for an Amendment, the Miſtake being in the Verdict; but if it could have been amended in the Common Bench, the Court might here have made ſuch Amendment. Antea 260.

Burfoot *verſus* Peal.

Antea 247. A Scire facias was brought againſt the Bail, who pleaded, That the Principal paid the Debt ad diem impetrationis Brevis. Upon which it was demurred.

Jones, Solicitor, for the Defendant, ſaid, Tho' the Bail may plead Payment, becauſe the Condition of the Recognizance is in the Disjunctive, (viz.) for rendering the Body, or paying the Money, yet the Principal cannot. Alſo it ought to have been pleaded, to be paid before a Capias ad ſatisfaciendum taken out; for as it is, it may be after the Recognizance forfeited: As if the Death of the Principal be pleaded, it muſt be alledged to be before the Capias ad ſatisfaciendum taken out.

But the Court held it to be well enough: For if that Matter be material, 'tis to come on the other Side, and ex gratia Curiæ the Bail has Time to ſave himſelf before the Return of the ſecond Scire facias.

Anonymus.

Q. Antea 257. IN an Aſſumpſit the Plaintiff declared, That on the 28th of June (Diſcourſing with the Defendant about the Marriage of his Daughter) the Defendant promiſes him, That if he would haſten the Marriage, and ſhould have a Son within twelve Months then next following, he would give him an Hundred Pounds: And ſets forth, That he did marry ſoon after, and had a Son within twelve Months after the Marriage.

Upon Non aſſumpſit pleaded, and a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That the Plaintiff had not ſet forth, that he had a Son within the Time, for then next following

ſhall be referred to the Day of the Diſcourſe, and not to the Marriage.

But the Court were of another Opinion, and gave Judgment for the Plaintiff.

Crawfoot *verſus* Dale.

IN an Action for Words, it was thus: There being a Diſcourſe of the Plaintiff's Trade, the Defendant ſaid, He was a cheating Knave, and kept a falſe Debt-Book, with which he cheated the Country. 1 Lev. 230. Antea 117.

After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That to ſay a Tradeſman was a cheating Knave, though there were a Colloquium of his Trade, was not actionable; for that might be ſaid, becauſe he ſold too dear, and ſo cheated in the Price; but to ſay that he ſold bad Commodities, is actiononable; and to ſay, He kept a falſe Book, will not bear an Action, for that may be unwittingly. 2 Saund. 307.

But the Court reſolved, That the Words laid together were actionable; for Tradeſmen's Books are of much Regard, and ſometimes given in Evidence.

Jennings *verſus* Hunking.

IN an Action for ſaying, He was Perjured, the Declaration was laid in Devonſhire. 2 Lev. 121. 3 Keb. 350, 372, 509.

The Defendant juſtified, for that the Plaintiff made a falſe Affidavit at Launceſton in Cornwal, and Iſſue was taken upon that, and tried at the Aſſizes in Devonſhire, and moved that this was a Miſ-Trial.

But it was anſwered, That the Statute of 16 Car. 2. cap. 8. helps all Miſ-Trials, ſo as the Trial be in the County where the Action is brought. And a Caſe was cited in this Court between Croſſe and Winton in 21 Car. 2. where an Action was brought for ſaying, He ſtole Plate from Wadham College in Oxford. The Defendant juſtified, That he did ſteal there. Upon which there was Iſſue joined, and tried in London, where the Action was brought, and it was held good. And this Term a Caſe was moved in the Common Bench in a Writ of Covenant againſt Wiſe: The Defendant pleaded a Feoffment of Lands in Oxfordſhire, and the Iſſue was non feoffavit, and afterwards tried in London, where the Action was laid; and the Opinion of the Court there was, that the late Statute would help it. Antea 22.

The Court ſaid, It was within the Words of the Act, but (as they conceived) not within the Meaning; for they intended only, ſo the Trial was in the County where the Iſſue did ariſe. But in regard of the Reſolutions before, they would not ſtay Judgment. 1 Saund. 246, 249.

Anonymus.

Anonymus.

IN an Action upon the Case the Plaintiff sets forth, That the Defendant malitiose crimen Feloniæ ei imposuit, and not mentioned any Felony in particular; and yet held to be well enough.

Anonymus.

TRespass with a Continuando, which was alledged for some Time after the Term wherein the Action was brought, and Damages given to 10 l.

It was moved in Arrest of Judgment, That for Part of the Trespass it appears by the Plaintiff's own Shewing, That the Action was brought before the Plaintiff had Cause of Action; and it was said, That if the Bill were filed at the End of the Term, and the Trespass reached to some Time within the Term, the Filing should not relate so as to make it insufficient: But here it was carried to the 3d of July, which the Court must see is out of the Term, because they take Cognizance of the Beginning and End of every Term.

Anonymus.

1 Sid. 14. IF an Audita Querela be brought before the Execution of a Judgment quia timet, and it goes for the Defendant, he shall execute his Principal Judgment: But if it be brought after the Party is in Execution, and he be bailed out, then the Judgment being once executed, there can be no after Resort to that, but the Defendant shall proceed upon the Record of the Audita Querela.

Fawkener *versus* Annis.

3 Keb. 352. THE Privilege of the Chancery was pleaded by Way of Prescription, and upon a Demurrer it was held naught.

Vid. 2 Lutw. 1466, 7. First, Because it was not concluded, & hoc paratus est verificare: And

Secondly, No Place alledged; for they are Matters of Fact, and triable. Privilege is not traversable and triable *per pais*, but Matter of Law, 1 *Salk.* 30, 543.

Anonymus.

IN an Action upon the Case the Plaintiff declared, That the Defendants (the Tenants and Occupiers of such a Parcel of Land adjoining to the Plaintiff's) have Time out of Mind maintained such a Fence; and that from the 23d of April to the 25th of May, & postea, the Fence lay open, and that una Equa of the Plaintiff's went through the Gap, and fell into a Ditch the 28th

of May, & ſubmerſa fuit. Upon Not guilty pleaded, and found for the Plaintiff, Holt moved in Arreſt of Judgment;

Firſt, That the Preſcription is laid in Occupiers, and not ſhewn their Eſtate; and that hath been adjudged naught in 1 Cro. 455. and 2 Cro. 665.

Curia. 'Tis true, there have been Opinions both Ways; but 'tis good thus laid; for the Plaintiff is a Stranger, and preſumed ignorant of the Eſtate: But otherwiſe it is if the Defendant had preſcribed. Poſtea 274, 275.

Secondly, It was objected, That the Cauſe of Action is laid after the 25th of May, and (for ought appears) the Fence might be good at that Time, tho' 'tis ſaid to be open till the 25th of May & poſtea. Sed non allocatur: For,

1. 'Tis after Verdict.

2. 'Tis ſaid expreſly, that the Beaſt was loſt in defectu fenſurarum, and ſo cannot be intended but that it was down at the Time.

Anonymus.

AN Indictment of Forcible Entry upon 8 H. 6. being removed hither by Certiorari, a Reſtitution was prayed: But to ſtop that, it was ſaid, That the Indictment was traverſed; and a Plea, that the Party had had three Years quiet Poſſeſſion, according to the 31ſt of Eliz. and though Dyer 122 is, That 'tis in the Diſcretion of the Court to grant Reſtitution even after a Traverſe put in; yet now ſince the Stat. of Eliz. where ſuch Plea is tendred, the Court cannot grant a Reſtitution, tho' they would in this Caſe, if by Law they might; for the Party that made this Entry had loſt the Land juſt before by Verdict in an Ejectment, and by this Means the Effect of it ſhould be diſappointed. Raym. 85.

Note, The Indictment wanted Vi & armis; for it was pacifice intravit & ſine Judicio diſſeiſivit, & à poſſeſſione expulit & amovit.

But on the other Side it was ſaid,

Firſt, That the Entry being pacifice, it was not the Courſe to lay it Vi & armis.

Secondly, That 37 H. 8. c. 8. ſupplied the Defect of Vi & armis in an Indictment: But as to the later the Court were of Opinion, That the Statute ſupplied only the Lack of the Words gladiis, baculis & cultellis, as are mentioned in the Statute. Vide the Statute.

Anonymus.

A Suit for a Penſion may be in the Eccleſiaſtical Court tho' by Preſcription; but if it be denied to be Time out of Mind, then a Prohibition is to go, ſo that the Preſcription may be tried at Law, as a Modus decimandi, mutatis mutandis. But if a Writ of Annuity is brought at Common Law, he can never after ſue in the Spiritual Court; for his Election is determined. 1 *Mod.* 218. 2 Lev. 128. 3 Lev. 17. 1 Salk. 58. Antea 3, 120. 1 Mod. 218. Poſtea 274, 335.

Kellew. 114. Cr. Car. 162. Contra. Yelv. 129. Raym. 425.

It was ſaid by the Court, That Two might join in a Prohibition, tho' the Gravamen was ſeveral; but they muſt ſever in their Declarations upon the Attachment.

Termino Sancti Hillarii, Anno 26 & 27 Car. II.

In Banco Regis.

Lord Eure *and* Turton.

2 Lev. 93, 120. 3 Keb. 416.

IN Erroꝛ, the Writ was Teſte the 30th of November laſt, and returnable in Parliament the 13th of April next, the Day to which the Parliament was prorogued. The Defendants Counſel deſired the Rule of the Court for the Taking out of Execution, ſuppoſing this Writ of Erroꝛ was no Superſedeas: And alledged, that the late Rule made in the Houſe of Lords did not extend to their Caſe; for that was, That all Cauſes there depending ſhould not be diſcontinued by the Intervening of a Prorogation; but this Caſe will not be there depending before the Return of the Writ. In 3 H. 7. 19. the Court of King's Bench would not allow a Writ of Erroꝛ into the Parliament until ſome Erroꝛ was ſhewn to them in the Recoꝛd, leſt it ſhould be brought on Purpoſe to delay Execution. In Bulſtrode's Repoꝛts a Writ of Erroꝛ returnable the ſecond Return of the Term was held to be no Superſedeas, becauſe it ſeemed an affected Delay that it was not made returnable the firſt Return.

Raym. 5.

Hale. It has been taken, that a Prorogation determined a Cauſe depending in Parliament by a Writ of Erroꝛ; but the Lords have lately declared otherwiſe: But that comes not to this Caſe, the Writ not being returned. A Writ of Erroꝛ returnable ad proximum Parliamentum is not good; but otherwiſe if they are ſummoned oꝛ prorogued to a Day certain. If the Day of the Seſſion had been a Year hence, it would be hard that a Writ of Erroꝛ ſhould ſtay Execution; and the ſame Reaſon where the whole Term intervenes. A Writ of Erroꝛ did bear Teſte 10 Nov. and was returnable 1 Nov. proxime futur'; and the Recoꝛd was ſent into the Exchequer-Chamber, and a Mittimus endoꝛſed upon the Roll here: And it was reſolved, That Execution might be taken out becauſe of the long Return.

Antea 31, 100.

1 Mod. 106.

Secondly, That tho' there were a Mittimus upon the Roll, yet the Recoꝛd remained here until the Return of the Writ to all Purpoſes.

And the Opinion of the Court was, That the Writ of Error was no Superſedeas: But they would make no Rule in it, becauſe they ſaid it was not judicially before them; but the Party might take out Execution if he thought fit: And then if the other Side moved for a Superſedeas, they ſhould then reſolve the Point. Antea 31.

Note, Hale ſaid in an Aſſumpſit for Money upon the Sale of Goods, That upon Non Aſſumpſit the Defendant might give in Evidence an Eviction of the Goods to mitigate the Damages, as in all Aſſumpſits; tho' upon certain Contracts the Jury may give leſs Damages than the Debt amounts to, as he ſaid was done in a Caſe where a Man promiſed to give a Straw for every Nail in every Horſe's Shoe, doubling every Time; and they gave in Damage but to the Value of the Horſe, tho' (as the Bargain was made) it would have come to above 100 l. 3 Cro. 22. 6 Mod. 305. 1 Lev. 111. 1 Jon. 138. 2 Raym. 77.

Lomax *verſus* Armorer.

A Writ of Error was brought to reverſe a Judgment in Dower given in the Court of Newcaſtle. 2 Lev. 98. Raym. 233. 3 Keb. 277, 326, 421.

The Error aſſigned was; becauſe the Proceeding was by Plaint, and no Special Cuſtom certified to maintain it: As in London and Oxford they have Aſſizes of freſh Force by Plaint.

The Court held it to be erroneous for this Cauſe; but would not determine, whether it might not be good upon a Special Cuſtom? 1 Rolle 793. Pl. 11.

Anonymus.

A Mandamus was granted to the Archdeacon of Norwich, to ſwear a Church-warden, upon Surmize of a Cuſtom, That the Pariſhioners are to chooſe the Church-wardens; and that the Archdeacon refuſed him, notwithſtanding that he was elected according to the Cuſtom. 3 Keb. 277, 326, 421. 6 Mod 89. Farſ. 83.

The Archdeacon return'd, that non ſibi conſtat that there is any ſuch Cuſtom (which Form is not allowable; for it ought to be poſitive, whereupon an Action might be grounded) and that by the Canon the Parſon is to chooſe one, &c.

The Court ſaid, That Cuſtom would prevail againſt the Canon, and a Church-warden is a Lay Officer, and his Power enlarged by ſundry Acts of Parliament, and that it has been reſolved, That he may execute his Office before he is ſworn, tho' it is convenient he ſhould be ſworn; and if the Plaintiff here were ſworn by a Mandate from this Court, they adviſed him to take heed of Diſturbing him. Noy Rep. 139.

Hawes *verſus* Smith.

2 Lev. 122. 3 Keb. 336, 417.

AN Aſſumpſit was brought againſt an Executor; for that the Teſtator being indebted to the Plaintiff, he did ad requiſitionem of the Defendant come to Account with him, upon which there appeared to be ſo much due to the Plaintiff, which he promiſed to pay.

After Verdict the Judgment was de bonis propriis, and it was moved that it ought to have been de bonis teſtatoris: For the Accounting with him is little more than telling him what is due, and this might make an Executor afraid of Reckoning with any of his Teſtator's Creditors.

The Court ſaid, That the Accounting upon the Defendant's Requeſt, (which was more than the Plaintiff was bound to have done) was a Conſideration, and after a Verdict they muſt intend an expreſs Promiſe.

But Hale ſaid, That if upon the Evidence it had appeared that there was no Intention to alter the Nature of the Debt, (as in Caſe, an Executor ſhould ſay, Stay a while until the Teſtator's Eſtate was come in, and I will pay you,) he ſhould direct the Jury to find againſt the Plaintiff, that would in ſuch Caſe charge an Executor in his own Right.

Termino Paſchæ, Anno 27 Car. II.

In Banco Regis.

Antea 252. Poſtea 293, 311.

NOte, In an Indebitat' Aſſumpſit a Man promiſes in Conſideration, that one (to whom the Promiſe was made) would marry his Kinſwoman, he would give her 100 l. It was adjudged that an Indebitatus will not lie; for 'tis not a Debt, but a collateral Promiſe.

Beſt *verſus* Yates.

3 Keb. 449.

IN an Action upon the Caſe the Plaintiff declared, That the Defendant being a Taylor, he retained him to make him a Coat well and artificially, and that the Defendant maliciouſly intending to abuſe and damnify the Plaintiff made it tam inepte, negligenter & inartificialiter, that it became of no Value or Uſe to him, to his Damage 20 l. To this Declaration the Defendant demurred;

Firſt, For that he ſays he retained him, and does not ſhew that he delivered him any Materials, ſo that the Action might lie for Spoiling of them; but this amounts to no more than that he beſpoke a Garment, which when it was made he did not like, and ſo might have refuſed it, therefore there does not appear to be any Damage. Vid. The Precedent in Aſton's Entries, fol. 12.

Secondly, He does not ſhew wherein he had ſpoiled the Coat, or what Defect there was in it, and this ought to have been certainly ſet forth. And of this Opinion were the Court, and Judgment was given quod querens nil capiat per billam.

James *verſus* Peirce.

IN an Action of Debt for an Eſcape, upon Nil debet, a Special Verdict was found to this Effect, (viz.) That the Plaintiff recovered 700 l. Debt againſt J. S. who was thereupon committed in Execution to the Fleet, and afterwards the Warden permitted him to make a voluntary Eſcape, after which he returned again to the Fleet, and the Defendant was made Warden in the Place of the other, and J. S. being then in the Fleet, was turned over with the other Priſoners, and afterwards ſuffered to eſcape. So that the Queſtion was, Whether he were ſo in Execution upon his Return, as the Eſcape in the now Warden's Time ſhould intitle the Plaintiff to the Action? It was principally inſiſted on againſt the Action, that there being once an Eſcape, the Party could not be in Execution again without new Proceſs.

Antea 4. 1 Mod. 194. 2 Mod. 136. 3 Keb. 453, 463. 2 Lev. 132. Vide ib. 109. 3 Salk. 159, &c. infra.

Hale ſaid formerly it was held, even in the Caſe of a permiſſive Eſcape, that if the Party were taken again, he might diſcharge himſelf by Audita Querela, and that he might not be retaken unleſs in Caſe of a voluntary Eſcape; but there the Remedy was only againſt the Gaoler. But afterwards it was held, that Debt would lie againſt the Party who eſcaped, becauſe the Duty they did not ſuppoſe was diſcharged by the Eſcape: But they held it was a good Plea to a Scire facias. But afterwards, 9 Car. between the Lord Roberts and Trevilian; the Opinion of the whole Court was, That a Scire facias quare Executionem habere non debet would lie againſt one that made a voluntary Eſcape; and there is no Reaſon, but that he may as well be taken by the Party again without a Scire facias, for the Party has an Intereſt in the Body of the Pledge, until his Debt is ſatisfied; Tho' if the Priſoner ſhould bring Treſpaſs againſt a Gaoler, that detained him after a voluntary Eſcape, he could not defend it; the Miſchief would be exceeding great if the Sheriff, &c. might at his Pleaſure put the Plaintiff to an Action only againſt himſelf. For this laſt Vacation, the Warden of the Fleet turned as many Priſoners at large, as their Debts came to 80000 l. and ran away himſelf:

1 Roll. Abr. 902. N. 8. Antea 4, 7. 1 Show. 174. Buxton and Home. 1 Mod. 194. 2 Mod. 136. Ch. Juſt. Jones 21. Cart. 212. Vintner v. Allen. 1 Sid. 330. 1 Lev. 211. 2 Lev. 109.

Hob. 202. himſelf: And ſo by the Opinion of the whole Court (abſente Twiſden) Judgment was given for the Plaintiff. Vide Hob. The Sheriff of Eſſex's Caſe, which was denied to be Law. 2 Roll. Abr. 902.

Sir Thomas Littleton's *Caſe.*

DEbt was brought againſt him, by one that entituled himſelf by Aſſignment of Commiſſioners of Bankrupts. Upon the Evidence it appeared, That he with Two others had covenanted with the King, to provide Victuals for the Seamen that ſerved in the late Dutch War at 8 d. per Man; and after this they made a Bargain with the Purſers of the Ships, to provide for ſuch as ſerved in their Ships, at other Rates agreed upon between them. The Victuallers afterwards falling into the King's Diſpleaſure, and being thereupon removed from their Employment, and having a great Sum of Money due from the King to them upon the Contract aforeſaid, refuſed to pay the Purſers, ſuppoſing (notwithſtanding their Contract) that they were no Debtors, (being upon the King's Account) until ſuch Time as their Accounts with the King were allowed; and ſo, was ſaid, was the Uſage of the Navy-board, whereupon a Commiſſion of Bankrupt iſſued forth. But the Court, (viz.) Hale, Rainsford and Wylde, were clear of Opinion, That this Employment in Buying up Stores for Victualling the Fleet did not make the Victuallers Traders, nor was it Buying and Selling within the Statute of Bankrupts. And Hale ſaid, that every Purveyor might as well be made a Trader, or Schoolmaſter that keeps Boarders in his Houſe; and tho' it were ſhewn, to enforce the Matter, that where there was a Redundancy of Proviſions, they uſed to victual Merchantmen; but in regard it was originally deſigned for the Uſe of the Navy, in Purſuance of their Contract with the King, they might well diſpoſe of the Surplus to any other Uſe: And then it was ſhewn, that they victualled the French Fleet alſo, and that was more than was contained in their firſt Agreement with the King; but that being proved to be done by the King's expreſs Order, (tho' that Order was not produced) The Court held, That it was not ſufficient Evidence to prove them Traders. But Hale ſaid that they having made a Contract with the King to provide for the Fleet at ſo much a Head, the King was not chargeable to thoſe with whom they contracted; and therefore that Contract with the Purſers of the Ships would make them Debtors to them. But upon the other Matter, they directed the Jury to find for the Defendant.

Wherever a Man buys and ſells under a particular Reſtraint and Limitation, he is not a Seller within the Stat. of Bankrupts, as a Farmer, Innkeeper. 1 Salk. 110. 3 Mod. 326. 3 Lev. 309. Show. 96, 268. Newton and Trigg.

Termino Sanctæ Trinitatis, Anno 27 Car. II.

In Banco Regis.

Motteram *verſus* Jolly.

IN Debt upon a Bond conditioned to perform Covenants in an Indenture; one of which was, That the Defendant covenanted with the Plaintiff, that the Plaintiff ſhould elect twenty of the beſt Trees out of his Wood, to be taken within eleven Years: And the Breach was aſſigned, that the Defendant had cut Trees within the Time; upon which it was demurred, and relied upon Sir Thomas Palmer's Caſes, 5 Co. where Sir T. P. ſold 2000 Cords of Wood, to be taken at the Election of the Vendee. And there it is ſaid, If the Vendor cuts the Wood before the Vendee hath elected, the Vendee cannot meddle with that which is cut, but muſt ſupply his Bargain out of the Reſidue: But here the Court were of Opinion for the Plaintiff, for by the Covenant he hath eleven Years Time to elect, and by Cutting any Trees in the mean Time, the Latitude of his Election is abridged. And Hale ſaid, for the Caſe in 5 Co. there if the Grantee can have the Number of his Cords of Wood, he hath the Effect of his Grant; But Trees differ in Value exceedingly from each other. 3 Keb. 477, 493. 2 Lev. 148.

Bolton *verſus* Cannon.

IN Debt againſt an Executor for Rent arrear in his own Time, in the Debet & detinet. 3 Keb. 189, 446. Poll. 127.

The Defendant pleads, That the Rent is more worth than the Land, and that he tendred a Surrender before the Time for which the Rent is demanded; and that the Plaintiff refuſed to accept the Surrender, and that he had fully adminiſtred, and ſo demands Judgment of the Action.

The Plaintiff replies, That there was Rent arrear to him, and that therefore he was not bound to accept of the Surrender, and to this the Defendant demurs. The Court ſaid, 1 Sid. 266.

Firſt, That an Executor that does intermeddle cannot waive a Leaſe, or any other Part of the Teſtator's Eſtate, for he cannot aſſume the Executorſhip for Part, and refuſe for Part. 2 Vent. 209. Yel. 103. 1 Mod. 185, 186.

Secondly, That in Caſe the Land be not more worth than the Rent, it is a good Plea to an Action of Debt in the Debet & detinet, for he is to be charged in the Detinet only; tho' where for Rent is of leſs Value, he may be charged in the Debet & detinet for Vide 1 Salk. 297, 317.

for that which is accrued in his own Time, according to Hargrave's Case, 5 Co.

Thirdly, The Doubt here is, That the Defendant having waived the material Part of his Plea, (viz.) That the Rent exceeded the Value of the Land, and relied upon his Tender of a Surrender, which is nothing to the Purpose, whether Judgment can be here for him, and that otherwise his Plea is double? But because the Plaintiff hath not demurred to that, but answered only to one Part of it, the Defendant might well demur upon the Replication, because it does not answer all contained in the Plea, for unless the Party demurs for Doubleness, he is bound to answer all the Matters alledged. Et adjornatur. But being this Term moved again, Judgment was given for the Plaintiff, because the Defendant relinquished the material Part of his Bar, and offered Matter meerly frivolous.

Cartwright *versus* Pinkney.

Raym. 222. 2 Lev. 80. 2 Mod. 174, 175. Antea 241, 242. 3 Keb. 131, 137, 466, 488.

TEnant for Years surrenders to the Lessor, reserving a Rent; the Question was, Whether it was a good Reservation? And held, That it was upon the Contract, and that Debt lay after the first Day was incurred wherein it was reserved to be paid, for it was in the Nature of a Rent, and not of a Sum in Gross. Antea, Wilston and Pilkney. 242.

Anonymus.

Postea 329.

IN Trespass for Fishing in his several Fishery & pisces cepit. After a Verdict for the Plaintiff, it was moved in Arrest of Judgment, That the Plaintiff ought to have alledged what Kind of Fishes, and the Number of them, as in Playter's Case, 5 Co. is. But for that it was said on the other Side, That at that Time they were more strict in the Certainty of Pleading than since, for now an Indebitat' assumpsit for Work done, or Goods sold, is allowed without further Certainty. And that however the Oxford Act, 15 Car. 2. here helped it; for tho' this be none of the Defects there enumerated; yet the Words of the Act being, That Judgment shall not be arrested for any other Exception, that doth not alter the Nature of the Action, or Trial of the Issue, shall extend to this Case. But the Court were of Opinion, that none of the Acts had aided this Case, in regard, that there was not so much as the Number of the Fishes expressed; as if a Man should bring Trespass for Taking of his Beasts, and not say what. But Hale said, Trover for a Ship cum velis had been allowed, because all made but one aggregate Body, both the Ship and Sails. But Trover pro velis would not be good. Vide 2 Cro. 435. Trespass quare clausum fregit & Spinas cepit, and 3 Cro. 553. Child and Greenhill's Case.

Dr. Webb *verſus* Batchelour, & al'.

IN Treſpaſs for Taking ſo many Cows; upon Not guilty a Special Verdict was found; 3 Keb. 476, 507. 2 Lev. 139.

That an Act of this King for Repairing of the Highways appoints, that ſuch Perſons as keep Carts and Horſes, &c. ſhould ſend them at certain Times to aſſiſt in the Repairing of the Ways, not having a reaſonable Excuſe, and that warning was given to the Pariſhioners of the Pariſh whereof the Plaintiff was Parſon, to ſend in their Carts; and that the Plaintiff omitting to do it, a Juſtice of Peace made a Warrant to the Defendant, to diſtrain him according to the Authority given by the Act, &c. It was alleged for the Plaintiff, 1 Lutw. 936, 937. N.Lutw. 291.

Firſt, That Clergymen were not obliged by this Act; for Eccleſiaſtical Perſons have always had Immunities from ſuch Charges, as Pontage, Murage, &c. and ſhall not be comprehended in the general Word, Pariſhioners.

Secondly, That in regard the Act allows an Excuſe, the Juſtice of the Peace ought to have cauſed the Plaintiff to have appeared before him, to have ſeen whether he had an Excuſe before he could have made his Warrant; and tho' the Officer that executes the Proceſs of a Court of Record be indemnified, where the Proceeding is erroneous; yet 'tis not ſo where the Proceeding is not of Record, as 10 Co. in the Caſe of the Marſhalſey. 3 Cro. 394. Nichols *verſus* Walker and Carter, Where a Warrant was made by a Juſtice of the Peace to diſtrain for a Poor's Rate: Treſpaſs was maintained againſt the Officer that executed the Warrant, becauſe the Plaintiff was not chargeable as an Inhabitant of the Pariſh, for whoſe Poor the Rate was made.

Curia contra. 1. The Clergy are liable to all publick Charges impoſed by Act of Parliament; and that hath been reſolved, as Hale ſaid, upon Debate before all the Judges. 2. The Officer that executes the Warrant (tho' unduly made for the Cauſe alledged) is not anſwerable, for he is not to judge, but to execute the Matter, it being within the Juriſdiction of the Juſtice of the Peace: And 'tis not like the Caſe in 3 Cro. for there the Churchwardens and Overſeers of one Pariſh diſtrained in another Pariſh, which was out of the Limits of their Authority; but in 14 H. 8. 16. where a Juſtice of the Peace made a Warrant to arreſt a Man for Felony, (which in thoſe Times was held beyond his Power, tho' otherwiſe ſince, unleſs there had been ſome Indictment of Record) yet 'tis there held, that the Officer that executes ſuch Warrant is not puniſhable. Wherefore Judgment was given here for the Defendants. 2 Roll. Abr. 560.

Termino Sancti Michaelis, Anno 27 Car. II.

In Banco Regis.

Anonymus.

A Judgment was removed by Error into this Court, and affirmed, the Capias that is awarded thereupon must mention it, and not be general as upon a Judgment originally in this Court; and if such a Writ issues out, the Court will upon Motion grant a Supersedeas, and there needs no Writ of Error in adjudicatione Executionis, tho' it was taken out in a former Term.

Anonymus.

1 Salk. 234, 332.

LIbel was (by the Church-wardens of, &c.) in the Ecclesiastical Court for 11. 10s. 8d. upon a Custom for Payment of so much, for being buried in the Body of the Church; and a Prohibition was prayed, suggesting that there was no such Custom. The Court held such a Custom must be good, because the Parish is to be at the Charge to make up the Church Floor; but if the Custom be denied, it must be tried at Law: And therefore inclined, that a Prohibition was to go; tho' it was objected, that this Duty belongs properly to the Ecclesiastical Court, and no Remedy for it elsewhere; for so is the Case of a Modus decimandi, which may be demanded in the Spiritual Court; but if the Custom be denied, there shall be a Prohibition: and so the Case of a Mortuary, since the Statute of H. 8. And it afterwards being moved again, Hale Chief Justice being present, the Prohibition was granted. Which, Hale said, was sometimes granted pro defectu Jurisdictionis, and sometimes pro defectu Triationis, as in this Case and others, where the Ground of the Suit is Prescription, for in their Law they have sometimes allowed Prescriptions of twenty Years, sometimes of forty Years, but we admit none but what are de temps dont, &c. Antea 265.

2 Show. 97.
1 Sid. 283.
1 Mod. 167, 176.
Antea 3, 120, 180, 265.
2 Vent. 239.
Cr. Car. 238.
Hob. 247.
3 Mod. 268.

St. John *versus* Moody.

2 Lev. 148.
Postea 319.
3 Keb. 528, 531.
Saunders and Williams.

IN an Action upon the Case, the Plaintiff declared, That he was possessed of a Wood, and that he had a Way leading from such a Place to the said Wood, and that the Defendant had obstructed it. See 6 Mod. 2, 3, &c. 2 Vent. 138, 139, 185, &c.

Upon Not guilty it was found for the Plaintiff, and moved in Arreſt of Judgment, That the Plaintiff had not ſet forth his Title to the Way, whether by Preſcription or otherwiſe; and this ought to be, that the Defendant might be aſcertained what to make Defence unto: Alſo 'tis proper to the Nature of an Action upon the Caſe, to ſet forth the Caſe at large.

Curia contra. The Action here is grounded upon the Poſſeſſion; indeed, if Treſpaſs were brought by the Owner of the Soil in a Juſtification for a Way, 'tis neceſſary to expreſs by what Right 'tis claimed; but this (for ought appears) may be againſt a Stranger. In an Aſſize for a Rent againſt the Terre-tenant, he may demand Judgment, whether he ought to anſwer before Title made? otherwiſe, of an Aſſize brought againſt the Perſon of a Man's Rent. Where 'tis pleaded, that the Party ought to keep the Fence, it ſufficeth to ſay occupatores reparare conſueverunt; for in Truth, the greateſt Part of the Incloſures in England have been within Time of Memory. The Writ of Curia claudenda, is only quod debet & ſolet; 'tis true, before 7 Jacobi, the Uſage has been in Actions of this Nature to preſcribe, but not ſince. Vide 2 Cro. 43, 123. 3 Cro. 499 & 575. Sands and Treſuſis's Caſe, and 325. Symonds and Seabourn. Whereupon Judgment was given for the Plaintiff.

Antea 264, 265. Poſtea 319. 2 Vent. 138, Dickman and Allen, and 139, 185, 288, 292.

Poſtea 319. 2 Vent. 138, 139. 186, 187.

Note, This Caſe was afterwards affirmed upon a Writ of Error in the Exchequer-Chamber.

Drue *verſus* Baily.

THE Caſe was, An Executor had a Term, and let Part of it, reſerving a Rent, and made his Executor and died. The Queſtion was, Whether the Executor ſhould have the Rent or the Adminiſtrator de bonis non? And it was held, that the Executor ſhould have it.

2 Lev. 100. Antea 259. 3 Keb. 298, 427, &c. Norton and Harvey.

Bell *verſus* Thatcher.

IN Error upon a Judgment given in the Court of Common Pleas, where the Plaintiff in an Action upon the Caſe declared, That he had been retained by the Under Poſtmaſter, to carry about Poſt Letters, of which he made a Profit, and had behaved himſelf honeſtly in that Employment. And that the Defendant to defame him ſaid, He had broken up Letters, and taken out Bills of Exchange, which brought him to ſuch Diſcredit, that he loſt the ſaid Employment. And Judgment was given for the Plaintiff, and Error aſſigned upon the Matter, for that the Words do not import, but that he might break open the Letters, by the Direction of thoſe to whom they were directed; neither do they expreſs that they were Poſt Letters; and the Innuendo will not help it, unleſs there had been ſuch a Signification in the

Words. Neither is it such an Employment that an Action should lie for Scandalizing. Also the Plaintiff does not declare, That he was retained for a Year, and seems to be little more than a common Porter. And for these Reasons, by the Opinion of the Court the Judgment was reversed; and (Hale) principally from the Quality of the Employment; for he said a Man should not speak disparagingly of a Man's Cook or Groom, but an Action would be brought, if such Actions as these should be maintained.

Snell *versus* Webling.

2 Lev. 150. 3 Keb. 546.

IN an Action for Words, the Case was, That the Defendant speaking to the Plaintiff, said thus, I know my self, and I know you, I never buggered a Mare; And the Opinion of the Court was, that the Words were actionable, or else there might be sly Ways to defame any Man and evade an Action.

Hodgkins *versus* Robson and Thornborow.

2 Lev. 143. Pollexf. 141. this Case. 3 Keb. 500, 505, 518, 541, 557.

IN Debt for Rent;

The Defendants pleaded in Bar to the Action, That the Plaintiff had entred in a Back-yard, Part of the Land demised, by Force and Arms, &c.

The Plaintiff replied, That he ought not to be foreclosed of his Action, for that the Defendant had let that Back-yard to J. S. for a lesser Term, reserving no Rent; and that J. S. entred, and after assigned unto the Plaintiff, &c. which is the same Entry in the Bar.

The Defendants rejoin, That J. S. did not enter, to which it was demurred: And after it was several Times spoken to at the Bar, Judgment was given this Term by the whole Court for the Plaintiff, (viz.) Hale Chief Justice, Twisden, Rainsford, and Wylde. And

First, They all held, That as the Pleading was in this Case, there could be no Apportionment of the Rent, for when there is to be an Apportionment, either the Jury shall do it upon Nil debet pleaded, or the Defendant may in his Pleading set forth the Value of the Land, and to what the Apportionment shall be. Hale said, If the Lessee redemise Part to the Lessor reserving a Rent, there shall be no Apportionment; for the Parties, by the Reservation, have ascertained what Rent shall be allowed for that Part; but where there is no Rent reserved upon the Redemise, there shall be an Apportionment; but if Part be assigned by the Lessee to a Stranger, who assigns it to the Lessor, and the Lessee had reserved no Rent, in that Case there shall be no Apportionment; for the Lessor comes under the Benefit of the Stranger's Contract. And Hale resembled it to the Case of Lord and

Tenant by an entire Service; if such Tenant aliens Part, the Service is multiplied; and after it be conveyed to the Lord, the entire Service still remains upon the Tenant that holds the Residue. A Rent upon a Lease is not within the Statute of Quia emptores terrarum; yet in many Cases there shall be an Apportionment at Common Law. If the Lessor enters into Part by Wrong, this shall suspend the whole Rent; for in such Case he shall not so apportion his own Wrong, as to enforce the Lessee to pay any Thing for the Residue. Otherwise of a rightful Entry into Part, as in the Case at Bar. 'Tis true, in Ascough's Case in 9 Co. 135. 'tis said, a Rent cannot be suspended in Part, and in esse for Part. And so in 4 Co. Rawlin's Case, it is held, That the whole Rent is suspended, where Part is redemised to the Lessor. But the Court observed, that the Resolution of that Point was not necessary to the Judgment given in that Case, which was upon the Extinguishment of the Condition, which is entire, and not to be apportioned: But as to the Rent, no Book was found to warrant such an Opinion, but Brook, Tit. Extinguishment 48. where 'tis said, If there be Lord and Tenant by three Acres, and the Tenant lets one to the Lord for Years, the whole Rent is suspended. This Case is not found in the Book at large. And in 7 Ed. 3. 56, & 57. where a Formedon was brought of a Rent-Service issuing out of three Acres, and as to one Acre it was pleaded, that the Demandant himself was sole seised, and concluded Judgment of the Writ: But it was ruled to be a Plea to the Action for so much, and to the rest the Tenant must Answer; which is a full Authority, that in such Case the Rent is to be apportioned. And the Case of Dorrell and Andrews, Rolle, Tit. Extinguishment 398. is full in the Point, That where Lessee for Years lets at Will, which Lessee licences the Lessor to enter, that the Entry of the Lessor thereupon shall not suspend his Rent. For Hale said, Tho' it might be objected, that in regard the Lessee at Will cannot let, the Entry of the Lessor thereupon might be a Disseisin; but that is ever at the Election of the Lessor: And if that were now the Question, perhaps the Lessor cannot take such an Entry for a Disseisin. 1 Inst. 148.

It is the common Experience, That where it comes to be tried upon Nil debet, if it be shewn that the Lessor entred into Part, to answer this, by proving it was the Lease of the Lessee; and if the Law should not go upon this Difference, it would shake Abundance of Rents, it being a frequent Thing for a Lessor to hire a Room, or other Part of the Thing demised, for his Convenience.

Hale

Hale ſaid, That a Caſe of a Leaſe for Years was ſtronger than a Leaſe for Life, where the Remedy is by Aſſize, and the Tenants of the Land (out of which the Rent iſſues) are to be named: And for a Condition, that muſt be extinct where Part of the Thing demiſed comes to the Leſſor, becauſe 'tis annexed to ſuch a Rent, in Quantity: For if the Rent be diminiſhed, the Condition muſt fail.

Pollexfen was againſt the Opinion of the Court in this Caſe, as appears by his Report, *fol.* 141.

Holland *verſus* Ellis.

2 Lev. 156. 3 Keb. 524. Raym. 395.

IN Treſpaſs Quare clauſum fregit, herbas conculc' & diverſas carectat' tritici ibid' aſportavit.

After Verdict it was moved in Arreſt of Judgment, That the Declaration did not mention whoſe the Loads of Wheat were; for it was not ibid' creſcent'. Adjornatur.

1 Sid. 90, and 101. contra. 3 Keb. 489. 564, 566, 604. Antea 181. Poſtea 352.

Reſolved per Cur', That an Inquiſition before the Coroner, taken ſuper viſum corporis, that finds that the Perſon was Felo de ſe, & non compos mentis, may be traverſed: But the Fugam fecit in an Inquiſition before the Coroner cannot be traverſed. Antea 239.

Termino Sancti Hillarii, Anno 27 & 28 Car. II.

In Banco Regis.

The Earl of Leiceſter's *Caſe*.

2 Lev. 149. Raym. 239. 2 Keb. 366, 489, &c. 2 Salk. 677. 4 Mod. 261. Show. Parl. Caſes 140. Poſtea 368.

IN an Ejectment upon a Special Verdict the Caſe was to this Effect:

Robert Earl of Leiceſter in the ... of Eliz. levied a Fine of the Lands in Queſtion to the Uſe of the Earl of Pembroke and his Heirs, for Payment of his Debts, reſerving a Power to himſelf to revoke by any Writing indented, or by his Laſt Will, ſubſcribed by his Hand and ſealed with his Seal: And ſome Time after he covenants by a Writing (ſealed and ſubſcribed as aforeſaid) to levy a Fine to other Uſes, and after the Covenant a Fine was levied accordingly. And whether this ſhould be taken as a Revocation, and ſo an Execution of the Power, and the Extinguiſhment of it, was the Queſtion?

It was argued by Jones, Attorney General, that this ſhould not be taken as a Revocation.

In Powers of Revocation, there is to be conſidered the Subſtance and the Circumſtance, and that which revokes muſt be defective in neither. The Deed alone in this Caſe cannot revoke; for tho' it has the Circumſtance limited, (viz.) Indenting, Writing, Sealing, Subſcribing; yet it wants Subſtance, for it doth nothing in præſenti, but refers to a future Act, (viz.) the Fine. If a Man has made his Will, a Covenant after that he will levy a Fine, or a Charter of Feoffment made, will not be a Revocation of the Will, 1 Rolle 615. yet there appeared an Intention to revoke; and leſs Matter will revoke a Will than a Deed.

Again, The Fine alone cannot revoke, becauſe it is defective in the Circumſtances contained in the Power; but then to conſider them both together, how can it be conceived that the Fine ſhould communicate Subſtance to the Deed, or the Deed give Circumſtances to the Fine?

But 'tis objected, That they make but one Conveyance.

I Anſwer, If ſo, then the Words of the Power here are to revoke by Deed, and not by Deed and Fine.

Again, This Conſtruction is repugnant to the Words of the Power, which are, That it ſhall be lawful for him to revoke by his Deed: And yet it is agreed here, that the Deed of it ſelf is not ſufficient to revoke, but only in reſpect of another Act done, which (as it muſt be obſerved) is executed at another Time. The Books agree, that a Condition or Power, &c. may be annexed to an Eſtate by a diſtinct Deed from that which conveys the Eſtate; but not unleſs both are ſealed and delivered at the ſame Time, and ſo they are but as one Deed: But in the preſent Caſe, the Deed was made in one Year, and the Fine levied in another. Suppoſe the Power to be with ſuch Circumſtances as in our Caſe, and a Deed is made which contains ſome of them at one Time, and another Deed comprehending the reſt at another Time, Should both thoſe make a Revocation as one Deed? Surely not.

Again, Suppoſe the Fine had been levied firſt, and then afterwards ſuch Deed had declared the Uſes; ſurely the Power had been extinguiſhed by the Fine, tho' there the Fine and Deed might be taken as one Conveyance, as well as here.

Again, the different Nature of theſe Inſtruments makes, that they cannot be taken as one entire Act within the Power; for the Covenant is the Act of the Party, and the Fine the Act or Judgment of the Court.

But it has been objected, That this ought to have a favourable Conſtruction.

I anſwer, But not ſo as to diſpence with that Form which the Execution of the Power is limited to be done by. In 6 Co. 33. Powers that are to deveſt an Eſtate out of another Perſon are taken ſtrictly, and here (upon the firſt Fine) the Earl of Leiceſter had

had no Eſtate in him. Mich. 6 Car. 1. in Communi Banco, the Caſe of Ingram and Parker, which tho' it may not be a clear Authority for me, yet I am ſure it does not make againſt me: The Caſe was, Catesby levied a Fine to the Uſe of himſelf in Tail, with Remainders over, reſerving a Power to himſelf and his Son to revoke by Deed, &c. (as in our Caſe) and his Son after his Deceaſe (by Deed intended to be enrolled) conveyed to one and his Heirs; and after levied a Fine, and it was held no Revocation;

Firſt, Becauſe he having an Eſtate-tail in him, the Deed might operate upon his Intereſt.

Secondly, Becauſe it was but an Inchoation of a Conveyance, and not perfected; and they held it no Revocation, and that the Fine levied after, tho' intended to be to the Uſes of the Deed, yet ſhould extinguiſh the Power.

Hale Ch. Juſt. Upon the Cloſe and Nice putting of the Caſe this may ſeem to be no Revocation; for 'tis clear, that neither the Deed nor Fine by it ſelf can revoke; but quæ non valent ſingula, juncta proſunt. The Caſe of Kibbet and Lee in Hob. 312. treads cloſe upon this Caſe, where the Power was to revoke by Writing under his Hand and Seal, and delivered in the Preſence of three Witneſſes, and that then and from thenceforth the Uſes ſhould ceaſe. It was there reſolved, That a Deviſe of the Lands by Will (with all the Circumſtances limited in the Power) ſhould revoke; yet the Delivery was one of the Circumſtances, and the Uſes were to ceaſe then and from thenceforth: Whereas a Will which could have no Effect while his Death, did ſtrongly import, that the Meaning was to do it by Deed, and yet there the Will alone could be no Revocation; for clearly he might have made another Will after, and ſo required other Matter, (viz.) his Death, to compleat it. And in that Caſe there is another put, That if a Deed of Revocation had been made, and the Party had declared, it ſhould not take Place until 100 l. paid, there the Operation of it would have been in Suſpence until the 100 l. paid, and then it would have been ſufficient; yet there it had been done by ſeveral Acts, and of ſeveral Natures; the Intention in Things of this Nature mainly governs the Conſtruction. In Terry's Caſe it was ruled, That if A. makes a Leaſe for Years to B. and then levies a Fine to him, to the End that he might be Tenant to the Præcipe for the Suffering of a Recovery, that after the Recovery ſuffered his Leaſe ſhould revive. 'Tis true, in the Caſe at Bar, if the Fine had been levied firſt, and then the Deed of Uſes made afterwards, the Power had been extinguiſhed by the Fine, and ſo no Revocation (of that which had no Being) could have been by the Deed.

Antea 195.
Cro. Jac. 643.
2 Lev. 126.
7 Co. 38.
1 Mod. 107.
1 Salk. 241.
Poſtea 368, 369, 371.

Twiſden. What if before the Fine levied the Intent had been declared to that Purpoſe?

Hale. I Doubt whether that would have helped it. I cannot ſubmit to the Opinion in Parker and Ingram's Caſe cited, (viz.) That the Deed not being enrolled, ſhould make no Revocation. For in Caſe of a Power to make Leaſes for Life, it has been always held (by the beſt Advice) that the better Way is to do it by Deed without Livery, (tho' Livery, by the Common Law, is incident to a Leaſe for Life) and ſo adjudged in Rogers's Caſe, for Lands in Blanford forum. In Moor's Rep. where Tenant for Life hath Power to make Leaſes for Life, and makes a Leaſe by Livery, 'tis there held a Forfeiture; tho' I conceive not, becauſe by the Deed the Leaſe takes Effect, and ſo the Livery comes too late. Therefore the Omiſſion of enrolling the Deed (in that Caſe) does not ſeem to be material; but if that Opinion be to be maintained, it is, becauſe the Party had ſuch an Intereſt, upon which the Deed might enure without Execution of his Power, and ſo rather conſtrued to work upon his Intereſt. But that Reaſon does not ſatisfy, becauſe ſuch an Eſtate as was intended to be conveyed, could not be derived out of his Intereſt; therefore it ſhould take Effect by his Power, according to Clere's Caſe in 6 Co.

So by the whole Court here, the Deed and Fine (taken together) were reſolved to be a good Execution of the Power, and Judgment given accordingly.

Richardſon *verſus* Disborow.

A Prohibition was prayed to the Eccleſiaſtical Court, where the Suit was for a Legacy; and the Defendant pleaded, That there was nothing remaining in his Hands to pay it, and that he had fully adminiſtred: And producing but one Witneſs to prove it, Sentence was given againſt him, and after he appealed, and becauſe their Court gave no Regard to a ſingle Teſtimony, he prays a Prohibition. 2 Keb. 570, 576, 579. Yelv. 92. 2 Roll. Abr. 299,300. and Show. 158, 172. 3 Mod. 283. 2 Salk. 547. Shotter and Freind.

But it was urged on the other Side, That it being a Matter within their Cognizance, they might follow the Courſe of their own Law: And tho' there are Diverſities of Opinions in the Books about this Matter, yet ſince 8 Car. 1. Prohibitions have been denied upon ſuch a Surmiſe. 2 Cro. 269.

Hale. Where the Matter to be proved (which falls in incidently in a Cauſe before them) is Temporal, they ought not to deny ſuch Proof as our Law allows; and it would be a great Miſchief to Executors, if they ſhould be forced to take two Witneſſes for the Payment of every petit Sum: And if they ſhould, after their Death there would be the ſame Inconvenience. In Yelv. 92. a Prohibition was granted upon the not Admitting of 3 Mod. 286.

one Witnels to prove the Revocation of a Will: Which is a ſtronger Caſe, becauſe that entirely is of Eccleſiaſtical Cognizance. Wherefore let there go a Prohibition, and let the Party (if he pleaſe) demur upon the Declaration upon the Attachment. Hob. 188. 1 Cro. 88. Popham 59. Latch 117.

Pigot *verſus* Bridge.

1 Sid. 442. Antea 35, 78. Style 356. 1 Saund. 114 to 118.

IN Debt upon a Bond, conditioned for Performance of Covenants; and the Breach aſſigned was, in the not quietly enjoying the Land demiſed unto him.

The Defendant pleads, That the Leaſe was made to hold from Michealmas 1661. to Michaelmas 1668; and that paying ſo much Rent half-yearly, he was to enjoy quietly; and ſhews, that he did not pay the laſt half Year's Rent, ending at Michaelmas 1668. To which the Plaintiff demurred, ſuppoſing that the Words being to Michaelmas 1668. there was not an entire Half-year, the Day being to be excluded; and that it was ſo held in the Caſe of Umble and Fiſher, in 1 Cro. 702.

Cur' contra. 'Tis true in Pleading uſque tale Feſtum will exclude that Day; but in Caſe of a Reſervation, the Conſtruction is to be governed by the Intent.

Browne *verſus* Collins.

2 Lev. 110. 3 Keb. 462, 517, 530.

NOte per Hale. Debt doth not lie againſt the Executor of an Executor, upon a Surmize of a Devaſtavit by the firſt Executor. For,

First, 'Tis a perſonal Tort, for which his Executor cannot be charged.

30 Car. 2. c. 7. 4 & 5 W. & M. c. 24. Note, a Statute made ſince hath altered the Law in this Point. 2 Saund. 116.

Secondly, 'Tis ſuch an Action of Debt, as would have admitted Wager of Law, and therefore lies not againſt the Executor. It was difficultly brought in, that Debt ſhould lie againſt the Executor upon a Surmize of a Devaſtavit by himſelf. But that Point is now ſettled, but no Reaſon to extend it further. And he cited a Caſe, where Debt was brought againſt A. Executor of B. Executor of C. who pleaded, that he had not of the Goods of C. in his Hands.

To which the Plaintiff replied, That B. had waſted the Goods of C. to the Value of the Debt demanded. Upon which Iſſue was joined and found for the Plaintiff, and he had Judgment to recover de bonis B. in the Hands of A. But that Judgment was reverſed.

Anonymus.

IF A. engages, that B. ſhall pay for certain Goods that B. buys of C. this is good to charge him upon a collateral Promiſe, but not upon an Indebitat' Aſſumpſit; for it doth not create a Debt. Antea 269. Poſtea 311.

Anonymus.

IN an Information for a Riot, it was doubted by the Court, Whether it were local, being a criminal Cauſe? And it was obſerved, That divers Statutes in Queen Elizabeth and King James's Time provided that Proſecutions upon Penal Laws ſhould be in their proper Counties. Which was an Argument, that at the Common Law they might have been elſewhere. Sed Quære.

Taylor's *Caſe*.

AN Information exhibited againſt him in the Crown-Office, for uttering of divers blaſphemous Expreſſions, horrible to hear, (viz.) That Jeſus Chriſt was a Baſtard, a Whoremaſter, Religion was a Cheat; and that he neither feared God, the Devil, or Man. 3 Keb. 607, 621.

Being upon his Trial, he acknowledged the Speaking of the Words, except the word Baſtard; and for the reſt, he pretended to mean them in another Senſe than they ordinarily bear, (viz.) Whoremaſter, i. e. That Chriſt was Maſter of the Whore of Babylon, and ſuch Kind of Evaſions for the reſt. But all the Words being proved by ſeveral Witneſſes, he was found Guilty.

And Hale ſaid, That ſuch Kind of wicked blaſphemous Words were not only an Offence to God and Religion, but a Crime againſt the Laws, State and Government, and therefore puniſhable in this Court. For to ſay, Religion is a Cheat, is to diſſolve all thoſe Obligations whereby the Civil Societies are preſerved, and that Chriſtianity is Parcel of the Laws of England; and therefore to reproach the Chriſtian Religion is to ſpeak in Subverſion of the Law.

Wherefore they gave Judgment upon him, (viz) To ſtand in the Pillory in three ſeveral Places, and to pay One thouſand Marks Fine, and to find Sureties for his Good Behaviour during Life.

Walker *verſus* Wakeman.

3 Keb. 544, 547. 2 Lev. 150. 2 Roll. Abr. 262.

THE Caſe was, An Eſtate which conſiſted of Land and a Rectory, &c.) was conveyed to the Uſe of one for Life, &c. with a Power to let the Premiſſes, or any Part of them, ſo as ſuch a Rent was reſerved for every Acre of Land. The Tenant for Life demiſed the Rectory reſerving a Rent, which Rectory conſiſted of Tithes only, and whether this was within the Power, was the Queſtion?

Serjeant Pemberton argued, That this Leaſe is not warranted by the Power; for a Conſtruction is to be made upon the whole Clauſe, and the later Words that appoint the Reſervation of the Rent, ſhall explain the former, and reſtrain the general Word Premiſſes to Land only; for if it ſhall be extended further, the Settlement (which was in Conſideration of a Marriage-Portion) is of no Effect for the Rectory: As in Caſe it ſhould be demiſed, reſerving no Rent; which it might be, if not reſtrained to the later Words they applied only to the Land.

But it was reſolved by the Court, That the Leaſe of the Rectory was good; for the laſt Clauſe being Affirmative, ſhall not reſtrain the Generality of the Former. And this Reſolution was chiefly grounded upon Cumberford's Caſe in 2 Rolle 263. where a Conveyance was made to Uſes of divers Manors and Lands, with a Power to the Ceſtuy que Uſe for Life, to make Leaſes of the Premiſſes, or any Part of them, ſo that ſuch Rent or more were reſerved upon every Leaſe, which was reſerved before within the Space of two Years; and a Leaſe was made of Part of the Lands, which had not been demiſed within two Years before: And reſolved, It was a good Leaſe, and that thereupon any Rent might be reſerved; becauſe the Power was General, to leaſe all; and the reſtrictive Clauſe ſhould only be applied to ſuch Lands as had been demiſed within two Years before.

Termino Sanctæ Trinitatis, Anno 28 Car. II.

In Banco Regis.

MEmorandum, The laſt Term Sir Richard Rainsford was made Chief Juſtice, (Hale Chief Juſtice quitting it for Infirmity of Body) and Sir Thomas Jones was made one of the Juſtices, of the Court of King's Bench. Poſtea 329.

Mitchil *verſus* Aleſtree.

IN an Action upon the Caſe brought againſt the Defendant, for that he did ride an Horſe into a Place called Lincoln's Inn Fields, (a Place much frequented by the King's Subjects, and unapt for ſuch Purpoſes) for the Breaking and Taming of him, and that the Horſe was ſo unruly, that he broke from the Defendant, and ran over the Plaintiff, and grievouſly hurt him, to his Damage, &c. 2 Lev. 172. m. c. 3 Keb. 650. 2 Salk. 440, 441, &c.

Upon Not guilty pleaded, and a Verdict for the Plaintiff, it was moved by Simpſon in Arreſt of Judgment, That here is no Cauſe of Action: For it appears by the Declaration, that the Miſchief which happened was againſt the Defendant's Will, and ſo Damnum abſque injuria; and then not ſhewn what Right the King's Subjects had to walk there; and if a Man digs a Pit in a Common into which one that has no Right to come there, falls in, no Action lies in ſuch Caſe. T. Jones 205.

Curia contra, It was the Defendant's Fault, to bring a wild Horſe into ſuch a Place where Miſchief might probably be done, by Reaſon of the Concourſe of People. Lately, in this Court an Action was brought againſt a Butcher, who had made an Ox run from his Stall and gored the Plaintiff; and this was alledged in the Declaration to be in Default of Penning of him. Hob. 134. Style 72. Raym. 458. 2 Jones 209.

Wylde ſaid, If a Man hath an unruly Horſe in his Stable, and leaves open the Stable-Door, whereby the Horſe goes forth and does Miſchief; an Action lies againſt the Maſter.

Twiſden. If one hath kept a tame Fox, which gets looſe and grows Wild, he that kept him before ſhall not anſwer for the Damage the Fox doth after he hath loſt him, and he hath reſumed his wild Nature. Vide Hobart's Reports 134. The Caſe of Weaver and Ward. Judgment for the Plaintiff. 2 *Lev.* 172.

Anonymus.

Anonymus.

1 Sid. 330. 1 Saund. 98, 99. 1 Roll. Rep. 394. Hob. 135. 1 Cro. 34, 297.

IN Treſpaſs in an inferior Court, if the Defendant plead ſon Frank Tenement, to ouſt the Court of Juriſdiction, it was ſaid by Wylde, That they might enforce the Defendant to ſwear his Plea, as in Caſe of Foreign Plea; (Negatur per Twiſden) and as in this Court, where a local Juſtification in Treſpaſs, &c. is pleaded, the Defendant muſt ſwear it: But the Court held, no Indictment will lie for Perjury in ſuch Oath, no more than upon a Wager of Law.

Anonymus.

IN Trover the Diſtringas Juratorum was returnable die Martis prox' poſt menſem Paſchæ, Niſi prius Richardus Rainsford Mil', &c. venerit die Lunæ in menſem Paſchæ, inſtead of poſt menſem, and ſo objected, That there was no Authority to try the Cauſe, there being no ſuch Day: And the Court ſeemed to be of that Opinion, and that there was no Record by which this could be amended; but the Parties agreed to go to a new Trial; and ſo this Point did not come to be fully reſolved.

Woodward *verſus* Aſton.

2 Mod. 95. 2 Mod. 260, 261, &c. Poſtea 298.

AN Indebitat' Aſſumpſit was brought by the Plaintiff againſt the Defendant for 10 l. received of his Money. Upon Non Aſſumpſit pleaded and a Trial at the Bar (which the Court permitted, becauſe the Parties were Officers of the Court,) the Caſe appeared to be thus;

The Maſter of the King's Bench Office, or Chief Clerk, had granted the Office of Clerk of the Papers, (and it was agreed on all Hands, that it was his to grant it) to Woodward, the Plaintiff, and one Vidian, and the longer Liver of them.

Vidian, being a Recuſant, and knowing himſelf diſabled by the late Act of Parliament to continue in the Office, prays the Court that Aſton might be admitted in his Room, which was done accordingly, and within two or three Years after Vidian died; and Woodward commenced this Suit againſt Aſton, ſuppoſing that he had no Right in the ſaid Office.

The Plaintiff, to entitle himſelf, ſhewed a Copy of the Enrolment in this Court, of the Deed of Grant of the Office, to him and Vidian. And it was objected on the Defendant's Part, that this

1 Salk. 280.

was not Evidence, but they ought to produce the Grant it ſelf; for tho' the Enrolment of a Bargain and Sale is Evidence becauſe the Eſtate paſſes by the Enrolment, without which the Deed would not be ſufficient; yet here the Deed paſſes the Office, and the Enrolment is but as it were a Copy. But the Court ruled, That the

Enrolment might be given in Evidence; and of Grants of Offices in this Court, it has been the Course to enrol Deeds. Then the Deed it self was produced by the Defendant, which was cancelled, and urged by his Counsel, that the Estate in the Office was thereby destroyed.

Cur' contra. Not as to the Plaintiff, unless it appeared, that he had a Hand in the Cancelling of it. But then for the Plaintiff it was said, That this was an entire Office, tho' granted to two; and one could not surrender or grant his Interest. But then the Counsel for the Defendant shewed, That when the Defendant was admitted into the Office, the Court demanded of the Plaintiff whether he consented? And he said salvo jure, and seemed unwilling at first; but afterwards the Chief Justice demanded of him, whether he would execute it alone? And told him he knew such Things of him which would make appear that it was not proper for him so to do, and then he said he submitted, and the Defendant was admitted thereinto, and afterwards Sir Robert Henly, Chief Clerk, made a new Grant to the Plaintiff and Defendant of that Office, which the Plaintiff knew of, and joined in Execution with the Defendant; which, as was urged, amounted to a Surrender of his former Grant. (In 3 Cro. 197, 258. it is said, if an Officer for Life accepts of a new Grant, 'tis no Surrender of his former Estate.) The Court did not deny, but that if it did appear, that the Plaintiff had accepted this new Grant, it would be a Surrender, and thereupon that Matter of Fact was left to the Jury, and they found for the Defendant.

The Court said in this Case, That a Rent or other Grant, was not lost by the Destruction of the Deed, as a Bond or chose en Action was. (Quære, if the Party himself cancel it,) and if the Grantee of the Rent delivers up the Deed to the Grantor, this is no Surrender; but he may sue for his Rent, if he can recover the Deed again, for a Chose en Grant must be surrendred by Deed. 2 Cro. 399.

Curtis & al' *versus* Collingwood.

IN an Assumpsit, the Plaintiffs declared, That the Defendant was excommunicated at their Prosecution, for not paying of a Tax made for the Reparation of a Church of which they were Church-wardens; and that in Consideration, that the Bishop would absolve the Defendant, at the Defendant's special Instance and Request, the Defendant promised to pay unto the Plaintiffs so much. After Verdict, it was moved in Arrest of Judgment, That there was no Consideration on the Part of the Plaintiffs; yet the Plaintiffs had Judgment; for it cannot be intended, but that the Bishop absolved the Defendant at their Instance, and would not have done it, but upon the Account of the Promise, of paying the Money to them. 2 Lev. 119. 3 Keb. 359, 434, 489.

Termino

Termino Sancti Michaelis, Anno 28 Car. II.

In Banco Regis.

Anonymus.

A Bill of Middleſex was iſſued out by an Attorney of this Court againſt the Counteſs of Huntingdon, which was diſcharged by Superſedeas without Pleading, becauſe it appeared by the Record that ſhe was a Peereſs, and the Attorney was committed for Suing out of the Proceſs.

The City of London *verſus* Goree.

Show. 35. 2 Mod. 260. 3 Mod. 239. 2 Lev. 174. 3 Lev. 262. 3 Keb. 480, 491.

AN Indebitatus Aſſumpſit was brought for the Duty of Scavage, and declared upon the Cuſtom of London, that every one which expoſes foreign Goods to Sale, which had been entred in the Cuſtom-houſe, ſhall pay ſo much for ſhewing of them: After Verdict, it was alledged in Arreſt of Judgment, That no Aſſumpſit lay for ſuch a Duty, for there ought to be a Contract expreſs, or implied, to maintain an Aſſumpſit.

Again, foraſmuch as the Cuſtoms of the City are confirmed by Parliament, this is a Duty by Record: Sed non allocatur; for there are Multitudes of Precedents in ſuch like Caſes. An Aſſumpſit lies upon a Bill of Exchange accepted; an Aſſignee of Commiſſioners of Bankrupt may bring an Aſſumpſit, and yet the Debt is aſſigned by Virtue of an Act of Parliament. And the Court ſaid, In ſuch Caſe as this the Declaration might be upon an Indebitatus Aſſumpſit, as it was in the Caſe at Bar.

Molyn *verſus* Cook & al'.

3 Keb. 676.

IN Treſpaſs for Aſſault, Battery and Impriſonment, until the Plaintiff was forced to ſpend 20 l. and deliver up a Bond of 100 l. to be cancelled, wherein one Lamplugh, one of the Defendants, ſtood bound to him.

Vide antea 1, 11, 16, 29. 2 Vent. 47, &c. ibid.

Cook pleads his Privilege, as Clerk to one of the Protonotaries of the Common Pleas. The Plaintiff replies, That this Treſpaſs, &c. was done by them jointly, and that he had taken out an Original againſt them all; and that this Declaration againſt Cook was upon that Original, and that he ſtill proſecuted the reſt, (viz.) Lamplugh and Jeffries, to which the Defendant demurred: And Judgment was given, (Twiſden and Jones only preſent) quod reſpondeat

ouſter, for Cook being joined with others in the Action, he ſhall have no Privilege, as Powell's Caſe, Dyer 377. he being Clerk of the Crown, was ſued with his Wife, and not allowed his Privilege, becauſe ſued with his Wife. Vid. Poph. Rep. 329. and Rol. Abr. 1. p. 493. Vid. 2 R. Ab. 274, 5.

Brown *verſus* Wait.

IN Ejectment, the Caſe upon a Special Verdict was to this Effect; Sir John Danvers being ſeized of the Lands, &c. in Tail, with the Fee expectant, Anno 1646 and in 1647, levied a Fine to the ſame Uſes as he was before ſeized, ſave that a Power was reſerved to make Leaſes for any Number of Years, and without reſerving any Rent. Sir John Danvers did after become Guilty of Treaſon, in Murdering of King Charles the Firſt in 1648, and died in 1655. 2 Lev. 169. Pollexfen 181, 185. 2 Jones 55, 58, &c. Raym. 260. 2 Mod. 130. 3 Keb. 459. 2 Show. 104.

In 13 Car. 2. cap. 15. the Statute, commonly called the Statute of Pains and Penalties, enacts, That ſundry of the Offenders in that execrable Treaſon, of which Sir J. D. was one, ſhould (amongſt other Penalties there inflicted) forfeit all their Lands, Tenements and Hereditaments, Leaſes for Years, Chattels real, and Intereſt of what Nature or Quality ſoever. See the Act of the 14th of this King. The Lands were by Patent granted to the Duke of York, who let them to the Defendant, and John Danvers, Heir of Sir John Danvers, entred, and made the Leaſe to the Plaintiff: It had been ſeveral Times argued at the Bar, and this Term Judgment was given by the Court for the Defendant. And Rainsford Chief Juſtice delivered the Opinion of the Court, and the Reaſons for himſelf, Twiſden, Wylde and Jones, as followeth.

The Queſtion being, Whether an Eſtate-tail were forfeited by the Words of the Act of 13 Car. 2. It was obſerved, that all Eſtates were Fee-ſimple at the Common Law and forfeitable. W. the 2d. de donis was the firſt Statute that protected Eſtates-tail from Alienations, and from all Forfeitures of all Kinds, and ſo continued until 12 E. 4. Taltarum's Caſe, from which Time common Recoveries have been held not to be reſtrained by the Statute de donis, (and by the Way it muſt be conſider'd, that Perpetuities were never favoured.) Then came the Statute of 4 H. 7. of Fines, which with the Explanation of 32 H. 8. have been always reſolved to bar the Iſſues in Tail; ſo as to Alienations, Eſtates-tail were ſet free, but were not forfeitable, no not for Treaſon, until 26 H. 8. by which they became ſubjected to Forfeitures in Caſe of Treaſon, and ſo by 5 E. 6. But 'tis true, theſe Statutes extend only to Attainders, and 33 H. 8. veſts the Lands, &c. in the King's Poſſeſſion without Office: Thus having conſidered the Hiſtory and Progreſs of Eſtates-tail, the Reaſons why ſuch an Eſtate ſhould be conſtrued to be forfeited upon this Act of 13 Car. 2. are theſe; Ch. Juſt. Jones R. 59. 2 Vent. 39.

First, The Crime mentioned is of the same Nature, and with the same Aggravations, as in 12 Car. 2. by which the Offenders are attainted of Treason, &c. for they are called Perpetrators of that execrable Treason, with many Expressions to the like Effect; which was looked upon as an Offence of that heinous Nature, that the same Parliament enacted an Anniversary Humiliation throughout the whole Kingdom, to be perpetually observed upon the Account of it; as if not only they that acted it, but the whole Kingdom and their Posterity, (like to another Original Sin) were involved in the Guilt of it, Nati natorum & qui nascuntur ab illis; and therefore the Punishment shall not be mitigated in any other Manner, than is expressly provided by that Act.

Secondly, It is proved by the Generality and Comprehensions of the Words which are made Use of, (viz.) Possessions, Rights, Hereditaments of what Nature soever; Interests, which does as well signifie the Estate in the Thing as that wherein the Estate is, which can have no Effect if not extended to Estates-tail. We must observe also, that at the making of this Act, entailed Lands were not protected from Forfeitures, and tho' 26 H. 8. extends only to Cases, where the Offender is attainted; yet 'tis of good Direction to the Judges in Cases of like Nature; and 'tis plain, that by this Act of 13 Car. 2. the Offenders were looked upon in pari gradu with these attainted; for when the Proviso comes to save the Estates of Strangers, &c. in Trust for whom the Offenders were seized, it is said, notwithstanding any of the Convictions or Attainders aforesaid.

Thirdly, It is to be observed, That the Act takes Notice, that divers of the Offenders included in this Act were dead; now in regard most Lands are known to be entailed, if the Act had not intended such Estates to be forfeited, it would signifie nothing indeed; if the Offenders had been alive it might have been somewhat satisfied with the Forfeitures during their Lives; but as the Case was, it should be of no Effect at all, after making a great Noise of Forfeitures and Confiscations, the Act would have been but a Gun charged only with Powder, or as in the Fable, Parturiunt Montes, &c.

Fourthly, It is manifest, That the Parliament did not intend that the Children or Heirs of the Persons within the Penalties of the Act, should have any Benefit of their Estates; for in the Saving which is made for Purchasers upon valuable Considerations, the Wives, Children and Heirs of the Offenders are excepted; then surely if they would bar them of the Benefit of their Purchases, a fortiori from inheriting to an Estate-tail, especially of a voluntary Entail, that seems to be made with a Prospect of this Treason, which was perpetrated a Year after, and such an Entail as scarce the like was ever seen before; that a Power should be reser-

bed to make Leases for any Number of Years, and without Reservation of any Rent. By which it is manifest that Sir John Danvers that committed the Treason, was fully Master of the Estate.

Again, all Conveyances are avoided by the Act, unless such as were upon valuable Consideration; which this Fine was not. The great Case which has been insisted upon by Way of Objection, is Trudgeon's Case, Co Litt. 130. Estates-tail were not forfeited upon the Statute of Præmunire but during the Offender's Life. For Answer to that it must be observed, That that Forfeiture is upon the Statute of 16 R. 2. at which Time Estates-tail were under the Protection of the Statute de donis; but since that Time the Judges have not been so strict in expounding Statutes concerning Estates-tail, as appears by Adams and Lambert's Case, 4 Co. That an Estate-tail given for a superstitious Use, was within the Statute of 1 E. 6. cap 4. where the Words are general, and not so large as in our Case, nor so much to demonstrate the Intent as in our Act to extend to Estates-tail; wherefore Judgment was given for the Defendant.

Note, They that argued for the Defendant endeavoured to maintain, That if it should be admitted, that Entails were not forfeited by the Act; yet the Estate of Sir John Danvers in those Lands would be forfeited, in regard he levied a Fine in 1647, and the Act of 13 Car. 2. extends to all Lands, &c. whereof the Persons therein mentioned were seized, &c. since 1646, and he being Tenant in Tail and levying of a Fine, there is an instantaneous Fee in him, out of which the new Estate-tail is supposed to be created, and that cannot hold, being derived out of a Fee subject to the Forfeiture by Relation; but this Point was not touched by the Judges, for that they were fully agreed upon the other Point. This Judgment was affirmed in the Exchequer, and afterwards in the House of Lords. 2 *Lev.* 171. See 1 Sal. 228, 269.

Beasly's *Case.*

HE was taken in Execution upon a Recognizance of Bail, and he made it appear to the Court, That he never acknowledged the Recognizance, but was personated by another; and thereupon it was moved, that the Bail might be vacated and he discharged, as was done in Cotton's Case, 2 Cro. 256. But the Court said, Since 21 Jac. c. 26. by which this Offence was made Felony (without Clergy,) it is not convenient to vacate it until the Offender is convicted, and so it was done 22 Car. 2. in Spicer's Case; wherefore it was ordered, that Beasly should bring the Money into Court, and be let at large to prosecute the Offender. Twisden said, It must be tried in Middlesex, tho the Bail was taken at a Judge's Chamber in London, because filed here; and the Entry is venit coram Domino Rege, *&c.* so it differs from a Recognizance acknowCh. Just. Jones R. 64. 3 Keb. 604.

T. Jones 64.

ledged before my Lord Hobart, upon 23 H. 8. at his Chamber, and recorded in Middlesex, there Scire facias may be either in London or Middlesex, Hob. Rep. 195, 196.

2 Sid. 90. If a false Bail is acknowledged, it is not Felony, unless it be filed, and so held in Timberly's Case.

The King *versus* Humphreys & al'.

3 Keb. 739, 764. AN Indictment upon the Statute of Maintenance, and one only found Guilty; and it was moved in Arrest of Judgment, That seeing but one was found Guilty, it did not maintain the Indictment, 2 Roll. 81. Several were indicted for using of a Trade, and said uterque eor' usus fuit, and held not good. Sed non allocatur; for that in that Case in Rol. the Using of the Trade by one, cannot be an Using by the other. But this is an Offence, that two may join in, or it may be several as in a Trespass.

But then it was alledged, That the Maintenance was in quodam placito in Cur' coram Domino Rege pendent', and not said where the King's Bench sate, and this was held fatal.

Termino Sancti Hillarii, Anno 28 & 29 Car. II.

In Banco Regis.

Jay's *Case*.

3 Sal. 233, 234. 3 Keb. 714. A Mandamus to restore to his Place of a Common Council-Man in the Corporation of Eye in Suffolk. The Return was that he was amoved for speaking of opprobrious Words of one of the Aldermen, (viz.) That he was a Knave, and deserved to be posted for a Knave all over *England*. And it was moved that the Return was insufficient, for Words are not good Cause to remove a Man from his Place in the Corporation. To which it was said, That this is not a Disfranchising of him, but only Removing him from the Common Council as a Person not fit to sit there. To which Twisden said, That his Place there could no more be forfeited than his Freedom; for he was chosen thereunto by the Custom of the Place. And Magna Charta is, That a Man shall not be disseised de liberis consuetudinibus; but he held, that Words might be a Cause to turn out a Freeman, as if they were that the Mayor or the like did burn the Charters of the Town, or other Words, that related to the Duty of his Place. But in the Case at Bar the Words do

Postea 327.

do not appear to have any Reference to the Corporation; wherefore it was ordered that he should be restored.

The Court said that my Lord Hale held, That Returns of this Nature should be sworn, tho' of late Days it has not been used, and that it was so done in Medlicot's Case in Cro. T. Jones 72.

Abram *versus* Cunningham.

UPon a Special Verdict the Case appeared to be to this Effect: Vidé 1 Salk. 299. Wankford v. Wankford. 2 Lev. 182. Ch. Ju. T. Jones 72. 2 Mod. 146, 147. 3 Keb. 725. Vid. 1 Show. 406.

A. possessed of a Term makes B. Executor, who makes three Executors and dies; two of them die, and the Will of B. the Executor, not being discovered, Administration is granted cum Testamento annexo, to D. who grants over the Term. The surviving Executor never intermeddles, but so soon as he had Notice of the Will, refused before the Ordinary, and the Point was, Whether the Grant of the Term in the mean Time was good?

Saunders (to maintain it) argued, That to the Making of an Executor, besides the Will, there was requisite, that the Executor should assent; and if the Executor refuses, 'tis as much as if there never had been any. There is no Book which proves the Acts of an Administrator void, where there is a Will and the Executor renounces. Greysbrook and Foxe's Case in Plowden's Com. is, That after Administration granted, the Executor proved the Will. And so in 7 E. 4, 14. in Dormer and Clerke's Case, it was held, That where there was an Executor who after refused, and Administration committed, the Administrator should have all the Rent, (belonging to the Term in Reversion) which accrued after the Death of the Testator. If an Executor be a Debtor, and refuses, the Administrator may sue him: (Which was denied by Twisden, because a Personal Action once suspended, is ever so.) Dyer 372. If one makes an Executor, who dies, and never proves the Will, Administration shall be granted, as upon a dying Intestate; suppose an Executor de son tort has Judgment against him, shall not there be Execution upon a Term, as Assets in his Hands? 9 Co. 37. a.

Twisden. It hath been doubted, Whether there could be an Executor de son tort of a Term? or, Whether he were not a Disseisor? And by the same Reason it may be granted in the present Case; for at least the Administrator here is an Executor de son tort before the Refusal.

Levinz contra. Anciently, Bona Intestati capi solebant in manus Regis, as appears in Hensloe's Case in 9 Co. And since the Power of the Ordinary hath been introduced, it was only to grant Administration upon a Dying Intestate. 4 H. 7. Pl. 10. If the Ordinary cites the Executor to prove the Will, and he renounces,

nounces, 'tis said he may grant Administration; which implies, that it cannot be before. So 21 H. 8. cap. 5. is to grant Administration, &c. upon a Dying Intestate, or Refusal of the Executor; the Interest of the Executor commences before the Probat. In 36 H. 8, 6. an Executor commanded one to take the Goods, and after the Executor refused before the Ordinary, who committed Administration, and the Administrator sued the Person that took the Goods; who justified by the Executor's Command, and it was held good: And a Relation shall never make an Act good, which was void for Defect of Power. And the Court seem'd strongly of that Opinion.

But Serjeant Pemberton desiring to argue it, the Court permitted him to speak to it the next Term. Et sic adjornatur.

And afterwards it was argued again, and Judgment was given for the Defendant per totam Curiam.

Dunwell *versus* Bullocke.

S. C. 2 Lev. 177. Vide 1 Sid. 98, 263. 3 Keb. 253, 507. Antea 106. 1 Lev. 18, 301. 2 Lev. 11, 176, &c.

IN an Action of Trover inter al', de uno Instrumento ferreo, Anglice, an Iron Range.

After Verdict for the Plaintiff, it was moved in Arrest of Judgment, That Instrumentum ferreum was too uncertain, and that a Range was the same with a Grate, for which Crates was a proper Latin Word.

Sed non allocatur: For Crates is such a Grate as is before a Prison: But a Fire-Range was not in Use in the Romans Times, and therefore Instrumentum ferreum is well enough, with the Anglice.

Twisden said, Trover de septem libris has been held good, without saying what they were.

Blackman's *Case*.

IT was assigned for Error, That the Venire was to summon probos & legales homines, instead of liberos, and so a material Variance; and alledged, that many Judgments had been reversed for it.

Raym. 417. But the Court here being informed, That the Precedents were generally probos instead of liberos, would not allow the Exception.

The King *versus* Armstrong, Harrison & al', &c.

1 Sid. 68. 1 Lev. 62. 1 Keb. 203, 254. 6 Mod. 100, 185.

THey and others were indicted for conspiring to charge one with the Keeping of a Bastard-Child, and thereby also to bring him to Disgrace.

After Verdict for the King, it was moved in Arrest of Judgment, that the bare Conspiring, without executing of it by some Overt Act, was not subject to an Indictment, according to the Poulterer's Case in 9 Co. And it does not appear that he was actually charged with the keeping of a Child; nay, 'tis alledged, 'twas but a pretended Child, neither was he by Warrant brought before a Justice of Peace upon such an Account; but only that they went and affirmed it to the Party himself, intending to obtain Money from him, that it might be no further disclosed.

Vide antea 12, 18, 19. 234. 2 Saund. 229, 230. 3 Salk. 97. 3 Mod. 220. 2 Mod. 306. 6 Mod. 31, 137, 169, 185. 1 Salk. 13, 14, 15. Q. 174. 1 Lev. 62. 5 Mod. 349, 405. 1 Hawk. 189 to 193.

Sed non allocatur: For there was as much an Overt Act as the Nature and Design of this Conspiracy did admit, in regard there was no Child really, but only a Contrivance to defame the Person, and cheat him of his Money, which was a Crime of a very heinous Nature.

Then it was alledged, That this was tried at the Old-Baily, commonly called Justice-Hall in London; and the Jury came de Warda de Faringdon extra London, which appeared to be out of the Jurisdiction. Sed non allocatur.

For the Name of the Ward is Faringdon extra, to distinguish it from Farindon infra; but both are known to be in London.

Whereupon Judgment was entred up against them; and Armstrong, which appeared to be the principal Offender, was fined 50 l. and the other 30 l.

Burrough's *Case*.

HE and others were indicted, for that they being Church-wardens, Overseers of the Poor, and he a Constable, did contemptuously and voluntarily neglect to execute diversa Præcepta & Warranta, directed to them by the Bailiffs of Ipswich (being Justices of the Peace) under their Hands and Seals, &c. It was moved to quash it, for that the Nature and Tenor of the Warrants were not expressed in the Indictment: For unless the Parties know particularly what they are charged with, they cannot tell how to make their Defence.

Constable indicted, &c. See 1 Salk. 380. 1 Mod. 13. Cumberba. 328, 416. 6 Mod. 96. 5 Mod. 96, 179. 2 Saund. 290. Vide prox. pag.

And for that Reason it was quashed by the Court.

Note, The Court never gives Costs, for not executing of a Writ of Enquiry of Damages, tho' Notice be given.

Anonymus.

Anonymus.

1 Salk. 261. 1 Sid. 102. Antea 108, 305.

AN Indiament for a Forcible Entry into certain Lands in the Poſſeſſion of J. S. was quaſhed, for not ſhewing what Eſtate J. S. had; and tho' the Word Diſſeiſivit were in, the Court held, that tho' that might be taken to imply a Freehold, yet it was not ſufficient, Vid. Mo. 481. And another was quaſhed, becauſe it was ſaid poſſeſſed pro termino: But the Court held, that if it had been pro termino annorum, tho' not ſaid for how many Years, it had been well.

See 6 Mod. 173, 210, 211. Farr. 8.

Note, A Bailiff caught one by the Hand (whom he had a Warrant to arreſt) as he held it out of a Window. And the Court ſaid, That this was ſuch a Taking of him, that the Bailiff might juſtifie the Breaking open of the Houſe to carry him away.

Kent *verſus* Harpool.

Pollexfen 199. T. Jones 76. 3 Keb. 731, 820.

AN Ejectment: The Caſe came hither by a Writ of Error out of the King's Bench in Ireland, and divers Points were in it which concerned the Act for Settlement of Lands in Ireland. But the Caſe was (as to the great Point at Common Law) to this Effect:

This Caſe is not truly ſtated. Vide Pollexfen 199.

Father, Tenant for Life, Remainder to the Son for Life, Remainder to the firſt Sonof that Son, (who was not born) Remainder to the Heirs of the Body of the Father; the Father died before the firſt Son was born, and whether the Deſcent of the Entail to the Son did prevent the Contingent Remainder, was the Queſtion? It was argued, that it did not, becauſe the Inheritance came to the Son by Act in Law. And the Opinion in Cordal's Caſe in 1 Cro. 315. was cited; the great Reaſon in Chudley's Caſe, and other Caſes, wherein Contingent Remainders have been held to be deſtroyed, was for the preventing of Perpetuities, which would have been let in, if Contingent Remainders had been preſerv'd, whatever Act had been done by thoſe which had the actual Eſtate. But there is no ſuch Neceſſity of making the like Conſtruction upon Acts in Law. If Leſſee for Years make the Leſſor Executor, the Term

1 Salk. 326. is not drowned: But if the Executor, that hath a Leaſe, purchaſes the Inheritance, the Term is gone, becauſe it is his own Act; but in the other Caſe, the Law ſhall not work that, which muſt be conſtrued a Devaſtavit. In Lewis Bowles's Caſe in 11 Co. and Co. Litt. where there is an Eſtate for Life, Remainder to the firſt Son, Remainder in Fee to the Tenant for Life; the Eſtates at firſt cloſe and open again upon the Birth of the firſt Son, which ſhould take the Remainder. And ſo it may be here.

But

But the Court ſeemed to be of Opinion, That the contingent Remainder was deſtroyed by the Deſcent of the Eſtate-tail. And Rainsford, Chief Juſtice, relied upon Wood and Ingerſol's Caſe in 2 Cro. 260. where a Deviſe was to the firſt Son for Life, Remainder to the Son which ſhould ſurvive; and there three Judges againſt one held, That the Deſcent of the Fee upon the firſt Son prevented the contingent Remainder to the Survivor. Et adjornatur. 2 Saund. 286, 287, 386, 387. This Judgment was affirm'd per tot' Cur'. 2 Jones 77. Poſtea 345.

Note, In Lewis Bowle's Caſe the Eſtates were united at the firſt, upon making of the Conveyance.

Smith *verſus* Tracy.

IN a Prohibition the Caſe was, One died Inteſtate; and whether his Brother of the Half-Blood ſhould come in for Diſtribution, (upon the new Statute of 22 & 23 Car. 2. cap. 10.) was the Queſtion? 2 Lev. 173. Ch. J. Jones 93. 1 Mod. 209. 3 Keb. 669, 730. Poſtea 316, 323. 2 Mod. 204. 2 Vent. 317. Show. Parl. Caſes 108.

It was argued, That the Half-Blood ſhould have no Share; for the Words are, The next of Kindred to the dead Perſon in equal Degree; which the Half-Blood is not. The Words likewiſe are, Thoſe which legally repreſent their Stocks; and that muſt be intended, in an Act of Parliament, ſuch as the Common Law makes to be Repreſentatives, and not the Civil Law, For then it would be, that the Baſtard-eigne ſhould come in for Diſtribution. For their Rule is, that ſubſequens matrimonium facit legitimum. Granting of Adminiſtration was originally Temporal, and came to the Church-men by the Indulgence of Princes, and therefore muſt in ſome Sort be governed by the Temporal Laws. In Adminiſtrations the whole Blood ought to be preferred before the Half-Blood; for next of Kin ſhall be taken to be meant by the Statute, ſuch as our Laws judge to be ſo, Roll. Tit. Prohibition 303. and ſo it was held in one Brown's Caſe before the Delegates in 8 Car.

This being a new Caſe, the Court gave no Opinion; but adjourned it to the next Term. Poſtea 316, 323.

Termino Paſchæ, Anno 29 Car. II.

In Banco Regis.

NOte, Where Juſtices of the Peace find a Force, and make Record of it upon their View; they are to commit the Offenders, but cannot reſtore the Poſſeſſion.

Anonymus.

A Prohibition was prayed to a Suit in the Spiritual Court, for Money taxed for the Reparation of the Church, upon a Surmize that the Tax was impoſed upon one Part of the Pariſh, omitting the reſt, And for this was cited Roll. Tit. Prohibition 291. in the Point.

Poſtea 335. But the Court doubted, in regard it was not alledged, That they had offered that Plea in the Eccleſiaſtical Court; becauſe Reparation of Churches is proper for their Cognizance. But the Prohibition was granted, and the other might demur, if they thought fit: But afterwards in this Term it was countermanded.

Anonymus.

Admiral Juriſdiction. A Prohibition was prayed to the Admiralty, where there was a Libel for a Ship taken by Pirates, and carried to Tunis, and there ſold; for that it did not appertain to the Court to try the Property of the Ship, being ſold upon Land.

Curia. In regard it was taken by Pirates, it is originally within the Admiral's Juriſdiction, and ſo continues notwithſtanding the Sale afterwards upon the Land. Otherwiſe where a Ship is taken by Enemies, for that alters the Property: And this was the Opinion of the Court in Eglesfield's Caſe, in my Lord Hale's Time, contrary to my Lord Hobart in the Spaniſh Ambaſſador's Caſe 78. In 1 Cro. 685. they have Cognizance of the Caſe of the Pirate, becauſe incident to the principal Matter.

Vide antea 1, 47, 123, 173, 174.

But afterwards it was obſerved upon the Libel, that there was no Mention made, That the Ship was taken ſuper altum Mare. And tho' there was contained therein very much to imply it, yet the Court held that to be abſolutely neceſſary to ſupport their Juriſdiction.

Note. One taken upon an Excom' Cap' was diſcharged; becauſe the Writ de Excom' Cap' was not delivered into this Court and enrolled, as is required by the Statute. Poſtea 338.

Robinſon *verſus* Woolly.

IN an Ejectment upon a Special Verdict, the Caſe appeared to be thus: 2 Lev. 199. Ch. J. Jones, 78.

A Clerk was admitted and inſtituted to a Benefice within the Dioceſe of Glouceſter whilſt the Biſhoprick was vacant, and a Mandate from the Archbiſhop for Induction; but before it was executed by the Archdeacon, a new Biſhop of Glouceſter was conſecrated; and whether the Induction coming after was ſufficient, was the Queſtion? Poſtea 319. 3 Keb. 747, 773, 821.

That it was,

It was argued, That after the Mandate made, it was executed ſo far as the Biſhop had to intermeddle in the Matter. For if no Induction does follow, the Remedy lies not againſt the Biſhop, F. N. B. 47. H. but an Action upon the Caſe againſt the Archdeacon; for the Induction is ſaid to be a temporal Act, 1 Roll. 125, 195. Neither can ſuch Mandate be revoked by the Biſhop, or be inhibited by the King, 1 Roll. 294.

Again, The Archbiſhop hath a concurrent Juriſdiction with the Biſhops throughout his Province, and may admit and inſtitute until the inferior Biſhoprick is full. And the Statute of 23 H. c. 9. takes away the Juriſdiction of the Metropolitan only as to Proceedings in that Court: In Caſe the inferior Ordinary refuſes to admit, the Archbiſhop may do it, as appears Hob. 13. Hutton's Caſe, and Mo. 879.

It was ſaid on the other Side, That this was but an Authority derived from the Biſhop, and therefore ceaſing before it was executed, is determined. The Biſhop may direct his Mandate to another, as well as the Archdeacon. It was compared to a Letter of Attorney, to make Livery, which cannot be done after the Death of him that gave it. Et adjornatur. Poſtea 319.

Anonymus.

IN an Information of Forgery, the Defendant challenged one of the Jury, for that the Proſecutor had been lately entertained at his Houſe: This was admitted to the Favour, tho' againſt the King, (Vide for that in 1 Cro. 663.) And then the Counſel for the King challenged another, and were preſſed to alledge the Cauſe; for 33 Ed. 1. does take away the General Challenge, quia non ſunt boni pro Rege. Challenge. 1 Salk. 152, 153. 3 Salk. 81. Poſtea 366. 2 Vent. 58.

Raym. 473, 474.

But all the Court (ſave Wylde, who ſeemed to be of another Opinion) ordered the Panel to be firſt gone through, and if there were enough, the King is not to ſhew any Cauſe.

Vertue *verſus* Bird.

3 Keb. 766. 2 Lev. 196. 2 Cro. 386. 1 Roll. Rep. 275.

IN an Action upon the Caſe, the Plaintiff declared, That it was agreed between him and the Defendant, that he ſhould carry the Defendant's Timber from a certain Place to the Defendant's Houſe; then and there to deliver at ſuch Place as the Defendant ſhould appoint; and that ſuch a Day and Year he did carry with certain of his Carts to the Place aforeſaid, the ſaid Timber, there ready to be delivered, but that the Defendant delayed by the Space of ſix Hours the Appointment of the Place; inſomuch that his Horſes being ſo hot with Carrying of the Timber aforeſaid, and ſtanding in aperto aere, they died ſoon after.

After Not guilty pleaded, and a Verdict for the Plaintiff, Ventris moved in Arreſt of Judgment, That here did not appear any Cauſe of Action; for it was the Plaintiff's Folly to let the Horſes ſtand: Neither was the Defendant under the Penalty of an Action bound to receive the Timber, or appoint a Place; but in Caſe of Refuſal the other might recover what he contracted for the Carriage, having done all on his Part; but not to bring an Action for not appointing of a Place. And by the Opinion of all the Court the Judgment was ſtayed. Vide 2 Cro. 386. Roll. Rep. 275. Baily and Merrit.

Anonymus.

2 Salk. 492, 524, 527. That the Juſtices Order either confirm'd on Appeal, or not appeal'd from, is concluſive and final.

IT was moved for the ſetting aſide of an Order of Seſſions, for the Settling a poor Perſon in a Town, which had been ſent thither by a Warrant of two Juſtices, and it was confirmed upon an Appeal to the Seſſions.

But the Court would hear nothing of the Merits of the Cauſe; the Order of the Seſſions being in ſuch Caſe final, unleſs there were an Error in the Form.

Note, A Man gives a Warrant of Attorney to confeſs a Judgment, and dies before the Judgment is confeſſed: This is a Countermand.

Anonymus.

1 Salk. 122. 2 Salk. 480. 3 Salk. 66.

JUſtices of the Peace at the Seſſions ordered the Father of him which had the Baſtard-Child, to provide for it under the Pretence of the reputed Grandfather; for the Statute doth enable them to tax the Grandfather of a legitimate Child.

But in this Case the Court held, There was no Colour, and therefore quashed the Order. And Wylde said, It was well Westminster-Hall Doors were open. Blackerby's Cases 40, 41.

Kent *versus* Derby.

INdebitat' Assumpsit. The Plaintiff declared, That the Defendant being indebted to him in a certain Sum, pro diversis mercimoniis ante tunc venditis & deliberatis ad requisitionem of the Defendant to a Stranger, did promise to pay, &c. After Verdict for the Plaintiff, it was moved in Arrest of Judgment, That this was but a collateral Promise, and that no Indebitatus Assumpsit would lie, for the Debt was from the Person to whom the Goods were sold. Wylde and Jones held the Action well brought, and cited an Action for Indebitatus Assumpsit lately in this Court, against one for Money promised in Marriage with his Sister. Vide R. 120 & 122. Sed Rainsford Chief Justice contra. But the Plaintiff had Judgment. 2 Vent. 36. 3 Keb. 756. Antea 268, 293.

Termino Sanctæ Trinitatis, Anno 29 Car. II.

In Banco Regis.

Howlet *versus* Carpenter.

THE Case upon a Special Verdict in Ejectment was this: A Copyholder of a Dean and Chapter levied a Fine with Proclamation, and five Years passed without any Seisure or Claim by him that was Dean at the Time of the Fine levied; and whether the succeeding Dean was barred, was the Question? And the Court at the first opening held clearly that he was not; for if so, the Statutes of 1 & 13 Eliz. which restrain the Alienation of the Church-Revenue, would be of small Effect. 11 Co. Case of Magdalen College. 3 Keb. 775.

The Company of Ironmongers *versus* Nailer.

IN Trespass upon Not guilty, a Special Verdict was to this Effect; That Nailer being one of the Officers for collecting of the Duty of Hearth-Money, distrained for a certain Sum, accruing for the Chimneys of a new built House which had never been inhabited; neither did it appear, that there had been any Account of the Chimneys thereof returned into the Exchequer. There were made three Questions: Ch. J. Jones, R. 85. Pollexf. 207. 2 Mod. 185. 3 Keb. 719, 757. Antea 191, 192.

First,

First, Whether any Thing shall be paid for Chimneys in such new built Houses?

Secondly, Whether the Distress can be for Duty in other Places than at such Houses?

Thirdly, Whether there can be any Distress taken before such Time as the Account of the Chimneys be returned into the Exchequer?

As to the first Point the whole Court were clear of Opinion, That such new Houses which were never inhabited, were chargeable; (for the Words of the first Act are express, (viz.) That every Dwelling and other House, and Edifice (other than such as are after excepted) shall pay. And there is no Exception that extends to such House, altho' it were objected, that the Proviso in the Act of 14 is, That the Duty shall be chargeable only on the Occupier, and every Clause in the Act runs upon Occupiers; and the Act of 15 recites the King's Revenue to have been much obstructed, for Want of just Accounts of Chimneys, under the Hands of the Occupiers; and the Act of 16, charges the next Occupiers with the half Year's Payment, where the former Occupier removed before it grew due; which implies, that if an House stood empty for longer Time it should not be paid.

Again, It is appointed to be demanded at the House, and in Case of Refusal to distrain; which shews an Intention, that it should be inhabited.

But it was answered, That the Words before-mention'd were so full as not to be avoided, and that there were sundry Clauses also in the Act which did import an Intention, that empty Houses should pay; and so hath been the Practice ever since the Act, and that there was no Manner of Difference between these Houses, which were new built, and other Houses; That in Case there was no Tenant, the Owner was understood to be Occupier; as if the Owner grants an House in his Occupation, it would be well, if he did not inhabit it himself, if it were inhabited by no other. The Act of 13 & 14, appoints Notice to be fixed upon the Door; for an Account to be given in Case there were no Inhabitant, and six Days after such Notice to enter and take an Account, which shews they meant that empty Houses should be chargeable; and why not as well for Chimneys, whereof no Use is made?

As to the second Point, The Distress is well taken, tho' it doth not appear to be after an Account made into the Exchequer, for the Duty accrues before; and that is provided only, that the King might be apprized of the Number of Chimneys, and so there might be a Check upon the Collectors when they make their Accounts; neither is any Process appointed to go out upon such Return of the Number of Chimneys. The Statute of 21 Jac. appoints Informers to be sworn, but if an Informer be not sworn, 'tis but a Neglect in the Officer: The Proceedings are notwithstanding sufficient,

ficient, Mo. 447. where 21 H. 8. appoints the Enrolments of Diſpenſations in Chancery; yet if not done, it does not invalidate the Diſpenſation.

Thirdly, The Diſtreſs was reſolved to be well taken being in the King's Caſe; for an Act of Parliament ſhall be expounded according to the Reaſon of the Law in ſuch Caſes.

Note, Liveſay, the Secondary, craved the Opinion of the Court, whether he ſhould tax treble Coſts in this Caſe? For the Act of 14 gives treble Coſts where any Perſon is proſecuted, for what he ſhould do in Execution of that Act, &c. which Act appointed the Conſtables, &c. to collect and execute the Act. But now by Virtue of the ſubſequent Acts for the Chimney-Money; the Collection, &c. is by other Perſons, and the Doubt is, Whether they can have treble Coſts by the Act of 13 and 14. Ch. J. Jones's Rep. 85.

But the Attorney General, who was of Counſel with the Defendant ſaid, he would inſiſt upon treble Coſts at this Time, becauſe this Cauſe was brought on by Conſent, for the Determination of the Doubt about new empty Houſes paying, but deſired that it might be without Prejudice.

Baker *verſus* Baker.

A Prohibition to the Delegates. The Caſe was, That Adminiſtration had been granted to the Wife, upon which an Appeal was brought by the Mother of the Inteſtate, upon this Allegation, (int' al') That the Wife had covenanted, that ſhe would not intermeddle in the Adminiſtration, in Regard ſhe had been otherwiſe ſufficiently provided for; for it was ſaid, that the Eccleſiaſtical Judges had not to do with ſuch Matter. But it was objected on the other Side, That it fell incidently into the principal Matter whereof they had Conuzance, but they might be prohibited, if they judged the Effect of it contrary to our Law; neither did it appear, that the Delegates would admit of this Allegation, and there were no Precedents for a Prohibition quia timet. 3 Keb. 759, 783, 858.

But on the other Side it was ſaid, That there would go a Commiſſion out to examine this Matter of Courſe before the Judges Delegates ſhould ſit to hear the Merits of the Caſe, and that would take up ſo much Time, that many of the Goods being bona peritura, would be loſt, (but Note, the Eccleſiaſtical Judges may provide for the Diſpoſition of them, in Caſe of ſuch Neceſſity, pendente lite.) And the Court granted the Prohibition quoad that Allegation only.

Tothil *verſus* Ingram.

1 Mod. R. 216. 2 Mod. 93, 281. 2 Lev. 210. 3 Keb. 785, 829. 1 Lev. 100.

IN Replevin the Defendant avowed for an Heriot, and Arreats of Rent upon a Leaſe.

In Bar of this Avowry, as to the Heriot the Plaintiff pleaded, That in a former Replevin brought by him againſt J. S. the ſaid J. S. made Conuſance as Bailiff to the Defendant, for the ſame Heriot, and was barred: And to the reſt he pleaded a Releaſe of all Demands, made unto him by the Avowant before this Rent accrued, and to this the Avowant demurred;

Firſt, For that he doth not ſhew, that he which made Conuſance was Bailiff to the now Avowant, for he might make Conuſance without his Privity; and if ſo, it could be no Bar to him now.

1 Sid. 141. 2 Salk. 578. 1 Lev. 100.

As to the Releaſe it was ſaid, That a Rent incident to a Reverſion would not be barred by ſuch Releaſe: And ſo it was adjudged in this Court, in Hen and Hampſon's Caſe, in the Year 1662, by Foſter Chief Juſtice, Wyndham and Mallet, againſt the Opinion of Twiſden, who now ſaid that that Reſolution was contrary to Littl. Sect. 510. who ſaith, That a Releaſe of all Demands will extinguiſh a Rent-ſervice. And it was ſaid, That in Hancock and Field's Caſe, 2 Cro. 170. it was adjudged, That ſuch Releaſe will extinguiſh a Rent reſerved upon a Leaſe, tho' not a Covenant before it be broken.

1 Mod. 99.

To which it was anſwered, That in Witton and Bye's Caſe, 2 Cro. 486. it is reſolved, That if a Leſſee aſſigns over his Term reſerving a Rent, it will be extinguiſhed by Releaſing of all Demands. But Houghton makes a Difference between ſuch a Rent, and a Rent incident to a Reverſion.

For the firſt Point the Court held, That if the Bailiff had no Authority to make Conuſance, it ought to be ſhewn on the Avowant's Part; for otherwiſe it ſhall be intended; and this may be traverſed by the Avowant here, tho' the Plaintiff in Replevin, when Conuſance is made, cannot traverſe the Being Bailiff.

But for the ſecond Point, adjornatur. Adjudg'd, That a growing Rent is not releas'd by a Releaſe of all Demands. 2 *Salk.* 578.

Sir Walter Plomer *verſus Sir* Jeremy Whitchcot.

2 Lev. 158. Ch. J. Jones 60, 61. 2 Mod. 119. 3 Mod. 143. King v. Lenthall. 3 Keb. 591, 656, &c.

THE Court were this Term to give their Opinions in the grand Point, (viz.) Whether Sir Jeremy Whitchcot, Warden of the Fleet, were liable for Eſcapes ſuffered by Duckenfeild his Leſſee; Duckenfeild being inſufficient. But the whole Court obſerving an Imperfection in the Verdict, which found that Duckenfeild was inſufficient when put in, and at the Time of his Eſcape, but it was not found that he was ſo at the Time of the Action brought; hereupon they declared, That they were all agreed, that Sir Jeremy

Whitchcot was liable, if the ſaid Matter had been found, but that they could not give Judgment upon the Verdict as it was found; whereupon the Parties were permitted to take a Venire facias de novo, but they rather choſe to have a Nil capiat, *&c.* entred, and ſo bring a Writ of Error; for their Counſel were very ſtrong, that that Matter ſhould be intended in a Special Verdict, and their Declaration did alledge him to be inſufficient at the Time of the Action brought, But Sir Jeremy Whitchcot ſoon after died, and ſo the Writ of Error did not proceed.

Ent *verſus* Withers.

IN Debt againſt an Executor, ſuggeſting a Devaſtavit, and to charge him in his own Right. 2 Lev. 209. 3 Keb. 797. 825.

The Defendant pleaded a frivolous Plea, to which it was demurred; but then Exception was taken to the Declaration, That it did not ſet forth any Judgment obtained before, againſt the Executor de bonis teſtatoris, without which this Action would not lie in this Manner. Vid. Wheatly and Lane, Hill. 20 & 21 Car. 2. in Saunders. And of that Opinion were the Court; but Serjeant Pemberton deſiring to argue it, ſaying there was no Difference in Reaſon between the Caſes, adjornatur. 1 Lev. 231. 255. 2 Lev. 45. Poſtea 321. 3 Keb. 735. 1 Saund. 216. 1 Sid. 397.

Anonymus.

THE Court ſaid, That in Caſe of an Indictment and Iſſue joined, the Party could not carry it down to try it by Proviſo, for it lay not againſt the King. So held per Cur' 2 *Salk.* 652. 1 Sid. 316. contra.

Aſtree *verſus* Ballard.

THE Caſe was, The Plaintiff had recovered againſt two in Trover, and now brought a Scire facias againſt the Bail; who pleaded, That he had taken one of the Principals in Execution, before the Scire facias taken out, 1 Ro. 897. If one hath Execution againſt the Principal, he cannot afterwards proceed againſt the Bail, nec econtra. But Paſchæ 28. of this King it was reſolv'd in the Caſe of Orlibary and Norris, where the Bail was taken firſt in Execution, and afterwards the Principal, that they ſhould be both detained until Satisfaction, contrary to 1 Ro. 897. So that it appears, that the Plaintiff ſhall not be concluded by his Election to proceed againſt the one firſt. But here the Difficulty is, that the Bail by the Plaintiff's Act is diſabled to bring in both their Bodies according to the Condition of the Recognizance, he having taken one of them himſelf. Et adjornatur. Judgment for the Plaintiff. 2 *Mod.* 312. 2 Lev. 195. 2 Mod. 312. 1 Sid. 107. T. Jones 75. 3 Keb. 709, 723, 761, 765, 766, 776.

Smith *verſus* Tracy.

Antea 307. Poſtea 323. 2 Vent. 317. 1 Lev. 173. Sir T. Jones 93. 3 Keb. 669, 730, 776, 806, 831. Parl. Caſes, 108.

IN a Prohibition the Caſe was, Eliz. Smith died Inteſtate, leaving two Brothers, one of the whole Blood, and the other of the half Blood: And in the Eccleſiaſtical Court, they would admit the half Blood to come in for Diſtribution with the whole Blood, upon the Act of 22 and 23 Car. 2. cap. 10. Upon which a Prohibition was granted, to which there was a Demurrer. And the Queſtion came upon theſe Words in the Act, (viz.) That Diſtribution is to be made to the next of Kin of the Inteſtate, who are in equal Degree, and ſuch as legally repreſent them.

For the Plaintiff it was ſaid, That Statutes were to be expounded by the Reaſon of the Common Law, which took no Conſideration of the half Blood; inſomuch that an Eſtate ſhould rather eſcheat than deſcend to the half Blood: Then the Words of the Act are, ſuch as legally repreſent them, which they both do the common Anceſtor, but not one another. In this Caſe Conſideration is to be had of the Intent of the Inteſtate, which muſt be ſuppoſed to prefer the Brother of the whole Blood. Dyer 372. Iſted's Caſe, where the Executor dies Inteſtate, the Reſiduary Legatee of the firſt Teſtator ſhall have Adminiſtration, and not the next of Kin, becauſe that is ſuitable to the Intent.

On the contrary it was argued, that altho' the half Blood be rejected in Deſcents; yet it is regarded in other Caſes. 3 Co. in Ratcliff's Caſe, the half Blood may be Guardian in Soccage. Vid. 2 Ro. 303. and Style's Rep. 74, 75. for granting of Adminiſtrations to the half Blood; there cannot be two Degrees made of the whole Blood, and the half Blood; neither does the Law make any Diſtinction, but when it wholly excludes them.

Curia. The Intent of this Act was, to give the Eccleſiaſtical Court the Juriſdiction in this Matter, and to provide for the Diſtribution of Inteſtates Eſtates; which they had a long Time attempted and conteſted, but were ſtill prohibited, but now this Act permits them to proceed; and it were fit we ſhould be informed, what their Courſe is and has been, and therefore let us hear the Civilians as to this Point. Poſtea 323.

The King *and* Marlow.

3 Keb. 736.

THE Defendant, being a Printer, was indicted, for his ſecond Offence, for Printing of a Seditious Book contrary to the Act of 14 Car. 2. cap. 33. and being found Guilty at the Seſſions of the Old Baily, the Judgment was given, That he ſhould be for ever diſabled to exerciſe the Art or Myſtery of Printing, and pay 20 l. Fine, and to ſtand in the Pillory; and a Writ of Error was brought

brought, and Errors were assigned in the Judgment, as varying from the Words of the Act. For,

First, The Act is, That he should be disabled to exercise the Art and Mystery of Printing or Founding of Letters: And the Judgment is only to disable him from Printing.

Secondly, The Act is, That he shall receive such further Punishment by Fine, Imprisonment, or other Corporal Punishment: And the Judgment is, both for Fine and Corporal Punishment, when it ought not to be for both.

Curia. The first is, as it should be; for Printing and Founding of Letters are two distinct Trades; and the Words are to be taken respectively to such Trade as the Defendant is of.

Again, 'tis a Rule, That a Man shall not assign an Error in that which is for his Advantage.

But the second was held an Error, for that the Act did not intend a Fine and Corporal Punishment both, and therefore the Judgment was reversed.

Termino Sancti Michaelis, Anno 29 Car. II.

In Banco Regis.

Davis *versus* Price.

IN Error upon a Judgment in the Common Bench in an Action of Trover, where Judgment was given by Default. 3 Keb. 693, 694.

The Error was assigned in the Declaration, which was de decem Juvencis (Anglice Bullocks and Heifers,) and not said how many of one and of the other.

But it was answered, that the Latine Word being proper and of known Signification, the Anglice was void, according to Osborn's Case, 10 Co. But the Court reversed the Judgment, and cited the Case before in this Court, Trover de viginti ovibus matricibus & agnis: And it was resolved to be naught, for not ascertaining the Number of each. But Twisden said, There was a Trover brought de viginti averiis, (*viz.*) bobus, agnis, *&c.* and viginti was applied to each Species, and held well. It was offered in this Case, to distinguish it from the Case de ovibus matricibus & agnis, that there the Latin was of two Sorts; Sed non allocatur, for the Words here being Equivocal, it was all one. Vide Antea 71. 1 Mod. 46. 2 Saund. 74. 1 Sid. 445. 2 Ven. 78. 2 Salk. 654.

Dutton & *Uxor verſus* Pool.

3 Keb. 786, 814, &c. Ch. Juſt. Jones 102. Poſtea 332. Antea 6, 7. 2 Lev. 210. 3 Lev. 139.

IN Aſſumpſit, the Plaintiff declared, That his Wife's Father being ſeiſed of certain Lands now deſcended to the Defendant, and being about to cut a Thouſand Pounds worth of Timber off from the ſaid Lands, to raiſe a Portion for his ſaid Daughter; the Defendant promiſed to the Father, in Conſideration that he would forbear to fell the Timber, that he would pay the ſaid Daughter 1000 l.

After Verdict, upon Non Aſſumpſit, for the Plaintiff, it was moved in Arreſt of Judgment, that the Father ought to have brought this Action, and not the Husband and Wife; and there was a Caſe ſhewn to be adjudged in the Common Bench, Hillary 23 and 24 Car. 2. Rot. 1538. between Pine and Norris, where the Son promiſed the Father, That in Conſideration that he would ſurrender a Copyhold to him, that he would pay a certain Sum to his Siſter, for which ſhe brought the Action, and then held that it would lie for none but the Father: for where the Party to whom the Promiſe is to be performed, is not concern'd in the meritorious Cauſe of it, he cannot bring the Action, But if a Promiſe were to a Man, that if his Daughter ſhould marry his Son, he would give her 1000 l. there, becauſe the Daughter does the Act, which is the Conſideration, ſhe may bring the Action.

Raym. 302. T. Jones 103.

On the contrary, the Caſe was cited, 1 Rol. 32. Starkey and Miln, where, in Conſideration of certain Goods ſold, the Promiſe was to pay Part of the Money to another, there that other might bring the Action. And it differs from the Caſe where Money is delivered to A. to pay over to B. B. may bring Debt. Yelv. 24. If the Father had in the Caſe at Bar cut the Trees, and the Son had ſaid, Let me have the Trees, and I will pay the Daughter ſo much, that had been the ſame with the Caſe before cited, 1 Rol. and it doth not ſeem to differ, as it is 1 Cro. 163. Rookwood's Caſe, where the Father being about to charge the Land with a Rent of 4 l. per Annum to his Younger Sons, the Eldeſt promiſed, That if he would forbear to charge the Land, he would pay the 4 l. per Annum, and the Sons upon this brought the Aſſumpſit, and recovered. (Sed vide librum, that Promiſe is ſaid expreſly to be made to the Sons who were preſent) Vid. 1 Cro. 619, 652. Levit and Haw's Caſe, where the Promiſe was made to a Man, in Conſideration, that he had agreed that his Son ſhould marry his Daughter, and to ſettle ſuch a Jointure upon her, that he would give the Son 200 l. with her; and for this the Father brought the Action, and held well brought, tho' the Court ſeem'd to incline, that the Son might alſo have brought it. And the Court here inclined for the Plaintiffs. Sed adjornatur. Poſt. 332.

Saunders *verſus* Williams.

IN an Action upon the Caſe, the Plaintiff declared, That he was ſeiſed in Fee of one Acre, and poſſeſſed for a certain Number of Years in another Acre, and had a Common in Black-Acre for Beaſts levant and couchant thereupon, and that the Defendant put his Beaſts in the Place, and diſturbed him. 3 Keb. 820. St. John and Moody, Antea 274, 275. Infra 356. 2 Vent. 138, 139, 185, 186, 288, 289, 292. T. Jones 48.

The Defendant pleaded a Title of Common to himſelf alſo there. Upon which Iſſue was joined, and found for the Plaintiff; and it was now moved in Arreſt of Judgment, That the Plaintiff had made no Title to the Common by Preſcription or otherwiſe.

Sed non allocatur: The Defendant being a Wrong-doer: And the ſame Matter was adjudged in the Court between St. John and Moody, Mich. 27. Car. 2. quod vide antea, and in 2 Cro. 43, 122. & 3 Cro. 500.

Robinſon *verſus* Woolly.

THE Caſe was this Term argued again: And Holt argued, That the Induction, tho' executed by the Archdeacon after the new Biſhop was conſecrated, was ſufficient. Antea 309. Ch. Juſt. Jones, 78. 2 Lev. 199. 3 Keb. 747, 773, 821.

The Biſhop is only to admit and inſtitute, and to ſend a Mandate to the Arch-deacon to induct, who is to do it de communi Jure; and therefore if the Biſhop hath admitted and inſtituted, and made a Mandate for Induction, 'tis a ſufficient Excuſe for him in a Quare impedit; (11 H. 4, 9.) for a Biſhop is meerly a Spiritual Officer. A Prebendary is to be inducted by the Dean and Chapter, Pl. Com. 529.

But 'tis objected, That the Archdeacon does not induct ex Officio, but a Mandate from the Archbiſhop is requiſite; (ſcilicet)

Firſt, The Mandate is to intimate to him, That the Party is inſtituted.

Secondly, To oblige the Archdeacon to induct, under the Penalty of an Eccleſiaſtical Cenſure.

But if it be granted, That the Archdeacon's Authority in this Matter is only derivative; yet that being executed (by the Mandate) quoad the Guardian of the Spiritualties, what remains to be done, remains only to the Archdeacon, who ſhall finiſh what hath proceeded ſo far already.

If a Venire be awarded to the Coroners, becauſe of Kindred in the Sheriff's Family; tho' a new Sheriff comes in before it be returned, yet the Coroner ſhall proceed in the Execution thereof. The Sheriff ſeized Goods by a Fieri facias, and before they were ſold a new Sheriff was made, and then he ſold them; and it was reſolved that the Sale was good, in 2 Cro. 73. Ayre and Aden's Caſe. 3 Sal. 323.

Sed

(Sed nota, the Court ſaid, That if the old Sheriff had returned, That the Goods had remained in his Hands pro defectu emptorum, a Diſtringas ſhould have gone to have them delivered to the new Sheriff, and then a Venditioni exponas ſhould have gone to the new Sheriff. Vid. Yelv. 44.)

In 2 Cro. 48. the Executors of the Biſhop of Carliſle were admitted to proceed in a Suit commenced by the Teſtator in the Eccleſiaſtical Court, becauſe the Suit was well commenced, and the Court were poſſeſſed of the Cauſe: Where Commiſſioners of Oyer and Terminer have given Judgment, and a new Commiſſion granted which determines the old; yet the former Judgment may be executed, Bro. Tit. Commiſſion 13. So by the Sitting of the King's Bench, the Commiſſion at the Old Baily, being in the ſame County, is ſuperſeded, and yet Execution is done in Term-time.

But the Court ſaid, That was by the Statute of 2 E. 6.

Again, Induction is but a Formality, and therefore ſhall not be ſo ſtrictly examined. Where the Queen granted to two the Stewardſhip of a Manor, it was held, That Admiſſion by one of them was ſufficient. Mo. 107. Noy's Reports, (Quære that Caſe) the Archdeacon having received a Mandate for Induction, makes a Precept omnibus literatis infra Archidiaconatum to induct, and a Clerk who did not belong to the Archdeaconry made the Induction; and this was held to be well enough.

Saunders contra. The only Queſtion is, Whether the Archdeacon induds by his own Authority, or derivative from the Biſhop? For if by the later, then the Induction cannot be good.

'Tis clear, That the Archdeacon is but Miniſter Epiſcopi, and in his Precept to thoſe of the Clergy to execute, he does as a Sheriff doth, who in his Precept to his Bailiffs, recites his Mandate. If the Sheriff makes Execution after the King's Death, if he hath Notice thereof he is excuſed in Treſpaſs; but the Execution ſhall be avoided. It appears by the making of the Statute of 2 E. 6. of executing Judgments given by Commiſſioners after ſuch Time as the Commiſſion is expired, is a great Doubt; and yet there the Thing was executed in a great Part: But here 'tis but one ſingle Act, whereof no Part was done before the new Biſhop was made. In Sir Randolph Crew's Caſe in 3 Cro. 97. it appears, that Commiſſioners to examine Witneſſes could not proceed after Notice of the Demiſe of the King.

But here 'tis objected, That the Verdict finds that the Archdeacon had no Notice.

I anſwer, That the Conſecration of a Biſhop is a publick and notorious Act.

And all the Court were of Opinion, That the Induſion was wholly void, and gave Judgment for Woolly the Defendant, and ſaid, It was a Miniſterial Act in jure Epiſcopi, and like a Letter of Attorney to deliver Seiſin, which cannot be executed but in the Life of him that made it. Antea 309.

It was afterwards Reverſed in the Exchequer-Chamber. Ch. Juſt. Jones f. 79.

Quære, Whether this Judgment was not afterward reverſed in the Exchequer-Chamber.

Ent *verſus* Withers.

THE Caſe was, Debt againſt the Executor upon a Bond of the Teſtator, and it was brought in the Debet and Detinet, ſuggeſting a Devaſtavit in the Executor.

Antea 315. 2 Lev. 209. 3 Keb. 797, 825.

The Defendant demurred: For altho' ſuch Action will lie, if there has been a Judgment againſt the Executor, yet no ſuch Action has been upon a Bond; and 'tis hard upon ſuch a Surmiſe to charge the Executor in his own Right.

1 Lev. 147, 255, 256. 2 Lev. 145, 209, 825.

But on the other Side it was ſaid, That this differs not in Reaſon from the Caſe of a Judgment, and upon Nil debet the whole Matter ſhall be brought in Queſtion; as whether the Bond was ſealed, &c? And in a Caſe between Merchant and Driver, tried at Guild-Hall before my Lord Hale, where it was brought as this; becauſe the Plaintiff could prove no actual Waſting (as is neceſſary in this Caſe) he was nonſuited. But Hale took no Exception to the Action.

But the Court ſaid, That they would extend theſe Actions no further than they had been already reſolved; and they would not agree, that an Executor ſhould be held to Bail upon a Surmiſe of a Devaſtavit, and ſo Judgment was given for the Defendant. Antea 315.

Poſtea 355. contra.

Pierce *verſus* Win.

ERror out of the Grand Seſſions of Wales: The Caſe upon a Special Verdict was thus;

Pollexfen 435. 3 Keb. 787.

A Deviſe to one and to the Heirs Males of his Body, with a Proviſo, That if he does attempt to alien, then immediately his Eſtate ſhall ceaſe, and another ſhall enter.

The Deviſee in Tail made a Feoffment, and he in Remainder entred, and Judgment was given in the Grand Seſſions for the Feoffee againſt him in Remainder.

And the Errors were aſſigned in the Matter in Law: And to maintain the Errors it was ſaid, That it muſt be agreed of all Hands, that a Tenant in Tail could not be reſtrained from Aliening by Fine or Recovery; and alſo, That in this Caſe a bare Attempt would be no Breach, according to Corbet's and Sir A. Mildmay's Caſe, &c. And alſo, That a Tenant in Tail might be reſtrained to alien by Feoffment or other Act which was tortious, and

and would make a Diſcontinuance; and here this Proviſo imports as much, and therefore the Feoffment will be a Breach; for that is an Attempt and more. For,

Firſt, In Conveyances, the Intention of the Words of a Condition and the Subſtance is regarded, and the Form of the Words not ſo preciſely followed. As a Feoffment upon Condition, That the Feoffee ſhall give the Land in Frank-Marriage with the Daughter of the Feoffor: This cannot be ſtrictly purſued; yet the Feoffee muſt make a Gift as near as may be. Co. 1 Inſt. 217. So upon Condition to give the Land to a Layman in Frank-Almoign: But this Rule holds (eſpecially in Wills) where the Intent is chiefly looked upon. A Deviſe of all his Rents will paſs Reverſions upon Leaſes, and tho' the Words be here, Proviſo, if he does attempt to alien; 'tis as much as to ſay, Proviſo, if he doth alien, &c.

Secondly, Whether the Feoffment ſhall determine the Eſtate quaſi by Limitation, ſo that the Remainder-Man ſhall take immediately by Executory Deviſe? and that is very clear. For tho' in M. Portington's Caſe in 10 Co. 'tis ſaid, That the Word Condition ſhall not in a Will be taken as a Limitation; yet the Current of the Authorities ſince are otherwiſe.

Antea 200.

But here the Court held the Condition void; For a Man cannot be reſtrained from an Attempt to alien: For non conſtat what ſhall be judged an Attempt, and how can it be tried? And when the expreſs Words are ſo, there ſhall not be made another Sort of Condition than the Will imports. And ſo the Judgment was affirmed.

Osborn *verſus* Beverſham.

3 Keb. 800, 810, 828. 2 Lev. 209.

DEbt for Rent, incurred at two half Years.

As to one of them the Defendant pleaded non debet.

And as to the other, Actio non; becauſe he ſays, He was ready to pay it at the Day and Place, and has been ever ſince; & profert in Cur' the Rent, ideo petit Judicium de damnis. To which the Plaintiff demurred.

2 Salk. 583.

For that he did not ſay, quod obtulit; for where the Time and Place of Payment is certain, Semper paratus is no Plea without an Obtulit. 2 *Salk.* 624.

Raym. 419.

For the Defendant it was ſaid, That the Plaintiff ought to reply to a Demand. 1 Inſt. 34. 'Tis a good Plea for the Heir in Dower to ſave his Damages to ſay, That he was always ready. Raſtal's Entries 159. Semper paratus is pleaded without an Obtulit. So 1 Rol. 573. no Mention of a Tender.

Antea 252.

But then another Fault was found, That it was pleaded in Bar, whereas it ought to have been only in Bar of Damages, and not to the Action; and this was agreed to be fatal.

But

But the Court held the Plea to be naught for the other Cause also.

Smartel *and* Scholler.

IN an Ejectment upon a Special Verdict, the Case was: A Man devised his Land to J. S. after the Death of his Wife. And after Argument the whole Court were of Opinion, That J. S. not being Heir to the Devisor, there should go no implied Estate to the Wife; for an Heir shall not be defeated, but by a necessary Implication. Post. 376.

Vaugh 262, 264. 2 Lev. 207. T. Jones 98, 265, 6, 7. 2 Cro. 75. 3 Keb. 816, 832. Postea 376.

Frowd *and* Frowd.

AN Action for Words; for that the Defendant said of the Plaintiff, He would have given Dean Money to have robbed Golding's House, and he did rob the House.

After Verdict, it was moved in Arrest of Judgment, That the first Part of the Words import only an Inclination, and not that he did give any Money: And the Words, He did rob the House, shall be referred to Dean as the last Antecedent, and not the Plaintiff.

But the Court were of Opinion for the Plaintiff, as was adjudged where the Words were, He lay in wait to rob. Vide Cockain' Case in 1 Cro. and in 4 Co. And the Court said, That the Words might be construed, That the Plaintiff offered Dean Money, and he refusing it, that the Plaintiff robbed the House himself.

1 Sid. 191. Raym. 453, 454. T. Jones 84. 3 Keb. 805, 812, 841. 2 Lev. 20.

Smith *versus* Tracy.

THE Case being moved again, the Opinion of the whole Court was, That the Half-Blood should come in for Distribution upon the new Act; For as to the Granting of Administration, the being of Guardian, &c. the Half-Blood may be taken nearer of Kin, than a more remote Kinsman of the whole Blood. Mo. 635. Ro. Rep. 114. Antea 307, 316.

Antea 307, 316. 1 Show. 1. Molloy 316. 2 Ventr. 317. 2 Lev. 173. Sir T. Jones 93. Parl. Ca. 108. 3 Keb. 669, 730, 776, 831.

J——'s *Case*.

J BRings his Habeas Corpus: The Return was, That he was committed by J. S. J. N. T. K. (to whom, and others, a Commission of Bankrupt was awarded) for refusing to answer a Question put to him concerning the Bankrupt's Estate, &c. and so Commissus fuit in Custodia by a Warrant to the Officer Virtute Commissionis præd', & hæc est causa captionis seu detentionis, &c.

The Counsel for the Prisoner took three Exceptions to the Return.

First, For that there did not appear a ſufficient Authority: For the Commiſſion is ſaid to be granted to them and others, and then they could not act without the reſt; for the Return does not expreſs any Quorum, &c. in the Commiſſion.

Secondly, Inſtead of Commiſſus in Cuſtodia, it ought to be Captus, for that is the uſual Form: For this is, as if the Commitment were by the Officer that makes the Return.

Thirdly, Hæc eſt cauſa captionis ſeu detentionis, is uncertain; for it ought to be & detentionis.

And upon the firſt and laſt Exception, the Priſoner was diſcharged by the Court; but at the ſame Time was told by the Court, That he muſt anſwer directly to ſuch Queſtions as were put to him, in order to the Diſcovery of the Bankrupt's Eſtate, or elſe he was liable to be committed.

Note, By the Stat. 4 & 5 *Geo.* againſt Bankrupts, This is made Felony, *&c.*

Termino Sancti Hillarii, Anno 29 & 30 Car. II.

In Banco Regis.

Harrington's *Caſe.*

Poſt. 327. 3 Keb. 841.

AN Information was preſented againſt him, for that he maliciouſly and traiterouſly intending to ſtir up Sedition, and to create a Diſturbance between the King and his People, upon a Diſcourſe of the late Rebellion and thoſe Perſons which were executed at Charing-croſs for the Murder of the late King, in præſentia & auditu quamplur' utteravit & propalavit hæc verba pernicioſa ſequentia, (viz. Gubernatio noſtra conſiſtebat de tribus Statibus, & ſi eveniret Rebellio in Regno, niſi foret Rebellio contra omnes Status, non eſt Rebellio.

Upon Not guilty pleaded, he was found Guilty of Speaking the precedent Words, and not Guilty as to other Words contained in the Information.

It was moved in Arreſt of Judgment, That Gubernatio ſignified the Exerciſe and Adminiſtration of the Government, and not the State of it, which Regimen doth.

Again, That it was Conſiſtebat, and ſo might relate to the Britons or Saxons Time, or to the late Mutations of the Form of Government amongſt us, and that to put the Words in Latin (without an Anglice) was not to be allowed; for the Tranſlation might either aggravate or mitigate the Senſe; and that ſuch a Precedent might be prejudicial as well to the King, as the Defendant.

But those Exceptions finding little Weight with the Court, his Counsel proceeded to justify, or at least to extenuate the Words, alledging, That the Relation was so great between the King and People, that to raise a Rebellion against the King must also affect the other States, and this, whether the King be taken (as some would have it) as one of the three Estates; or (as others) that the Lords Spiritual and Temporal make two of the Estates, and the Commons the Third, and the King as Chief and Head of all, as is the Stat. of 1 Eliz. cap. 3. where the Lords and Commons call themselves the Queen's Obedient Subjects, representing the three Estates of the Realm of England, and so is 4 Inst. 1.

But the Court supposing that the Words did tend to set on Foot that Position upon which the War (levied in 1641 by the two Houses against the King) was grounded, were much displeased, that the Counsel would pretend to defend them, or put any tolerable Sense upon them.

It was also insisted upon by the King's Counsel, and agreed by the Court, That the antient Precedents, and many later also, were used to express the Words in Latin, and this pursuant to the Statute of E. 3. which requires, that their legal Proceedings should be in Latin; and if the Words were not so elegant, yet they would serve in an Information, &c. where 'tis rather chosen to put in Words agreeable to the Phrase of the Law, than to Tully's Orations.

And so the Court (Wylde being absent) delivered their Opinions for the King; but took Time to set the Fine, and immediately committed the Defendant (who before was upon Bail) as the Course is when Judgment is given, altho' no Fine was set. Post. 327.

Anonymus.

IT was said by the Court upon an Indictment against one for Refusing to take an Apprentice bound by the Church-wardens and a Justice of Peace according to 43 Eliz. that in such Case a Man cannot be compelled to accept an Apprentice. 3 Mod. 271. 1 Lev. 84. Raym. 66, 177. 1 Sid. 99.

Paget *versus Dr.* Vossius.

TRin. 26 Car. 2. Rot. 583. In an Ejectment upon a Special Verdict the Case appeared to be thus: 2 Lev. 191. Jones Ch. Just. 73. 2 Mod. 223. 3 Keb. 638, 749.

Dr. Brown by Will devised certain Lands to Dr. Vossius, the Defendant, (a Dutchman) during his Exile from his Country; and if it should please God to restore him to his Country, or that he should die, that then the Lands should go to the Lady Mary Heveningham in Fee, who was the Lessor of the Plaintiff.

It was found, That at the Time of Making the Will, and the Death of Dr. Brown, there was War between England and the States General, and that the Doctor was fallen into Diſpleaſure with the States, and that they had taken a Penſion from him of 140 l. per Annum, and that by Reaſon thereof he came over: But did not find that he was exiled by any Act of State, and that the War was now ceaſed, and that the Doctor might return, if he pleaſed; but it did not find that they had reſtored him to his Penſion, &c.

After divers Arguments on both Sides this Term, Judgment was given for the Defendant by the whole Court.

For they ſaid, There was a voluntary and compulſory Exile, and in Regard he was not exiled by any publick Edict, the Will muſt be underſtood of a voluntary Abſence from his Country: And the Jury found, That thoſe Matters which drove him away did ſtill continue, (viz.) The Depriving him of his Penſion.

Nota, Exilium is a Word known in our Law, (viz.) When Villains, by hard Uſage, are conſtrained to depart from the Manor.

And if it be objected, That this durante Exilio is a void Limitation, as being of unknown Senſe in our Law, 'tis ſtill againſt the Leſſor of the Plaintiff, and then ſhe cannot claim until the Doctor's Death, and in the mean Time the Deſcent muſt be to the Heir at Law. Exilium, quaſi ex ſolo; that is, as if it had been ſaid, During his Abſence from his Country.

The King *verſus* Plume.

2 Lev. 206. 3 Keb. 816, 843. Poſtea 346. 2 Show. 155, 210.

HE was indicted upon the Statute of the 5th of the Queen for that he had ſet up, uſed and exerciſed artem, myſterium ſive manual. occupationem Pomarii, Anglice, of a Fruiterer, being a Trade, Myſtery, or manual Occupation uſed in this Kingdom, the 12th Day of January, Anno Eliz. 5. in which Trade the ſaid Plume was not brought up by the Space of ſeven Years, &c. And to this the Defendant demurred.

For that it hath been held, That the Statute extends not to every Trade, but to ſuch an one as requires Art and Skill, and therefore not to a Hemp-dreſſer, as in 1 Cro. ſo in 2 Bulſtrode 188. nor to a Pippin-monger, as in 1 Roll. Rep. 10. And ſo a Gardiner hath been reſolved not to be within the Act. In the 14th of this King, the Indictment was for the Trade of a Barber, but no Judgment given; (but others ſaid, That in that Caſe Judgment was for the King.)

On the other Side it was ſaid, That the Queſtion here is not of thoſe which ſell Apples in Stalls; but the Trade of a Fruiterer is well known, and they are incorporated in London, and there

requires much Skill in Sorting of Fruit, and in Judging the Durableneſs thereof.

But the Court inclined for the Defendant. But being informed by the Counſel for the King, that there were many Precedents, it was adjourned. Poſt. 346.

Harrington's *Caſe.*

HArrington was again brought up, and the Court fined him a Thouſand Pounds, and awarded that he ſhould recant the Words in ſuch Words as the Court ſhould direct, and to find Sureties for his Good Behaviour for ſeven Years; after which he produced a Writ of Error returnable before the Lords then Sitting in Parliament, and prayed that it might be allowed, and that he might be admitted to Bail. Antea 324.

The Court ſaid, That they allowed the Writ, but would adviſe whether they ſhould Bail him or no, and ſo remanded him to Priſon.

Anonymus.

IN an Aſſault, Battery and Wounding, the Plaintiff after Verdict moved the Court for an Encreaſe of Damages; the Court ſaid they could not do it, if the Word Maihemavit was not in the Declaration.

Clark's *Caſe.*

UPon an Habeas Corpus to the Mayor, &c. of London, a Cuſtom was returned to diſfranchiſe, and commit a Freeman for Speaking opprobrious Words of an Alderman. 3 Keb. 764, 799, 811. Antea 302. 2 Lev. 200. 2 Salk. 426.

The Court ſaid, They might fine in ſuch Caſe, but the other Cuſtom would not not hold, notwithſtanding the Act of Confirmation of their Cuſtoms, which does not extend to unreaſonable Cuſtoms.

Termino

Termino Paſchæ, Anno 30 Car. II.

In Banco Regis.

Anonymus.

Antea 93.
2 Mod. 66.
2 Vent. 29.
1 Show. 350.

IN Treſpaſs of Battery by Baron and Feme, for Beating of them both.

Upon Not guilty, the Verdict was for ſo much Damage for Beating the Husband, and ſo much for Beating of the Wife.

The Court ſaid upon a Motion to arreſt the Judgment, That the Plaintiff might releaſe the Damages for Beating of himſelf, and take Judgment for the other.

The King *verſus* Mead.

AN Information was brought againſt him, upon the Statute of 17 Car. 2. which reſtrains Non-conformiſt Miniſters from inhabiting within five Miles of any City, Town-Corporate or Borough, that ſends Burgeſſes to Parliament, &c.

After Verdict for the King, it was moved in Arreſt of Judgment.

Firſt, That the Place of his Habitation was alledged to be within five Miles of London; but it was ſaid, That London ſent Burgeſſes to Parliament, which not being in the Record, the Judges were not to take Knowledge of. Sed non allocatur;

For the laſt Words of ſending Burgeſſes to Parliament ſhall be referred only to Boroughs; and therefore the Act reſtrains them from dwelling in Corporations, &c. tho' ſuch Corporations as ſend no Burgeſſes.

Secondly, It is alledged, That the Town where the Defendant dwells is within five Miles; but not that the Place of his Habitation in that Town was ſo, and therefore may be intended to be more remote.

Thirdly, There wants Vi & Armis. Sed non allocatur, ſed Judicium pro Rege.

Termino Sanctæ Trinitatis, Anno 30 Car. II.

In Banco Regis.

MEmorandum, This Term Sir Richard Rainsford was removed, and Sir William Scroggs, one of the Juſtices of the Common Pleas, was made Lord Chief Juſtice of the King's Bench. Antea 295. Poſt. 354.

Hovel *verſus* Reynolds.

IN Treſpaſs for Fiſhing in his ſeveral Piſcary, and for Taking twenty Buſhels of Oyſters there ſuch a Day, continuando piſcationem prædictam from the ſaid Day to the Time of the Action brought. T. Jones 109.

Upon Not guilty pleaded, and a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That the Fiſhing in the Continuando was altogether incertain, not expreſſing the Quantity or Quality of the Fiſhes as it ought, according to Playter's Caſe, 5 Co. and of this Opinion were Wylde and Jones. Antea 272. Poſt. 363. 2 Show. 196. 462, 493. 6 Mod. 38. 3 Salk. 359, 360.

But the Chief Juſtice inclined to think it well enough, and ſaid Playter's Caſe had not been very well approved of late Years, and that is, that 'tis neceſſary to expreſs the Kind of the Fiſhes, which has been held ſince needleſs; and he knew not why it might not be, as well as an Indebitatus Aſſumpſit pro diverſis mercimoniis. But the other Judges ſaid, tho' it was Reaſon it ſhould be as the Chief Juſtice ſaid, yet they knew not how to depart from the Authorities in the Point, and that Playter's Caſe had remained unſhaken. Sed adjornatur. Judgment quod quer' nil cap' per Bill'. 2 Jones 109. Playter's Caſe. 5 Co. 34.

Knight *and* Peachy *and* Freeman.

IN Debt for Rent againſt an Aſſignee of a Leſſee. T. Jones 109. Raym. 303.

The Defendant pleaded, That before the Action brought he aſſigned over to J. S. and thereof gave Notice to the Plaintiff.

The Plaintiff replied, That he ſtill kept the Poſſeſſion, and had made the Aſſignment by Fraud to diſappoint him, &c. To which it was demurred, for it was ſaid, That Fraud was not averrable in this Caſe, neither by the Common Law nor any Statute.

But the Court inclined that it might, for if ſuch a Practice ſhould obtain, the Leſſor might be hindered perpetually of his Action of Debt, by making Aſſignments to Perſons unknown. An Executor confeſſes a Judgment, which is lawful for him to do; yet this may be averred to be entred or kept on Foot by Fraud, and Poſtea 331.

that

that by the Common Law which hates all Frauds. Sed adjornatur. Poſtea 331.

Anonymus.

Antea 212. A Prohibition was prayed to the Counſel of the Marches, for that they proceeded upon an Engliſh Bill there againſt the Defendant; ſuppoſing that he had promiſed upon a Conſideration to pay the Debt of a Stranger, becauſe 'tis in the Nature of an Action upon the Caſe, and conſiſts meerly in Damages. And altho' many Precedents were ſhewn of their Proceedings in ſuch Actions, and the Statute of 34 H. 8. cap. 26. that they ſhould determine ſuch Caſes as were heretofore accuſtomed and uſed, &c. as ſhould be aſſigned to them by the King's Majeſty; and it was pretended that this was within their Inſtructions; yet the Court granted the Prohibition: For where Damages are uncertain, they cannot be ſet in a Court of Equity but by a Jury. In Debt, becauſe the Demand is certain, the Courts here have ſometimes aſſeſſed Damages without a Writ of Enquiry, but never in Treſpaſs or Actions upon the Caſe, which lie wholly in Damages. Vide Cro. Jac. 220. Yelv. 151, 2.

1 Roll. Ab. 573.

Anonymus.

Vid. T. Mo. 839. AN Habeas Corpus, the Return was read and ſpoken to, and the Priſoner ordered to be remanded.

Twiſden ſaid, The Return ſhould have been firſt filed, and the Priſoner committed to the Marſhalſey, for otherwiſe the Court have no Power over him, and he cited 1 H. 7. Humphry Stafford's Caſe, who being brought to the Bar upon an Habeas Corpus by the Lieutenant of the Tower, was committed to the Marſhalſey, and afterwards remanded to the Tower; but the other Judges differed as to the Commitment, and ſaid it was not neceſſary to keep the Priſoner in the Marſhalſey until the Matter was determined, but he might be ſent from Time to Time to the ſame Priſon, and brought up by Rule of Court, until he is either bailed, diſcharged or remanded. And ſo they ſaid it was lately done in the Earl of Shaftsbury's Caſe.

Gilmore *verſus* Shuter. Paſch. 30 Car. 2. Ro. 465.

2 Lev. 227. Ch. Juſtice Jones 108. UPon a Special Verdict the Point was, Whether a Promiſe made upon ſuch Conſideration as by the Act of 29 Car. 2. to prevent Frauds and Perjuries, is requiſite to be in Writing ſigned by the Party to be charged therewith, being made before the 24th of June laſt, but the Action brought after, be within the Reſtraint of the Act which ſaith, That from and after the 24th of June, no Action ſhall be brought upon ſuch Promiſe, &c.

And it was reſolved, That the Caſe was not within the Act, which did not extend to any Promiſe made before the 24th of June.

The King *verſus Sir* Thomas Fanſhaw.

SIR Thomas Fanſhaw and others were indicted for not Repairing of a Bridge, which it was alledged they were bound to repair Ratione Tenuræ of ſuch Lands. 3 Keb. 855.

Sir Thomas Fanſhaw pleaded, That he was not bound to repair Ratione Tenuræ, and found that he was.

In Arreſt of Judgment it was ſaid, That the Verdict was not purſuant to the Indictment; for therein 'tis alledged, that Sir Thomas Fanſhaw and others were bound to repair Ratione Tenuræ, and the Verdict is, that Sir Thomas Fanſhaw Ratione Tenuræ, &c. Reparare debet Parietem prædict' modo & forma prout per Indictamentum prædict' ſupponitur.

Sed non allocatur; For each of them may be bound to repair for their reſpective Lands, and they muſt get Contribution by the Writ de onerand' pro rata portione.

Secondly, It was ſaid, that 'tis Ratione Tenuræ, and not ſaid Suæ, and this was ſaid to be naught. Noy's Rep. 93.

Sed non allocatur; For the Precedents are generally ſo.

Parker's *Caſe*.

A Mandamus to reſtore an Attorney to his Liberty of Practiſing in a Court within the County Palatine of Cheſter was returned, That the Court was holden before the Chamberlain, Vice-Chamberlain, Baron, or the Deputy of the Baron, and that at a Court before the Baron's Deputy, he ſpoke contemptuous Words of him, whereupon he ſuſpended him from his Practice, & quod non aliter amotus fuit. Upon Exceptions offered to the Return, The Court held it a good Cauſe of Suſpenſion, and ordered a Submiſſion to him that received the Affront in open Court, before he ſhould be reſtored. Antea 77, 82. 3 Mod. 334, 335. 5 Mod. 404, 452. 6 Mod. 18. Raym. 56, 94. 1 Sid. 94, 152.

Knight, &c. *verſus* Freeman.

THE Caſe upon the Averment of Fraud, upon an Aſſignment by the Aſſignee of a Leſſee was now moved again, and by Twiſden, Wylde and Jones, againſt the Opinion of Scroggs Chief Juſtice, Judgment was given for the Plaintiff, (viz.) That Fraud in ſuch Caſe might be averred. Antea 329. Antea 329. Q. Poſt. 361 &c.

Anonymus.

1 Sid. 223. Antea 248.

IN Ejectment, it was debated, Whether Confeſſion of Leaſe, Entry and Ouſter would ſerve, where there ought to have been an actual Entry upon the Title, as in the Caſe of a Condition broken, or the like? And the Opinion of the Court inclined, That it would not, tho' my Lord Hale was ſaid to be of another Opinion. Antea 248.

Termino Sancti Michaelis, Anno 30 Car. II.

In Banco Regis.

Dutton *verſus* Poole.

Antea 6, 7, 318. 2 Lev. 210. 3 Lev. 139. Sir T. Jones 102. 3 Keb. 786, 814, 830, 836. Raym. 302.

CUjus principium ante, Mich. 29 Car. 2. It was now moved again to ſtay the Judgment, by Saunders, who argued, That the Action could not be maintained by the Plaintiff; for the Father whoſe the Wood was, could only bring it; for it will be agreed he might have releaſed it, or by Cutting of the Wood, might have taken away all Right of Action.

Again, It does not appear by the Record that the Defendant was Heir, and ſo no Benefit by the Forbearing to cut the Wood. Rookwood's Caſe cited on the other Side. 1 Cro. 163. 1 Leonard 192. is, that the Promiſe was made to the younger Brothers, and the Conſideration that they would Conſent; but here the Plaintiff who was to have the Money, had no Share in the Conſideration or meritorious Act; as where the Father promiſes J. S. if his Son will marry his Daughter he will give him 1000l. the Son may bring the Action, becauſe the Conſideration moves from him, Hetly's Rep. 20. the Caſe was to this Effect, A Man promiſes a Woman whom he was to marry, upon a certain Conſideration, That if he had a Son by her he ſhould have a Term, (whereof the Woman was then poſſeſſed) and if it were a Daughter, ſhe ſhould have the Moiety of the Goods, &c. they intermarry, and after the Death of her Husband, the Daughter born between them brings an Action againſt the Executor of the Husband; and reſolved, That it would not lie; tho' they did not think the Agreement made with the Wife, to be diſcharged by the Intermarriage, but only ſuſpended, which is a Quære in my Lord Hobart; Yet the Daughter being no Party to the Promiſe, or to the Conſideration, could not

bring an Action. The Case of Norris and Pine before cited is stronger, for there he that made the Promise had a Benefit, for it was in Consideration of Marriage,

On the other Side it was said, That tho' it doth not appear that the Defendant was Heir, yet it may be intended after Verdict; however 'tis not nudum pactum, for if the Defendant had no Benefit, yet there was a Restraint upon the other, and that is Consideration enough. And for the Objection of Releasing, that holds; where J. S. promises J. N. if his Son will marry his Daughter he will pay him 1000 l. J. N. may release; but 'tis doubtful whether he can after Marriage, because then 'tis vested in the Son, as Scroggs Chief Justice said. 1 Roll. 31. The Uncle of an Infant delivered J. S. 12 l. who promised to pay the Infant when he came of Age, and the Action was well brought by him after his Age. So Goods sold to A. to pay 10 l. to B. B. may sue. Vide 1 Roll. 32. Starkey and Mills.

The Court said, It might be another Case, if the Money had been to have been paid to a Stranger; but there is such a Nearness of Relation between the Father and Child, and 'tis a Kind of Debt to the Child to be provided for, that the Plaintiff is plainly concerned. And so by the Opinion of them all, (viz.) Scroggs, Wylde, Jones, and Dolben, Judicium pro Querente. Antea 318. This Judgment was affirm'd in the Exchequer. 2 *Lev.* 212. *Raym.* 303.

Anonymus.

A Prohibition was prayed to the Sheriffs Court of London; for that an Action was there commenced, to which the Defendant pleaded, That the Cause of Action did not arise within the Jurisdiction, and offered to swear his Plea; but it was refused. The Counsel for the Plaintiff objected against the Prohibition, that the Plea came too late, for it was after an Imparlance. But it being proved by Affidavit, that the Plea was tendered within two Days after the Declaration was delivered, and that immediately upon Delivering the Declaration, there is an Imparlance of Course, the Court granted the Prohibition, and said that the other Side might demur, if they thought fit; for the Liberty of the Subject was infringed by Bringing him within a private Jurisdiction, when the Matter arises out of it; and Attornies in such Places are sworn to advise no Plea to the Jurisdiction, nor that none shall be put in by them. Antea 88, 180, 181. 1 Mod. 63, 81. 2 Mod. 273. 2 Lutw. 1571.

And whereas 'twas said, That the Party had not Prejudice, for he might remove his Case by Habeas Corpus;

To that the Court answered, Coming by Habeas Corpus Bail must be put in above, tho' the Cause otherwise did not require it.

Inſtit. Leg. 485, 486.

Note, It appeared here, That there was no Defence made in this Cauſe to the Juriſdiction, and Co. Inſt. was quoted, that Defence ſhould be made tho' not full Defence: But the Court ſaid, It was not neceſſary, and that Precedents were otherwiſe, eſpecially where the Court have no Juriſdiction of the Matter, otherwiſe where not of the Perſon.

James *verſus* Richardſon.

3 Keb. 832. Pollexf. 457. Chief Juſt. Jones 99, 100. 2 Vent. 311. 2 Lev. 232. Raym. 330.

IN Ejectment, the Caſe upon a Special Verdict was thus; A. deviſed the Lands to B. and his Heirs during the Life of J. S. and after to the Heirs of the Body of R. D. now living, and to ſuch other Heirs as ſhould after be born; the Deviſee for Life levied a Fine in the Life of him to whoſe Heirs the Remainder was limited, but he had a Son at the Time of the Death of the Teſtator. The Queſtion was, Whether it was a contingent Remainder, the Conſequence whereof was to be deſtroyed by the Fine, or that it was veſted in the Son? Scroggs, Chief Juſtice, Wylde and Jones held it a Remainder veſted by Reaſon of the Words (now living) which was a ſufficient Deſignation of the Perſon that was to take in a Will, tho' improper to call him Heir: But Dolben, contra, for by this Conſtruction the Heirs, born after, are excluded, and the Son would take but an Eſtate for Life, tho' it were deviſed to the Heirs in the plural Number.

T. Jones 99, 100. Raym. 330.

Note, Upon a Writ of Error in the Exchequer-Chamber, this Judgment was reverſed. Hill. 31 & 32 Car. 2.

Afterwards as the Lord Chief Juſtice Jones in the Margin of his Reports to this Caſe, fol. 99, 100. ſays, That this Caſe 1 Jac. 2. was brought into Parliament by a Writ of Error upon the Reverſal in the Exchequer-Chamber; and the Reverſal in the Exchequer-Chamber was reverſed by the Parliament, and the Judgment given by the Court of King's Bench affirmed.

Raym. 330. 2 Vent. 311. Burchett

and Durdant, where an Ejectment was brought on the ſame Title by the Heir of Geo. Durdant, and Judgment was given for him in B. R. which was affirm'd in the Exchequer, which was affirm'd in the Houſe of Lords; and 2 Lev. 233.

Termino Paſchæ, Anno 31 Car. II.

In Banco Regis.

A Mandamus was prayed to the Eccleſiaſtical Court, to grant the Probate of a Will under Seal, &c. 2 Show. pl. 34. pa. 48.

The Caſe was, The Executor named in the Will, had taken the uſual Oath, and then refuſed, (but after a Caveat entered) and another endeavoured to obtain Letters of Adminiſtration; the Executor came afterwards to deſire the Will under Probate and conteſted the Granting of Adminiſtration: Which was adjudged againſt him, ſuppoſing that he was bound by his Refuſal.

And after an Appeal to the Delegates, this Mandamus was prayed, and granted by the Court; for having taken the Oath, he could not be admitted to refuſe, and the Eccleſiaſtical Court had no further Authority, and the Caveat did not alter the Caſe.

Note, The Oath was taken before a Surrogate; yet it was all one.

Anonymus.

A Prohibition was prayed to a Suit for Tithes upon the Suggeſtion, that the Lands out of which they were demanded lay out of the Pariſh, and the Bounds of Pariſhes are triable at the Common Law. Antea 308.

But the Court denied the Prohibition, becauſe it did not appear, that a Plea thereof had been offered in the Eccleſiaſtical Court.

Anonymus.

A Prohibition was prayed to ſtay a Suit againſt J. S. Leſſee of a Rectory, out of which a Penſion was demanded. It was ſuggeſted, That the Lord Biron had three Parts in four of this Rectory, upon which the Penſion was chargeable, and that the Suit againſt one alone ought not to be, as in an Aſſize for a Rent-charge, all the Terre-Tenants are to be named, and here the Party has an Election to ſue a Writ of Annuity, and if ſo, he muſt have named all that had been chargeable.

Curia. 'Tis true, in our Law it were a good Plea in Abatement; but perhaps their Law and Courſe is otherwiſe. And here they have Juriſdiction, and may proceed according to their own Rules; or if not, you may have an Appeal. Whereupon a Prohibition was denied. Antea 3, 120, 265. 2 Cro. 159, 270.

Anonymus.

Anonymus.

Antea 305. Poſt. 344, &c. Ibid.

IN an Habeas Corpus and Certiorari for the Body of J. S. who had been impriſoned for not paying of a Fine of 20 l. ſet at the Quarter-Seſſions, the Return was, That he being Conſtable, and demanded by the Court to preſent an Highway, which was ſworn before him by two Witneſſes to be out of Repair, ſaid in Contempt of the Court, That he would not preſent it: For which and certain other contemptuous Words the Fine was ſet.

The Counſel for the Priſoner moved, that it might be filed: Which was done.

The Court were of Opinion, That the Fine was not well ſet; for Conſtables are to preſent upon their own Knowledge, and the two Witneſſes ſhould have been carried to the Grand Jury; for the Conſtable was not obliged to preſent upon their Teſtimony. This Court is to judge of their Fines, whether without Cauſe, or to mitigate them when exceſſively impoſed; and for the contemptuous Words the Return is ill, becauſe not expreſſed what.

On the other Side it was prayed, That the Return might be amended, for he had ſpoken oppprobrious Words; but that could not be admitted after the Filing. And ſo the Party was diſcharged.

Anonymus.

IT was moved to quaſh an Order of Seſſions, for the Keeping of a Baſtard-Child.

Firſt, That it doth not appear that the Child was born within the Pariſh.

1 Salk. 121, 122, 478. 1 Sid. 222. 1 Mod. 20. 2 Show. 129, 132, 256, 257, &c.

Secondly, 'Tis to allow ſo much weekly until the Child is eight Years of Age; whereas the Statute gives Power to make a weekly Allowance while the Child ſhall be chargeable.

Thirdly, The Order was, at eight Years old to pay 5 l. for the Binding of it out.

But the Court would not quaſh it; for they ſaid it was implied, by ſaying, It would be chargeable to the Pariſh, that it was born there; and 'twas apparent it would continue chargeable for ſo long as they appointed the Allowance, and they might order 5 l. to be paid in the End.

Sed Quære, For a Sum in groſs ought not to be ſet, but a weekly Allowance.

And the Court ſaid, they muſt ſhew that reſpect to Juſtices of the Peace, who ſerved the Country at their own Charge, as not too nicely to examine their Orders. Antea 210.

Anonymus.

ERror upon a Judgment by Nihil dicit given in the Common Pleas, where the Action was for Words, which in the Declaration were laid thus: That the Defendant ſaid, Quidam J. S. (which was the Plaintiff's Name) Innuendo the Plaintiff was, &c.

The Error aſſigned was, That there was no Averment that theſe Words were ſpoke of the Plaintiff, for there might be more of the Name.

But Holt for the Defendant ſaid, The Innuendo would help that Fault; and he cited the Caſe of Robotham and Venlecke in 3 Cro. 378. where the Plaintiff declared, That he had made an Oath before a Judge upon certain Articles exhibited for the Good Behaviour; and the Defendant to ſcandalize him ſaid, He made a falſe Oath, (Innuendo the ſaid Oath before the Judge) where it was held, That the Innuendo was ſufficient to aſcertain what Oath was meant. Innuendo. Vide Cro. El. 497. Hob. 2, 3, 45, 468. Yelv. 21. Hutt. 65. All. 32, 92. 1 Sid. 52. 2 Salk. 513. 2 Show. 305, 411.

But the Court reverſed the Judgment in this Caſe, and ſaid, That not ſaying in the Declaration that the Words were ſpoken of the Plaintiff, it was not ſufficient to bring that in by an Innuendo, which ought to have been averred; and it is the worſe, becauſe 'tis ſaid quidam J. S. which imports another Perſon than the Plaintiff.

Anonymus.

ERror to reverſe a Judgment given in the King's Bench in Ireland, in a Prohibition, where the Iſſue was, Whether he proſecuted in the Court Chriſtian after the Prohibition? And it was found for the Plaintiff, and Damages aſſeſſed to 100 l. and 6 d. pro miſis & cuſtagiis. Poſtea 348, 350, 362.

And now the Error was aſſigned in the Judgment given, which was, That the Plaintiff ſhould recover damna prædicta per Juratores aſſeſſ. ad 100 l. nec non pro miſis & cuſtagiis de incremento per Cur' adjudicat' 20 l. omitting the 6 d. Coſts given by the Jury. Raym. 387.

On the other Side it was ſaid, That damna prædicta in the Judgment included all, and the ſaying 100 l. was but a Miſcomputation. Et adjornatur. Poſtea Hill. 33 & 34 Car. 2. 362.

How

How *verſus* Whitfield.

T. Jones 110, 205. Poſtea 339. 2 Show. 57. 3 Mod. 317.

A Fine of certain Lands to the Uſe of J. S. for Life, and after to his Executors and Aſſigns for eighty Years, with Power to the Leſſee and his Aſſigns to let Leaſes for twenty-one Years, reſerving the antient Rent.

After ſeveral mean Aſſignments, the Aſſignee of an Executor of an Aſſignee made a Leaſe for twenty-one Years, which in the Special Verdict was found to be made of the ſaid Lands inter alia, reſerving proinde ſix Shillings per Annum, and found that ſix Shillings was the antient yearly Rent for the Land.

The Court ſeemed to be of Opinion, That an Aſſignee after ſo many Removes might execute this Power, for it was coupled with an Intereſt, and annexed to the Eſtate, tho' to be conſtrued ſtrictly; but in regard the Leaſe was made of the Land inter alia, reſerving proinde, &c. in Caſe the Reſervation ſhould be taken to be for the whole Land, then it was not the antient Rent reſerved for this; and upon that they doubted. Et adjornatur. Poſt. 339.

Anonymus.

AN Indictment was quaſhed for Want of Addition: For the Court ſaid, No Proceſs ought to go out thereupon, becauſe the Party cannot be outlawed.

Anonymus.

IN an Habeas Corpus the Return was, That the Party was taupon an Excom' Cap'.

It was moved, That the Party might be diſcharged, becauſe upon Search it appeared that the Writ had not been enrolled in this Court; for ſo it ought to be by the Statute of the 5th of the Queen, tho' the Writ iſſues out of Chancery.

The Court doubted, Whether they could diſcharge him upon a Motion, or that he ſhould be driven to plead this Matter? And it was ſaid the Courſe had been both Ways. Vide Parker's Caſe, 3 Cro. 553. Antea 309.

But the Party was afterwards diſcharged; ut opinor.

Herne *verſus* Brown.

A Prohibition was prayed to a Suit in the Eccleſiaſtical Court, T. Jones 122. 2 Lev. 247. Antea 5.

The Libel ſets out, That a Tax has been made for the Repairs of a Church where the Defendant inhabited, and was to make him pay his Proportion. To which they required his Anſwer, (viz.) Whether he had paid, &c.

The Suggeſtion was, That the Party had tendered his Anſwer, but the Court had refuſed it, becauſe it was not upon Oath, and that the Eccleſiaſtical Court cannot tender an Oath to the Party ſued, niſi in cauſis Matrimonialibus & Teſtamentariis.

But the Court, after hearing divers Arguments, denied the Prohibition; for they ſaid, It was no more than the Chancery did, to make Defendants anſwer upon Oath in ſuch like Caſes. Antea 5.

Termino Sanctæ Trinitatis, Anno 31 Car. II.

In Banco Regis.

How *verſus* Whitfield, antea in ult. Term.

IN Replevin, the Plaintiff declares of the Taking of his Cattle in a Cloſe containing five Acres. Antea 338. T. Jones 110. & 205. 2 Show. 57. 3 Mod. 317.

The Defendant avows, and ſets forth a Fine to the Uſe of A. in Tail, which deſcended to him, Virtute cujus he was ſeiſed in Dominico ut de feodo talliato, *&c.*

The Plaintiff replies, That the Fine was firſt to the Uſe of J. S. for Life, the Remainder to his Executors, Adminiſtrators and Aſſigns for 80 Years, with Power to him and his Aſſigns, to let the five Acres in Poſſeſſion or Reverſion for 21 Years, determinable upon three Lives, reſerving the ancient Rent, and that J. S. deviſed this Term to J. N. and died; his Executors aſſented, and after it came to the Executors of J. N. who aſſigned it, and that the Aſſignee made a Leaſe of the ſaid five Acres inter alia, reſerving proinde the Rent of 6 s. per Annum, and avers that the ancient Rent was 6 s. per Annum.

The Avowant rejoins, setting forth his former Title. And the Plaintiff demurs.

It was objected;

First, That the Plaintiff ought to have traversed the Seisin in Tail, alledged by the Avowant, seeing in his Replication he sets forth and intitles himself under an Estate inconsistent with it.

To this it was answered, and the Court agreed, That there ought to be no Traverse; for the Avowant doth not say, it was his Freehold, or that he was seised in Tail; but only under a Virtute cujus, &c. And the Plaintiff in his Replication sets forth a Title consistent with all that the Avowant alledges, and so confesses and avoids, and all depends upon the Execution of the Power. And for that,

Secondly, It was objected, That he which made this Lease was not Assignee of J. S. for Executors were not within the Power, and consequently not their Assignees: This is a Power collateral to the Estate, and shall not run with the Land; for then Assignees of Commissioners of Bankruptcy, the Vendee of the Term of the Sheriff upon an Execution, &c. should execute this Power. It is like Covenants annexed to Leases, which the Assignee could not take Advantage of till 32 H. 8.

Again, Here appears to be no good Reservation, for the Lease is of the five Acres inter al', reserving proinde, so that the Rent issues out of other Lands as well as the five Acres, and therefore cannot be said to be the ancient Rent reserved upon that.

The Court were all of Opinion, That the Assignee in this Case might execute the Power, and conceived that Assignees might include Assignees in Law, as well as Fact; but however the Tenant for Life devising this Term, the Devisee was an Assignee, and the Power in the greatest Strictness of Acceptation was in him, and consequently must go to his Executors, and by the same Reason to their Assignee.

Vid. Mo. 855.

As to the Reserving the Rent proinde, the Court said it might be intended that the inter al' might comprehend nothing but such Things out of which a Rent could be reserved, and then the six Shillings was reserved only for the five Acres. However the proinde might reasonably be referred only to the five Acres, and not to the inter al', and that a distinct Reservation of six Shillings might be for five Acres. And so Judgment was given for the Plaintiff. Antea 338.

Steed

Steed *verſus* Berrier.

ERror upon a Judgment given in the Court of Common Pleas; upon a Special Verdict, the Caſe was to this Effect; Pollexf. 546. Ch. J. Jones, 135. Raym. 408, 409. 1 Mod. 267. 2 Mod. 313. 3 Keb. 845. 2 Lev. 235. or 243.

J. S. made his Will in Writing, and deviſed Lands to his Son J. S. and his Heirs, and in the ſame Will gave a Legacy of 100 l. to his Grandſon, The Son died afterwards, in his Life-time, after whoſe Deceaſe J. S. the Grandfather, made a Codicil, wherein he gave away Part of the Lands deviſed, as aforeſaid, to a Stranger, and afterwards declared by Parol, That his Intention was, that his Grandſon J. S. ſhould have his Lands, which his Son J. S. ſhould have had.

The Queſtion upon this Special Verdict was, Whether this were ſufficient to carry the Lands to the Grandſon? And Judgment was given in the Common Pleas by three Judges againſt one, that it was. Whereupon a Writ of Error was brought in this Court. 2 Mod. 313, 314.

Finch, Solicitor, argued, That this Will was ſufficient to carry it to the Grandſon. He agreed Brett and Rigden's Caſe in Pl. Com. that a Deviſe to a Man and his Heirs, who dies in the Life of the Deviſor, a new Publication will not be enough to make the Heir take by the Will, becauſe named in the Will by Way of Limitation of the Eſtate, and not Deſignation of the Perſon that ſhould take. But in Fuller's Caſe in 1 Cro. 423. and in Mo. 2. where the Deviſe was to his Son Richard and the Heirs of his Body; which Richard afterwards died in his Life-time, and then the Deviſor ſaid, My Will is, That the Sons of Richard, my Son deceaſed, ſhall have the Land deviſed to their Father, as they ſhould have had if their Father had lived and died after me. There Popham and Fenner held, That this new Publication would carry the Land to Richard's Son. Gawdy and Clench contra. But our Caſe is much ſtronger; for there, Heirs of the Body were uſed only for Limitation; but in the Will here, where the Words are, I deviſe to my Son J. with this new Publication the Grandſon J. may take, becauſe a Grandſon is a Son; and when a Will is new publiſhed, it is all one as if it were wrote at the Time of ſuch Publication. Beckford and Parncot's Caſe in 1 Cro. 493. Mo. 404. Deviſe of all his Lands, and after the Will the Deviſor purchaſeth other Lands, and then publiſhes it again, it will carry the new purchaſed Lands. Dyer 149. Trevanian's Caſe. Ceſtuy que uſe before the 17th of H. 8. deviſed the Lands; a new Publication will paſs the Lands executed in him, by the Statute.

The Opinion of the Court inclined to reverſe the Judgment; They held it to be the ſame with Fuller's Caſe in 1 Cro. that no Parol Averment can carry Lands to one Perſon, when the Words of the Will plainly intended them to another. They agreed, If a Man having no Son, but a Grandſon, deviſeth his Lands to his
1 Sid. 149. Son, the Grandſon may take: But here is an Oppoſition contained in the new Publication, (viz.) Thoſe Lands which my Son J. ſhould have had, my Meaning is, my Grandſon J. ſhall have. And in the Will it ſelf there is a Legacy deviſed to the Grandſon by that Name; ſo where they are ſo diſtinguiſhed, 'tis impoſſible to take the Grandſon to be meant by the Name of Son. As to Beckford's Caſe, the Words are full to carry all, and therefore it had been impertinent to have wrote over the Will again. So where a Man has two Sons named John, it may be well averred that he meant the younger Son; for nothing in the Will is inconſiſtent with ſuch Meaning.

The Court took Time to deliver their Opinions. And afterwards the Chief Juſtice delivered the Opinion of the Court, That neither the Republication, nor Parol Declaration, could operate as a Deviſe to R. &c. the Grandſon.

Pepis's *Caſe.*

2 Jones 50, 51. A Mandamus to reſtore him to his Place of Recorder of the Town of Cambridge.

The Return was, That they were incorporated by the Name of Mayor, Aldermen, &c. with a Power to chuſe a Recorder, Habend' pro termino vitæ, aut ad voluntat' eligentium.

That Mr. Pepis was choſen Recorder ad voluntat' eligentium: And that afterwards by the Votes of the greater Number of the Electors he was removed, and the Lord Allington conſtituted Recorder under their Common Seal, &c.

Antea 77, 82, 331. Upon this Return it was moved for Mr. Pepis, That altho' they had alledged a Power to chuſe a Recorder at Will, yet they ſhould have ſhewn Cauſe for his Removal, being a judicial Office, which the Court takes Notice of; and that none had ſuch a Power but the King to remove Judges ad libitum.

Again, A Corporation aggregate cannot determine their Will, but under their Common Seal, and that is not ſhewn here.

2 Sid. 49, 72. Curia. Where a Recorder is at Will, they may remove him at Pleaſure, as it is in Blagrave's Caſe, and ſeveral other Caſes.

As

As to the other Point, it does not appear that he was constituted under their Common Seal; perhaps then they must have determined their Will under their Common Seal; but now 'tis well enough, my Lord Allington is constituted under their Common Seal, which Act removes the other, so it was adjudged against Mr. Pepis.

Termino Sancti Michaelis, Anno 31 Car. II.

In Banco Regis.

A Prohibition was prayed to the Court of Admiralty upon a Suggestion, That the Suit was there upon a Contract made upon the Land. The Case was thus; See Ray. 3. 3 Mod. 244. 3 Lev. 60. Coke & Cretesull. 1 Salk. 31. Opy & Addison cont. See 1 Sal. 34, 35. 2 Sal. 415, 424.

A Bargain was made upon the Land with several Seamen, to bring up a Ship from a Port in England to London, for a certain Sum to them to be paid. And for the Prohibition 'twas alledged, That this being upon the Land, and a Contract with divers jointly for a Sum in Gross, it could not be within the ordinary Rules of Mariners Wages, which is permitted to be sued for in the Court of Admiralty in Favour of the Mariners, because they may all join in that Court, and not be put to the Inconvenience of suing severally, as they must at Law; but as this Contract is, they are to sue jointly at Common Law.

But the Prohibition was denied, for this must be taken as Mariners Wages: And therefore tho' the Contract were upon the Land; yet they have Jurisdiction: Besides the Party comes after Sentence, and therefore in the Court's Discretion, whether they will then grant a Prohibition. Antea 146. 2 Vent. 181. 6 Mod. 25, 79, 424.

Note, A Rump-Act was made to enable Mariners to sue for Wages in the Admiralty, but yet the Law was taken to be so before. Vid. 3 Cro. 2 Rol. Ab. 350. pl. 10. See the Stat. 4, 5 Annæ, cap. 16.

Anonymus.

A Prohibition was prayed to the Ecclesiastical Court, where the Libel was for these Words, You are a Whore and ply in Moorfields. And the Suggestion was, That the Words were spoken in London, where an Action lies for such Words; and for that Cause a Prohibition was granted, otherwise Suits might have been in the Court Christian for such Words, tho' not singly for the Word Whore, being a common Word of brabbling, otherwise where joined with Words, which shew the Intent to defame in that Kind. Antea 7, 61, 72, 220. 1 Mod. 21. Postea 352.

Anonymus.

AN Indebitat. Aſſumpſit was brought for Goods ſold and delivered. The Action was laid in London, and a Motion was made to change the Venue, upon an Affidavit, That the Sale was in Kent. But on the other Side it was ſaid, The Delivery was in London, and that where the Matter conſiſts of two Parts in ſeveral Counties, the Plaintiff ſhall have his Election; to which the Court agreed.

Anonymus.

A Man covenants with his intended Wife, to give her Leave to diſpoſe of ſo much by her Will, and then they intermarry; the Husband having given Bond to a third Perſon for the Performance of theſe Covenants, after the Death of the Wife the Husband is ſued upon the Bond, for not permitting her Will to be performed: And upon Dyer of the Condition it was inſiſted on for the Defendant, that theſe Covenants were diſcharged by the Marriage, and ſo the Bond likewiſe loſeth its Force. Vid. Hob. 216. Et adjornatur.

Vide Cro. Car. 219, 376, 597. 1 Keb. 347. 1 Salk. 313. 1 Jon. 157. Gage and Acton, Hill. 11 W. in B.R. econtra. Vid. 1 Mod. R. 211.

Anonymus.

A Motion was made to quaſh an Inquiſition of forcible Entry; it was Inquiſitio capta per Juratores ſupra Sacramentum ſuum coram T. S. & J. N. Juſticiariis, *&c.* qui dicunt ſuper Sacramentum præd'.

And it was objected, That qui dicunt, &c. referring to the laſt Antecedent, it was that the Juſtices ſay: Sed non allocatur, for ſuper Sacramentum prædict' makes it certain.

Note, The Caption of an Indictment may be amended the ſame Term it comes into Court.

Anonymus.

AN Indictment for not taking upon him and executing the Office of a Conſtable, to which he was choſen by the Leet. The Queſtion was, Whether a Tenant in antient Demeſne were obliged to that Office? And the Court held, that he was.

1 Salk. 380, 381. 1 Mod. 2, 13. 5 Mod. 96, 179. 2 Show. 75. Antea 305, 336.

Termino Sancti Hillarii, Anno 31 & 32 Car. II.

In Banco Regis.

Harriſon *and* Belſey.

IN Ejectment upon a Special Verdict the Caſe was thus; A Leaſe was made to A. and B. for their Lives, Remainder to the firſt Son of A. &c. Remainder to the Heirs of A. B. conveys his Part to A. Raym. 413. Pollexfen 573. contra. Ch. Juſt. Jones 136. contra.

The Queſtion was, Whether the Contingent Remainder to the firſt Son were deſtroyed? 3 Salk. 299.

Holt argued that it was. For a Contingent Remainder muſt have ſome particular Eſtate of Freehold to ſupport it, and by the Releaſe of B. his Eſtate was gone; and there became an entire Fee in A. For by whatſoever Means a Joint-Tenant for Life conveys his Moiety to his Companion, it does not enure by Grant of the Eſtate, but by Releaſe, as Euſtace and Scawen's Caſe, 2 Cro. 696. A. and B. Joint-Tenants for Life, A. levies a Fine to B. B. dies, there ſhall be no Occupancy of the Moiety of A. during the Life of A. Jones 55. and the Caſe of Lewis Bowels, 11 Co. is not to be objected, where an Eſtate for Life was made to B. and F. the Remainder to their firſt Son, that they ſhould have, in Tail, Remainder to B. and F. in Tail; here, tho' an Eſtate in Tail is executed in B. and F. until a Son born, yet after, upon the Birth of the Son, the Contingent Remainder ſhall veſt, and ſplit and divide the former Eſtate; but here the Fee becomes executed by ſeveral Conveyances, but there the Eſtate-tail was executed by the firſt Conveyance. And in the Caſe at Bar until the Releaſe of B. the Fee was not executed in A. for the Preſervation of the Jointure, and ſo the Plight and Condition of the Eſtate alter'd by Matter ſubſequent, and by Conſequence the Contingent Remainder deſtroyed. 2 Co. 60, 61.

The Court doubted, Whether there were ſuch Alteration of the Eſtate, as to deſtroy the Remainder? For they ſaid, To ſome Purpoſes the Fee was executed before the Releaſe, for if the Joint-Tenants had joined in a Leaſe for Years, an Action of Waſte would lie againſt the Leſſee. Et adjornatur. Afterwards it was adjudged that the Remainder was deſtroyed. Pollexfen, Jones and Raymond report, that the Contingent Remainder was not deſtroyed by the Releaſe. *Quod vide.* Antea 306, 307. 2 Saun. 386, 387, 389. Vid. 1 Inſt. 184. a.

Anonymus.

Anonymus.

A Perſon who was committed to the Tower for Conſpiring the Death of the King, was brought up by Habeas Corpus, and prayed to have Bail taken, unleſs an Indictment were found againſt her this Term, according to the new Act of 31 Car. 2. for Habeas Corpus's.

The Court ſaid, That they which would have the Benefit of that Act, muſt pray it before the firſt Week of the Term expires; but in regard it appeared, that ſhe had prayed it before by her Counſel, and her Habeas Corpus was taken out in Time, the Court ſaid, The Benefit of the Act ſhould be ſaved to her, for the Prayer is not neceſſary to be made in Perſon, But M. C. G. was refuſed the Advantage, he having omitted to make the Prayer during the firſt Week, either in Perſon or by Counſel.

Sir Robert Peyton's *Caſe*.

HE was brought up by Habeas Corpus from the Tower, his Counſel preſſed much to have the Return filed, ſuppoſing that he would be then a Priſoner to the Court, and committed to the Marſhalſey; but the Court ordered the Return to be filed, and notwithſtanding remanded him to the Tower, as they ſaid they might do.

The King *verſus* Plume.

Antea 326. 2 Lev. 206. 3 Keb. 816, 843. Vid. 2 Show.

ANte Hill. 29 & 30 Car. 2. The Caſe was ſpoken to again upon the Demurrer to the Indictment, for uſing the Trade of a Fruiterer, contra 5 Eliz. not having been bound an Apprentice.

Scroggs, Chief Juſtice, and Dolben inclined to the Opinion, That it was a Myſtery within the Statute, there being great Art in chuſing the Times to gather, and preſerve their Fruit; and that the Cauſe deſerved the more Conſideration; for that the Fruiterers were an ancient Corporation in London, (viz.) From the Time of E. 4. Alſo a Barber, Upholſter, and lately a Coachmaker, ruled to be within the Act.

Jones and Pemberton ſeemed to be of another Opinion, for it would be very inconvenient to make every one that ſells Fruit by the Penny within the Act, and majus & minus would make no Odds; Surely ſince the 5th of Eliz. there would have been ſome Proſecution by the Company of Fruiterers in this Caſe, if it would have lain. Brewers and Bakers require Skill, and yet not within the Act. But the Court took Time to deliver their poſitive Opinions. Et adjornatur. Antea 326.

Reve *verſus* Cropley.

AN Indebitat' Aſſumpſit was brought for 20l. as Executor to William Burroughs, for ſo much of the ſaid William's Money had and received by the Defendant in his Life-time; whereupon the Plaintiff had Judgment by Nihil dicit, and upon a Writ of Enquiry, (the Plaintiff not being provided to prove the Debt, ſuppoſing it to be confeſſed by the Judgment,) the Jury found but two Pence Damages.

Ventris moved to ſet aſide the Writ of Enquiry, for that the Plaintiff was not obliged in this Action to prove the Debt at the Executing of the Writ of Enquiry, no more than if he had brought an Action of Debt. 2 Cro. 220. In Treſpaſs for Taking of Goods, the Property is not to be proved upon the Writ of Enquiry after Judgment ſur nihil dicit; for, ſaid the Court, if he ſhould fail thereof, it would be in Deſtruction of the firſt Judgment. Vide Yelv. 152.

Curia. This being in an Action upon the Caſe which lies in Damages, the Debt ought to have been proved, and ſo let it ſtand.

Note. If a Verdict be for 30l. and the Judgment is quod recuperet damna prædicta ad 32l. this Surplus will do no hurt, becauſe 'tis damna prædicta. Jones 171.

Cooke *verſus* Fountain.

IN an Ejectment upon a Trial at the Bar, the Title of the Leſſor of the Plaintiff was upon the Grant of a Rent, with Power to enter for Non-payment.

The Executor of the Grantor was produced as a Witneſs for the Defendant. And it was objected againſt him, that in the Grant of the Rent, the Grantor covenanted for himſelf and his Heirs to pay it, and that the Executor being obliged, was no competent Witneſs.

Againſt which it was much inſiſted upon on the other Side, That this Covenant annexed to a real Eſtate would not bind the Executor, but only the Heir.

But the whole Court were againſt it. The Counſel for the Defendant mentioned a Bill of Exceptions, and the Court doubted, whether it would lie in the King's Bench, ſo they waived it, and ſhewed that the Executor had fully adminiſtred the Inventory: But they gave a further Charge on the Plaintiff's Side, and ſo that Witneſs was ſet aſide.

Termino Sanctæ Trinitatis, Anno 32 Car. II.

In Banco Regis.

Anonymus.

IN an Action upon the Case, the Plaintiff declared, That he kept a Stage-Coach, and got his Livelihood by Carrying of Passengers: And that the Defendant spoke such scandalous Words of his Wife, that reflected upon him, and rendered him so ridiculous, that no Body would ride in his Coach, and he thereby lost his Customers.

After a Verdict for the Plaintiff, it was moved to stay Judgment, That here was no Cause of Action: But on the other Side, a Case was cited of one Bodingly, 14 Car. 2. C. B. where the Plaintiff declared, That he was an Inn-keeper, and that the Defendant had presented his Wife at a Leet for a Scold, and that such and such Guests in particular had absented from his House upon it, and after Verdict he had Judgment.

But the Court here said, That the Cases differed, for that Quality of the Wife's might make the House troublesome to the Guests; but a Stage-Coachman could receive no probable Prejudice in his Trade by Defaming of his Wife, or at the least the Plaintiff should have declared, What Customers he had lost in particular, and therefore they ordered quod querens nil capiat per Billam.

2 Lev. 233. 1 Roll. Ab. 63. 1 Salk. 16.

Anger *versus* Brewer.

IN an Attachment upon a Prohibition, the Plaintiff declared, That he proceeded in the Court Christian, after the Prohibition delivered,

After Judgment by Nihil dicit and 100 l. Damages given to the Plaintiff, it was moved to stay Judgment; That there was no Place laid in the Declaration, where the Defendant prosecuted since the Prohibition delivered, and so if Issue had been taken upon non prosecut. fuit post deliberat. brevis, whence should the Venue have come: But it being made appear to the Court, That in all the Precedents of these Kinds of Declarations, there is no Place found mentioned of the Proceeding after Delivery of the Writ, but the Place only expressed where the Writ was delivered, they thereupon over-ruled this specious Exception. Post. 350.

Postea 350. Ch. Justice Jones R. 128. Antea 337. Postea 362.

Anonymus.

Anonymus.

ONE A. B. was indicted of High Treason in Conspiring the Death of the King, and was brought to his Trial at the Bar this Term, and one D. being produced a Witness against him; the said A. B. excepted against him, for that the said D. had been outlawed of Felony and burned in the Hand, and produced the Record. Raym. 378, 380.

The Witness, to clear himself thereof, produced the King's Pardon, whereby he was pardoned of the said Crimes, Outlawry, &c.

The Prisoner still objected, That the Pardon did not restore him to his Credit; and that notwithstanding he was no legal and competent Witness, and prayed that he might have Counsel assigned him, to argue the Point, which was granted: And the Court having heard his Counsel, and conceived some Doubt in the Matter, they desired Mr. Justice Raymond to consult with the Judges of the Common Pleas, to which Court Raymond immediately went, and at his Return reported to this Court the Opinion of the said Judges to be, that he might be sworn. But if a Man convicted of Perjury were afterwards pardoned; yet that would not enable him to be a Witness, because it seemed to be an Injury to the People, to make them subject to the Testimony of such an one. Vide Hob. 81. Pardon takes away pœnam & reatum; so D. was sworn.

This Difference was taken per Holt Ch. Just. where the Disability is only the Consequence of that Judgment, the King may pardon it; but where the Disability is Part of the Judgment it self

the King's Pardon will not take it away; therefore if a Man is convict of Perjury on the Statute, the King's Pardon will not restore, for 'tis a Consequence and not Part of the Judgment, viz. quod imposterum not sit receptus ut testis: But a Pardon by Act of Parliament will not restore him in that Case. Quære of a Perjury at Common Law, and if the Law be the same; for there the Disability is only a Consequence and not Part of the Judgment; otherwise if a Jury is convict on an Attaint. 2 Salk. 689. 3 Lev. 426. 1 Sid. 52. Kel. 38.

Colepepper's *Case.*

HE was indicted of High Treason, for raising Rebellion in Carolina, (one of the King's Foreign Plantations in America) whereupon he was this Term tried at the Bar and acquitted.

Note. By 35 H. 8. cap. 2. Foreign Treasons may be either tried by Special Commission, or in the King's Bench by a Jury of the County, where that Court sits. Vide Co. 1 Inst. 261. b. 3 Inst. 11.

Anonymus.

UPon a Trial at Nisi prius at Guildhall before my Lord Chief Justice North, in Trover and Conversion against an Executor de son tort.

The Question came to be, Whether the Goods having been taken in Execution, upon a Judgment obtained against the Defendant by a Creditor of the Deceased, should discharge him against the Plaintiff who brought this Action as Administrator? And the Opinion of the Chief Justice was, That this Exception was a good Discharge against another Creditor that should sue him, to whom he might plead Riens inter se mains, but it was no Discharge against an Admini- Keil. 59. 1 Sid. 76. But he shall be recoupt in Damages pro tanto.

Kellw. 59. Administrator, for Men must not be encouraged to meddle with a personal Estate without Right; but to prevent this Mischief where the Party dies Intestate, and there is Contest about the Administration, a Man may procure of the Ordinary Letters ad colligendum.

Termino Sancti Michaelis, Anno 32 Car. II.

In Banco Regis.

Anonymus.

THE Statute of 43 Eliz. cap. 2. that enables Justices of Peace, where a Parish is unable to provide for their Poor, to tax the neighbouring Parish, the Words being, Any other of any other Parish, it was resolved, That the Justices might impose the Charge upon any of the Inhabitants of the neighbouring Parish, and were not obliged to put a general Tax upon the whole Parish.

Anger *versus* Brower.

Antea 348. 2 Jones 148. Raym. 387. Cro.Car. 559. 1 Roll. Ab. 575. 3 Lev. 360.

A Prohibition, the Plaintiff declared upon an Attachment, That at such a Day and Place he delivered the Writ to the Defendant, and that he had prosecuted the Suit in the Court Christian since, and upon Judgment by Nihil dicit, and upon a Writ of Enquiry, 100 l. Damages were found, and Judgment given, and a Writ of Error brought.

The Error assigned was, That the Plaintiff had laid no Venue where the Suing was since the Writ delivered, which was the Cause of Damage, and not the Delivery of the Writ, so that Place would not serve. On the other Side it was said, That the Precedents were generally this Way: But to that the Court said, That where those Precedents were, there was no further Proceeding after Judgment, as there seldom was when there was Judgment by Nihil dicit; but here they reversed it for this Error. Antea 348.

The Case of the City of London, concerning the Duty of Water-Bailage.

THE Mayor and Commonalty of London brought an Indebitat. Assumpsit against A. B. for 5 l. for so much due to them for divers Tons of Wine, brought from beyond the Seas to the Port of London, at four Pence per Ton. 2 Lev. 231, 236. 2 Jones 116. Antea 296, 298.

Upon Non Assumpsit pleaded, and Trial at the Bar, divers Freemen of London were offered as Witnesses for the Plaintiff. But the Counsel of the other Side excepted to them, for that they were Parties, the Commonalty of London comprehending all the Freemen, and likewise interested.

On the other Side it was said, That their Interest was in no Sort to be considered, it being so very small and remote; a small Legatee hath been sworn to prove a Will. In an Indictment against the County for not Repairing of a Bridge, one of the County may be a Witness (and this Justice Dolben said, he had known in the Case of Peterburgh-Bridge.) In a Robbery sur Statute de Winton, the Plaintiff shall be sworn a Witness, and that for Necessity.

But it was replied, That there was no Necessity, for they might have other Witnesses besides Freemen, (tho' perhaps with Difficulty,) In an Action against the Hundred upon the Statute of Winton, an Hundredor cannot be a Witness. 1 Mod. 74.

Scroggs, Chief Justice, Dolben and Raymond were of Opinion that they were Witnesses.

Jones contra. And a Bill of Exceptions was tendered by the Counsel for the Defendant, which the Court proffered to seal, and to allow three or four Days Time to draw it up.

But afterwards the Plaintiff's Counsel offered other Witnesses, and set by their Citizens; but the Verdict went for the Defendant.

Note, It was said, That the Lord Mayor could not release the Action but under the Common Seal; and that for a Duty or Charge upon a Corporation, every particular Member thereof is not liable, but Process ought to go in their publick Capacity.

Note, A Sheriff was ordered to attend the Court for Demanding an excessive Fee for the Execution of an Hab' fac' possess. the Court saying there was none due. Vide 1 Salk. 231. The Court refus'd to grant a Rule to attend, but said he might be indicted. 2 Sid. 155, 156.

Anonymus.

Anonymus.

Antea 543. 1 Show. 131. A Prohibition was granted to the Conſiſtory Court of the Biſhop of London, for citing one for Calling of her Whore; becauſe ſuch Words by the Cuſtom of London are puniſhable in the Courts of Law there; but Oath muſt be made, that if any ſuch Words were ſpoken it was in *London*, and not elſewhere. 4 *Mod.* 367.

Anonymus.

Cr. Car. 102. Kellw. 61. b. IF the Plaintiff dies after the Term begin, tho' before Judgment entred; yet Judgment may be entred, becauſe every Judgment relates to the firſt Day of the Term.

Anonymus.

2 Jones 198. 2 Lev. 140. 152. Dev. 278. 3 Keb. 489, 564, 566, 604. Antea 182. A Motion was made to quaſh an Inquiſition taken before the Coroners ſuper viſum corporis of one that killed himſelf, which found that he was Felo de ſe.

But the Court were informed, That the Party was Non compos mentis, and that there had been an undue Practice by the Coroner; of both which great Proof was made, and upon that it was quaſhed.

Note, The Court ſaid, That if the Body could not be digged up, there might be an Indictment exhibited to the Grand Jury, who might enquire thereupon. 3 Inſt. 55. Hale's P. C. 29.

Termino Sancti Hillarii, Anno 32 & 33 Car. II.

In Banco Regis.

Anonymus.

A Motion was made againſt a Judge of an inferior Court of Record, for increaſing upon a View the Damages in an Action of Treſpaſs and Battery to ſo much more than was given by the Jury.

Curia. The proper Way is to reform it by a Writ of Error; for none but the Courts at Weſtminſter can increaſe Damages upon View. Per Cur. Inferior Courts have Power to judge on View of Maihem, and to increaſe Damages. 2 Jones 183. 2 Jones 183. contra.

Anonymus.

IF a Writ of Error in Ejectment, &c. abates by the Act of God, a ſecond Writ will be a Superſedeas. Otherwiſe where it abates by the Act of the Party.

Anonymus.

IN a Writ of Error to reverſe a Fine, the Proclamations were pleaded in the ſame Fine, and five Years quiet Poſſeſſion, and this in the Bar of a Writ of Error.

The Court inclined, That the Error being in the Fine, five Years Poſſeſſion could not be pleaded. Sed adjornatur. Mo. Rep. 8. So adjudg'd Raym. 462. 2 Jones 181. Cockman *verſus* Farrer. 10 & 11 W. 3. c. 14. No Fine, Recovery or Judgment ſhall be revers'd for Error, unleſs Writ of Error is brought within twenty Years after ſuch Fine levy'd, &c.

Termino Paſchæ, Anno 33 Car. II.

In Banco Regis.

Antea 295, 329. NOte, This Term Sir Francis Pemberton was made Lord Chief Juſtice of the King's Bench in the Room of Sir William Scroggs, who was diſplaced.

Page *verſus* Denton.

1 Salk. 312. HILL. 32 & 33 Car. 2. Rot. 45. In Debt upon a Bond againſt an Executor, who pleads that the Teſtator was indebted to him by an Obligation, the Condition whereof was to pay Rent; and that at the Time of his Deceaſe there was 300 l. due for Rent, and that he had not more than 60 l. Aſſets to pay it, &c.

The Plaintiff replied, That there was but 30 l. due for Rent at the Time of the Teſtator's Death.

Which the Court held to be a good Replication, altho' the Penalty of the Bond was forfeited at the Time of the Teſtator's Death. For if a Bond due to a Stranger be forfeited, and this be pleaded by an Executor, and that he hath not Aſſets ultra, 'tis a good Replication to ſay, That the Obligee would have taken Part of his Money in full, and it ſhall be a Bar for no more; and here the Defendant ought to take but his due Debt.

And the Court ſaid, That if Men would plead their Caſe ſpecially, it would ſave many a Suit in Chancery.

Fitzharris's *Caſe*.

2 Show. 163. Vide State Trials. EDward Fitzharris was indicted of High Treaſon; upon which being arraigned, and demanded to plead, he delivered in a Paper containing a Plea to the Juriſdiction of the Court; which could not be received, (as the Court ſaid) not being under Counſel's Hand. Whereupon he prayed to have Counſel aſſigned, and named divers, whereof the Court aſſigned four. And he was taken from the Bar, three or four Days being given him to adviſe with his Counſel, to prepare his Plea as they would ſtand by him.

The Counſel prayed, that they might have a Copy of the Indictment.

1 Sid. 84, 85. But the Court denied it and ſaid, That it was not permitted in Treaſon, or any other capital Crimes.

But Juſtice Dolben ſaid, That ſometimes it had been allowed to take Notes out of the Indictment. Vid. Mirror 304. Abuſion eſt que Juſtices ne monſtre l'Indictment a les Indictes s'ils demandront. Sect. 115.

And note, by Stat. 7. W. 3. c. 3. Perſons indicted of Treaſon where Corruption of Blood is, are to have a Copy of their Indictment five Days before their Trial.

Termino Sanctæ Trinitatis, Anno 33 Car. II.

In Banco Regis.

Anonymus.

IN an Action of Debt againſt the Executor, in the Debet and Detinet, upon a Surmiſe of a Devaſtavit, the Defendant was held to Special Bail, and ſo ruled upon Motion. So held per Holt, C. J. 1 Salk. 98. Antea 321. contra.

Haddock's *Caſe*.

IT was ſaid by the Court, That if a Corporation that hath been by Preſcription, accept a new Charter, wherein ſome Alteration is of their Name, and likewiſe of the Method in the Governing Part; yet their Power to remove, and other Franchiſes which they had de temps d'ont, *&c.* do continue; and if the Power to remove be at their Will and Pleaſure, this Will muſt be expreſſed under their Common Seal; but in a Return to a Mandamus, debito modo amotus may ſuffice. Raym. 435, 9.

Note, No Writ of Error lies upon an Indictment of Recuſancy and Conviction by Proclamation. Raym. 434.

Note, In an Ejectment, where there are divers Defendants which are to confeſs Leaſe, Entry and Ouſter, if every one do not appear at the Trial, the Plaintiff cannot proceed againſt the reſt, but muſt be Nonſuit. 2 Vent. 195.

Termino Sancti Michaelis, Anno 33 Car. II.

In Banco Regis.

Anonymus.

IN Covenant, the Plaintiff declared upon ſeveral Breaches, one whereof was, for not paying of 7 l. according to the Covenant.

It was moved for the Defendant, That he might be admitted to bring 7 l. into Court to pay the Plaintiff, together with his Coſts hitherto, &c. as is uſual in Caſes of Debt or Aſſumpſit for Money, and that the Plaintiff might proceed for the reſt, if he thought fit: But the Motion was denied, becauſe the Plaintiff had declared of other Breaches, and the Matter lay in Damages.

Bound *and* Brooking.

T. Jones 148. Antea 147, 319. 2 Mod. 70. 2 Lev. 148, 194. 2 Jones 147, 8.

ERror upon a Judgment in the Common Pleas, where the Plaintiff declared in an Action upon the Caſe, That he had Common in the Defendant's Lands, & habere debuit, *&c.*

The Defendant demurred, becauſe not ſet out how the Plaintiff was intitled to the Common, whether by Preſcription, or otherwiſe. Notwithſtanding which, Judgment in the Common Bench was for the Plaintiff, and now the ſame Matter inſiſted on for Error here, and the Court doubted.

Antea 329. 3 Salk. 12. 2 Vent. 73, 174, 186.

To make the Declaration good, there was quoted the Caſe of Sands and Trefuſis, in 3 Cro. in an Action for ſtopping of a Water-Courſe to his Mill, which was held good without ſaying an ancient Mill, or that he was intitled to the Water-Courſe by Preſcription, or otherwiſe. 2 Cro. 43, 122. Dent and Oliver; An Action for diſturbing of him to take Toll, and no Title ſet forth. Sed adjornatur. Vid. Co. Entr. 9, 11. Judgment affirmed, 2 Jones 148.

Day *verſus* Copleſton.

2 Jones 165.

IN an Aſſumpſit for Money, the Defendant pleaded the Statute for the Diſcharge of poor Priſoners, and that he had been diſcharged by that Act; which provides, That there ſhall be no After-Proſecution by a Creditor in ſuch Caſe, ſo as to ſubject the Body to Execution, and ſays, That he can ſay nothing further in Bar of the Action.

Upon

Upon which the Plaintiff demurred, and the Defendant joined in the Demurrer, and Judgment was entred up for the Plaintiff, but with a Ceſſet executio quoad Corpus, *&c.*

And the Court approved of this Way of Pleading the Statute, for otherwiſe they ſaid, If the Matter had not been diſcloſed in Pleading, they doubted whether they could have given the Defendant the Benefit of the Act, but he would be driven to his Audita Querela.

Anonymus.

ERror of a Judgment in the King's Bench in Ireland, it was ſuggeſted, that the Plaintiff was in Execution upon the Judgment in Ireland. 1 Sid. 357. Vide antea 88. 4 Inſt. 350. Parl. Caſes. 78, 79, &c.

And the Court ſeemed to be of Opinion, That a Habeas Corpus might be ſent thither to remove him, as Writs Mandatory had been awarded to Calais, and now to Jerſey, Guernſey, *&c.*

Anonymus.

THE Caſe was, A. Tenant in Tail, Remainder to B. in Tail, &c. A. makes a Leaſe for the Life of the Leſſee, not warranted by the Statute, and dies, leaving B. in Remainder his Heir: B. lets for 99 Years, to commence after the Death of the Tenant for Life, reſerving Rent; and then the Tenant for Life ſurrenders to B. upon Condition, and dies; B. ſuffers a Recovery with ſingle Voucher, and dies; the Leſſee for Years enters, the Heir of B. diſtrains for the Rent, and the Leſſee brings a Replevin; and upon an Avowry, and Pleadings thereupon, this Caſe was diſcloſed to the Court of Common Bench, and Judgment given there for the Avowant, and Error thereupon brought in this Court.

For the Plaintiff in the Error it was argued, That the Leaſe being derived out of a Reverſion in Fee, which was created in A. upon the Diſcontinuance for Life, and the new Fee vaniſhing by the Surrender of the Tenant for Life, (for it was urged, he was in his Remitter, altho' the Taking of the Surrender was his own Act) that the Leaſe for Years by Conſequence was become void.

Again, It was objected againſt the Common Recovery, That the Tenant in Tail, and a Stranger which had nothing in the Eſtate, were made Tenants to the Præcipe, and therefore no good Recovery.

Again, In caſe B. were not remitted after Acceptance of the Surrender, then he was ſeiſed by the Force of the Tail, and ſo no good Recovery, being with ſingle Voucher.

On the other Side it was argued to be no Remitter, because the Acceptance of the Surrender was his own Act, and the Entry was taken away. But admitting it were a Remitter, because by the Surrender the Estate for Life (which was the Discontinuance) was gone, and it was no more than a Discontinuance for Life; For if Tenant in Tail lets for Life, and after grants the Reversion in Fee; if the Lessee for Life dies after the Death of the Tenant in Tail, so that the Estate was not executed in the Grantee during the Life of the Tenant in Tail, the Heir shall immediately enter upon the Grantee of the Reversion. Co. Lit. It seems also to be stronger against the Remitter in this Case, because it is not absolute, but only conditional; however the Lease may be good by Estoppel, for it appears to have been by Indenture, and if the Lessor cannot avoid the Lease, the Lessee shall without question be subject to the Rent.

But it was objected against the Estoppel, That here an Interest passes, and the Lease was good for a Time: As if the Lessee for ten Years makes a Lease for twenty Years, and afterwards purchaseth the Reversion, it shall bind him for no more than ten.

To which Pemberton, Chief Justice, said, The Difference is, where the Party that makes the Estate, has a legal Estate, and where a defeasible Estate only; for in the later a Lease may work by Estoppel, tho' an Interest passed, so long as the Estate (out of which the Lease was derived) remained undefeated.

As to the Recovery, it was held clearly good, altho' a Stranger, that had nothing in the Land, was made Tenant to the Præcipe with the Tenant in Tail; for the Recompence in Value shall go to him that lost the Estate, and being a common Assurance, 'tis to be favourably expounded. Et adjornatur.

Termino Sancti Hillarii, Anno 33 & 34 Car. II.

In Banco Regis.

Moor *and* Pitt.

IN Error upon a Judgment, in Ejectione Firmæ in the Common Pleas, where the Case was, That the Bishop of London was seized in jure Episcopatus of a Manor, of which the Lands in Question were held, and Time out of Mind were demised and demisable by Copy of Court-Roll for Life, in Possession and Reversion; and J. S. being Copyholder for Life in Reversion, (after an Estate for Life in Anne Pitt) and J. N. being seized of the Manor by Disseisin, J. S. at a Court holden for the Manor in the Name of J. N. surrendred into the Hands of the said J. N. (the Disseisor-Lord) to the Use of the said Lord. Afterwards the Bishop of London entred, and avoided the Disseisin. Anne Pitt died, and an Ejectment was brought by J. S. and it was adjudged by the Common Bench that he had a good Title; and now upon a Writ of Error in this Court, the Matter in Law was insisted upon by Pollexfen for the Plaintiff in the Writ of Error, Vid. Pitt and Moore. T. Jones 153. 2 Mod. 287.

That this Surrender to the Disseisor-Lord, to the Lord's own Use, was good; for all the Books agree, a Copyholder may surrender to a Disseisor of the Manor, to the Use of a Stranger, and why not to the Lord's own Use? As if Lessee for Years be ousted, and he in Reversion disseised, and the Lessee releases to the Disseisor, this extinguishes his Term. Here is a compleat Disseisin of the Manor by Attornment of the Freeholders, (without which the Services cannot be gained) and the Copyholders coming to the Disseisor's Court, and by making Surrenders, &c. owning him for their Lord, tantamounts.

Serjeant Maynard contra. And he insisted, That this Surrender was not good, for the Disseisor had no Estate in this Land capable of a Surrender; for the Copyholder for Life continuing in Possession, and never having been ousted, there could be no Disseisin of that; and he endeavoured to distinguish it from a Surrender to a Disseisor-Lord to the Use of another, for in such Surrenders the Lord is only an Instrument, and does but as it were assent, and until Admittance the Estate is in the Surrenderer. And he resembled it to the Attornment of a Tenant, when (e converso) a Seigniory is granted; and he put Cases upon Surrenderers of Leases, that they must be to one that hath the immediate Reversion, as an Under-Lessee for Part of the Term cannot surrender to the first Lessor; and he cited

cited a Case of Lessee for Years, Remainder for Life, Remainder in Fee to a Stranger, he that had the Fee enfeoffed the Tenant for Years by Deed and made Livery; and the Conveyance held void, for it could not work by Livery to the Tenant for Years, who was in Possession before; and a Surrender it could not be, because of the intermediate Estate for Life, and it could not work as a Grant for want of Attornment. He said it had been commonly received, that a common Recovery cannot be suffered, where the Tail is expectant upon an Estate for Life, (not made Tenant to the Præcipe) which he said was true in a Writ of Entry, in the Post which are commonly used. And the true Reason is, because such Writ supposes a Disseisin, (which cannot be when there is a Tenant for Life in Possession.) But, as he said, a common Recovery in such Case in a Writ of Right would be good.

Pemberton, Chief Justice, said, His Reason of Disseisin would overthrow Surrenders to the Use of a Stranger; for if the Possession of a Copyholder would preserve it from a Desseisin, then was it pro tempore lopped off, or severed from the Manor, and then no Surrender could be at all. Et adjornatur. Judgment affirm'd. 2 Jones 154.

Perry *versus* Bowes.

1 Show. 206. Ch. Justice Jones 196.

IN an Ejectment upon a Special Verdict, the Case appeared to be this;

Commissioners of Bankrupt had assigned by Indenture the Lands in Question to the Lessor of the Plaintiff, which Indenture was afterwards enrolled: But the Declaration was upon a Demise made after the Indenture, and before the Enrolment, and whether that Demise were sufficient to entitle the Lessor of the Plaintiff, was the general Question?

It was first insisted on, That an Enrolment of the Deed of Assignment, tho' to pass Lands, was not necessary, 2 Co. 26. But the Court over-ruled that, saying, That an Enrolment is not requisite upon an Assignment of Goods, but of Lands it is: But then it was said, That after the Deed was enrolled, it shall relate to the Delivery; and it was compared to a Bargain and Sale, where by the Statute of H. 8. of Enrolments, nothing passeth till the Deed be enrolled; but then it relates, 2 Inst. 675. Bargainee sells before Enrolment, the subsequent Enrolment makes it good; so if the Bargainee suffers a Recovery before Enrolment, he is a good Tenant to the Præcipe by Relation, ibidem: And this is confirmed by the common Practice. So if at Common Law a Recognizance be acknowledged before a Judge, (as any Judge of the Courts at Westminster may take a Recognizance) and afterwards he causeth it to be recorded, it binds the Land from the Time of the Caption, Hob. 196. If Land be conveyed to the King by Deed enrolled, it

it binds from the Time of the Executing of the Deed, altho' the Enrolment be some Time after.

Saunders contra. Here the Commissioners are under a Power given to them by the Statute of Bankrupts, and they must execute that Power in all Circumstances before it can become effectual. In the Case of Enrolment of a Bargain and Sale, the Deed it self passeth the Use, and the Statute of Enrolments obstructs the Operation of it till Enrolment; but when that is done, it passeth by the Deed. Again, here needs no Relation to avoid the Mischief of mean Assignments from the Bankrupt, because he is restrained from the Time of his first Act of Bankruptcy. And on the other Side, the Mischief would be very great, if there should be a Relation from the Enrolment, in regard the Statute limits no Time for the doing of it, so that it may be seven Years after; and if this should relate to punish Mesne Trespasses, the Inconvenience would be very great, for such Trespasses are, until the Enrolment, exposed to the Actions of the Bankrupt. As to the Case of the Recognizance, the Caption is a judicial Act and the principal, and so binds from the Time. And in the Case of Granting to the King by Deed enrolled, the Reason is, because the King shall not receive any Prejudice by the Laches of his Officer in neglecting to enrol the Deed. But generally in Cases at Common Law there is no Relation, as in Case of Feoffment and Livery, but stronger in Case of a Grant of Reversion, where the Attornment is but the Assent of the Tenant; yet it shall not relate to the Grant. It would be hard, if a Relation should be admitted to make a Man liable to a Trespass. It has been much doubted, whether a Bargainee before an actual Entry, can maintain an Action of Trespass?

Curia. The Case of Bellingham and Alsop, altho' it was said to be reversed, and the Authority is stirred in Iseham and Morrice's Case, 3 Cro. yet it has been since taken for good Law in the main Point. Where Executors sell by an Authority given by Will, the Vendee is in the per from the Devisor, but here in the Post, and by the Statute. It were very inconvenient to admit of Relation, because no Time prefixed for the Enrolment. Sed adjornatur.

Afterwards Judgment was given for the Defendant. 2 Jones 197. Quære, Whether, it being only the Mistake of the Clerk in laying his fictitious Demise, it may be amended. Holt Ch. Justice held it not amendable. 1 Show. 207.

Anonymus.

UPon a Writ of Error out of an inferior Court, in an Action upon the Case, upon an Agreement to assign over a Term, which the Defendant had in him for four Years. Upon Non Assumpsit a Special Verdict was found, That the Agreement was made, but not put into Writing, and they found the Clause in the Act of 29 Car. 2. of Frauds and Perjuries, (viz.) No Action to be brought upon any Contract or Sale of Lands, &c. or any Interest in or concern- Q. Antea 329, 331.

concerning them, &c. Upon which Special Verdict found, it was adjudged for the Plaintiff, and now Error was assigned in the Matter in Law, that this Contract was within the Act to be put in Writing: But it was objected, That the Statute extended only to Interests, created de novo out of an Estate, and not to an Assignment.

Curia contra, and held the Case to be plain within the Words of the Act, and so the Judgment was reversed.

Anonymus.

Raym. 387, 388.

IN Error to reverse a Judgment given in an inferior Court.

First, Because 'tis said Cur' tent' apud Guildhall' Burgi, &c. and not said, That the Guildhall was within the Jurisdiction of the Court. Sed non allocatur; for that shall be intended.

Secondly, The Damages given by the Jury were 3 l. 19 s. and Costs 6 d. and so much for Costs de incremento adjud', and nothing said of the 6 d.

Antea 337, 348, 350. Yelv. 107. contra.

Sed non allocatur; because dampna per Jurator' assess' includes all, and the other is but Miscomputation, and the Costs awarded de incremento necessarily implies the 6 d. Costs before included. Vid. antea Pasch. 31 Car. 2, 237.

Walburgh *and* Saltonstall.

1 Lut. 333. 1 Sid. 463, 464. Antea 12, 18, 23, 25. T. Jones 149. Q. 2 Saund. 228, 229. 1 Mod. 4.

IN an Action upon the Case, the Plaintiff declared, that the Defendant did take out a Latitat 21 Januarii, 32 Regni, ac etiam Billæ, &c. whereas he owed him nothing.

Upon Not Guilty pleaded a Special Verdict was found, That the Latitat was Teste 28 Novembris, 32 Car. Regis, but was really taken out 21 Januarii, 32 Regis, Et si pro, Quære, &c.

Holt argued upon this, That by Law it must be said to be taken out the 28th of November, when the Teste is. Yelv. Debt upon a Bond bearing Date the 30th of December, the Defendant demands Oyer of the Condition which was to perform Covenants, and says, Tho' it were dated the 30th of December, yet it was deliberat' primo die Feb. and no Breach since. If the Plaintiff replies and agrees with the Defendant, 'tis a Departure, because he had declared of a precedent Date, which implies the Delivery.

But it is objected, That the Jury are not estopped to find the Truth.

I answer, Where the Parties impleading have agreed a Point certain, the Jury is estopped to find the contrary.

Pemberton

Pemberton Chief Juſtice. We know the Courſe of the Court is to Teſte Latitats taken out in the Vacation, of the Term preceding; and the Courſe of a Court is the Law of a Court. He might have declared, That the Defendant ſued out a Latitat the 21ſt of January, Teſte the 28th of November preceding, and if he be not eſtopped to declare ſo, ſurely the Jury may find the whole Matter. And ſo Judgment was given pro Quer'.

Termino Paſchæ, Anno 34 Car. II.

In Banco Regis.

Clayton *verſus* Gillam.

IN Treſpaſs for Breaking and Entring of his Cloſe, and Feeding, &c. and laying thereon certain Pieces of Timber, &c. Et continuando Tranſgreſſionem præd'. T. Jones 194. Raym. 396. 3 Lev. 93.

After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That one of the Treſpaſſes, (viz.) The Laying of Timber, could not be with a Continuando. Antea 329. 2 Salk. 638. 6 Mod. 38.

But it was reſolved by the Court, That continuando tranſgreſſionem præd' ſhall be referred only to the Treſpaſſes, which may properly be ſaid with a Continuando. But if the Continuando had been expreſly laid for that Treſpaſs, all would have been naught; as it was reſolved in a Caſe in this Court, between Letchford and Elliot, 16 Car. 2. 5 Mod. 178. 2 Show. 196, 462, 493. 1 Sid. 224, 242. Raym. 396. Butler and Hodges, 319, 379.

The Earl of Shaftsbury *verſus* Cradock.

IN an Action of Scandalum Magnatum for ſaying, That the Earl was a Traitor, &c. The Action being laid in London where the Words were ſuppoſed to be ſpoken; it was moved in Behalf of the Defendant, That the Venue might be changed into ſome other County, and Affidavits were read, that the Plaintiff had a great Intereſt in the City, and an Intimacy with the preſent Sheriffs, ſo that the Defendant could not expect an indifferent Trial there, and thereupon the Court did think fit to take the Cauſe out of London, and gave the Earl the Election of any other County; but he refuſed to try it elſewhere, and would rather let the Action fall. Ch. J. Jones 192. Poſtea 364, 365.

Curtis *verſus* Inman.

IN Debt for the Penalty forfeited by the Stat. of 5 Eliz. for Uſing the Trade of a Grocer, having not been bound an Apprentice.

It was moved, That the Action lies not in this Court, becauſe 21 Jac. cap. 4. enacts, That Actions popular ſhall be brought before Juſtices of Aſſize, of the Peace, &c. But a Caſe was cited, which was adjudged in this Court, Hill. 20 & 21 Car. 2. between Barns and Hughes (which ſee before) that ſuch Action would lie. But the Court notwithſtanding in this Caſe ſaid, They would hear Arguments.

Antea fol. 8.

The Earl of Shaftsbury *verſus* Graham, & al'.

IN an Action upon the Caſe in the Nature of a Conſpiracy, the Declaration was, That the Defendants did conſpire to indict the Plaintiff of High Treaſon, and for that Purpoſe did ſolicit one Wilkinſon; and endeavour to ſuborn him to give falſe Teſtimony againſt the ſaid Earl, and an Indictment was offered at the Seſſions at the Old Baily in London, by the Defendant in Purſuance of the ſaid Conſpiracy, which Indictment the Grand Jury there found Ignoramus, &c.

Ch. J. Jones, 198. 1 Sid. 185. 2 Mod. 215. 2 Salk. 668. Viſne refus'd to be chang'd in an Action of Scandal' Magnatum.

Antea 363.

It was moved in Behalf of the Defendants, That whereas the Conſpiracy was in the Declaration alledged to be in London, that the Court would change the Venue, and an Affidavit of the Defendants was produced, That the Conſpiracy alledged in the Declaration, if there was any ſuch, was in Surrey, and not in London.

(Note, Wilkinſon at the Time of the ſuppoſed Conſpiracy was a Priſoner in the King's Bench.) And Affidavits were produced likewiſe to ſhew, That the Plaintiff had ſuch Intereſt with the preſent Sheriffs of London, that an indifferent Jury was not like to be returned, and that ſeveral Perſons named to be material Witneſſes for the Defendants, durſt not come to the Trial, if it were in London, for fear of their Lives, in regard they had been ſo affronted and abuſed when they were produced to prove the before-mentioned Indictment at the Old Baily, and ſeveral other Matters were alledged. But it was inſiſted upon by the Counſel for the Earl, That,

Firſt, The Venue uſes not to be changed in Caſe of a Peer who is one of the Comites Regis, and ſhall not be forced to travel into another County to try his Caſe as a common Perſon.

Secondly, That the preſent Caſe was local, (viz.) The preferring the Indictment at the Old Baily; and where the Cauſe of Action ariſeth in two Counties, the Plaintiff hath his Election to bring it in either. 7 Co. Bulwer's Caſe.

But the Court declared, That they were ſatisfied, that no indifferent Trial could be had in London; they remembered they were affronted themſelves when they were at the Old Baily, upon the before-mentioned Indictment: And they reſolved, That they had a Power to alter the Venue in the Caſe of a Peer, as it had been done about ſix Years ſince in a Scandalum Magnatum, brought by the Earl of Salisbury in this Court. And alſo they ſaid, That the Cauſe of Action here was Tranſitory, (viz.) The Conſpiring, and that the Preferring of the Indictment was but in Aggravation of Damages, and the Action would lie altho' none had been offered, or if preferred by other Perſons than the Conſpirators. 2 Mod. 215, 216.

'Tis true, when the Matter ariſeth in ſeveral Places, the Plaintiff has Election, but if there be like to be no indifferent Trial in the Place where it is laid, 'tis uſual with this Court to change the Venue. But the Court ſaid, They would not confine the Plaintiff to Surrey, if he could ſhew that that was not an indifferent County. Vide 42 Ed. 3. 14.

Termino Sancti Michaelis, Anno 34 Car. II.

In Banco Regis.

Deniſon *verſus* Ralphſon.

IN an Action upon the Caſe the Plaintiff declared, That the Defendant in Conſideration of a Sum of Money paid by the Plaintiff, did promiſe to deliver to him ten Pots of good and merchandizable Pot-Aſhes, and that not regarding his Promiſe, and to defraud him, he delivered him ten Pots of Aſhes not merchandizable, but mixed with Dirt, &c. And declared alſo, That pro quadam pecuniæ ſumma, &c. the Defendant vendidit to the Plaintiff ten other Pots of Aſhes, Warrantizando, &c. that they were good and merchandizable, and that he delivered them bad, and not merchandizable, knowing them to be naught; and to this Declaration the Defendant demurred. Antea 223.

And it was argued by Saunders, That here were divers Cauſes of Action of ſeveral Natures put into one Declaration, and they required ſeveral Pleas, (viz.) Non Aſſumpſit, and Not guilty, and therefore ought not to be joined together.

Thompſon for the Plaintiff cited a Caſe between Matthews and Hoskin. An Action againſt a Common Carrier, and declared upon the Cuſtom of the Realm, and that he had not delivered the Goods; 1 Sid. 244, 245.

and declared alſo in a Trover and Converſion upon the ſame Matter, and after Verdict upon Motion in Arreſt of Judgment, the Action was adjudged well brought, 16 and 17 Car. 2. Hill. in this Court. So an Action againſt one for twenty Shillings, upon the Hire of an Horſe, and declared further, that he abuſed him, and held good.

Adjudged directly contrary. 1 Sid. 244, 245.

3 Mod. 322. 2 Lev. 101. 1 Sid. 244. Cro. Car. 20. 1 Danv. 3.

Curia. Thoſe Caſes were after Verdict. Cauſes upon Contract which are in the Right, and Cauſes upon a Tort cannot be joined, for they do not only require ſeveral Pleas, but there is ſeveral Proceſs, the one Summons, Attachment, &c. the other Attachment, &c. Theſe upon the Contract lie for and againſt Executors, the other not; but theſe ſeem to be both upon the Contract, (viz.) That upon the Warranty as well as the other, tho' the Declaration, knowing them to be naught, yet the Knowledge need not to be proved in Evidence. Debt upon a Bond and a Mutuatus may be joined in one Action; yet there muſt be ſeveral Pleas; for Nil debet, which is proper to the one, will not ſerve in the Action upon the Bond. Sed adjornatur.

Termino Sancti Hillarii, Anno 34 & 35 Car. II.

In Banco Regis.

Dominus Rex *and* Higgins & al'.

Raym. 484, 486. 1 Salk. 152. 3 Salk. 81. Antea 309.

A Quo Warranto was brought againſt divers Perſons of the City of Worceſter, why they claimed to be Aldermen, &c. of the ſaid Corporation. The Cauſe came to be tried at the Bar, and a Challenge was made to the Jury in Behalf of the Defendants, for that the Jurymen were not Freeholders.

The Court ſaid, That for Juries within Corporate Towns, it hath been held, That the Statutes that have been made, requiring that Jurymen ſhould have ſo much Freehold, do not extend to ſuch Places; for if ſo, there might be Failure of Juſtice, for Want of ſuch Jurymen ſo qualified; but then to maintain the Challenge it was ſaid, by the Common Law Jurymen were to be Freeholders.

But the Court over-ruled the Challenge; but at the Importunity of the Counſel, they allowed a Bill of Exceptions, and ſo a Verdict paſſed againſt the Defendants; and afterwards it was moved in Arreſt of Judgment upon the Point: But the Court would not admit the Matter to be debated before them, (tho' di-

vers Precedents of like Nature were offered) because they said, They had declared their Opinions before, and the Redress might be upon a Writ of Error.

Termino Sanctæ Trinitatis, Anno 35 Car. II.

In Banco Regis.

Thursfield *versus* Jones.

A Motion for a Prohibition to a Suit in the Ecclesiastical Court for a Church-warden's Rate, suggesting that they had pleaded, That it was not made with the Consent of the Parishioners, and that the Plea was refused. 1 Mod. 79, 194, 236. 2 Jones 187. 1 Salk. 165.

The Court said, That the Church-wardens (if the Parish were summoned, and refused to meet or make a Rate) might make one alone for the Repairs of the Church, (if needful) because that if the Repairs were neglected, the Church-wardens were to be cited, and not the Parishioners; and a Day was given to shew Cause, why there should not go a Prohibition.

Termino

Termino Sancti Michaelis, Anno 35 Car. II.

In Banco Regis.

Gamage's *Case*.

Raym. 401.

ERror out of the Court of the Grand Sessions, where in an Ejectment the Case was upon Special Verdict upon the Will of one Gamage, who devised his Lands in A. to his Wife for Life, Item his Lands in B. to his Wife for Life, and also his Lands which he purchased of C. to his Wife for Life, and after the Decease of his Wife, he gave the said Lands to one of his Sons, and his Heirs.

And the Question was, Whether the Son should have all the Lands devised to the Wife, or only those last mentioned? And it was adjudged in the Grand Sessions that all should pass. And upon Error brought it was argued, That they were Devises to the Wife in distinct and separate Sentences, and therefore his said Lands should be referred only to the last.

On the other Side it was said, That the Word Said should not be referred to the last Antecedent, but to all. If a Man conveys Land to A. for Life, Remainder to B. in Tail, Remainder to C. in forma prædict', the Gift to C. is void, 1 Inst. 20. b. It is agreed, if he had said, All the said Lands to his Son and his Heirs, it would have extended to the Whole: This is the same, because Indefinitum æquipollet universali. Et adjornatur.

Herring *versus* Brown.

2 Show. 185. Postea 371. Antea 278, 280.

IN an Ejectment upon a Special Verdict the Case was; Tenant for Life, with several Remainders over, with a Power of Revocation, levied a Fine, and then by a Deed found to be sealed ten Days after, declared the Uses of the Fine, which Deed had the Circumstances required by the Power. The Question in the Case was, Whether the Fine had extinguished the Power?

It was argued that it had not, because the Deed and Fine shall be but one Conveyance, and the Use of a Fine or Recovery may be declared by a subsequent Deed, in 9 Co. Downam's Case. And a Case was cited, which was in this Court in my Lord Hale's Time, between Garret and Wilson, where Tenant for Life, with Remainders over, had a Power of Revocation, and by a Deed under his Hand and Seal covenanted to levy a Fine, and

declared it should be to certain Uses; and afterwards the Fine was levied accordingly. This was held to be a good Execution of the Power and Limitation of the new Uses, and the Deed and Fine taken as one.

On the other Side it was argued, That the Deed was but an Evidence to what Uses the Fine was intended, and the Power was absolutely revoked by the Fine. Suppose he in Remainder had entred for the Forfeiture before this Deed, should the Defendant have defeated his Right? Et adjornatur. Postea 371. Antea 289.

Hodson *versus* Cooke.

2 Show. 328. 2 Jones 214. Olliet versus Besley. Sed vide Show. 254. Temple and Killingworth.

IN an Action upon the Case for commencing of an Action against him in an inferior Court, where the Cause of Action did arise out of the Jurisdiction.

After a Verdict for the Plaintiff, upon Not guilty, it was moved in Arrest of Judgment, That it was not set forth that the Defendant did know, that the Place where the Action arose was out of the Jurisdiction, which it would be hard to put the Plaintiff to take Notice of.

On the other Side it was said, That the Party ought to have a Recompence for the Inconvenience he is put to, by being put to Bail perhaps in a Case where Bail is not required above, and such like Disadvantages which are not in a Suit brought here; and the Plaintiff ought at his Peril to take Notice of the Place. Antea 236.

And of that Opinion were Jeffreys Lord Chief Justice, Holloway and Walcot; but Withens contra.

The Court said, That it could not be assigned for Error in Fact that the Cause arose out of the Jurisdiction, because that is contrary to the Allegation of the Record, neither is the Officer punishable that executes Process in such Action, but an Action lies against the Party. And so it was said to be resolved in a Case between Cowper and Cowper, Pasch. 18 Car. 2. in Scac. when my Lord Chief Baron Hale sate there. 2 Lutw. 1571, 1572. Read and Wilmott. T. Jones 14, 209, 215. Antea 220. 1 Mod. 81. Kelw. 55. a. 106. a. 2 Mod. 195, 196, 197.

Anonymus.

AN Indictment of Perjury for Swearing before a Justice of the Peace, That J. S. was present at a Conventicle, or Meeting for Religious Worship, &c. 2 Show. 165, 486. 2 Jon. 163.

It was moved to quash it, because it did not appear to be a Conventicle, (viz.) That there was above the Number of Five, and so the Justices of the Peace had no Power to take an Oath concerning it, and then it could be no Perjury. To which the Lord Chief Justice said, That Conventicles were unlawful by the Common Law, and the Justices may punish unlawful Assemblies. And he

seemed

ſeemed to be of Opinion, That a Man might be indicted of Perjury for a voluntary and extrajudicial Oath; and cited a late Caſe, where one had ſtoln away a Man's Daughter, and went before a Juſtice of the Peace, and ſwore that he had the Father's Conſent, and this in order to get a Licence to marry her; and he was indicted and convicted thereupon.

And all the Court ſaid, That it was not the Courſe to quaſh Indictments of Perjury, Nuſance, or the like; but to put the Party to plead to them.

Termino Paſchæ, Anno 36 Car. II.

In Banco Regis.

Duncomb *verſus* Walter.

Raym. 479. 3 Lev. 57.

IN an Indebitat' Aſſumpſit by an Aſſignee of Commiſſioners upon the Statute of Bankrupts, upon Non Aſſumpſit pleaded, a Special Verdict was found, upon which the Caſe appeared to be thus:

2 Lev. 19. 2 Saund. 297, 298.

One Staly was arreſted by an Executor of his Creditor, 6 Sept. which was before Probate of the Will, and within two or three Days after he paid 1000l. to the Defendant, to whom he ſtood indebted in ſuch Sum, and after the 18th of September he yielded himſelf to Priſon upon the ſaid Arreſt.

The Queſtion was, Whether the Defendant ſhould be obliged to refund this Money which was paid unto him, as aforeſaid?

Firſt, Whether the Arreſt before the Probate was a good Arreſt? It was ſaid, If an Executor hath a Reverſion in a Term upon which a Rent is reſerved, and diſtrains, &c. he may avow for the Rent before the Probate. Vide 1 Roll. 917. Tit. Executors. Where an Executor brings an Action before Probate, yet if he ſhews the Probate upon the Declaration, 'tis well enough.

Secondly, Whether, when he yields himſelf to Priſon, it ſhall not relate to the firſt Arreſt, to make him a Bankrupt from that Time? This depends upon the Statute of 21 Jac. cap. 19. where it is ſaid, That in the Caſes of Arreſt and lying in Priſon, he ſhall be adjudged a Bankrupt from the Time of his firſt Arreſt.

Obſect. This Relation doth not prejudice Strangers.

Anſw. Dame Hale's Caſe, Pl. Com. 293. If one giveth another a mortal Wound, and then ſells his Land, and the Perſon dies; there ſhall be ſuch Relation as to make the Land forfeited from the firſt Stroke.

Note, This Caſe came by Writ of Error out of the Common Pleas, where Judgment was given for Walter; and the ſaid Judgment was affirmed in this Court principally upon the Point of Relation: For the Court ſaid, That it would be a great Miſchief if it ſhould relate to the firſt Arreſt, as to the Payment of Money to Strangers.

1 Salk. 109, 111. Holt ſaid he was not ſatisfy'd with the Judgment in this Caſe.

Termino Sancti Hillarii, Anno 1 & 2 Jac. II.

In Banco Regis.

Herring *verſus* Brown.

Quod vid. antea, Michaelmas, 35 Car. 2.

THE Caſe upon a Special Verdict was to this Effect; That J. S. being ſeiſed in Fee had made a Conveyance of his Eſtate to the Uſe of himſelf for Life, with divers Remainders over to other Perſons, with a Power of Revocation by Writing under his Hand and Seal, &c.

Antea 368. 2 Show. 185. Antea 278, &c.

Afterwards the ſaid J. S. having a Purpoſe to revoke the ſaid Uſes, and make a new Settlement of his Eſtate, he levied a Fine, and after the Fine he made a Deed, wherein he expreſſed that he revoked the former Uſes, and ſo proceeded to a new Limitation by that Deed, and declared that the Fine by him levied ſhould be to the Uſes of the ſaid Deed.

The ſole Queſtion was, Whether the Fine had extinguiſhed his Power, and by Conſequence forfeited his Eſtate? or, Whether the Fine and Deed ſhould be taken as one Conveyance, and ſo be a good Execution of his Power, and new Limitation of the Uſes?

And after many ſolemn Arguments it was reſolved by the Chief Juſtice Herbert, Holloway and Wright, That the Fine was an Extinguiſhment of his Power, and that the Deed came too late, contrary to the Opinion of Juſtice Withens. Vide antea 368.

ADDENDA.

Termino Sanctæ Trinitatis, Anno 26 Car. II.

In Banco Regis.

Pibus *verſus* Mitford.

Intratur Trin. 20 Car. 2. Rot. 703.

1 Mod. Rep. 98, 121, 159, 237. Raym. 228, 318. 2 Mod. 207, 208, 209. 4 Mod. 153, 380. Tippin and Coſon. Show. Parl. Caſes 104. Davy's and Speed. 3 Keb. 129, 239, 316, 338. 2 Lev. 75. 2 Salk. 675.

IN an Ejectment the Jury find a Special Verdict to this Effect, (viz.) That Michael Mitford was ſeiſed of the Lands in Queſtion and of divers other Lands in Fee, and having Iſſue Robert by one Venter, and Ralph by Jane his ſecond Wife, did (23 Jan. 21 Jac.) by Indenture covenant to ſtand ſeiſed of ſome of the Lands to the Uſe of himſelf for Life, Remainder to Truſtees for Years for ſeveral Purpoſes, Remainder to Jane his ſecond Wife for Life, Remainder to Ralph and the Heirs Male of his Body. And as to the Lands in Queſtion, he covenants to ſtand ſeiſed To the Uſe of his Heirs Male begotten, or to be begotten on the Body of his ſecond Wife, and died. And then the Jury made this ſpecial Concluſion, If any Uſe did ariſe by the Deed to Ralph, then they find for the Defendant; and if not, they find for the Plaintiff.

This Caſe was argued ſeveral Times at the Bar, and now the Judges delivered their Opinions ſeriatim.

2 Mod. 211.

Wylde, Juſtice, for the Defendant.

We are to give our Opinions upon a Deed of Uſes, made for the Proviſion of younger Children not otherwiſe provided for: But if the Caſe were not ſo, It is a ſafe Way, when the Words are ambiguous, to follow the Intention of the Party appearing in the Deed. I ſhall not maintain that Ralph is a Purchaſer, and ſo make this an executory Uſe: I agree, a Man cannot either by Conveyance at the Common Law, by Limitation of Uſes, or Deviſe, make his right Heir a Purchaſer; I agree alſo Griſwold's Caſe in Dyer 156. and if this Caſe had operated by Tranſmutation of Poſſeſſion, this Limitation to the Heirs of the Body of the Covenantor had been void, and no Uſe ſhould have riſen: But here, in the Caſe of a Covenant to ſtand ſeiſed, nothing

moves out of the Covenantor; he retains the Land and directs the Use, and keeps sufficient in him to maintain this Use. There's a great Difference between a Conveyance at the Common Law, and a Conveyance to Uses: At the Common Law, the Heir cannot take where the Ancestor could not; but otherwise it is in Case of Uses, 2 Roll. 794. and so is Wood's Case, 1 Co. 99. a. cited in Shelly's Case.

This I say to shew, That the Intent of the Parties shall be the Guide, and that there is a Difference between Conveyances at the Common Law, and Conveyances to Uses. Horwood's Opinion in Hussey's Case, 37 H. 8. comes to our Case; There's no great Difference between a Covenant to stand seized, and a Feoffment to Uses.

I will not argue to prove, That this Deed shall enure as an Executory Use, because 'tis against a Rule in Law taken by my Lord Hobart, and so agreed before his Time: But here Ralph is Tenant in Tail, Michael his Father being Tenant for Life, Remainder to his Heirs Male begotten on the Body of Jane his second Wife. For the Law, to preserve this Limitation to the Use of his Heirs Male, &c. will by Implication create an Estate for Life in Michael; because the Intent of the Parties appears, that it should be so. There's no great Difference between the Construction of a Deed of Uses and a Will, 13 H. 7. The Wife takes an Estate for Life by Implication, where the Land is devised to the eldest Son after her Decease, Manning and Andrew's Case in 1 Leon. 259. * The Reason of these Cases is the Fulfilling of the Intention of the Parties; and here this Limitation cannot be made good by Way of a future Use, nor by any other Way, but only by Creating of an Estate for Life in Michael the Father by Implication, and this is according to the Nature of a Covenant to stand seiz'd: For the Use is not to pass out of the Covenantor till the proper Time for the subsequent Estate to commence. As to my Lord Paget's Case, 'twas his Intention to have the Use during his Life. And my Lord Coke was certainly very well satisfied with the Resolution in Fenwick and Mitford's Case, when he wrote his Institutes; for he argued before to the contrary, as appears by the Report of that Case in Moor.

* But if it be devised to one after the Death of the Wife, who is not Heir, then the Wife shall not have an Estate for Life by Implication, but the Heir at Law shall enter and hold it during her Life. Smartle and Scholler, Ch. Just. Jones Rep. 98. Vaugh. 261. 1 Mod. 159, 160. 1 Inst. 22. b.

Rainsford, Justice, to the same Intent.

If no Use rises immediately to Ralph; yet if a Use rises by the Deed so that he has the Land any Way, be it by Descent from his Father, 'tis within the Conclusion of the Verdict.

By the Scope of the Conveyance it appears, That it was intended, that Robert should never have this Land till Twelve hundred Pounds were paid for the Provision of younger Children; so that if Robert should have it, it would be against the Intention of Michael.

There are two Reaſons and Grounds in Law, by which we may make this Deed agree with the Intention of the Parties.

Firſt, Becauſe it is in the Caſe of an Eſtate-tail, ubi voluntas donatoris obſervari debet.

Secondly, It is in a Conveyance ſettled by Way of Uſe; and in Caſes of Uſes the Intention of the Parties ought to be purſued; And this is in Caſe of a Uſe that riſes by Covenant to ſtand ſeiſed, which makes the Caſe the ſtronger.

And I conceive this is not a void Limitation, but ſuch an one as gives an Eſtate to Ralph. In Speaking to which I ſhall obſerve what my Lord Coke in 1 Inſt. 23. ſays, viz. That ſo much of the Uſe as the Owner of the Land does not diſpoſe of, remains in him, &c. and ſo in Cownden and Clerk's Caſe in Hob. 30. And this is the Reaſon of Bingham's Caſe. 2 Co. 82.

Now here when Michael covenanted to ſtand ſeiſed to the Uſe of his Heirs Male on the Body of his ſecond Wife begotten, I conceive he ſhall retain the Land as Parcel of his ancient Uſe during his Life; for non eſt hæres viventis, according to Archer's Caſe, 1 Co. And that Michael ſhall retain an Eſtate for Life is proved by my Lord Paget's Caſe, 1 Co. 154. Dyer 310. N. 79. 1 Co. Chudleigh's Caſe 129. 2 Rolle 788. 21 H. 7. 18.

From my Lord Paget's Caſe (upon which I ſhall rely) and the other Caſes it appears, That where there's a Limitation to one after the Death of another, the Covenantor ſhall retain the Land during the Life of the other; and here in our Caſe, this Eſtate not taking Effect till after the Death of Michael, he ſhall retain the Eſtate, and ſhall be Tenant for Life of the old Uſe.

Now the Queſtion is, Whether Ralph ſhall take by Deſcent, or Purchaſe? And I conceive this Eſtate for Life, with the Remainder in Tail makes but one Eſtate-tail in Michael, and that he becomes Tenant in Tail, and ſo Ralph ſhall take as Heir in Tail. I ſhall not trouble my ſelf, whether Ralph may take here as a Purchaſer, becauſe in Cownden and Clark's Caſe in Hob. it is reſolved, That he cannot take as Heir Male of the Body by Purchaſe; becauſe all the Words are not verified in him, for he is not Heir.

I ſhall rely upon the firſt Point, That here is an Eſtate-tail executed in Michael. For when an Eſtate for Life is in the Anceſtor by Way of Retainer, and an Eſtate is afterwards limited to his Heirs, this is within the Rule put in Shelley's Caſe in 1 Co. where the Anceſtor takes an Eſtate of Freehold, and by the ſame Conveyance an Eſtate is limited to his Heirs, mediately or immediately, they are Words of Limitation, and not of Purchaſe; becauſe the Heir is Part of his Father.

Our Case is stronger than Fenwick and Mitford's Case: It's true, the same Reason for that Case is not given by Anderson and Moor, which is given by my Lord Coke. Moor 437. There the Reason is, because the Limitation to the right Heirs is merely void; here Michael hath an Estate in Tail of the antient Use, therefore 'tis not necessary for the Law to create an Estate for Life.

Obj. That this cannot be an Estate-tail executed in Michael, because the Estate for Life is not by the same Limitation, but by Construction of Law.

But my Lord Coke says in Fenwick and Mitford's Case, 1 Inst. 22. b. That there is no Difference where the Estate is created by Law, and where by the Deed. 1 And. 259. And the Law retaining an Estate in Michael for Life, our Case is the same, as if the Estate had been limited to him, with the Remainder to his Heirs Male begotten on his second Wife, which would be an Estate-tail executed in Michael, and would have descended to Ralph.

Twisden, Justice, for the Plaintiff.

I hold there's no Use raised to Ralph by this Deed. We are here in the Construction of a Deed, and not of a Will; It may be an Estate should be raised in such a Case by Will, altho' my Lord Hobart is of a contrary Opinion. I agree, the Case of Hodgkinson and Wood, Cro. Car. 23. but it cannot be argued from thence, that it shall be so in a Deed; for a Devise is not to take Effect till after the Death of the Devisor, and then 'tis apparent, that he is Heir Male of his Body. It hath been agreed, that Heirs Male of the Body are Words of Purchase: It is plain, that Ralph cannot take as Special Heir unless by Purchase, and that he cannot do, because he who shall take by Virtue of such a Limitation ought to be Heir as well as Issue Male; and Ralph here cannot take by Virtue of the Statute de Donis Conditionalibus because none can take as Special Heir, but where his Ancestor took before; and therefore this Limitation is utterly void.

To make this Limitation good, divers Ways have been urged.

First, That this Deed has an Operation by Way of Returning of the Use, and it has been compared to my Lord Paget's Case which differs from it; here cannot be any Part of the old Use in Michael, for if he hath an Estate for Life, it ought to be a new Use; It cannot be a returning Use, for the Limitation to the Heirs Male of the Body of Jane the second Wife is void, and it cannot be returning where the Use is not settled in any Person. I agree my Lord Paget's Case, because there the Estate was vested in William Paget, and the other Use returned by Operation of Law, and the Estate settled could not be devested; but here the Limitation to the Heirs Male being void, the antient Use remained yet in Michael, for nothing was out of him, he having limited a Thing

which

which cannot be. And as to the returning Use, tho' all be done in an instant, yet there is a Priority of Time in the Eye of the Law, for it ought to vest first in him in Remainder, and then return; but here nothing vests in the Remainder.

Secondly, It hath been urged, That it shall be made good by Implication of Law, and so shall amount to a Covenant to stand seised to the Use of the Covenantor for Life, &c. and the rather, as it has been said by Wylde, because Uses are guided by Equity.

Vaugh. 261. Postea 379. But I answer, We are here in Case of a Deed, where an Estate shall not be raised by Implication, as it shall by a Will, Cro. Car. Seagood and Hone 336. A Deed differs greatly from a Will, for if a Man surrenders Copyhold Land to Two, equally to be divided, they are Jointenants; but such a Devise would have made them Tenants in Common. Admit in some Cases an Estate shall be raised by Implication in a Deed; yet it shall not be so here, for it would be to the Disinheriting of the Heir: As to the Case of 13 H. 7. I agree, that a Devise to the eldest Son, after the Death of the Wife, gives an Estate for Life to the Wife; but otherwise it would be upon such a Devise to the younger Son, for there the eldest Son, and not the Wife, should have the Estate in the mean Time, Cro. Jac. Horton and Horton 57. We are not here in favorabili materia, and therefore no Construction shall be made, which does not appear by the Words. It hath been strongly urged, that this being by Way of Use (which is a Matter of Equity) shall be favoured. Admit it; yet it shall be guided by the Common Law, for æquitas sequitur legem. There never shall be a Settlement by Way of Use to make one capable who is not capable by the Common Law. I do not see any Difference between a Feoffment to Uses, and a Covenant to stand seised; for if a Feoffment be made to the Use of one for Life, the Use shall return which is not disposed of, as well as upon a Covenant to stand seised.

Antea 323. 2 Cro. 75. Vaugh. 5, 6, 7, 262, 264. Chief Just. Jones 98.

Postea 378.

Thirdly, It has been urged, That if these severally cannot support this Limitation; yet the Intention operating with the Deed, will both together make an Estate for Life in Michael. But I do not see his Intent here to have it for Life; the Intention even in a Will, which is much stronger, ought to be collected out of the Words of the Will. Cro. Car. Sprit and Bence 368. agreed by the whole Court, That Words in a Will ought to have an apparent Intent to disinherit an Heir, and here there is not any apparent Intent, but rather to the contrary; for of some Lands Michael covenants to stand seised to the Use of himself for Life, Remainder, &c. but of the Lands in Question, he makes a Difference in the Limitation: And the Words of the Deed are to be considered, He covenants to stand seised to the Uses, mentioned, declared and limited in the Deed, and if Michael shall have an Estate for Life, he

Antea 323. Vaugh. 3, 4, 5, 6, 262. 1 Sid. 191.

must have it by Operation of Law. There was a like Case between Flavil and Ventroise in the Common Pleas, in which the Court was divided; but the same Point came afterwards in Question, in the Case of Mr. Tape of Norfolk, and it was adjudged to be the antient Use; And no Case can be shewn, that the Law will create an Estate in the Covenantor, where the Use is not vested in any Person, but the antient Use remains in him.

As to the Cases cited on the other Side, I have answered my Lord Paget's Case already. And as to my Lord Coke's Case, 1 Inst. 22. b. I agree the Use returns, and the Son is in by Descent, and so it was adjudged in Fenwick and Mitford's Case there cited: But the Paraphrase he makes there I do not understand; It is said there, When a Limitation is made to his right Heirs, and right Heirs he cannot have during his Life, the Law doth create an Use in him during his Life: Wherefore is this said? to make the Heir in by Descent? No Doubt without this he is in by Descent, and so was the Judgment in that Case; for what Reason then should there be an Estate for Life raised by the Law, to be merg'd by the Fee as soon as raised? Postea 379.

And there 'tis said, Till the future Use come in Esse, I do not conceive then where it is so long as the Father lives, and what he Means by the future Use, I do not know, for it always was in Esse, and never was out of the Feoffor, and this was so adjudged in that Case of Fenwick and Mitford, and not the Construction of my Lord Coke: And 'tis strange, that no other Reports should mention his Construction.

Hale, Chief Justice, for the Defendant.

If Ralph takes either by Descent from Michael, or by Purchase, the one Way or the other Answers the Verdict, and Judgment ought to be given for the Defendant.

I shall divide the Case into two Points.

1. If he takes by Descent?

2. Admitting he does not, if he may take by Purchase? As this Case is, I shall premise two or three Things.

First, It has been agreed, if an Estate for Life be raised to Michael, the Remainder being to his Heirs Male of the Body of Jane his second Wife, the Estate-tail is executed in him; be the Estate for Life raised by Implication or express Limitation.

Secondly, It is plain, quacunque via it be raised, that the Estate was lodged in Michael, till Ralph the Son be in a Capacity to take it, either by Descent or Purchase; for be it Part of the antient Use, or a new Use, it ought to be in Michael during his Life, for there is nothing to bring it out of him.

Thirdly, In all Cases touching Uses, there is a great Difference between a Feoffment to Uses, a Covenant to stand seised, and

and a Conveyance at the Common Law. If a Man by Feoffment
Antea 376. to Uſes conveys Land to the Uſe of J. S. for Life; he may remit the Uſe to himſelf and the Heirs Male of his Body by the ſame
Co. Litt. 22. b. Deed, and ſo alter that which was before a Fee-ſimple, and turn
2 Mod. 209. it into another Eſtate; but if A. gives Land to B. for Life, Remainder to A. and the Heirs Male of his Body; becauſe a Man cannot give to himſelf, the Remainder is void, for a Man cannot convey to himſelf by a Conveyance at the Common Law.

Theſe Things being premiſed, I conceive here is an Eſtate-tail in Michael.

Firſt, Becauſe in this Caſe the Uſe returns by Operation of Law, and executes an Eſtate in Michael for Life, which being conjoined to the Eſtate limited to the Heirs Male of his Body, makes an Eſtate-tail: This Eſtate for Life riſing by Operation of Law, is as ſtrong as if it had been limited to him for his Life, and after his Deceaſe to the Heirs Male of his Body.

Secondly, Becauſe that a Limitation to the Heirs Male of his Body is in Conſtruction of Law, a Limitation to himſelf and the Heirs Male of his Body. There is a great Difference, when he who has the Uſe, limits it to A. for Life, the Remainder to the Heirs of the Body of B. here no Eſtate can riſe to B. becauſe no-
1 Mod. 98. thing moved from him, but where he who has the Eſtate limits it to the Heirs Male of his own Body, ut res valeat, he ſhall have it for his Life.

Thirdly, It is plainly according to the Intent of the Parties; For the Intent perfectly appears, that the Iſſue by the ſecond Wife ſhould take, and that Robert the eldeſt Son ſhould not take till ſo much Money be paid; therefore, if we can by any Means ſerve the Intent of the Parties, we ought to do it as good Expoſitors.
Hob. 125, 277. For, as my Lord Hobart ſays, Judges in Conſtruction of Deeds do no Harm, if they are aſtuti in ſerving the Intent of the Parties without violating any Law.

Obj. Here the Uſe being never out of Michael, he hath the antient Uſe, which is the Fee-ſimple, and conſequently being the antient Uſe, and this being a new Limitation to the Heirs Male of his Body, the antient Uſe and the new one cannot be pieced to make an Eſtate-tail executed in Michael, but it ſhall be a contingent Uſe (if any) which ought to riſe to the Heir Male of his Body, and ſo remains the antient Fee-ſimple. And it hath been compared to theſe Caſes. If a Man covenants to ſtand ſeiſed to the Uſe of J. S. or of his Son after his Marriage, or after the Death of J. D. theſe are contingent Limitations, and there is a Fee-ſimple determinable in the Covenantor to ſerve the future Uſes.

Husband ſeiſed in the Right of his Wife; Husband and Wife levy a Fine to the Uſe of the Heirs of the Body of the Husband, Remainder to the Husband in Fee; they have Iſſue; the Wife dies; the Iſſue and Husband die; the Queſtion was, Whether the Heir of the Husband or the Heir of the Wife ſhould have the Land: And held per Cur', that here can be no Eſtate for Life to the Husband by Implication, becauſe the Eſtate was in the Wife, to which he was a Stranger. 2. This Limitation to the Heirs of the Body of the Wife was meerly void, for Taking it as a Remainder, there is no precedent Eſtate of Freehold to ſupport it; and taking it as a ſpringing Uſe, then 'tis a ſpringing executory Uſe, to ariſe after a Dying without Iſſue, which the Law will not expect; ſo that 'tis either Way void. 2 Salk. 675. 4 Mod. 153. Show. Parl. Caſes 104. Davys and Speed. 3 Salk. 292.

Anſw. 'Tis true, if a Man covenants to ſtand ſeiſed to ſuch Uſes, as that he leaves a deſcendible Eſtate in himſelf: As if a Man covenants to ſtand ſeiſed to the Uſe of his Son, from and after his Marriage, this is purely a Contingent Uſe, becauſe 'tis poſſible the Marriage may never take Effect, and nothing is fetch'd out of the Covenantor; ſo if he covenants to ſtand ſeiz'd to the Uſe of J. S. after 40 Years, there is a Fee-ſimple determinable in the Covenantor, and therefore thoſe Caſes are not to be reſembled to our Caſe, where the Eſtate of Michael cannot continue longer than his Life. And this without any Wrong done to any Rule of Law, may be turned to an Uſe for Life, and therefore ſuch Conſtruction ſhall be. 1 Mod. 169.

Object. 2. Here is an Eſtate to riſe by Way of Uſe by a Deed, and not by a Will, which ſhall not be by Implication by a Deed. Antea 376.

Anſw. It's a certain Truth: But we are not here upon raiſing an Eſtate by Implication, but qualifying an Eſtate that is now in the Father, which by this new Deed is to be qualified to be an Eſtate for Life, to preſerve the Eſtate-tail, ſo that the Caſes of Implication are not to the Purpoſe.

Object. 3. In this Caſe Michael ſhall be in of his ancient Eſtate in Fee-ſimple which is in him, and not of a new Eſtate created by Implication of Law; and it hath been compared to the Deviſe of Land to a Man's Heir, he ſhall not be in by the Deviſe, but of his ancient Eſtate, that would have deſcended to him.

Anſw. True: But in this Caſe a Man may qualifie his Eſtate, as in Gilpin's Caſe, Cro. Car. 161. Deviſe to his Heir, upon Condition, that he ſhall pay his Debts in a Year, the Heir is a Purchaſor; ſo here is a Qualification to turn the Eſtate of Michael into an Eſtate for Life, ut res valeat.

Object. 4. Michael had not an Intention to have an Eſtate for Life, for in the Limitation of the other Lands, he has limited them expreſly to himſelf for Life, and if he had intended to have had an Eſtate for Life in the Lands in Queſtion, he would alſo have ſo expreſſed it.

Anſw. The Intention will not controul the Operation of Law; his main Intent was to ſettle the Lands upon his younger Children, this the Law ſerves, but not his ſecondary Intentions; If a Man covenants to ſtand ſeiſed to the Uſe of himſelf for Life without Impeachment of Waſte, and afterwards to the Uſe of the Heirs Male of his Body, the Law ſupervenes his Intention, and makes him to be Tenant in Tail. And in our Caſe there was a Neceſſity to limit the other Lands to himſelf for Life, becauſe there was another Eſtate to intervene the Eſtate for Life, and the Eſtate-tail. The Reaſon given by my Lord Coke, in Fenwick and Mitford's Caſe, is plain enough, and it appears that he was of that Opinion afterwards by the Report of Pannel and Antea 377.

Lane's Caſe, 13 Jac. in Rolle Rep. 1 part 238. The Caſe upon which I ſhall rely, which has not been anſwered, is my Lord Paget's Caſe, adjudged by all the Judges of England.

1 Leon. 394. 1 Co. 154. a. in the Rector of Chedington's Caſe. Mo. 478.

Tho. Lord Paget covenants in Conſideration of the Diſcharge of his Funerals and Payment of his Debts and Legacies out of the Profits of his Land, and for the Advancement of his Son, Brother and others of his Blood, that he and his Heirs would ſtand ſeiz'd of divers Manors to the Uſe of T. F. one of the Covenantees, for the Life of my Lord Paget, and after his Death to the Uſe of C. Paget for the Term of 24 Years, and then to the Uſe of W. Paget his Son in Tail, with Remainders over; and afterwards the Lord Paget was attainted of Treaſon. And it was adjudged, that the Lord Paget himſelf had an Eſtate for his Life, for the Remainder being limited after his Death, the Eſtate cannot paſs out of him during his Life; and there in Caſe of a Covenant to ſtand ſeiz'd, he himſelf hath an Eſtate for Life: And this is not becauſe the Eſtate returns, as my Brother Twiſden had ſaid, but becauſe the Eſtate was never out of him, and cannot return either from the Heir or the Covenantee; otherwiſe where ſhould it be during the Life of the Lord Paget who was attainted? The Book is, that it was never out of him, but was turned into an Eſtate for Life; ſo that now it is all one, as if he has covenanted to ſtand ſeiſed to the Uſe of his eldeſt Son after his Death. And the Queſtion is, What Eſtate he has during his Life? It is adjudged that he has an Eſtate for Life; for if there had been a Contingent Fee-ſimple in the Lord Paget, his Heir could never have had an Amoveas manus; for if a Man covenants to ſtand ſeized to a Contingent Uſe, and afterwards is attainted of Treaſon before the Contingency happen, the Contingency ſhall never riſe, for the King has the Eſtate diſcharged, and the Uſe is to riſe out of the Eſtate of the Covenantor; ſo is Moor, Sir Tho. Palmer's Caſe 815. In Moor's Rep. of my Lord Paget's Caſe, 194. it's ſaid, That W. Paget had an Amoveas manus for the Eſtate of the Queen leaſed by the Death of my Lord Paget. In Sir Francis Englefeild's Caſe, Popham 18. n. 7. it's reſolved, That no Uſe riſes, becauſe 'tis that it ſhall deſcend, remain or come, which is uncertain; but if he had covenanted, that after his Death he and his Heirs would have ſtood ſeized to the Uſe of John, an Uſe would have reſulted to Sir Francis.

Second Point. I conceive if it be impoſſible for Ralph to take by Deſcent, this would be a Contingent Uſe in him by Purchaſe.

The great Objection againſt this is, that the Limitation is to an Heir; and an Heir which ought to take by Purchaſe, ought not to be only Heir of the Body, &c. but Heir general. Of this I am not well ſatisfied: I conceive the Remainder being limited to the Heirs of the Body of Jane begotten by Michael, ſuch a Limitation will make a ſpecial Heir to ſerve the Turn, and 'tis not to be reſembled to Shelley's Caſe. My Reaſons are, 1 Co. 94. 1 And, 69. Mo. 136. Dyer 373.

Firſt, Becauſe at the Common Law, before the Statute de Donis, Notice was taken, that this was a ſpecial Heir, and therefore 'tis no Wrong done to make him here a qualified Heir. In the Statute de Donis 'tis ſaid, When Lands are given to a Man and his Wife, and the Heirs of their two Bodies begotten.

Secondly, Upon the ſpecial penning of the Deed it is apparent, that Michael took Notice that he had an Heir at Common Law, therefore it can't be intended that he meant here ſuch an Heir that ſhould be Heir general to him; this would be Contradictio in Adjecto. Litt. Sect. 352. puts this Caſe; If a Feoffment be made upon Condition, that the Feoffee ſhall give the Land to the Feoffor and his Wife, and the Heirs of their two Bodies begotten; in this Caſe, if the Husband die, living his Wife, before the Eſtate-tail is granted to them, the Feoffee ought to make the Eſtate as near the Condition and as near the Intent of the Condition as may be, (viz.) To let the Land to the Wife for her Life without Impeachment of Waſte, the Remainder to the Heirs of the Body of her Huſband on her begotten; If the Husband and Wife die before the Gift made, then the Feoffee ought to make it to the Iſſue and to the Heirs of the Body of his Father and Mother begotten. Suppoſe that this had been to a ſecond Wife, and there had been Iſſue by a former, the Book of 12 H. 4, 3. ſays, That there it ſhall be in another Manner; but Litt. ſays it ſhall be as near, vid. Litt. Sect. 22. Morevil's Caſe, Fitzh. Tail 23. 2 Ed. 3, 1. 4 Ed. 3, 50. By all theſe Caſes it appears, That no Regard is had whether the Son be Heir of the Husband, if he be the Heir of their two Bodies. Therefore it ſeems, that by this Limitation Ralph ſhall take by Way of Contingent Remainder: For Heirs of the Body of the ſecond Wife is a good Name of Purchaſe. I have not read any Caſe againſt this. Hill. 16. or 26 Eliz. there was this Caſe. A Man taking Notice in his Will, that his Brother (who was dead) had a Son, and that he himſelf had three Daughters who were his right and immediate Heirs, he gave them 2000 l. and gave his Land to the Son of his Brother by the Name of his Heir Male. Pro-

vided, If his Daughters troubled his Heir, then the Devise of the 2000 l. to them should be void. And it was resolved that the Devisor taking Notice that others were his Heirs, the Limitation to his Brother's Son by the Name of Heir Male was a good Name of Purchase, and this agrees with Cownden and Clerk's Case, in Hob. 30.

Wylde, Justice, said, He was of the same Opinion with Hale in this last Point. And Judgment was given for the Defendant.

See the Case of Davis and Speed, in 2 Salk. 675. 4 Mod. 153. Parl. Cases, 104.

Three

Three Learned

ARGUMENTS,

One in the

Court of King's Bench,

BY

Sir *FRANCIS NORTH*, Attorney General;

And Two in the

Court of Exchequer.

BY

Sir *MATTHEW HALE*, Chief Baron there.

The Argument of Sir *Francis North*.

In Banco Regis.

Potter *and* Sir Henry North.

Antea 163, 164. Vaugh. 251. 1 Saun. 347, &c. 350. 1 Lev. 253, 268. 2 Keb. 513. 517. 2 Lev. 2. 2 Saun. 320, &c. 324. 1 Mod. 74. 2 Keb. 757, 842. Similis Casus. Carter 199. 2 Show. 43.

IN a Replevin for taking of an Horse in a certain Place called the Fen, at Milden-Hall in the County of Suffolk; the Defendant makes Cognizance, as Bailiff to Sir Henry North, and saith, That the Place Where, &c. containeth ten Thousand Acres of Pasture in Milden-Hall, whereof a certain Place called Delfe, is Parcel, and that it is Sir Henry North's Freehold, and the Horse was Damage feasant there, &c.

The

The Plaintiff replies, Confeſſing the Soil to be the Freehold of Sir Henry North, but ſays, That Time whereof, &c. the Place Where hath been Parcel of the Fen, and Parcel of the Manor of Milden-Hall, of which Sir Henry North is ſeized in Fee; and that the Plaintiff was at the Time, &c. ſeiſed of an ancient Meſſuage, (one of the Freeholds,) holden of the Manor, by Rents and Services, and Parcel of the ſaid Manor; and that Time out of Mind there were divers ancient Freehold Meſſuages, holden of the ſaid Manor, by Rents and Services, and divers Copyhold Meſſuages, Parcel of the ſaid Manor, by Cuſtom of the ſaid Manor, demiſed and demiſable by Copy of Court-Rolls of the ſaid Manor.

And the ſeveral Tenants of the ſaid Freehold Tenements being ſeiſed in their Demeſne as of Fee; and thoſe whoſe Eſtate they have in the ſame, Time out of Mind have had, together with the Cuſtomary Tenants of the ſaid Cuſtomary Tenements, the ſole and ſeveral Feeding of 100 Acres of Paſture for all Beaſts, except Hogs, Sheep and Northern Steers, levant and couchant upon their ſeveral Freeholds every Year, at all Times of the Year, as to their ſeveral Freeholds belonging.

3 Mod. 150.

Antea 18.

And that within the ſaid Manor there is, and Temps dont, *&c.* hath been ſuch a Cuſtom, That the ſeveral Tenants of the Cuſtomary Meſſuages, together with the Freeholders aforeſaid, have uſed and accuſtomed to have the ſole and ſeveral Feeding of the ſaid 100 Acres of Paſture for all their Beaſts, except Sheep, Hogs, and Northern Steers, levant and couchant upon their ſeveral Copyholds every Year, at all Times in the Year, tanquam ad ſeparal' Tenementa cuſtomar' ſpectant' & pertinent: ; and the Plaintiff being ſeiſed put in his Horſe, &c. and ſo juſtifies.

3 Mod. 250.

Antea 163, 164.

Vaugh. 251.

Upon this the Defendant demurs generally.

This Preſcription is naught in Subſtance, and Judgment ought to be given for the Defendant, upon theſe Four Exceptions:

Firſt That ſeveral Freeholders cannot join, or be joined in a Preſcription to claim an entire Intereſt in another Man's Soil, as annexed to their ſeveral Eſtates.

Secondly, The Intereſt of ſola & ſeparalis Paſtura, is an entire Intereſt, and cannot be claimed both by Preſcription and Cuſtom.

Thirdly, That the Owner of the Soil cannot be wholly excluded out of the Soil at all Times, as this Preſcription and Cuſtom import.

Fourthly, This is a new Invention in Pleading, framed to overthrow a Maxim in Law, and is of miſchievous Conſequence,

Tho'

Tho' but one Man pleads, yet 'tis a Joint Prescription that he justifies by, and he involves all their Estates in his Prescription, and prescribes for the whole Thing belonging to all their Estates; so that 'tis the same Thing in Substance, as if they had joined in Pleading.

If he had pleaded, That he, together with all the Freeholders and Copyholdees, &c. he had prescribed alone, and only for himself; but that would have been naught, because the sole Pasture cannot by any Title or Prescription be annexed to their several Estates, as shall be shewn afterwards.

First, I shall consider the Nature of the Thing.

Secondly, The Rules of Prescription.

Thirdly, Examine the Case by those Rules.

First, I admit that there is a sole and several Pasture, and that it lies in Prescription. Cases are frequent, where one Man hath the first Crop and the Soil, and another Man hath the Pasturage or sole Feeding till the Sowing again, &c. Hutton 45.

I conceive it to be in its Nature a certain and determinate Interest or Profit; I mean in Distinction to an incertain Profit a prender.

To have a Common or Pasturage for Beasts levant and couchant upon such Land, or to have Estovers to be spent in such an House, without any determinate Quantity or Number, I call incertain; for it is to be measured only by Use and Occasions. Vide Nelf. Lutw. 364. 3 Lev. 260.

But to have Pasture or Common for 100 Sheep, or Estovers of a certain Quantity, as ten Load of Wood, is certain every Year, and differs very much in its Nature from an incertain Profit a prender.

As for Example: The Levancy and Couchancy is not traversable, nor the Employment of Estovers certain, because that no Surcharge can be to the Owner. Yelv. 188, 189. 2 Saun. 327.

It may be granted from the Land a que, 2 Cro. 15. Drury and Kent; for the same Reason, in Case of a sole Pasturage, the Party that claims it having a general Interest, and the Owner being wholly excluded, it is not material with what Cattle it be taken tho' they prescribe with an Exception of some, for if there be an Overplus the Owner cannot have it.

Now as there may be such an Interest, so I admit that several Persons may have it; but it must be as Joint-Tenants or Tenants in Common, where they have several Rights by Moieties and Purparties: But several Men cannot claim the Entiertie of this Profit by Prescription, as I shall after shew. If such a Profit a prender as this be annexed to Land, 'tis appurtenant by Prescription or Grant; and if Part of the Land a que, &c. is alienedy the Entiertie cannot belong to both their Estates, but there shall be an Apportionment, (scilt.) the Alienee shall have the same Proportion for the 1 Saun. 352. 2 Saun. 327. Vaugh. 252.

the ſole Paſturage, that he has of the Land a que, &c. in the ſame Manner as it would be in a Caſe of Common appurtenant certain, for which there will be an Apportionment in ſuch Caſes, as was adjudged 7 Jac. inter Moreton & Woods, 1 Rolle 235.

Having ſaid this concerning the Nature of the Intereſt demanded, I will now ſpeak concerning the Nature and Rules of Preſcription.

A Preſcription that is to claim a real Intereſt of Profit in ſolo alieno, is a Title, and as a Title muſt be ſtrictly and curiouſly pleaded; and is not like Preſcriptions that are by Way of Diſcharge, and for Eaſements, or Matters of perſonal Exemption or Privilege.

Yelv. 159.

A Man may lay a Preſcription in a great many, where it tends but to claim an Eaſement or Diſcharge, and not Matter of Intereſt and Profit. 15 E. 4, 29. 18 E. 4, 3. to ſay, That all the Inhabitants have had ſuch an Eaſement, &c. or, to have been diſcharged, &c. will be well: And for Matters of Privileges a Preſcription may be in General; for it is but a Matter of Exemption, and perſonal, and is called a Preſcription in Diſtinction to a Cuſtom; becauſe Cuſtom is meerly local, and this is to Perſons, yet having Reſpect to ſuch a Place, as all the Citizens, &c. as in Day and Savage's Caſe in Hob. Rep. Or having Reſpect to ſuch a Condition, as All Serjeants at Law, or all Attornies of ſuch a Court, ſuch Preſcription muſt be in Generalty, to expreſs the Extent and Nature of the Privileges, and ſo always have been allowed.

Cr. El. 441.

Hob. Rep 86.
1 R. Ab. 264.

But a Preſcription to claim a Profit, or an Intereſt, in alieno ſolo, is a Title; and as in ſetting forth Titles the Law is curious in pleading, and lays down ſtrict Rules, which muſt be obſerved; ſo in pleading ſuch Preſcriptions, the Rules taught in our Books, and the Courſe of Pleading hitherto uſed, muſt be followed.

One Rule of ſuch Preſcription is, That the Thing preſcrib'd for by a que Eſtate (not in groſs, but appendant or appurtenant) muſt agree in the Nature and Quality of the Thing to which it is annexed or appurtenant. Corporeal Things cannot be appurtenant to Corporeal, becauſe they are diſtinct, and can have no Relation one to another. Eſtovers of Wood cannot be appurtenant to Land, becauſe they cannot be uſed for it, 1 Inſt. 121. b. 122. a. If a Man would plead, That he and all thoſe whoſe Eſtate, &c. in Black-Acre, &c. Time out of Mind, have had ten Load every Year, to be taken, &c. tanquam ſpectant', &c. upon Demurrer this would be naught; becauſe it does not agree with the Rules of Law. And Uſage may be objected in that Caſe; but Uſage alone makes but a Title in groſs, which will ſerve when it was Time out of Mind continued in the ſame Hereditary Line.

Dy. 70. b.
4 Co. 36. b.

Uſage cannot annex a Thing that cannot in Nature be uſed with the Thing to which it ſhould be annexed.

One other Rule of Preſcription for Matters of Intereſt is, That nothing can be preſcribed for, that cannot at this Day be raiſed by Grant.

For the Law allows Preſcriptions but in Supply of the Loſs of a Grant. Antient Grants happen to be loſt many Times, and it would be hard that no Title could be made to Things that lie in Grant but by Shewing of a Grant: Therefore upon Uſage temps dont, &c. the Law preſumes a Grant and a lawful Beginning, and allows ſuch Uſage for a good Title; but ſtill it is but in Supply of the Loſs of a Grant: And therefore for ſuch Things as can have no lawful Beginning, nor be created at this Day by any Manner of Grant, or Reſervation, or Deed that can be ſuppoſed, no Preſcription is good. 11 H. 7. 13, 14. 13 H. 7. 16. per Keble 21 H. 7. 40.

Preſcription for a Lord to have ſo much for every Pound-breach is a good Preſcription to bind the Tenants, but naught as to Strangers; becauſe as to the Tenants it might have a good Beginning by Way of Reſervation, but as to a Stranger it could have no lawful Beginning by Way of Grant, or Reſervation, or any Way that can be imagined. 21 H. 7. 40.

Now if we examine the Preſcription in the Caſe in Queſtion, by theſe Rules, we ſhall find;

Firſt, That the Thing preſcribed for does not agree in the Nature and Quality, nor is applicable to the Thing to which it is annexed.

The Thing preſcribed for is an entire, determinate Intereſt; and the Thing to which it is annexed is ſeveral Eſtates that have no Relation one to another: the Uſage of one can have no Relation to the Uſage of another. Antea 164.

I would put this Caſe. In an Action of Treſpaſs, the Defendant juſtifies for Eſtovers certain, or Paſture certain in this Manner (viz.) that he is ſeiſed of a Meſſuage, &c. in Fee, and that J. S. is ſeiſed of another Meſſuage, &c. in Fee, and that he and J. S. and all they whoſe Eſtates they have in the ſaid two Meſſuages, have had ten Load of Wood, &c. or Feeding for 500 Beaſts: Or, if two Lords of ſeveral Manors in Fee join in preſcribing for a certain Rent, under Favour it were abſurd and never was known or allowed; for the Things to which, &c. being ſeveral, the Uſage of Neceſſity muſt be ſeveral, and the Preſcriptions alſo muſt be ſeveral: As for Example, For one of them to preſcribe for a Moiety, &c.

The Reaſon why a Man cannot preſcribe to have Eſtovers of Wood to Land is, becauſe there can be no Uſage to anner it; for it cannot be uſed with it; and in all Caſes Preſcription follows 4 Co. 39. a.

the Nature of the Uſage; and therefore in the Caſe at Bar, the Uſage being ſeveral, and the Eſtates ſeveral, the Preſcription ought to be ſeveral alſo.

It is impoſſible to raiſe ſuch an Intereſt by a Grant at this Day; for if ſuch a Grant were now made, either the Grantees would be Jointenants of this Intereſt, and then there would be a Survivorſhip, or elſe they would be Tenants in Common of it, and their ſeveral Intereſts might be annexed to their ſeveral Eſtates by Purparties or Apportionment: And ſo it would be in the Nature of ſeveral Grants; and there muſt be to ſeveral Preſcriptions ſeveral Men that have had Land Time out of Mind, yet cannot join in making a Title, but muſt make it ſeverally. As for Example:

If there be Three, one of them muſt ſay, That his Father was ſeiſed of a Third Part that deſcended to him, and ſo make a Title againſt a Stranger, tho' there be a joint Poſſeſſion: And if he be to make a Title againſt his Companions, he may ſay, That he and all thoſe whoſe Eſtates they have in the other Two Parts; they cannot ſay, That their three Fathers were ſeiſed of the Lands, and ſhew the ſeveral Deſcents; nor, That they Two, and all whoſe Eſtates they have in Two Parts in Three to be divided, have held in Common.

For the Title of the one concerns not the other; they are upon Lines and Deſcents: And Preſcription is making of a Title, as was ſaid before; and the Law is as ſtrict in it, or rather more ſtrict than in making of a Title to Land.

Therefore ſeveral Men that have ſeveral Eſtates, and no Relation one to another, cannot join in making a Preſcription; for the Preſcription of one does not concern the other.

Raſtal's Entries 622. d. en Treſpaſs, &c. Two Commoners (to avoid Prolixity and Repetition) do, as near as they can, join in a Preſcription; but being conſidered, it is a ſeveral Preſcription, as much as if they had juſtified ſeverally.

By Lord Coke's Rule on Littleton 197. a. That Tenants in Common may join in an Aſſize for an entire Thing, as an Hawk, or an Horſe for the Neceſſity of the Caſe. It may be objected, that there is the ſame Neceſſity here; I anſwer,

That tho' in that Caſe they join in the Demand and the Action, yet they muſt make their Titles ſeverally as they are, they muſt ſue as they may recover, which cannot be Half an Hawk, or Half an Horſe; but when they come to make their Titles in Pleading, they muſt ſet them forth diſtinct; there the Poſſeſſion is joint and cannot be ſevered; but in our Caſe the Poſſeſſions are ſeveral, and one hath nothing to do with the other, and the Thing claimed is in its Nature ſeverable, either by Moieties, Purparties or Apportionment.

It may be objected against my Rule, That a Prescription must be, as a Grant at this Day may be made, that (11 H. 7. 13, 14.) a Man may prescribe against many as Tenants, or a Commonalty, without naming a Party certain; and such a Prescription cannot spring out of one Grant no more than this. For if a great many may join in one Grant, yet it is so many several Grants as to their several Interests; and so it may be said, there ought to be so many several Prescriptions.

I answer, The Rules are not alike: For if 100 Men, being a Generality, (as all the Tenants of the Manor of Dale) make the same Kind of Grant to J. S. or there be the same Kind of Reservation, and the Thing claimed be annexable to the Estate of J. S. these all unite in the Grantee and his Estate, and the Estate continues entire: Time knits and unites it, and an entire Prescription will serve, being it will serve the Case.

But when a Grant is made from one to many that have several Estates, their Estates are carried and descended several Ways, and Time and Usage makes them distinct and several, and cannot be severed by the same Prescription.

But the Prescription at the Bar is worse upon my second Reason; for Prescription and Custom are of contrary Natures and incompatible, and cannot give Being to the same Thing.

Prescription is a Title presuming a Grant to the Freeholders, and a lawful Beginning. The Copyholders claim by Custom, because they are but Tenants at Will and not capable of a Grant; then this must be raised from the Lord by Parcels, which being an entire Thing it cannot be: For which soever should be raised first, the rest must be left in the Lord, who cannot have a Right of sole Pasturage in his own Soil distinct from the Soil. 6 Co. 60. b.

It may be objected here, That Custom and Prescription are not of such contrary Natures as I make them; for in Day and Savage's Case in Hob. 85. the Pleadings were as a Custom of the City, and the Court adjudged it to be a Prescription; which shews, that Custom and Prescription differ not so much in the Nature of the Thing, as in the Manner of the Pleading. Cro. El. 363. Cro. Jac. 152.

For Answer, I need but observe the Nature of that Case. The Officers of the City of London justified for a Duty of Wharfage claimed by the City. The Plaintiff sets forth in his Replication, That within the City there is a Custom for Freemen to be discharged, &c. and the Question was, Whether this was a Custom to be tried by the Mouth of the Recorder, or a Prescription to be tried per Pais? It was held to be in its Nature a Prescription; and if it were not, that it was adjudged that it ought not to be tried by their Certificate who were concerned in Interest.

The Preſcription there meant by the Court, was not a Preſcription to claim a real Intereſt, as in this Caſe; but it was (as I may call it) a local Preſcription to privilege Perſons in a certain Place and Condition, which is in its Nature betwixt a Preſcription and a Cuſtom; and not a Cuſtom, becauſe it concerns the Diſcharge of Perſons, and it is merely Local; nor a Preſcription, becauſe it is not annexed to any Eſtate, nor to any Perſon; but in relation to a certain Place and Condition. And yet it is rather termed a Preſcription; for it is ſaid, That Inhabitants may preſcribe for an Eaſement or a Diſcharge; but a ſtrict Preſcription to make Title to a real Intereſt is ſo nice, that it cannot be pleaded by Way of Cuſtom, nor confounded with it. Inhabitants, or Freemen, or Citizens cannot preſcribe in that Kind.

I muſt add to ſtrengthen my Reaſons upon theſe two Matters, that no Precedent can be ſhewn in all our Books of any ſuch Caſe, either where two Freeholders join to claim a real Intereſt in ſolo alieno, or where Preſcription and Cuſtom are mixed as in this Caſe.

It will be no Objection that it cannot be pleaded better, when it appears the very Thing cannot conſiſt with the Principles of Law; for tho' there be ſuch a Thing as ſeveral Paſture, which may be appurtenant to a Meſſuage, yet it cannot be annexed to the Eſtates of ſo many ſeveral Freeholders and Copyholders: But if the Thing were conſiſtent with Principles of Law, the Pleading here is naught, to mix a Preſcription and a Cuſtom together, which are incompatible.

The Whole ought to have been laid by Way of Cuſtom, it being an entire Thing, and the Neceſſity of the Caſe would have maintained it.

If J. S. makes a Feoffment to the Uſe of the Feoffee and Feoffor and their Heirs, one cannot be in by the Common Law, and another by the Statute of Uſes; but both ſhall be in by the Statute of Uſes. So here, the entire Thing not being to be maintained, poſſibly both Preſcription and Cuſtom ſhould have been laid by Way of Cuſtom; for the Freeholders in Caſe of Neceſſity (it may be) might claim by Cuſtom, tho' the Copyholders could not preſcribe.

Antea 164. Thirdly, My third Reaſon is, becauſe the Owner of the Soil can by no Preſcription or Cuſtom be excluded out of his own Soil at all Times of the Year. And this Reaſon I principally depend on, becauſe it ſtrikes at the very Root and Eſſence of the Thing.

I know there are many Caſes, in our Books, of Uſages, that have been allowed in Reſtraint of the Owner of the Soil; I ſhall not oppoſe any of them, but admit them all; yet oppoſe this

Preſcription of which I may confidently ſay, there is not one Precedent in all our Books.

I will admit the Lord or Owner may be excluded for a certain Time, according to the Books, Fitzh. Tit. Preſcription 51. Hutton's Rep. 45. Pitt and Cheek's Caſe, and the ſame Caſe 6 Co. by the Name of Spark's Caſe, and Co. on Litt. 122. a. where he ſays, a Man may preſcribe to have ſolam veſturam, from ſuch a Day to ſuch a Day, and thereby the Owner of the Soil may be excluded from Feeding there; ſo he may preſcribe to have Separalem paſturam, and exclude the Owner of the Soil from Feeding there.

I know that they object, that my Lord Co. is to be underſtood as to Separal' paſtur', that it may be at all Times in the Year, becauſe he does not reſtrain it as he does the Solam paſturam. But certainly the Law is the ſame for the one as for the other, and the Books muſt be intended for the one as well as for the other, for coming immediately next, there needed no Repetition for the later, but the (ſo) ſignifies in the ſame Manner, and ſo underſtood I admit it.

I admit the Lord or Owner may be ſtinted as to this Kind of Cattle; and have none but Sheep or Horſes, and ſo he may be ſtinted to a certain Number, according to Kenwrick and Pargiter's Caſe. Yel. 129. 2 Cro. 208.

I admit the Lord or Owner may be excluded as to ſome Kind of Profits: Another Man may preſcribe to have omnes Spinas upon ſuch a Waſte, according to Dowglas and Kendal's Caſe. Yelv. 187. 2 Cro. 256. 8 Co. 136. b. 2 Brown. 149.

And for this Reaſon a Man may preſcribe to have ſolam piſcariam upon another's Soil; for there he leaves the Owner the Profits of the Soil for Manuring of his Ground or Ballaſtage, which the Owner has beſides the Property and the Uſe of the Water; ſo that he leaves enough for the Subſiſtence of the Fiſh.

Nay, I ſhall agree further, that the Lord may be excluded wholly from the Feeding of his Ground, upon Special Matter ſhewn to the Court, whereby it may appear that the Lord has ſome Recompence, or takes the Profits ſome other Way; as if there be a Park or Foreſt where the Lord has the Game, another Man may preſcribe to have the Herbage, for the Lord has conſiderable Profits of the Ground by his Deer, which is ſo conſiderable, that if the Franchiſe comes to be determined, it hath been held that ſuch a Preſcription for Herbage, being but Surplusage after the Feeding of the Deer and ſubordinate to it, ſhall rather be loſt than carry the whole Profit of the Feeding and exclude the Owner. And it has been the Caſe of many Parks, that have been diſparked by the King after the Herbage granted away; ſo if there be Mines opened, or any other Profit that appears to the

the Court to be left to the Owner. I do not oppose, but that the Pasturage may be claimed by Prescription.

But to have the sole Pasturage of all Pasture-Grounds at all Times in the Year, is to have the whole Profit of the Ground, and the Owner is wholly excluded, which would be very unreasonable. I shall agree yet further, that upon a Special Case shewn to the Court in the Pleading, the Lord may be excluded from any Pernancy of Profit in his own Soil; as putting this Case, a Lord hath improved so much of his Wastes as that he has left but just sufficient for his common Feeding; in such Case the Lord ought to be excluded of Feeding; but this must be shewn in Pleading, according to my Lord Coke's Opinion, in Kenwrick and Pargiter's Case, which is well reported in Brownl. 2 part, 64, 65. And in all Reason there must be Special Pleading in such Case; for where a Prescription or Custom is reasonable only upon Special Matter or Circumstance, that Special Matter or Circumstance must be shewn to the Court, by him that would have the Advantage of the Prescription; for the Negative cannot be averred on the other Side.

And it cannot be helped, by supposing there may be Trees, Mines or Park; but it ought to be shewn; for every Thing that depends upon Supposition, may as well not be as be; and to allow a Prescription upon such a Supposal, would be to bind up a Party by it tho' the Thing be not; and Pasturage may well be supposed the whole Profit of Pasture-Ground; for it is so in Fact in many Places, and has its Name, because it is fed all the Year. But where it is fed but Part of the Year, and mowed or plowed the rest, it is called Arable or Meadow.

2 Brownl. 322.

Dy. 71. a. 235. b. 2 Brownl. 322. Owen 37.

The main Objection that I conceive they can make to this is, That the sole Pasturage or Vesture lies in Grant, and the Owner may exclude himself wholly by Grant, and so he may be excluded by Prescription or Custom; and this they ground upon Co. Litt. 4. b. 2 Roll. Ab. 2. where it is said, If a Man grants to another and his Heirs vesturam terræ, and makes Livery secundum formam Chartæ; yet the Freehold of the Soil shall not pass; by which it is implied that the Vesture shall.

1 Inst. 4. b.

If this Book be to be understood of the Vesture at all Times of the Year where no other Profits remain to the Lord, I shall crave Leave to object against him from the same Page, where it is agreed, that if it were Profits, the Soil would pass.

Methinks it should be the same in Reason, where the Vesture is all the Profits, and Vesture shall be intended all the Profits. I shall cite some Authorities, which are not inconsiderable, to warrant this Opinion.

Owen 38.

I have in a Manuſcript Report of Caſes in King James's Time, a Caſe betwixt Collins and the Biſhop of Oxford, It was Paſchæ 19 Jacobi, upon a Trial at Bar in the King's Bench. The Caſe was, that 1 E. 6. the King erects the Biſhoprick of Oxford, and gave to the Biſhop and his Succeſſors, inter al' primam veſturam of a Meadow called Horſe Meadow. John Bridges, Biſhop of Oxford, leaſed it for three Lives, rendring Rent, and dies; his Succeſſors, before Reſtitution of the Temporalties, accepted the Rent of the Leſſee and afterwards entered upon him. Upon this Caſe the firſt Queſtion was, What paſſed by the Grant of prima veſtura?

My Report ſays, That it was agreed by all the Juſtices, that by a Grant of Veſtura Terræ by a common Perſon the Soil will paſs, and then there muſt be a Livery of Conſequence; but they held a Grant of prima veſtura was but like a Grant of prima tonſura, and being for no certain Time, is but an Intereſt in the firſt Cutting or Taking of the Graſs. But they all agreed, that if a Man grants primam Veſturam from ſuch a Day to ſuch a Day certain, the Grantee ſhall have the Soil and mow it, or feed it as he pleaſes.

Kellewey 118. If a Man grants veſturam Terræ for Term of Life to another, it is a Grant of the Land for Life; for, ſaith the Book, the Veſture is the Profit of the Land, and it is all one to have the Profit as to have the Land ſelf. Littleton puts the Caſe, if a Man grants the Veſture of Land to another and his Heirs, without Livery, no Eſtate paſſeth. Dy. 375. b. Moor 302, 355.

But the Book where my Lord Coke puts the Difference betwixt the Veſture of the Land and the Profits of the Land, ſeems to be miſtaken, and in Reaſon they are the ſame; for I take it, generally ſpeaking, Veſture ſhall be intended all the Profits, and if there be ſpecial Profits, as Mines opened, or Waters, &c. which may qualify the Word, and retain the Soil to the Owner, it muſt be ſhewn.

And as it is for Veſture of Land, ſo I conceive where it appears in Pleading that the Ground is Paſture, Paſturage or ſole Feeding will ſignify all the Profits; for Paſture is properly that which is wholly for Feeding; and where the ſole Paſture is claimed, the Owner cannot claim, or take any other Profit.

Temps E. 1. Tit. Partition 21. Two Men agree to make Partition of Paſture-Ground in this Manner, That one ſhall have totam paſturam, from ſuch a Time to ſuch a Time, and the other for the Reſidue of the Year; this is a Partition of the Soil it ſelf, which ſhews Paſture is to be intended the whole Profits of Paſture-Ground; in that Caſe the Quo jure could not be maintained, for the Party had not barely a Liberty, but the Soil it ſelf.

It

If several Men have Profits upon the same Land, alternis vicibus, the Law most commonly determines the Right of the Soil to be in him that has the most considerable Profits. As for Example,

If one has the Summer Feeding of Pasture, or the first Tonsure of Meadow, or the Sowing and Reaping of Corn upon arable, and another Man has the Feeding separately at other Times of the Year; the Law saith, That the Soil is in him that has the Summer Profits and Corn, because it is the greater Profits, and the other hath but a Profit a prender.

Cr. Car. 362. Hutton 45.

Now suppose that two Men have interchangeably the sole Feeding of Pasture at such Times, that the Interest of one is in all Respects equal to that of the other, there nothing can determine the Soil to be in one more than the other; and therefore it shall be in one for his Time, and in the other for his Time. But where one has the sole Feeding of Pasture at all Times in the Year, and it has been so Time out of Mind, and there is nothing but Pasture, what can the other have to shew the Soil to be in him, and why should it not be said to be in him that has the Feeding or whole Profits? It seems very absurd, that a Man should be allowed to be Owner of the Soil, and yet it may be he has no Badge of Ownership by Perception of Profits; If the Man's Estate be displaced so as to be put to a Writ of Right, how should he lay the Esplees?

And as to this Consideration there may be Difference betwixt a Grant and Usage; for a Grant beginning within Time of Memory, the Ownership of the Soil was once fully manifested, until he had devested himself of all but that; but upon Usage Time out of Mind nothing can be said, why one Man should have the Soil more than another, if it be not in him that hath all the Profits.

I must end this Point also with this Observation, That there is no Case in all the Books of a sole Pasture at all Times of the Year, but in F. N. Tit. Prescription 51 and 55. and Hutton 45. where it is made a Profit a prender, and the most considerable Profits are left to the Owner.

My fourth Reason upon which I hold this Prescription is void, is, because it is a new Invention framed to overthrow a Maxim in Law, and is of mischievous Consequence.

New Inventions that are agreeable to Rules of Law, I know have been always received, and sometimes have proved of excellent Use. But new Inventions that are framed to supplant Principles of Law, have been always baffled and rejected.

The Maxim and Principle of Law that is overturned by this Way of Pleading is, That a Commoner cannot prescribe to exclude his Lord.

This Maxim is one of the Foundations of Law, and depends upon the Reason of the Thing, and not upon the Sound of the Word.

It will be objected, that the Reason is, because ex vi termini the Word Common implies that they are to common with the Lord, which they cannot do, if the Lord does not feed.

But I conceive it is not so, for it may as well be called a Common, without a Solecism, where the Tenants feed in common together, and the Lord never feeds with them, as where he does. The true Reason is from the Nature of the Thing, for it is supposed the Lord has no need of his Waste, and to make Non-usage in such a Case turn to a Prescription or Custom against him, would be most unreasonable.

Upon the Creation of Manors, the Lords took as much as was for their own Use into their Demesnes, they distributed as much as was convenient amongst their Tenants; what was left was called the Lord's Waste, which was neglected by the Lord because he had before taken into his Demesnes what he had need of.

It were very hard, that Non-usage should turn to a Prescription against the Lord, because he doth not feed his Wastes, when he left them waste before, because he had taken as much before as he had Occasion to feed.

It is upon the same Reason that the Law will not allow any Prescription for Commoners to exclude, and not upon any Argument from the Word Common. Maxims in Law do not depend upon Words, but upon Foundations of Reason; it is not for the Honour of the Law that it should have its Maxims depend upon Sounds and Words, and not upon solid Reason.

That Commoners cannot prescribe to exclude their Lords, if they call their Right by the Term of Common; but if they call it by another Name, tho' they claim the same Kind of Interest, they may exclude them.

If you prescribe to have Communiam excludendo Dom', that is not good; but if you prescribe to have solam & separalem Pastur' in common amongst your selves for Beasts Levant and Couchant, you may exclude him.

Under Favour, to have such a Maxim turned out of Doors and made useless, there ought to be very good Authority for it; such an Invention ought to be examined by strict Rules.

And the Consequence of this Innovation will be great and general, for there is no Common in England, but this Plea will serve for, if the Jury will find it; and it is found by Experience, that many Times, though the Lord of the Manor gives very good Evidence, a Jury will find against him; and if a Lord cannot prove an actual Feeding, a Jury will certainly incline to find it, let the Court direct what they please.

The King and great Lords that have large Wastes, that lie remote from their Care, seldom made any Benefit by Feeding; and they must not expect hereafter to make any Improvements if this Pleading be allowed, which will be very mischievous; whereas, if that Maxim of Law were observed, and such an unreasonable Claim disallowed in Pleading, it will not be in the Power of Juries to exclude Lords out of their own Wastes.

I conceive, in this Case, upon the Matter disclosed in Pleading, the Court may discern judicially, that this is but an Innovation, and an Artifice to disguise a Common, and to call it a sole Pasture, to enable the Commoners to prescribe to exclude the Lord, which they cannot directly do by the Rules of Law.

Here first, The Soil is the Lord's of the Manor, and a Parcel of the Manor, and a large Quantity in Truth, 10000 Acres, tho' the Place assigned is but 100 Acres.

All the Freeholders and Copyholders of antient Houses, or Parcel of the Manor, are to feed and not to be excluded.

'Tis for Beasts Levant and Couchant, 'tis with an Exception of Hogs, Sheep and Northern Steers, which is like the Regulation of Common; if it were a sole Pasture they might have put in what Cattle they pleased, for it is all one to the Lord, who is to be wholly excluded.

The Court may discern by all these Badges, that it is in its Nature but a Common, by Art put into other Words to oust the Lord.

I shall now crave Leave to offer to the View of the Court the Consequences and Inconveniencies of this Prescription.

1. If there be a Surplusage at any Time, the Lord cannot improve nor feed, but it must be lost, which is against the publick Good.

2. If a Stranger feeds and does a Petit Trespass, as it is called in Robert Mary's Case, 9 Co. the Lord can have no Action for the Feeding but the Tenants must, and then they must either join or sever; if they join, what a Number of Plaintiffs will there be, and how shall the same when recovered be divided, or the Contribution for the Costs? If they sever, and be nonsuit; then there will be as many several Actions which will be vexatious, according to Robert Mary's Case.

3. If a Freehold be purchased by the Lord, or escheat, or a Copyhold Estate be determined, what is become then of the Share of the sole Feeding? The Lord cannot join with them in the Prescription; shall he have no Benefit of the Soil?

If ſo, what if all but one fail, ſhall that one have all?

If, on the contrary, the Lord ſhall feed, muſt he do it as the Owner of the Soil, and have the Surpluſage? for the Levancy and Couchancy is not material among themſelves. And then they would become as Commoners again; and this would be a ſtrange Preſcription, that cannot be maintained if ever there were any Eſcheat of any Tenancy into the Lord's Hands.

4. But the greateſt Miſchief of all will be, that this will be a ready Way to enable Tenants to withſtand all Improvements. In Gateward's Caſe, 6 Co. 60. it was a great Reaſon againſt a Preſcription, that it was inconſiſtent with any Improvement; it would be a great Miſchief to this Kingdom where there are large Waſtes and Commons, Forreſts and Fens, to take away all Power of Improving them; for the ſame Land by Improvement becomes able to ſupport a great Number of People which are the Strength of the Kingdom.

And as there are great Inconveniencies on this Side, ſo the other Way there will be none at all; for they may enjoy the ſame Uſages as Commoners, if they preſcribe the ordinary Way, and the Lord cannot do them any Prejudice at all; he can only take the Surpluſage, leaving them ſufficient; if he feeds to their Damage, it will be a Surcharge, and an Action upon the Caſe will lie againſt him.

The Lord cannot improve but he muſt leave them ſufficient, and there can be no Reaſon why the Owner ſhould not have the Surpluſage, if any be.

I know they will cite an Authority againſt me in the Caſe between Webb and Littleburgh, which was in C. B. 1654. There, I confeſs, the Declaration was grounded upon a Preſcription much like to this, and the Plaintiff had a Verdict, and the Court would not arreſt Judgment upon it.

The Anſwer that I muſt give to that Caſe is grounded upon the Difference between a Demurrer and a Verdict.

The Court may intend that after a Verdict, which may help it; for I allow an Excluſion of the Lord upon a Special Caſe diſcloſed in Pleading, and that Special Matter may be ſupplied by the Verdict.

Beſides I muſt obſerve, that it was a Caſe of ſmall Conſequence that concerned the Lord only for his Coſts, for he hath enjoyed his Feeding againſt that Verdict ever ſince: I can ſay it upon my own Knowledge, for I know the Parties, and know the Place; it was at Elinſwell near Bury St. Edmunds in Suffolk. The Judges liſten to Exceptions after a Verdict, but will give Judgment, if there be any Poſſibility to maintain it.

I may add that this was in popular Times, when all Things tended to the Licentiouſneſs of the common People.

I ſhall conclude praying Judgment againſt this Preſcription for theſe Reaſons:

It is a new and unheard of Way of Pleading, and againſt the Rule of Law, joining Freehold Tenants in the Generality, which have no Relation one to another, and annexing an entire Intereſt to ſeveral Eſtates, and mixing Preſcription and Cuſtom, which are of contrary Natures, and are great Abſurdities.

It is againſt Reaſon to ouſt the Owner of all the Feeding, which for ought appears is all the Profits, without any Special Matter or Recompence appearing in Pleading.

There is great Inconvenience in admitting of ſuch a Preſcription, new Inventions bringing unknown Conſequences.

No Inconvenience in ouſting Tenants of this Preſcription, ſeeing that they claim the ſame Uſage the ordinary Way, and the Lord can do them no Wrong either by Feeding or Improvement.

Ch. Juſt. and Tyrrel for the Plaintiff, Sir H. North, Archer and Wylde for the Defendants. Vaugh. Rep. 258.

In this Caſe the Court of Common Pleas had been divided in Opinion upon the Matter in Law, as appears by Vaughan's Reports; and therefore Sir Henry North thought fit not to waive the Matter of Law in the King's Bench, altho' he had ſo good a Caſe upon the Fact, that if it had been no Prejudice, he would join Iſſue and try the Truth of this Preſcription at the Bar; whereupon the Demurrer was by Conſent waived; and the Cauſe tried at the Bar, and the Verdict paſſed for Sir Henry North, with the Approbation of the whole Court.

It was held in B. R. that Preſcription by Freeholders, and Cuſtom by Copyholders, may be joined in one Plea. 1 Lev. 269.

Afterwards another Action was brought to Trial in the Exchequer at the Bar, and it appearing to the Court that there had been Propoſals towards an Agreement, a Juror was withdrawn, and my Lord Chief Baron Hale gave the Tenants Advice to comply with this Saying, Redime te captum quam queas minimo.

So that the Matter of Law was never adjudged againſt Sir Henry North, but the Matter of Fact tried for him, and the main Queſtion upon the Act of Level never came in Queſtion, which may extend to this great Waſte, altho' both the other Points were againſt Sir Henry North.

Afterwards there was another Action brought to Trial in the Exchequer, and after a full Evidence of about four or five Hours, the Plaintiff not daring to ſtand the Verdict, was nonſuited.

Adjudg'd, that Preſcription for *ſol' & ſeparal' Paſtur'* is good, for that does not exclude the Lord of all the Profits, for he ſhall have the Mines, Trees, *&c.* and 'tis not like to have a Preſcription for the whole Common, to exclude the Lord, for that is repugnant. *Vide* 1 *Lev.* 268. 2 *Lev.* 2. 2 *Saund.* 324. *Hoskins* and *Robbins.* 1 *Vent.* 123, 163.

THE

CASE

OF

Sir Robert Atkyns,

AGAINST

HOLFORD CLARE,

Under-Sheriff of the County of *Glouceſter.*

Termino Sancti Hillarii, Anno 22 & 23 Car. II.

In Scaccario.

AN Action upon the Caſe was brought by the Plaintiff, ſetting forth, That he was ſeiſed of the Seven Hundreds of Crochon, Bright, Reppeſgate, Bradley, &c. in the County of Glouceſter, and had Return and Execution of Writs there: That the Defendant knowing of it, did execute ſeveral Writs there to the Plaintiff's Damage, &c. Upon Not guilty pleaded Iſſue is taken, and this Special Verdict is found, (viz.)

Vide Co. Entr. 439. a Quo Warranto brought for theſe Hundreds.

They find the Patent of 11 May, 5 Johannis, whereby the King reſtores to the Abbot and Convent of the Canons Regular, in Cirenceſter, certain Lands granted to them by his Brother, Richard the Firſt; and alſo grants, That no Sheriff of Glouceſter, or his Bailiff, do intromit in aliquo within the Seven Hun-

Hundreds, except for Pleas of the Crown and Summons, which the Abbot, &c. ſhould receive from the Hands of the Sheriffs, and execute.

They find the Patent of 20 Decembris, 17 E. 3. wherein the King, reciting that Richard the Firſt by Patent granted to this Abbot and Convent the Manor of Cirenceſter and the Seven Hundreds, and the Return of Writs in them, and that thereby they had uſed and enjoyed Retorna Brevium tanquam pertinentia ad Septem Hundred' prædict'. Reciting alſo, that He (Edward the Third) for a Fine of 3000 l. grants that they ſhould hold the Manor, Hundreds, Mills, &c. & quod haberent in Villis & Hundredis prædictis, &c. abſque impedimento retorna Brevium Infangthef, &c. tanquam pertinent' Hundredis prædictis, &c. of the King and his Succeſſors, &c. and confirms the Patent of King John.

They find, That the Abbot, &c. were ſeiſed prout Lex poſtulat till 4 Febr. 27 H. 8. when the Monaſtery was diſſolved and all came to the Crown.

They find the Statute for veſting of theſe Lands, &c. belonging to the Monaſtery in the King, and the Statute of 32 H. 8. cap. 26. whereby it is enacted, That all Liberties, &c. which the late Owners of Monaſteries had uſed, &c. ſhall be revived, and be really and actually in the King, his Heirs, &c. and ſhall be in the Rule, Order, Survey and Governance of the Court of Augmentations, and that the ſame Liberties, &c. ſhall be uſed and exerciſed by ſuch Stewards, Bailiffs, &c. as the King, his Heirs, &c. ſhall name and appoint, &c. and that the ſaid Stewards, Bailiffs, &c. ſhall be attendant and obedient to all the King's Courts for all Returns of Writs, &c. as the Officers of the late Owners ſhould have been, &c. and that no Sheriff, Under-Sheriff, &c. ſhould intromit, meddle in, with or upon the other Premiſſes otherwiſe, or for other Cauſe than they lawfully might have done before the ſame Premiſſes came to the Poſſeſſion of the King.

They find, That Edward the Sixth (being ſeiſed by Deſcent from Henry the Eighth) Anno primo of his Reign, per Lit' Patent' ex gratia & adviſamento Concilii ſui dedit & conceſſit cuidam Tho. Seymour Mil', Dom' Seymour de Sudley, omnia illa Hundreda de Crochon, &c. nuper Monaſterio Cirenceſtrenſi dudum ſpectantia, &c. omnia Letas executiones Brevium & retorna eorundem Sect' Hundred', &c. reputat' ſpectant' & pertinent' Hundredis prædictis, &c.

They find, That the Lord Seymour being ſeiſed, &c. was attainted of Treaſon (by Act of Parliament, 2 & 3 Ed. 6. cap. 11.) and that thereby his Lands and Hereditaments were forfeited and veſted in the King.

They find, That 6 Octob. Anno 6 Ed. 6. the King grants the Hundred, by his Letters Patents to Kingston, and his Heirs, and therein grants omnia amerciamenta Heriota emolumenta hæreditamenta, &c. dictis Hundredis quoquo modo spectant' aut ut membrum sive pars eorundum antetunc cognit', reputat', vel usitat', vel habit' aut accept' ut pars parcell' vel membrum. And further grants, by another Clause, Tot talia & tanta & consimilia Jurisdictiones, Privilegia, Libertates, Franchesias, &c. quæ quot qualia & quanta, & adeo plene & integre, as Thomas Lord Seymour, or any Abbot, &c. had, &c. ratione vel prætextu Hundred' prædict' virtute vel colore alicujus Doni, Chartæ, Præscriptionis, &c.

They find, That the Estate which Kingston had, came to the Plaintiff, and that the Defendant entred into the Hundreds where the Liberty is claimed, and executed several Writs, &c. Et si, &c.

Baron Wyndham had argued, and was of Opinion for the Plaintiff; and Baron Littleton for the Defendant.

Now argued Baron Turner and my Lord Chief Baron Hale.

Turner, I am of Opinion for the Defendant. At the last Arguing my Opinion was for the Plaintiff; but upon something which fell from my Brother Littleton I am altered. The Case arises upon the Patents.

I take it to be clear that Retorn' brevium did not pass by the Patent of King John; there is indeed some Implication of such a Franchise; but it is nothing like a Grant of it. 'Tis true, we must put that Exposition upon antient Charters, as should have been put in those Days wherein they were made: But I say, this Patent would not have been expounded to have amounted to such a Grant in diebus illis. If there had been an Usage of such a Franchise in Pursuance of this Patent, (tho' made since Richard the First's Time) I think it might have been allowed to have given the Return of Writs, Vide 2 Inst. 282. But here has been no such Usage.

'Tis true, in the Patent of E. 3. it is recited, That there was an Usage, and that the Franchise was granted by Richard the First, and confirmed by King John; but the Jury's Finding of that Patent, is no Finding of the Things recited in it, as in 10 Co. 56. b. the Finding of Evidence of a Conversion, (scilt. Refusal to deliver on Request) upon a Trover, is no Finding of the Conversion.

In 17 Ed. 3. 'tis true, the Hundreds, and the Returns of Writs therein are granted: But since my Brother Littleton's Argument I have been, and am of Opinion, that that Grant is void, and that (as he observed) because of the Statute 2 Ed. 3. c. 12. Ordaining, That henceforth Hundreds and Wapentakes should not be given nor severed from the Counties: And 14 Ed. 3. c. 9. Ordaining, That henceforth all the Wapentakes and Hundreds, which were severed from the Counties, should be rejoined to the same

Coun-

Counties, as before that Time had been eſtabliſhed by another Statute, (Meaning, I ſuppoſe, the ſaid Statute of 2 E. 3. cap. 12.) And thereupon my Lord Coke, in 4 Inſt. 267. gives his Opinion, That all the Grants made of the Bailiwicks of Hundreds ſince this Statute are void, and that the Making the Bailiffs thereof belongs to the Sheriff, for the better Execution of Juſtice and of his Office. And for that he cites a Reſolution in his own Caſe; for he it was that was the Sheriff of Bucks, mentioned in the Caſe there. Fitzh. Petition 1. 18 E. 3. is a Caſe of a Man, who by Colour of the New Statute 'tis ſaid was ouſted of his Liberty of Retorna Brevium, which was granted to him and his Heirs by the King in Parliament. My Brother Littleton, cited a good Opinion of three Judges, that an Hundred could not be granted without a Non obſtante to the Statute, and here is no Non obſtante. Now a Man cannot have the Return of Writs without the Hundred. Vide 2 Inſt. 452. 2 H. 4. pl. 12.

But admitting it did paſs, and was granted before the Statute, then the Statute doth not extend to avoid that Grant. But then the Queſtion will be, when the Liberties return to the Crown, Whether the Crown can grant them out again? And therein it will be conſiderable, Whether they are extinct in the Crown, or
Kelw. 72. a. no? I think they are not extinct. In 9 Co. 25. b. 'tis ſaid, that all Liberties, Franchiſes, &c. which were at firſt created and erected by the King, and were not Liberties, &c. in the Hands of the King as Flowers of the Crown, are not by their Acceſſion to the King drowned in the Crown; and there Hundreds and Leets are inſtanced in and allowed to be ſuch. And now the Liberty of Retorna Brevium is more ſtrongly ſuch; for that all Juriſdictions (of which Hundreds, &c. are a Branch) were once in the Crown: But Retorna Brevium is but a miniſterial Thing. It is expreſly adjudged in the King's Bench, Kellewey 72. pl. 16. that the Liberties of Retorna Brevium are not extinct by coming to the King's Hands. But however, if they were or were not extinct and drowned, I think that they could not (becauſe of the Statute) be ſevered and granted to Kingſton.

Lord Chief Baron Hale:

I am of another Opinion; but I am very glad that two of my Brothers are againſt me and my other Brother. I would have been glad to have been excuſed in this Matter.

Firſt, Becauſe the Caſe relates to my own Country, and is much to the Prejudice of it.

Secondly, Becauſe it relates to Retorna Brevium, which I always took to be one of the moſt pernicious Liberties to the Common Juſtice of the Kingdom.

Thirdly, Because it is a Case full of Difficulty; but we that are Judges must satisfie our Judgments, and come to a Resolution, and I must argue as the Law is, and not as I wish it. I argue according to my Conscience, tho' somewhat against my Desire, and I am sure against my particular Interest.

I shall be somewhat long, because the Case is very intricate, and requires an Explication of many Things.

In the first Place I shall explain three Terms in the Case.

First, The Monastery of Cirencester.

Secondly An Hundred.

Thirdly, Retorna Brevium.

First, As to the Monastery of Cirencester I shall speak a little historically, to shew the Traduction and Derivation of this Matter. It was a Monastery Time out of Mind, but in 30 H. 1. it was translated to the Canons Regular; and therefore Henry the First is accounted the Founder; he endow'd it with three Hides of Land. Richard the First gave them the Manor of Cirencester, and the Seven Hundreds, at the Farm of 30 l. per Annum. The Charter of Exemption (mention'd in the Verdict) was made by King John, who confirm'd the Grant of Richard the First at the same Farm. This you shall find in Chartæ Antiquæ Letter G. (for the Book goes by Letters) Number 9. and the Letter M. in Number 12.

Secondly, The next Thing to be consider'd is an Hundred. Of old Time Hundreds were Parcel of the Crown, belonging of Common Right to the King. 11 H. 6, 89. Pl. 44. by the Grant of an Hundred there did not pass only a Liberty which had a Court, and also commonly a Leet, which is called the Leet of the Hundred; but there was also an implied Power of making a Bailiff: The Bailiff had a double Office.

First, He had the Collection of Perquisites, Amerciaments, Fees, Ancient Duties, as Beaupleader, Head-Silver, &c. belonging to the Hundreds in some Places.

Secondly, He had another Office, and that was relating to the Sheriff. In Ancient Time the Bailiffs of the Hundreds were the immediate Bailiffs of the King for the Execution of Process. Vide the Statute of Sheriffs made at Lincoln 9 Ed. the second; there 'tis said, That the Execution of Writs that come to the Sheriffs shall be done by Hundredors, (i. e. Lords, or rather Bailiffs, of the Hundred) sworn and known in the full County, &c. which is confirm'd 2 E. 2. c. 4. and 14 E. 3. c. 9. This Thing of Farming out Hundreds to Persons thus grew to be a great Inconvenience: For as to the Hundreds which were of the County and did belong to the Sheriff, there was no Inconvenience; the Sheriff did sometimes account as Custos, sometimes per Manus. Then those many Provisions were made, viz. 2 E. 3. c. 12. whereas

all the Counties in England were in old Time assessed to a certain Farm; and then were all the Hundreds and Wapentakes in the Sheriff's Hand rated to this Farm, and afterwards there were Appravers sent into divers Counties, which did increase the Farms of some Hundreds and Wapentakes. And afterwards the Kings at divers Times have granted to many Men part of the same Hundreds and Wapentakes for the old Farms only. And now of late the Sheriffs are wholly charged of the Increase which amounteth to a great Sum, to the great Hurt of the People and Disherison of the Sheriffs and their Heirs. It is ordained, that the Hundreds and Wapentakes set to Farm by the King that now is, be it for Term of Life or otherwise, which were sometimes annexed to the Farms of the Counties where the Sheriffs be charged, shall be adjoined again to the Counties, and that the Sheriffs and their Heirs have Allowance for the Time that is past, and that from henceforth such Hundreds and Wapentakes shall not be given nor severed from the Counties. Then 14 E. 3. cap. 4. Whereas many Mischiefs be happened throughout the Realm, for that Sheriffs have let the Hundreds and Wapentakes to a higher Farm than they do yield to the King, and the Farmers do let the same to others at higher and greater Sums, in such Manner, that by the letting and enhancing of the Farms, and by the greater Number of Bailiffs-Errants, Outriders and others, whom the Sheriffs, Bailiffs and Hundredors do put in, the People be in divers Manners charged and grieved: It is assented and accorded, That from henceforth all the Wapentakes and Hundreds which be severed from the Counties, shall be rejoined to the said Counties, as before this Time hath been established by another Statute, and that the Sheriffs hold the same in their own Hands, and put in such Bailiffs and Hundredors, having Lands within the said Bailiwicks and Hundreds, for whom they will answer: And if they will let any Hundreds, Bailiwicks or Wapentakes to Farm, they shall let the same at the ancient Farm without any thing increasing, and that the King and his People be served by such Bailiffs and Hundredors, and their Under-Bailiffs, in avoiding for ever the Outriders and others, which in divers Counties before this Time have notoriously grieved the People: And that no Bailiff-Errant be but in the County where Bailiffs-Errants have been in Times past, in the Time of the King's Grandfather that now is, and that there be no more but one Bailiff-Errant in one County: And in the same Manner it is assented, That all other, of what Estate or Condition they be, which have Bailiwicks or Hundreds in Fee, if they the same will hold in their own Hands, then they shall put in such Bailiffs for whom they will answer; and if they will let the same in Farm to other, they then shall let the same at the ancient Farm without any thing increasing, as aforesaid is said, &c.

For

for the Sheriffs did farm at a certain Rate, and did account for it in the Exchequer, and this was called Firma Ballivarum.

Hundreds were either Parcel of the County, and there the Sheriff did constitute Bailiffs, viz. these Hundreds which were anciently Parcel of the Farm of the Sheriffs that the Statute of 2 Ed. 3. cap. 12. speaks of) or else they were such as were granted out, which the Lord of the Hundred held sometimes at Farm and sometimes in Fee, call'd Hundreds of Fee, Liberties of Hundreds, Franchises of Hundreds.

It was found that a great Inconvenience grew from the severing of Hundreds from the Counties. The Statute intended that the Sheriff should execute Writs, &c. and it was unreasonable that he should have Bailiffs put upon him, and yet be bound to execute, &c. therefore the Statute intended to reconcile this as far as it could well, and to restore as many of the Hundreds, as could well be, to the Sheriff.

Thirdly, I come to the third Thing to be explained and consider'd, viz. The Liberty of Retorna Brevium.

This is a superadded Liberty; tho' the Hundreds were granted, yet the Sheriff might and must still return the Writs executed there. This Liberty was commonly anner'd to the Grants of Hundreds, tho' sometimes of Manors it is acquirable by Grant, and (I think) by Prescription, tho' that has been a Doubt: But 8 H. 4. c. 7. pl. 10. speaks of Retorna Brevium by Prescription, and it was adjudg'd it might be so in the Quo Warranto brought by the Queen against the Earl of Shrewsbury for Retorna Brevium and other Liberties claim'd by the Earl in Coleharbour in London. You will find the Pleading in the New Entries Quo Warranto, pl. 2. Mich. 41 & 42 Eliz. in Banco Regis. Vid. Mo. 670. contra. Hardr. 423.

'Tis true, It was adjudged against the Earl, but it was agreed that a Man might prescribe for Retorna Brevium, and that to have it within a House only; for that Place was formerly the Bishop of Durham's Mansion-House.

But the Prescription was naught, because it was applied only to the Return of the Writs of the Queen: For he laid a Prescription (in the Bishop of Durham) to have Retorna omnium Brevium Præceptorum & Mandatorum dictæ Dom' Reginæ, and says not of her Predecessors; and it is plainly impossible that a Man should have Time out of Mind the Return of the Queen's Writs when the Queen began her Reign within Time of Memory.

This Retorna Brevium carries in it (by Implication) the Execution of Writs, tho' it be not express, as in the last preceding Case, where after the Words abovementioned is added, & Executionem eorundem.

And ſo it was adjudged in the Caſe of the Counteſs of Warwick againſt Atwood, Paſch. 41 Eliz. Rot. 331. B. R.

This Liberty, tho' it carries an Exemption, yet it doth not exclude, but that the Sheriff may execute Writs within it. But then it is a Wrong, for which the Lord of the Liberty may have his Action: But in ſome Caſes the Sheriff may lawfully do it, as in the Caſe of the King, a Non omittas, &c. in Caſe of Execution of a Writ of Waſte, whereto he is particularly empower'd by the Statute, and ſometimes where the Thing is divided, &c.

But I ſhall add no more concerning this, but only ſay,

Firſt, This Liberty of Retorna Brevium is a dangerous Liberty for him that hath it; for he is to be reſponſible for all the Defaults of his Bailiffs, as Eſcapes, &c. And if the Bailiff do not account for the Collection of the King's Revenue, he is reſponſible for it; 'tis a Feather in his Cap, but a Thorn in his Foot.

Secondly, 'Tis much derogatory to the Juſtice of the Kingdom: For the Party muſt go to the Sheriff firſt, then to the Bailiff, &c. and by this Means Juſtice is delay'd and diſappointed.

There are two Liberties do abundantly more Hurt than they are worth, (viz.) the Grants of Fines, eſpecially of Jurors, and this of Retorna Brevium: Therefore Edward the Firſt, a moſt Wiſe Prince, declared in Parliament, and it was recorded in the Courts, That he would not grant it. This you will find in the Pleas of Edward the Firſt, towards the later End, in Mr. Ryley. The Paſſage meant is in Placita Parliamentaria 35 Ed. 1. fol. 366. in Mr. Ryley, it is this.

Præceptum Domini Regis.

LE Roy ad dit & commande, Quod apres ceſt Grant qui'l ad fait al un Counte de Nicole, de Return de Brief avoir, en deux Hundreds a terme de la vie du dit Counte, le Roy ne voet doner ne granter a nulluy tiel Franchiſe tant come le Roy vivera, s'il ne ſoit a ſes Enfantes demeſne, & ceo voet le Roy que ſoit eſcrit en le Chancellerie, en Gardrobe, & al Eſchequer.

Thirdly, A Grant of this Liberty was within a certain Precinct, and could not extend to a County, 2 H. 4. For as my Lord Coke obſerves on W. 2. cap. 39. 2 Inſt. 452. A Grant to have Return of Writs in a County is void; for in Effect it taketh away the Office of a Sheriff.

By that time I have applied theſe Obſervations, I ſhall in Effect have done.

Firſt, It is to be conſidered, Whether the Charters of King John did create the Return of Writs, or no? ſeeing there are only Negative,

Negative, no Positive Words in it. Somewhat may be said to maintain this to be a good Grant of Retorna Brevium, but because the contrary has been admitted, I will admit it too, especially because the Scope of the Patent was, that the Abbot should be immediate Officer to the King; and the Intention of the Charter was to exclude the Sheriff, and that does appear by the Conclusion, where an Exception is made of the Sheriff's Power of meddling per Summonitionem, &c. and so it is like the Case of the Town of Berwick in 5 Jacobi, a Grant to them that they should be a County, but no Grant of having a Sheriff, was adjudged to be void, because there would be no Officer to execute and do Justice. I do observe that 13 E. 3. in the Iter there was an Information against this Abbot, and he pleaded the Charter of R. 1. but there is nothing of Return of Writs that I can find, and I have read the Book over.

Secondly, We come to consider the Grant of E. 3. I say,

1. It is a good Grant of Retorna Brevium.

2. There is a good Annexation of it to the Hundreds by Reason of these Words, tanquam pertinent' Hundredis prædict. for even at this Day such a Thing as Common of Estovers, &c. may be granted appurtenant. Sacheverel against Porter, 13 Car. 1. 1 Cro. 482. 1 Rol. 400. 11 H. 6. 11 Pl. 27. Now then by this Patent here is a Retorna Brevium, not only newly created, but newly created appurtenant, and especially since here is a Kind of Cognation between the Things, this may very well be; in like Manner may Cognisance of Pleas be granted; if the King should grant that a Lord of an Hundred should have cognitionem omnium placitorum, &c. tanquam pertinent' Hundred', &c. it would create Cognisance of Pleas appurtenant to the Hundred; for it being a Creature of the King's it may be created as he pleases, either in gross or as appurtenant; for a Thing appurtenant may be by Grant, tho' a Thing appendant must be by Prescription.

Well now, this Abbot is seised of this Liberty quodammodo appurtenant.

3. When the Monastery, &c. comes to be dissolved and given to the King, it is to be consider'd, What becomes of this Liberty then? I conceive this Liberty is in the Hands of the King, as it was in the Hands of the Abbot, (viz.) as appurtenant, and that without the Aid of the Statute of 32 H. 8. c. 20. It was adjudged Kellew. 72. Pl. 16. that this Liberty of Retorna Brevium, when it comes to the King, remains in the Crown, and is not extinguished, rejoined or drowned thereby.

And this Liberty is not by this coming to the Crown re-annexed to the County, but if that were a Question, the said Statute of 32 H. 8. hath put it out of the Question, for by that Statute it is in the same State that it was before.' Tis true, the King

might

might rejoin it to the County, but till he does, it continues a Liberty distinct, an Hundred in Gross, and the Sheriff shall write Ballivo Dom' Regis, &c. 'Tis true, if a Man forfeit such a Liberty by Nonuser or Misuser, the Sheriff shall enter into it, and do and execute as in other Parts of the County, because in that Case the King comes in in Disaffirmance of the Liberty, but otherwise it is where the King comes in under a Subject, as in the Bar-Case it does.

Fourthly, We come to consider what Alteration is made in the Case by the Grant to Seymour and his Attainder: As to this I must observe, that the Verdict is ill found, for 'tis concessit, &c. Dom' Seymour, &c. but not found what Estate, and here is a Breaking off in the Middle, of which we cannot tell what to make. Now when the King grants, and expresses no Estate, some Books have held the Grant to be void; but the better Opinion is, that it creates an Estate at Will, 5 E. 4, 8. (the last Leaf) B. pl. 1. but
Davis 45. 17 E. 3. 45. Pl. 46 is express in it, and so it was adjudged Paschæ 8. Jacobi in Petsall's Case.

Why then the Consequence will be, that by the Attainder the Will was determined, and then the King was in of his Old Reversion, and then the Statute of 32 H. 8 serv'd well to preserve the Liberty in the same Estate still. But if the Grant were in Fee, then the King came in by a New Title, viz. the Attainder, and then there is no Benefit of the said Statute; so that this Error in the Verdict is most to the Disadvantage of the Party (the Defendant) who would not amend it; for there was a Proposal and Discourse of amending, and some Things were amended; but the amending of this Mistake would not be consented to by the Defendant. But to suppose this to be a Grant in Fee, I say still it stood of it self a Liberty without the Statute, and so when it returned to the Crown by Attainder, it stood not in Need of any such Statute, it was Substantive and not melted down in a General Confusion in the Form whence it was derived.

Fifthly, Come we now to the Grant to Kingston: It has many Clauses in it, I will insist upon two.

1. The King grants Omnia Amerciamenta, &c. with large Words, Cognita, Reputata, Aceptata, &c. I did say that the Grant of E. 3. made an Annexation of this Liberty of Ret' Brev. to the Hundreds; and if we should admit that, it were not sufficient to create an Appurtenancy in Reputation; and if it were no more than so, these Words would lay hold on it.

2. The other Clause I will rest upon, thereby the King grants tot, talia & tanta, &c. as any, &c. had ratione vel prætextu Hundred' prædict' virtute, prætextu, vel colore alicujus Doni, Chartæ, &c. Now certainly the later Words are subservient and ancil-

lary

lary, and the ratione vel pretextu Hundredi governs all, for it is but one entire Sentence, like Finche's Case, 6 Co. 39. This prætextu is a very large Clause and much more than tot talia & tanta, wherefore I conclude, that it is a good and sufficient Grant of the Thing in Question.

Three Objections have been made, to which I shall endeavour to give Answers.

Object. 1. By the coming to the Crown the Liberty is merged.

Answ. 1. It is not.

2. Admit it were merged thereby, yet that is not till the Dissolution. Why now in this last Grant there is a Retrospect, and it is with a leaping over to the Seisin which the Abbot had, and therefore the Grant of the King conjoining it to the Possession of the Abbot, the Liberty is effectually revived and erected in the same Manner and Condition as it was before the Uniting of it to the Crown.

Object. 2. If this Liberty be to be revived, yet 'tis not revivable without special Words; in the Grant to Seymour there are the Words Retorna Brevium, but in the Grant to Kingston, not.

Answ. Tot talia, &c. does it, and 'tis as much as if all had been particularly recited, because it refers to a Thing determinate.

'Tis true, if there were an Act of Resumption, as in Paget and Darcy's Case; or if the Thing were meerly Personal, as in the Abbot of Waltham's Case, the Privilege for his Dogs in the Forest, such general Words will not revive and pass the Things, because of the ratio privata which intervenes; but if there be nothing in the Case (which hinders) more than the Generality of the Words, 'tis clear the Words do it; no Case can be fuller than Ameredith's Case is in this Point, 9 Co. 29. B. 30. in the Case of Colehar- bor above-mention'd, the Ret' Brev', &c. came to the Crown by Act of Parliament. The King Ed. 6. grants to Francis Earl of Shrewsbury the House, & quod habeat tot talia, &c. specially reciting many Privileges Liberties, &c. but not mentioning Retorna Brevium, and concludes, & alia, &c. and it was adjudged that this Grant in these general Words did revive Retorna Brev', (for I have a Report of the Case) but only for the Cause above-mentioned Judgment was given against the Earl as to the Thing.

Vide 2 Roll. R. 156. Palm. 81. Hard. 456. 2 Brownl. 341.

This Verdict is ill found; the effectual Statute which should aid this Case, if there were Need, is 1 Ed. 6. c. 8. which is not found; thereby it is enacted, That all Letters Patents, &c. made or to be made by the King, of any Honours, &c. Franchises, Liberties, &c. should be good, sure, &c. notwithstanding any Misnaming, Misrecital or Nonrecital of the Premisses, or the Lack of the true naming of

of the Natures, Kinds, Sorts and Qualities of them or any Parcel thereof, and notwithstanding divers and sundry other Suggestions and Surmises, &c.

Object. 3. The Patent of Ed. 3. or at least this Patent made to Kingston, is void by Reason of the Statute 2 Ed. 3. c. 12. (and likewise 14 E. 3 c. 9.) whereby it is ordained, That henceforth the Hundreds and Wapentakes should not be given nor severed from the Counties.

Answ. This indeed is the grand Objection, and was materially objected by my Brother Littleton, and the Case of Forteſcue against my Lord Coke has been truly cited to this Purpose, which was in this Court, and is reported by himself. How shall we do now in this great Difficulty? Truly this Objection had need be strictly examined into, for it runs to the Avoiding of the Grants of 100 Hundreds and more, which have been granted since 2 Ed. 3.

I do conceive this Grant of Ed. 3. is not within the Statute, for tho' it be a New Grant of Ret' Brev', yet it is no New Grant of the Hundreds, neither is the Grant of Ed. 6. avoided hereby. For,

1. This Statute extends only to those Hundreds which were Parcel of the Sheriff's Farm, and not to those which were divided, because as to the first only there was an Inconvenience to the Sheriff, in that he should be charg'd with the Farm of the County (the Sheriff's Farm) and yet the Profits, the Firma Ballivarum be taken from him. The Words of the Statute are, That such Hundreds, viz. as were annexed to the Farms of the Counties, shall not be given nor severed from the Counties, neither did these Hundreds come in to the Sheriff by their coming to the Crown: The Sheriff's Farm was modelled and settled long before; and when these Hundreds came to H. 8. they were not Part of the Sheriff's Farm, but he made Bailiffs of his own there, and they were within the Survey of the Court of Augmentations; so I say it refers only to those Hundreds which made a Part of the Sheriff's Farm.

2. None of these Statutes extend to prohibit a Grant of an Hundred in Fee. (I apprehend my Lord meant a Regrant of an Hundred, which before those Statutes had been granted out in Fee, for 2 E. 3. c. 12. rejoins and prohibits the Grant of those Hundreds only which were set to Farm by the King for Term of Life or other-
T. Jones 194. wise.) The very Words of the Statute 14 E. 3. c. 9. make Provision for the Hundredors in Fee; 'tis said that they which have Bailiwicks or Hundreds, &c. shall answer for their Bailiffs. Fitzh. Petition 1. there is a Complaint of one who is turned out of an Hundred he had in Fee, because of the Statute called there the New Statute: And perhaps these Hundreds were seised, upon the like Pretence, and that was the Matter of the Presentment mentioned in the Grant of E. 3. or rather Regrant.

3. Neither this Statute nor the Decree or Report of the Case in this Court does extend to this Case; for they are not to be understood of, nor extended to, a Case wherein Retorna Brevium is granted; were not Retorna Brevium added, 'tis true, the Grant of the Bailiwick might be void; where an Hundred is granted at this Day the Grant is good; but by Virtue of this Statute the Sheriff may put in and use his Bailiffs there, the Collection of the Profits, &c. the Grantee shall have, but the Execution of Writs is in Subservience to the Sheriff, (still I speak where no Retorna Brevium is granted) this Bailiff shall not be a Bailiff to the Sheriff in spight of his Teeth; and this was the very Case of Forteſcue; he had a Grant of the three Hundreds of Newport: We find the Farm of these Hundreds formerly here in the Exchequer; the Firma Ballivatus in Chiltern, &c. the Farm of the three Hundreds of Newport was 5 l. then in 13 E. 3. 7 l. then in 23 E. 3. 9 l. then in R. 2. 10 l. &c. these were the antient Farms: Queen Elizabeth grants a Lease of these three Hundreds to Forteſcue for three Lives at a certain Farm, but does not grant him Retorna Brevium. This Grant indeed was adjudged void, (viz.) as to the Excluding of the Sheriff; observe what my Lord Coke saith in the Case, By the Statute, &c. (saith he) Hundreds are rejoined as to the Bailiwick of the same to the Counties; and all Grants made of the Bailiwicks of Hundreds since that Statute are void, and the Making of the Bailiffs thereof belongs to the Sheriff for the better Execution of Justice and of his Office, and so it was resolved, &c. the Grant at this Day is good as to what belongs to the Lord (of an Hundred) but not as to the Execution of Process, which belongs to the Sheriff; so that I say,

1. Consider the Grantee as an Officer for the Collection of the Profits, &c. and so it is a good Grant.

2. Consider him as an Officer for the King's Process, and so 'tis void, because the Sheriff ought not to have a Bailiff put upon him, and the Grantee shall not be the Sheriff's Bailiff whether the Sheriff will or no. But,

3. I say if the Grant be with Retorna Brevium, then it is a good Grant as to the Bailiwick and all, for in that Case the Sheriff is at no Inconvenience, for the Grantee shall do all, and shall be liable to all the Escapes, and all Things done or suffered by him.

My Lord Coke was very wary in what he said about this Matter, for he knew, and the Truth is, if this Statute should make the Grants of Hundreds void, it would call in Question most of the Hundreds in England, and particularly would shake his own Grants of Hundreds which he passed when Attorney General, and some of which his Posterity enjoy at this Day. 8 H. 7. fol. 1, 2, 3, 4, 5. and 13 H. 7. fol. 19, 20. Pl. 2. is a great Case concerning an Hundred granted by Ed. 4. and afterwards by R. 3. wherein there are many

Queſtions much argued, whereof the Chief is, whether a Leet may be granted and paſs as Part and Parcel of an Hundred? And 'tis adjudged that it may; but it is the Opinion of all on all Sides, that the Grant of an Hundred is good, and ſo much is implied and concluded in the Judgment, as reported by Coke upon Ameredith's Caſe, 9 Co. 29, 30. there Judgment is given that the Grant of the Hundred is good.

Palm. 81. Hard. 456. 2 Brownl. 341. Antea 409.

I know that in 11 H. 4. by Special Act of Parliament (vide 1 H. 4. c. 11.) the Sheriffs had an Allowance made to them for ſeveral Hundreds, which had been Parcel of their Farms and were granted away, which could not have been, if this Statute had made the Grants void.

I think there ought to be Judgment for the Plaintiff.

Nevertheleſs I am glad with all my Heart, that we are delivered of this Caſe, for truly if I could have found any Thing to ſatisfy my Judgment, I would have given Judgment another Way, both for the general Concern and for the ſake of the County of Glouceſter which I know will ſuffer much by this Thing.

One ſhort Act of Parliament of three Lines, (viz.) That all Proceſs ſhould go with a Non omittas propter aliquam libertatem (ſaving ſtill the Liberty of a Man's Houſe, which indeed the Law in all ſuch Caſes ſaves now) would avoid a great Delay of Juſtice, many Suits and Vexations, grievous Wrongs and Oppreſſions, and would do more good to the Kingdom than all the Liberties of Retorna Brevium have been worth theſe 100 Years; for as they are uſed now, they are nothing but a Foundation of Bracage and Miſchief; they are a Feather in his Cap that has them, but they are a Thorn in the Foot of every one that has to do with them: For firſt the Party muſt go to the Under-ſheriff, and there he is handled; then through another Purgatory, to the Bailiff of the Liberty, and there he is handled; and then to the Under-bailiff, and there he is handled; and then to the Sheriff again. I confeſs I drew a ſhort Act once, and I wiſh ſome good Man would now promote it.

It is now adjourned into the Exchequer-Chamber.

THE CASE OF *COLLINGWOOD* and *PACE* IN THE Exchequer-Chamber.

The Lord Chief Baron *HALE*'s Argument.

IN the Argument of this Case I shall first suppose as clear and unquestionable, these three Things, viz. 1 Sid. 193. Vaugh. 274. 2 Vent. 1.

First, That Patrick the Son, and William the Grandson of Nicholas the elder Brother, are not inheritable to John the Earl, because tho' they are both Denizens born, yet Nicholas their Father, through whom they must convey their Pedigree, was an Alien. Ch. J. Jones 10. 2 Sid. 23, 51, 148. Hardr. 224. 1 Keb. 65, 174, &c.

Secondly, That as Patrick and William cannot inherit, so neither can they obstruct the Descent to John the Son of George, because being descended from an Alien, the Law takes no Notice of them as to this Purpose; otherwise 'tis if the said Nicholas had been a Denizen born and attainted, because in such a Case, tho' he could not take himself by Descent, he could obstruct the Descent to the younger Brother, so the Land would escheat. 1 Lev. 59. Carter 185.

Thirdly, That the Case of George, the Son naturalized, and the Case of John his Son, as in Reference to John the Earl, and the Descent from him, will be all one; if George had survived him, John the Earl might have inherited; so will John his Son, who, jure Representationis, is the same with his Father, & è converso.

These Things being unquestionably clear, before I come to the Arguments of the Case, I shall premise certain general Observations.

First, Touching Descents.

Secondly, Touching the Capacities or Incapacities of an Alien.

Thirdly, Touching Naturalizations.

Touching Descents I shall consider,

First, The Rule whereby they are to be governed.

Secondly, The various Kinds of Descents or hereditary Successions.

Concerning the Rule of Descents, we must not govern our selves therein by the general Notions of Law or Proximity of Nature, but by the municipal Laws of the Country where the Question ariseth; for the various Laws of Nations have variously disposed the Manner of Descents, even in the same Law or Degree of Proximity.

For Instance.

1 Salk. 251. The Father is certainly as near of Kin to the Son as the Son is to the Father, and is nearer in Proximity than a Brother, and therefore shall be preferred as next of Kin in an Administration.

3 Co. 38. 3 Rep. Ratcliff's Case.

Yet touching the Succession of the Father to the Purchase of his Son, the Laws of several Countries variously provide.

First, According to the Jews, for Want of Issue of the Son, the Father succeeds excluding the Brother, and that hath been the Use and Construction of the Jewish Doctors, upon Numbers, cap. 27. Selden de Successionibus Hebr. cap. 12.

But the Mother was wholly excluded.

Secondly, According to the Greeks, the Provision for the Succession or Exclusion of the Father is left doubtful. Petit Leges 1, 6. fol. 6.

Thirdly, According to the Roman or Civil Law, by the Construction of the Law of the Twelve Tables, the Father succeeds in the Purchase of the Son for Want of Issue of the Son under the Title of Proximus Agnatus, and accordingly was their Usage, tho' my Lord Coke supposed the contrary. Co. Lit. 11. But to settle all, the Institutes of Justinian, Lib. 3. Tit. 3. in an authentick Collection, 8. Tit. de. Hæred' ab intestato venientibus, the Son dying without Issue, his Brothers and Sisters, Father and Mother do succeed him in a Kind of Coparcenary as well to Lands as Goods.

Fourthly, According to the Customs of Normandy, which in some Things have a Cognation with the Laws of England, the Son dying without Issue, his Brothers are preferred before the Father, but the Father is preferred before the Uncles, Terrier, lib. 6. c. 6. la Customier de Normandie, cap. De Successions, page 234, 235.

Fifthly, According to the Laws of England, the Son dying without Iſſue, or Brother or Siſter, the Father cannot ſucceed, but it deſcends to the Uncle. And it is a Maxim of the Engliſh Law, An Inheritance cannot lineally aſcend.

Conſequently, the Queſtion being in this Caſe touching a Deſcent of Lands in England, it muſt be diſputed and ruled according to the Grounds and Reaſons of the Laws of England.

Secondly, Touching the Second, the Diviſion of Deſcents are of two Kinds:

Firſt, Lineal, as from the Father or Grandfather to the Son or Grandſon.

Secondly, Collateral or Tranſverſal, as from Brother to Brother, Uncle to Nephew, or è converſo. And both theſe are again of two Sorts:

Firſt, Immediate, as in Lineals from Father to Son.

Secondly, Mediate, as in Lineals from Grandfather to Grandſon, the Father dying in the Life of the Grandfather, when the Father is the Medium differens of the Deſcent.

Thirdly, In Collaterals, from the Uncle to the Nephew, or from the Nephew to the Uncle, where the Father is likewiſe the Medium differens.

And I call this a mediate Deſcent, tho' as to many Purpoſes it be immediate; for the Father dying in the Life of the Grandfather, the Son ſucceeds in Point of the Laws of Deſcents immediately to the Grandfather; and in a Writ of Entry ſhall be ſuppoſed in the Per to the Grandfather, and not in the Per and Cui.

But I call it a mediate Deſcent, becauſe the Father is the Medium through or by whom the Son derives his Title to the Grandfather.

Therefore if any Man thinks the Term of mediate Deſcent not properly uſed, he may if he pleaſe uſe the Words of mediate or immediate Anceſtors. Words are impoſed to ſignify Things, and therefore the Terms being explained what I mean by them, I ſhall retain the Terms of mediate or immediate Deſcents.

This Diſtinction of Deſcents or Relations between Anceſtor and Heir, and hereditary Succeſſion, will be of Uſe throughout this whole Debate.

In immediate Deſcents there can be no Impediment, but what ariſes in the Parties themſelves.

For Inſtance.

The Father ſeiſed of Lands, the Impediment that hinders the Deſcent muſt be either in the Father or the Son; as if the Father or the Son be attaint, or an Alien.

Molloy 366 to 369. By 11 & 12 W. 3. c. 6. All natural-born Subjects may inherit as Heirs, and make their Pedigree by Deſcent from any of ſuch Perſon, thro' whom he or they claim, be aliens born.

In immediate Deſcents, a Diſability of being an Alien or Attaint in him that I call a medius Anceſtor, will diſable a Perſon to take by Deſcent, tho' he himſelf hath no ſuch Diſability.

For Inſtance.

In lineal Deſcents; If the Father be Attaint or an Alien, and hath Iſſue a Denizen born, and dies in the Life of the Grandfather, the Grandfather dies ſeiſed; the Son ſhall not take, but the Land ſhall eſcheat.

their Anceſtors, lineal or collateral, tho' the Father or Mother, or other Anceſtor of

In collateral Deſcents:

3 Salk. 129. A. and B. Brothers, A. is an Alien or attainted, and hath Iſſue C. a Denizen born. B. purchaſeth Lands and dies without Iſſue, C. ſhall not inherit; for A (which was the Medius Anceſtor, or Medium differens of this Deſcent) was incapable. Dyer 274. Gray's Caſe.

And this is apparent in this very Caſe; for by this means Patrick, tho' a Denizen, and the Son of an elder Brother, is diſabled to inherit the Earl.

A. and B. Brothers, A. is an Alien or Perſon attainted, and hath Iſſue C. and dies, and C. purchaſeth Lands and dies without Iſſue. B. his Uncle ſhall not inherit for the Reaſon before going; for A. is the Medius Anceſtor which was diſabled. This was Courtney's Caſe. 3 Inſt. 241.

And if in our Caſe Patrick the Son of Nicholas, altho' a Denizen born, had purchaſed Lands and died without Iſſue, John his Uncle ſhould not have inherited him by Reaſon of the Diſability of Nicholas; and yet Nicholas himſelf, had he not been an Alien, could not immediately have inherited to his Son; but yet he is a Block in the Way to John. See the Reaſon 17 E. 4. 9. The Caſe of Appeals.

But this muſt be intended of ſuch as are abſolute Impediments, as Attainder or Alien, not temporary Suſpenſions: As in the Lord Delaware's Caſe in 11 Co. 1.

But in any Deſcents the Impediment of an Anceſtor that is not Medius Anceſtor, between the Perſons from whom and to whom, will not impede the Deſcent.

The Grandfather and Grandmother both Aliens, or Attaint of Treaſon, have Iſſue the Father a Denizen, who hath Iſſue the Son a Denizen; the Son ſhall be Heir to the Father notwithſtanding the Diſability of the Grandfather: (For they are not Medii anteceſſores between the Father and the Son, but Paramount); and yet all the Blood the Father hath, he derived from his diſabled Parents.

And this Obſervation ſtates in Effect the Caſe.

For if the Deſcent between Brothers be an immediate Deſcent, and that the Father be not Medius Anteceſſor between them, then the Diſability in Robert the Father will not impede the Deſcent

from John the Earl, to George his Brother, or to John his Brother's Son. But if it be a mediate Deſcent, and the Father be a Medius Anteceſſor between them, then the Diſability in Robert the Father may and muſt in this Caſe impeach the Deſcent.

The ſecond Term to be explained, is that diſabling Term of an Alien, and to conſider what Diſability ariſeth from it. The Law, that is the Rule of Deſcents in England, is alſo the Meaſure of this Nonability, and is the only Rule that muſt determine how far it extends.

Therefore I ſhall firſt conſider, what Diſability the Law doth not induce in Caſe of an Alien, viz.

It doth not hinder, but that an Alien is of the ſame Degree and Relation of Conſanguinity as in the like Caſes of a Denizen born. The Son, Father and Brother, tho' Aliens, are yet Son, Father and Brother as natural-born Subjects, and ſo taken Notice of in our Law.

In Cro. Car. 8, 9. Caroon's Caſe, he ſhall be preferred in Adminiſtration as next of Kin. Molloy 366, 380. Cr. Eliz. 683.

Secondly, What the Law doth do as to Diſabilities of an Alien: And this is of two Kinds. Moor 431.

Firſt, The Diſability that is Perſonal or Original to the Alien himſelf, in Reference to Inheritance, viz.

Tho' he may take by Purchaſe by his own Contract, that which he cannot retain againſt the King, yet the Law will not enable him by Act of his own, either 1ſt to transfer by hereditary Deſcent; For the Alien dying, having ſince a Denizen born, the Land will not deſcend.

Or 2dly, To take by an Act in Law; for the Law, quæ nihil fruſtra facit, will not give him an Inheritance or Freehold by Act in Law, for he cannot keep it.

And therefore the Law will not give him the Benefit of either.

1. Deſcent.
2. Courteſy.
3. Dower; or,
4. Guardianſhip.

And in Reſpect of this Incapacity he doth reſemble a Perſon attaint; yet with this Difference, the Law looks upon a Perſon attaint as one that it takes Notice of: And therefore the eldeſt Son attaint, over-living his Father, tho' he ſhall not take by Deſcent in reſpect of his Diſability, yet he ſhall hinder the Deſcent of the younger Son.

But if the eldeſt Son be an Alien, the Law takes no Notice of him; and therefore as he ſhall not take by Deſcent, ſo he ſhall not impede the Deſcent to his younger Brother, 28 E. 3. Couſenage 5. Bro. Denizen 7.

A conſequential conſecutive Diſability that reflects to an Alien from one that muſt derive by or through him, tho' he perchance be a natural-born Subject.

As

As in our Caſe, tho' Patrick, the Son of Nicholas, be a natural-born Subject, yet becauſe Nicholas his Father was an Alien, there is a conſecutive Impediment derived upon Patrick, whereby he is conſequentially diſabled to inherit John his Uncle; and this conſecutive Diſability is parallel to that which we call Corruption of Blood, which is a Conſequent of Attainder.

Co. 3. 11. Dowtie's Caſe contra.

If the Father be attainted, the Blood of the Grandfather is not corrupted, no nor the Blood of his Son, tho' he could not inherit him, but only the Blood of the Father: But that Corruption of Blood in the Father draws a conſequential Impediment upon the Son to inherit the Grandfather; becauſe the Father's Corruption of Blood obſtructs the Tranſmiſſion of the hereditary Deſcent between the Grandfather and the Son.

And here we muſt take Notice of a great Diverſity between a Diſability in the Blood and a Bar.

1 Cro. 524, 543.

Cro. Car. (16 Car. 1.) Edwards and Rogers's Caſe. William Rogers was ſeiſed of a Reverſion in Fee, Andrew his Uncle levies a Fine with Proclamations and dies, having Iſſue John, who dies leaving Iſſue William; then William Rogers dies without Iſſue. Ruled, that William the Grandſon of Andrew ſhall inherit, notwithſtanding the Fine of his Grandfather; and the Reaſon is, becauſe William Rogers dying after Andrew, the Eſtate never paſſed through Andrew, and conſequently William the Grandſon claiming from William, is in Effect a Stranger to the Fine of Andrew, and may aver that Partes, &c.

But in that Caſe had Andrew been an Alien, or Attaint, then had William his Grandſon been diſabled to have inherited William by the conſecutive Diſability.

Now in the Caſe at Bar, there is firſt no Doubt but that John the Earl and George were Brothers, tho' they continued Aliens; neither is there any Queſtion that they could not have inherited one the other, had they continued Aliens; neither is there any Queſtion whether that perſonal Diſability be removed by the Naturalization.

But the Queſtion is, Whether any conſequential or conſecutive Diſabilities do reſult upon them from their Father Robert's being an Alien, which may diſable the one Brother to inherit, tho' their perſonal Diſability be removed?

Thirdly, I come to the Explication of the third Term, (viz.) the reſtoring or enabling Term, Naturalization.

The Means of removing Diſabilities of this Kind are Two:

1ſt, A tempoary, partial and imperfect Amotion thereof, as Letters Patents of Denization, which tho' it puts the Perſon denized as to ſome Purpoſes in the Condition of a Subject, and enables a Tranſmiſſion hereditary to his Children born after the Denization; yet it doth not wholly remove the Diſeaſe or Nonability,

as to the Point of Deſcents or hereditary Tranſmiſſion, and reſembles a Pardon in Caſe of an Attainder.

And therefore in lineal Deſcents, if there be a Grandfather a natural-born Subject, Father Alien, Son Natural; the Father is made Denizen, he ſhall not inherit the Grandfather; and if the Father dies in the Life of the Grandfather, the Grandchild, tho' born after the Denization, doth not remove either the perſonal, or the conſequential Impediment or Incapacity of the Father.

In collateral Deſcents the Father a natural-born Subject hath Iſſue two Sons Aliens, who are both made Denizens, and one dies without Iſſue, the other ſhall not inherit him. This was agreed in Godfrey and Dixon's Caſe, hereafter cited.

The Second is more deep and intricate, (viz.) Naturalization.

According to the Laws of Normandy they may naturalize, but ſuch Naturalization ſhall not deveſt a Deſcent already veſted. Terrier, lib. 2. c. 12.

But according to our Law it can only be by Parliament, and not otherwiſe.

And this cures the Defect, and makes them as if they had been Born in England; and no Man ſhall be received againſt an Act of Parliament to ſay the contrary; and therefore if the Father an Alien hath Iſſue a Son born here, and then the Father is naturalized, the Son ſhall inherit.

If the Father a natural Subject hath Iſſue a Son an Alien, who is naturalized; the Father dies, the Son ſhall inherit. Co. Litt. 129.

Touching the Retroſpect of a Naturalization, and whether the Son being an Alien naturalized after the Death of the Father, ſhall direct the Deſcent to the Youngeſt, depends upon the Words of the Naturalization, which being by Act of Parliament, may by a ſtrange and unuſual Retroſpect direct it ſo, if penn'd accordingly.

But as the Naturalization in the Caſe in Queſtion is penned, it would not do it, the Naturalization hath only reſpect to what ſhall be hereafter. And,

The Clauſe of Taking by Deſcent, after the Commencement of the Seſſion of Parliament, is ſufficient to check that Retroſpect.

And this brings me to the Conſideration of the Naturalization in the Caſe in Queſtion, and the Effect thereof, which I ſhall not argue as a Point; becauſe I take the Point of the Caſe to be ſingle: But I ſhall deliver my Opinion of it by Way of Conveyance to the main Matter or Point of the Caſe.

(Read the Naturalization.)

First, In this Naturalization I shall set down, what Effect it hath. And,

Secondly, What Effect it hath not.

First, What Effect it hath: It doth Doubtless remove that Inability and Incapacity that is in John the Earl and George, in respect of themselves, being Aliens, and so put them in the Condition as if they had been Born in England.

Molloy 374, 375.

But if there be a consequential Impediment or Incapacity derived upon them by Robert their Father's being an Alien, which might hinder their Successions one to another, which at the Present I suppose, or admit: I say, if there be any such consequential Impediment, this I take is not removed by this Naturalization.

My Reasons are briefly these Three, viz.

First, Because this Act of Naturalization hath a proper Subject upon which it may work, and with which it is satisfied, (viz.) The Removal of the personal Defects of the Parties naturalized.

Secondly, Because this Defect arising from the Incapacity of the Father is not in any Measure taken Notice of by the Act, nor so much as mentioned that the Father was an Alien.

Thirdly, By the whole Scope of the Act, and every Clause of it, and those relative Terms (As if Born in England,) is only to supply the personal Defect of the Parties naturalized, arising from their Birth out of England, and therefore shall never be carried to a collateral Purpose.

Touching the Objection, viz.

Tho' this Remedy shall not cure a Disease of another Nature, as Illegitimation, Half-Blood, &c. yet it cures all the Defects of foreign Births, whether in the Parties themselves, or resulting from the Ancestors. To this I answer, The Act might have been so penned as it might have done it; but it is not so:

The Plaister is applied only to Defects arising from their own Birth; not Defects arising from the Father, or that consequential Disability arising thereby.

Second Objection, viz.

That we find in Curteen's Case, Placita Coronæ 241. that where the Father was attainted, the Restitution in Blood granted by the Act to the Son, cures that Disability that results from the Father's Attainder; and this not only to the Son, but also to the collateral Heirs of the Father.

Answ. I have before observed, the Corruption of the Blood by Attainder is only of the Blood of the Father; for the Son's Blood was not at all corrupted. And by this Act of Restitution,

1. Notice is taken of the Father's Attainder;

2. It doth intentionally provide against it; and 3dly, It was the only Business of that Act to remove it.

And had it not removed that Corruption of Blood, it had been uſeleſs; for there was nothing elſe for it to provide againſt, and ſo the Reſtitution had been idle, had it not had that Effect. But in our Caſe the Naturalization, as it takes no Notice of the Defect in the Father, nor provides againſt it; ſo it hath another Buſineſs to ſatisfy, and which ex propoſito it doth remedy, viz. the foreign Birth of John and George.

And let us examine the ſeveral Clauſes in this Act of Naturalization; we ſhall find the whole Scope of it was no other, than to put them in the ſame and no better Condition, than as if they were Born in England. This is the governing Senſe, both in the firſt and laſt Sentence, and hath an Influence upon all the Clauſes that intervene.

It hath been endeavoured to break the Context, and to make the Clauſe (As if Born in England) to be cumulative and ſuperabundant.

But this were by a Nicety to alter the Scope and Intent of the Act. Beſides,

If it were omitted, yet the firſt Clauſe making him but a natural-born Subject to all Intents and Purpoſes, ſurely makes him no more, and meddles not with the Diſability of his Father, or the Conſequence thereof.

There hath been ſome Streſs laid upon the Clauſe, which enables him to make his Reſort and Pedigree to Anceſtors lineal or collateral, as if that ſhould entitle George at leaſt to ſome more Advantage by the Naturalization, than if he had been born here.

But to this I ſay,

Firſt, That is a general Clauſe, and cannot make a legal Anceſtor.

Secondly, Upon the ſame Reaſon it may make John or George inheritable to Patrick, and not adjudge the Diſability of Nicholas his Father, which no Man pretends.

It makes him as much inheritable to Anceſtors lineal, as well as collateral; and yet it makes no Anceſtors lineal. The Words are general, and create no new Anceſtor, that the Law doth not enable.

It is true, that in the Argument of Godfrey and Dixon's Caſe, Montague eſpecially laid ſome Streſs upon theſe auxiliary Clauſes; but the reſt rather reſted upon the very Matter, that the Party naturalized was thereby become a natural-born Subject.

And thus I have done with the Naturalization, which doth not Cure any Diſability of Tranſmiſſion hereditary between the Brothers, reſulting from the Diſability of the Father, if any ſuch be.

But it doth cure the perſonal Diſability in John and George, and makes them to all Intents as natural Subjects as if they had been born in England. So that now the Caſe made is no more than this:

An Alien hath Iſſue two Sons born in England, and one purchaſeth Lands and dies without Iſſue, whether the other ſhall inherit?

For, as I have before obſerved, the Caſe of John the Son of George is all one with the Caſe of George himſelf, whom he repreſents, as to the Point of the Deſcent from John the Earl.

Before I come to the Argument of the Queſtion, the Verdict had need be delivered from a Queſtion, which poſſibly would make an End of the Diſpute.

It hath been ſaid, that if the Wife of Robert were an Engliſh Woman, there would be no Queſtion but the Land might deſcend between the Brothers John and George, tho' Robert the Father were an Alien; and that it ſhall be ſo intended, becauſe nothing appears to the contrary.

To this I ſay,

It is true, that if the Mother were an Engliſh Woman, the Deſcent from John to George his Son would be unqueſtionable: For notwithſtanding the Incapacity of Robert the Father, by being an Alien, they might inherit their Mother, and conſequently they might inherit one the other.

It hath been endeavoured to be anſwered, That it is not poſſible the Mother could be an Engliſh Woman, becauſe the Sons are found to be Aliens.

Cr. Car. 602. March 91. But that will not be ſo, altho' an Engliſh Man marry an Alien beyond the Seas, and having there Iſſue, the Iſſue will be Denizens, as hath been often reſolved: Yet it is without Queſtion, that if an Engliſh Woman go beyond the Seas and marry an Alien, and have Iſſue born beyond the Seas, the Iſſue are Aliens; for the Wife was ſub poteſtate viri, and yet the Iſſue born in England ſhould inherit tho' the Husband be an Alien. Molloy 367.

But the true Anſwer is, That in this Caſe Robert the Husband being an Alien, born out of the Allegiance of the Crown of England, and marrying, and having all his Iſſues born there, ſhe ſhall not be preſumed an Engliſh Woman, but ſhall be preſumed a Native in Scotland, where her Husband lived and had Iſſue, unleſs the contrary had been expreſly found.

Now touching the Point in Queſtion, it is true that Sir Edw. Coke (whoſe Opinion I muſt ever reverence) in his Littl. fol. 8. is of Opinion: That if an Alien have two Sons born in England, and one die without Iſſue, the other ſhall not inherit him. But I take the Law to be the contrary.

First, I will shew what Reasons do not move me.

Secondly, What Reasons do convince and satisfy me.

It doth not move me thus to conclude, because there is no defectus Patriæ, or Nationis or Ligeantiæ of either of the Brothers; for tho' there be no personal Defect in either of the Extreams, yet it may be possible that a consequential Impediment arising from another Ancestor, may hinder the Descent; and this is apparent in the Case in Question, for Patrick the Son of Nicholas the Elder, Brother of John the Earl, hath no Defectus Ligeantiæ, for he was naturalized, yet the Land shall not descend from John the Earl to Patrick by Reason of the Defect of Nicholas his Father; neither doth it move me that George or John his Son do not claim the Land from Robert the Father, but from John the Earl, for if the Grandfather be seised, the Father is an Alien.

The Son a Denizen born, the Father dies in the Life of the Grandfather, the Son shall not inherit by Reason of the Defect of the Father, tho' he claim nothing from him, but from the Grandfather.

But the Reasons that satisfy me are these three in Order as they are propounded.

My first Reason is, Because the Descent from a Brother to a Brother, tho' it be a collateral Descent, yet it is an immediate Descent, and consequently upon what hath been premised at first, unless we can find a Disability or Impediment in them, no Impediment in another Ancestor will hinder the Descent between them. First Reason.

Now to prove this Descent immediate, I shall use these three ensuing Instances or Evidences.

First, In Point of Pleading, one Brother shall derive himself as Heir to another, without mentioning another Ancestor; this hath been at large insisted on by others, and therefore I shall pass it over.

Secondly, According to the Computation of Degrees, according to the Laws of England, Brother and Brother make one Degree, and the Brother is distant from his Brother and Sister in the first Degree of Consanguinity.

According to the Civil Law, the Brother is in the second Degree from the Brother, for they make one Degree from the Brother to the Father, and from the Father a second Degree to the other Brother; but yet they say in Collaterals, Nullus est proximior Fratre, ideoque in Collateralibus nullus est primus Gradus, sed secundus Gradus obtinet vocem primi, Inst. lib. 3. Tit. B. de Gradibus Consanguinitatis.

According to the Canon Law, Frater & Frater, Soror & Soror, sunt in primo Gradu, Decret' Gratian. Laus 35 quest. 5. ad sedem. And therefore their Laws prohibiting Marriage in the fourth De-

Degree, take Brother and Sister to be the first Degree of the Fourth.

The Laws of England, in Computation of the Degrees of Consanguinity, agree with the Common Law, and reckon the Brother and Brother to be the first Degree, and this is apparent by Littleton, sect. 20. and the Objection of the Lord Coke thereupon, and the Book of 31 E. 3. Holland's Case cited by Littleton.

And with this likewise agree the Laws and Customs of Normandy, which tho' in some Things they differ from the Law of England, as is before observed, yet in this particular and divers other touching Descents, they agree with it. Vide Glov. Com. super Customeir de Normandy, in Cap. de Escheat, Et doit un scavoir que selonque le Custome de pays de Normandy pur compter les Degrees en Line Collateral & solonque les Canonists, deux freres ont le primier Degree & ne ont que un Degree.

My third Evidence that the Descent between Brothers is immediate, thus (viz.) the Descent between Brothers differs from all other collateral Descents whatsoever, for in other Descents collateral the Half-Blood doth inherit, but in a Descent between Brothers, the Half-Blood doth impede the Descent, which argues that the Descent is immediate.

The Uncle of the Part of the Father hath no more of the Blood of the Mother, than the Brother of the second Venter.

The Brother by the second Venter hath the immediate Blood of the Father, which the Uncle (viz.) the Father's Brother hath not, but only as they meet in the Grandfather.

The Brother of the Half-Blood is nearer of Blood than the Uncle, and therefore shall be preferred in the Administration.

And so it hath been resolved in 5 E. 6. in Brown's Case, and tho' the Book of 5 E. 6. B. Administration 47. mistakes the Law in preferring the Brother of the Half-Blood before the Mother, yet it had been Right in the Case of a Competition between him and the Uncle.

And yet the Uncle is preferred in the Descent before the Brother of the Half-Blood, and the Reason is, because that is a mediate Descent, mediante Patre; but the Descent to the Brother must be immediate, if at all, and therefore the Half-Blood impedes it.

Again, it is apparent, that if in the Line between Brother and Brother, the Law took Notice of the Father as the Medium thereof, the Brother by the second Venter should rather succeed the other Brother, because he is Heir to his Father; therefore in a Descent between Brothers the Law respects only the mediate Relation of the Brothers as Brothers, and not in respect of their Father, tho' it is true the Bosom or Foundation of their Consanguinity is in the Father and Mother.

My second principal Reason is to prove, That the Disability of the Father doth not at all hinder the Descent between the Brothers immediate, is this, Second Reason.

If the Father in Case of a Descent between Brothers, were such an Ancestor as the Law looks upon as the Medium that derives the one Descent from the other, then the Attainder of the Father would hinder the Descent between the Brothers.

But the Attainder of the Father doth not hinder the Descent between the Brothers.

Therefore the Father is not such a Medium or Nexus as is looked upon by Law as the Medium deferens, or Means deriving such Descent between the two Brothers.

Both the former Propositions, and indeed the Illustration and Enforcement of the whole Reason, will be evidenced by the Comparison of three Cases, the two former of the Cases evincing the Truth of the first Proposition, and the later proving the second Proposition.

The First is Graves's Case, 10 Eliz. Dyer 274. The younger Brother hath Issue and is attaint of Treason and dies, the elder Brother having a Title to a Petition of Right, dies without Issue; without a Restitution, the other Brother's Son hath lost that Title; for though that Title were in an Ancestor, that was not attainted, yet his Father that is the Medium whereby he must convey that Title, was attainted, and so the Descent is obstructed.

On the other Side, the Case of Courtney, in Cro. Car. 241. Henry Courtney had Issue Edward, and is attaint of Treason and dies, Edward purchaseth Lands, and dies without Issue, the Sisters and Sisters Children of Henry are disabled to inherit Edward, yet neither Edward nor his Aunts were attainted, nor their Blood corrupted, as is before manifested, but only Henry; tho' the Land could not descend immediately from Edward, yet because he, who nevertheless was the Medium whereby the Aunts must derive their Pedigree and Consanguinity to Edward, was attainted, the Descent was obstructed till a Restitution in Blood.

But suppose that the Grandfather of Edward was attainted, and not Henry, this could not have hindred the Descent from Edward to his Aunts, because the Attainder had been Paramount that Consanguinity which was between Henry and his Sisters, as Brothers and Sisters, and that is proved by the third Case, cited 1 Inst. 8. in the Margin, reported in Noy 158.

In 40 & 41 Eliz. in the Exchequer, Hobby's Case, William Hobby had Issue Philip and Mary, and is attainted of Treason and dies, Philip purchaseth Lands, and dies without Issue; ruled that notwithstanding the Attainder, Mary shall inherit, because the Descent between Philip and Mary was immediate, and the Law regards not the Disability of the Father, and in that Case all the

Reasons

Reaſons that have been objected againſt the Deſcent in the Caſe at Bar, were objected.

If it be objected that in that Caſe the Mother was not attainted, which might preſerve the legal Blood between Philip and Mary;

I Anſwer, That that would not ſerve, admitting the Diſability of the Parents were not at all conſiderable; for if it diſable the Blood of the Father which is derived to the Son, it would infallibly deſtroy the Deſcent to Mary the Siſter, for ſhe could not inherit her Brother in the Capacity of Heir to the Part of the Mother, if by the Attainder ſhe had been diſabled to take as Heir by the Father's Blood. 49 E. 3. 12.

If the Heir on the Part of the Father be attainted, the Land ſhall eſcheat, and ſhall never deſcend to the Heir of the Mother, becauſe notwithſtanding the Attainder, the Law looks upon it as in eſſe; but otherwiſe it is in Caſe of an Alien, as hath been before ſhewn; for if the Son purchaſe Land and have no Kindred on the Part of his Father, but an Alien, it ſhall deſcend to the Heir of the Part of the Mother.

And altho' the Blood both of the Father and the Mother were in Mary, yet if ſhe were diſabled in the Blood of her Father by his Attainder, ſhe could never intitle her ſelf by the Blood of her Mother.

I have done with this Reaſon; there remain two principal Objections to be anſwered.

Object. 1. The Father in the Caſe at Bar, is the Fountain from whence the Blood of John and George is derived, and their Conſanguinity ariſeth not from one to another, but from their Father, which is the common Vinculum to them both, and therefore this Diſability in the Parents deſtroys the Civil Relation of hereditary Blood between the two Brothers.

I anſwer Firſt, The very ſame Objection might be, and indeed was made in Hobby's Caſe, but prevailed not.

Secondly, But further, no Man will ſay but that the Blood of the Father and Mother are neceſſary to derive Conſanguinity in the Son, for the Blood of the Father without the Mother is impoſſible to be derived to the Children; and yet no Man will deny, that if the one or the other were Denizen born, their Children ſhould inherit one the other.

Thirdly, But the Truth is, the Father and the Mother are the Blood natural to both the Sons, but it is the Law, into which by their Birth or Naturalization they are tranſlated, that is the Fountain of the Civil or Hereditary Blood; the Parents are the common Vinculum, the Fountain of their Blood, that aliquod tertium in quo conveniunt in regno naturali, but it is the Law of

the Land into which by their Birth, or Naturalization they are transplanted, the Commune Vinculum, that aliquod tertium in quo conveniunt in Regno Civili.

Obj. 2. But all their Blood that they have is derived from their Parents, and they can take no other Blood but what they have from them; and if that Blood which the Parents transmit, be stained, and void of hereditary Quality, no hereditary Blood can intervene between them.

I answer, it is true that their natural Blood is derived from their Parents, and as it is that that makes them Brothers Sons, so it is that that makes them their Blood; but yet the civil Qualification of their Blood which makes them inheritable one to the other is from another Fountain (viz.) the Law of the Land; and this Law finding them legitimate & utrinque conjunctos sanguine parentali naturali, and so natural Brothers, and finding them transplanted into the civil Rights of this Kingdom by their Birth here or Naturalization, which is all one, doth superinduce and close the natural Consanguinity, with a civil hereditary Quality, whereby they may inherit one the other.

For Instance,

A. Grandfather and B. his Wife, both Aliens, have Issue C. a Son born here, who hath Issue D. a Son also born here.

No body can deny that C. hath all his natural Blood from A. and B. and no where else; nor is that Blood that he hath so from them, an inheritable Blood, yet is it unquestionable that D. shall inherit C. and D. hath no natural Blood but what he hath from C. nor C. no natural Blood but what he hath from A. and B. But true it is, the Law doth superinduce that civil hereditary Quality upon the Blood of C. by his Birth in England, tho' as he took it from his Father and Mother it was void of that Quality; the Law of Nature made him indeed Son, but it was the Law of England that gave him a Capacity to be an Heir in England, or to have one.

My third and last Reason is indeed more general, tho' not so conclusive as the two former were upon the particular Reason of the Case, tho' not altogether to be neglected. (viz.) 3d Reason.

The Law of England which is the only Ground, and must be the only Measure of the Incapacity of an Alien, and of those consequential Results that arise from it, hath been always very gentle in the Construction of the Disability, and rather contracting than extending it so severely.

For Instance,

The Statute de natis ultra Mare 25 E. 3. declares that the Issue born beyond Sea of an English Man upon an English Woman shall be a Denizen, yet the Construction hath been, tho' an English

Merchant marries a Foreigner, and hath Iſſue by her beyond the Sea, that Iſſue is a natural born Subject. Molloy 358, 367.

Cr. Car. 602. In 16 Cro. Car. in the Dutchy, Bacon's Caſe, per omnes Juſtic' Angl'.

And accordingly it hath been more than once reſolved in my Remembrance, Pround's Caſe, of Rent.

The Caſe of the Poſtnati, commonly called Calvin's Caſe, the Report is grounded upon this gentle Interpretation of the Law, tho' there were very witty Reaſons urged to the contrary; and ſurely if ever there were Reaſon for a gentle Conſtruction even in the Caſe in Queſtion, it concerns us to be guided by ſuch an Interpretation ſince the Union of the two Kingdoms, by which many perchance very conſiderable and Noble Families of a Scottiſh Extract may be concerned in the Conſequence of this Queſtion both in England and Ireland, that enjoy their Inheritances in Peace. I ſpare to mention Particulars. So far therefore as the parallel Caſes of Attainder warrant this Extent of this Ability I ſhall not diſpute, but further than that I dare not extend.

Now as touching the Authorities that favour my Opinion, I ſhall not mention them, becauſe they have been fully repeated; and the later Authorities in this very Caſe are not in my Judgment to be neglected.

Cr. Jac. 539. Palm. 13. Godb. 275. 2 Rol. Rep. 92, 113. Touching the Caſe of Godfrey and Dixon, it is true it doth differ from the Caſe in Queſtion, and in that the Father was made a Denizen and then had Iſſue a younger Son, who inherited the elder Son an Alien born, but naturaliz'd after the Death of his Father; yet there is to be obſerv'd in that Caſe, either the Naturalization of the elder Son relates to his Birth, or relates only to the Time of his Naturalization; whether it did relate, or not, depends upon the Words of the Act of Naturalization, which I have not ſeen.

If it did relate, the Cauſe in Effect will be no more, but an Alien hath Iſſue a Natural born Son, (for ſo he is, as I have argued by his Naturalization) and then is made a Denizen, and hath Iſſue and dies, the elder Son purchaſeth Lands and dies without Iſſue, the younger Son ſhall inherit; the elder ſhould not have inherited his Father, by Reaſon of the Incapacity of the Father.

But it doth not relate further than the Time of his Naturalization, which was after the Time of the Death of his Father, and conſequently he could not devеſt the Heirſhip of his younger Brother; yet if he purchaſeth and dies without Iſſue, his younger Brother ſhall inherit him, tho' there was never Inheritable Blood between the elder Son and his Father, ſo much as in Fiction or Relation.

Upon the whole Caſe I conclude,

Firſt, That there be two Brothers Natural-born in England, the Sons of an Alien, the one ſhall inherit the other.

Secondly, That the Naturalization puts them in the ſame Condition as if born here, tho' it does not more.

Thirdly, That John the Son of George ſtands in the ſame Condition of inheriting his Uncle, the Earl, as George ſhould have done, had he ſurvived the Earl.

Fourthly, But if the Diſability of Robert the Father had diſabled the Brothers to have inherited one the other, the Naturalization of the Earl or George had not removed that Diſability,

But fifthly, As no ſuch Diſability of the Father doth diſable the Brother George to inherit the Earl; it neither doth conſequentially diſable John the Son of George to inherit the Earl. And therefore,

Conſequently, as to the Point referred to our Judgment, John the Son of George is inheritable to the Land of John the Earl his Uncle.

Judgment was given by ſeven Judges againſt three, that the one Brother ſhould inherit the other by Virtue of the Acts of Naturalization. 1 Lev. 59, 60.

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