THE

REPORTS

OF

Sir Bartholomew Shower, *Knt.*

Of CASES Adjudg'd in the

Court of King's-Bench,

In the REIGN of His Late MAJESTY

King William III.

With ſeveral Learned Arguments.

With Two TABLES: The Firſt, of the *Names of the Caſes*; The Other, of the *Principal Matters.*

LONDON:

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TO THE

READER.

THE Author of the following REPORTS acquir'd ſuch Eminency in his Profeſſion, as ſufficiently recommends them to the Publick, they being left under his own Hand with a deſign to communicate 'em to the World. This, without queſtion, will make them acceptable to the preſent Gentlemen of the Robe, and profitable to thoſe who ſhall hereafter ſtudy the *Common-Law*; which makes it unneceſſary to ſay more concerning the Work it ſelf, or the Author of it, tho' there is Juſtice in diſtinguiſhing the Dead as well as the Living.

The Deſign of this *Preface* is not to enter into the Hiſtory of the Author's Family or Education, tho' both might be mention'd to his Advantage, but to give ſome Sketches of his Perſonal Character.

His Vivacity of Parts, and Felicity of Expreſſion, ſoon diſtinguiſh'd him, which led him into a Crowd of Buſineſs betimes, and at an uncommon Age brought him to ſtand before the moſt Auguſt Aſſemblies of the Nation, where he acquitted himſelf with Satisfaction to Others, as well as to his own Honour.

His Native City of *Exeter* ſhew'd him ſuch a diſtinguiſhing Reſpect, as to chuſe him to be their Repreſentative in Two Parliaments, as they alſo had return'd him to ſerve in a Third, when confin'd by that Sickneſs which ended in Death, in the Forty-third Year of his Age. ——

I muſt not omit to mention his Generoſity, which makes ſo beautiful a Part of a good Character. This was ſo free and impartial, without regard to Parties and Denominations, that Indigence and Worth always found a Patron in him, in which he gratify'd Himſelf at the ſame time he reliev'd the Objects of his Charity; And that his Kindneſs might be the better eſteem'd by the Receivers, he was wont to give them ſome Opportunity of Service, that it might appear an Act of Juſtice rather than Compaſſion, and this way he cover'd their Modeſty at the ſame time he help'd their Neceſſity.

As to his Religion, it was that of the Church of *England* eſtabliſh'd by Law; nor was he only ſatisfied in relation to its Government, Diſcipline and Doctrines, but thoſe who were intimately acquainted with him knew he defended them, as he likewiſe did our Civil Conſtitution.

Term.

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Term.

Term. Paſchæ.

1 Will. & Mar.

Fitzpatrick *verſus* Robinſon.

Intr. Mich. ult. Rot. 105.

BOnd for Performance of Covenants, which were for J. S. to render a true and juſt Account, and to pay what ſhould, &c. Defendant pleaded Performance generally. Plaintiff replies, That he did not give a true and juſt Account, &c. Defendant demurs generally. Mr. Girdler for the Defendant urged, That this was not a good breach, becauſe juſt and true Account implies that there was an Account, and this is therefore a perplex'd and multifarious Iſſue; he ought to have ſaid, either that he gave no Account at all, or that he gave an Account, but not a juſt and true one, and have ſhewn wherein it was otherwiſe, ſo as the Defendant might know what Anſwer to make. Adjornatur.

Pleading performance generally where a ſtranger is to render an Account, not good.

Afterwards Plea held ill, becauſe for the Act of a ſtranger, and then you muſt ſhew how: but this is not help'd by the Replication, as Plea of Performance general to Negative Covenants may be. Vide Agar *verſ.* Reeves, Yelverton 39, 40. Judic. ℔ Quer. Quære de ceo ..... ℔ Replicat. Vid. 2 R. 3. 17. Styles 473, 474.

An ill Plea of performance to affirmative Covenants not aided by the Replication.

Browne *verſus* Browne.

MOtion for a Prohibition to a Suit in Court Chriſtian, by a Siſter of the half-blood, to have Diſtribution as next of Kin. Mr. Dobbins urged, That the Caſe in Brooke's Abridgement had been exploded and denied; but it was anſwered, That this was quieta movere, for this had been ſettled, in Perkins and Story's Caſe, and held that they were in equal de-

A Siſter of the half-blood ſhall have Diſtribution.

gree for Adminiſtration. Smith *verſ.* Tracey. Hill. 27 Car. 2. Mod. Rep. Browne *verſ.* Wood in Mr. Allen's Rep. There's the ſame nearneſs of Blood, there's no difference in Degree; and a Prohibition was denied per tot' Cur' on debate.

Browne *verſus* Shore.

One dies Inteſtate before diſtribution, his ſhare belongs to his Adminiſtrator.

MOtion for a Prohibition, on this ſuggeſtion, That the Adminiſtrator of one dying Inteſtate before Diſtribution ſued for that parties ſhare, and that no Right was veſted, but only a Power and Direction to the Ordinary to diſtribute, and conſequently it muſt be to the next of Kin at the time of the Deceaſe, and not at the time of the Diſtribution. The Court inclined that it was a Right veſted; but to ſettle the Point, they directed them to declare, and the other to demur, and accordingly they did. Vide infra. 25.

Thompſon *verſus* Harvey.

Intr. Trin. ult. Rot. 192.

Bond with Condition not to buy Sheeps Feet of any other but ſuch and ſuch, and not above ſuch quantity, void.

DEbt ſur Obligation, with Condition not to buy Sheeps Feet, &c. of any others but ſuch and ſuch, &c. and not to buy above ſuch a quantity, &c. Defendant pleads, That that was his Trade, and that the Bond was procured from him to reſtrain the uſe of his Trade, and therefore is of no force, but void in Law. Plaintiff replies, That it was voluntarily given, and Defendant demurs. Argued for the Plaintiff, That it was a good Condition; that dreſſing of Sheeps Feet was not ſuch a Trade as the Law regards, and the naming it ſo will not make it otherwiſe than in reality it is; and admitting it a Trade, yet the reſtraint is lawful, being only a particular ſpecial Reſtraint, and not univerſal and general, as is Brode and Jolliff's Caſe. On the other ſide it was urged by Mr. Selby, That the Bond is void, becauſe the Condition is againſt Law, 1 Inſt. 56. It is an univerſal Reſtraint; for we muſt not buy of any a greater number than he does, ſo that if he leaves off his Trade, we muſt leave off ours; or if he buys none, we muſt not. We have averred that the Bond was given upon an unlawful Condition, and that will make it void, as in the Caſe of Simony, Moore 641. 1 Cro. 180. 1 Cro. 245. 2 Cro. 248. March 158. To this the Court anſwered, That theſe are all void by Act of Parliament, and that there was a difference between Bonds void by Statute

and

and thoſe which are void at Common-Law, becauſe of the unlawfulneſs of the Condition, as a Bond not to proſecute a Felon, 1 Leon. 203. and the Averment may be good however, if it be conſiſtent with the Condition: But this is plainly reſtrictive of Trade, becauſe he is not to deal with any perſon whatſoever that the Plaintiff hath dealt withal; and there is no difference between a Reſtraint from a particular place and from particular perſons; and in the Company of Taylors of Exeters Caſe, in Cam' Scacc' held that a Reſtraint from any particular place was unlawful. But Dolbin held ſtrongly, That a Bond not to trade in a Dale is good, and that he always took the Caſe of Jolliff and Brode to be good Law. At laſt they all agreed this was ill, and gave Rule for a Judgment p Def. niſi. Vide infra.

Difference between a Bond void by Statute and by Common-Law.

Strode *verſus* Osborne.

Intr. Paſch. ult. Rot. 297.

ERror on a Judgment in Com' Banco in a Writ of Waſte. Exception taken becauſe the Jury had not the View; but per Cur' it need not appear on Record that they had the View, as was reſolved in Cole and Green's Caſe, Saund. ..... Object. 'Tis unneceſſary there ſhould be an Award that they have the View, or ſomewhat to warrant it, the Judgment is without per viſum Jurator'. Court. The Preſidents are ſometimes without theſe words per viſum; the Defendant is not to demand the View, as in a Writ of Entry; for 'tis there for the Tenant himſelf to have the View, here the Jury are to have it by the Statute, and no need to mention the View, Judgment well enough without it. Vide Raſt. Entr. 696. Another Exception, becauſe the Writ is for cutting of forty Trees growing ſparſim in forty Acres, but the Jury find that he cut down forty Trees in twenty Acres: If this be a good finding? Quære. If aſſignable for Error, becauſe it is a thing for the Defendant's Advantage? But the Writ of Error was quaſhed, becauſe it was directed to Sir Edward Herbert as coram ipſo & Sociis ſuis, but the Record removed was before Bedingfield.

Waſte, 'tis not neceſſary to appear on Record that the Jury had View.

Carneth *verſus* Priour.

Vide le Pleadings Intr. Paſch. ult. 74.

Plea begins in *Bar*, and concludes in *Abatement*.

UPon Debate of this Caſe (which I little heeded, &c.) Holt took this difference upon 33 Hen. 6. 18. that a Plea which concludes in Abatement, tho' it begins in Bar, is a Plea in Abatement; and that, è contra, a Plea concluding in Bar, tho' it begins in Abatement, is a Plea in Bar. Quod non fuit negat'.

Barker *verſus* Beardwell.

A perſon to whom an Apprentice is turn'd over according to the Cuſtom of the City of *London*, can't maintain Covenant on the Indenture of Apprenticeſhip, to which he is not party.

COvenant brought by the Plaintiff upon an Indenture of Apprenticeſhip made by the Defendant to J. S. in London, which was inrolled there, and Defendant turned over to the Plaintiff before the Chamberlain, &c. Demurr' al Narr', & Judgment p Def. becauſe Cuſtom cannot make an Aſſignee, ſo as to entitle him to an Action. Where there is a Cuſtom of a place that creates a Duty, an Action lies in the King's Courts, becauſe there is a Duty veſted; but here is no Duty veſted, and you muſt make your ſelves privy to the Contract, for to found an Action. Action for calling a Woman Whore will not lie here, though it will in London. Judic' p Def.

Cramlington *verſus* Evans.

Vid. les Pleadings Paſch. 2 Jac. 2. Rot. 192.

A Bill of Exchange payable to *P.* to uſe of C. by *P.* aſſigned by Indorſement to another, can't be extended for a Debt due to the King by *P.*

DEfendant draws a Bill of Exchange payable to one Price to the uſe of one Calvert. Price aſſigns by Endorſement the Bill to the Plaintiff, who brings the Action as Indorſee. Defendant pleads that Calvert was indebted to the King, and that thereupon an Extent had been ſued, and this Money paid. Plaintiff demurs. Sir Robert Sawyer argued for the Defendant, That here is no legal Intereſt in this Bill, but the Money is and belongs to Calvert; the bare delivery of Goods and Chattels upon a Confidence, is not a Truſt, but the Property remains in Ceſtuy que Uſe; and cited Shaw and Horewood, Yelverton 23. Harris *verſus* Beaver, 2 Cro. 678. Where Goods or Money, or other perſonal things, are delivered to another, they give no Property, unleſs it be to his uſe; ſo if it be expreſly to the uſe of the Deliverer, or a ſtranger,

ſtranger, Dyer 20, 21. If Price had received the Money, Calvert might have had an Action of Debt againſt him for it, 36 Hen. 6. 9. And if this be ſo, how can theſe Aſſignees come to an Intereſt? And to lay a Cuſtom that a man ſhall come to a Property in that which he knows and ſees plainly is mine, without my direction, ſhall never help it, 33 H. 6. 5. 3 Rep. 78. The Cuſtom of Merchants aſſigns a Choſe in Action, but 'tis from him that hath the Property; but the going to the firſt Drawer is not by the Cuſtom of Merchants, but by the Common-Law, by reaſon of the value received. It cannot be ſaid to be paid in his own wrong, becauſe he that recovers hath as much Right to ſue as the other, and both may. Now here's an Extent, whereby this very Debt is extended, as well againſt Cramlington as the others, and the Money actually paid, for ſo it is pleaded: This Extent is a Suit in Calvert's Name, whoſe Money it was, for the Extent is his, and he recovers; then here's a Recovery before the other Suit, which ſhews that it doth not amount to the General Iſſue, but is a ſubſequent Bar. Thompſon è cont' p Quer'. The privity of Contract is between the Drawer, and Price, and the Indorſee, and the laſt Indorſee hath an Action againſt any of the Indorſers, or againſt the Original Drawer, and therefore this can be no good Plea. Beſides, this Plea goes only to the Conſideration, and anſwers nothing to the Aſſumpſit; here is a Right veſted in the Plaintiff by the Indorſement and Aſſignment ten days before the Extent. L. C. J. Holt. An Univerſal Cuſtom is a Law, and I know no diſtinction between Lex Mercatoria, and Conſuetudo Mercatorum: If the Drawer mentions it for value received, then he is chargeable at Common-Law; but if no ſuch mention, then you muſt come upon the Cuſtom of Merchants only. This is a Bill which is aſſignable by Price, and when Price aſſigned it he received the Money, and that receipt was for the uſe of Calvert, and there Calvert hath his Action; but we can take notice of none but Price, and at this rate the Credit of Bills of Exchange will be ſpoiled. Judic' p Quer' per tout Cur'.

Beake

Beake *verſus* Tyrrell.

Vid. ſupra. Hill. 3 & 4 Jac. 2. Rot. 334. vel 173.

A Juſtification as Captain of a Man of War a Caption as Prize, and Condemnation in the Admiralty Court.

TReſpaſs for taking a Ship, &c. Defendant pleads, That he was a Captain of a Man of War, and that he took her on the High-Seas as a Prize, and carried her to ..... and there proſecuted her and condemned her in the Admiralty Court as a Prize, &c. Demurrer. Argued in maintenance of the Plea, That Credit is to be given to the Admiralty's Proceedings, and that the Sentence and Condemnation there is a good Bar, and after the matter hath been there examined, this Court muſt take it for juſt Proceedings; That the Cauſe of the Sentence is not traverſable, but only whether there were ſuch Proceedings there or no, 8 Rep. 68. The Court and Juriſdiction of the Admiralty reaches over the Sea all the World over, and they may ſit at Land any where, in the Eaſt-Indies as well as here; and in 29 Car. 2. Hutchinſon's Caſe, who was accuſed and acquitted in Spain for killing a Man there, it was held to be a good Bar to any Proceedings here; and Hughes and Cornelius's Caſe, 34 Car. 2. Cottingham's Caſe depended on a Sentence in Italy. E contra, urged, That ut prizam cepit is uncertain, and not averred that 'twas a Prize; he was a Captain of a Man of War, but ſhews not any Commiſſion, or quo modo he was ſuch. If a Man be to plead Proceedings in an inferiour Court, he muſt ſhew ſo much as to evince that they had a Conuſance of the Cauſe; he only ſays, That being upon the High Sea, he took her as a Prize; he doth not ſay that the Suit in the Admiralty was upon our inſtance: If it had, if we had complained there of this unjuſt taking, and Sentence had been againſt us, it would have been ſtronger on their ſide; but they only ſay that they took it, and carried it in, and proſecuted and condemn'd it. L. C. J. Holt, That he was a Captain is well enough, he need not ſhew his Commiſſion; but it doth not appear how this Ship came to be a Prize; it doth not appear there was any cauſe to ſeize her as ſuch, nor ſhewn that there was any War; the ſubſequent going to the Admiralty cannot juſtifie the firſt illegal Caption; beſides, it is not ſhewn whoſe Court of Admiralty 'twas, nor before what Judge. Judic' p Quer' per tout le Court

This was an Interloper ſeized by the *Eaſt-India* Company, and carry'd into the *Indies*, and there condemned by the Companies Admiral, &c.

Hurton

Hutton *verſus* Goodrick.

Intr. Hill. 3 & 4 Jac. 2. Rot. 334.

EJectment on three ſeveral Demiſes in an inferiour Court, and for the ſecond doth not ſay it was infra Juriſdic' Cur', only infra Libertat' & Jur', and doth not ſay præd', If good? There was cited 3 Cro. 441. Gooday *verſ.* Minſhall, and 2 Cro. 95. Beſides, the Judgment was, Quod recuperet Terminum ſuum, whereas there were three ſeverals. There was cited Pattiſon *verſ.* Goddard, Mich. 3 Jac. 2. Rot. 110. Adjornatur.

Ejectment in an inferiour Court on Demiſe *infra Libert' & Jur'* without Verdict.

Pepis *verſus* Low.

Intr. Mich. ult. 540.

ACtion ſur le Caſe by Aſſignees of Commiſſioners of Bankrupt. Exception to the Declaration, becauſe alledged J. S. to be a Bankrupt, and doth not ſhew how. Quære, If good?

Villers *verſus* Ball & al'.

Intr. Paſch. 1 W. & M. Rot. 410.

CAſe for ſtopping of Lights, and ſays only, quod poſſeſſionat' of ſuch an Houſe, in which he had, and habere debuit ſuch and ſuch Lights. On Demurrer, Exception was taken, becauſe did not ſay time out of mind, nor ſo much as that it was an ancient Houſe, and that the Lights were ancient; but held well enough upon Sands and Trefuſe's Caſe, 1 Cro. 575.

Caſe for ſtopping Lights without alleging the Houſe or Lights ancient.

Lapdall *verſus* Hart.

Intr. Trin. ult. 953.

CAſe on a Promiſe. After Verdict, urged that it was ſuper ſe Aſſumpſit, and doth not ſay who; and there was cited Oxford's and Rivet's Caſe, 1 Cro. 79, 93. in Scire Fac' *verſ.* Adminiſtrator'. Plea, That ſhe was only Adminiſtratrix durante minor' ætate, and had fully adminiſtred. Replication, Quod devaſtavit, and Iſſue thereon, and found for the Plaintiff, and held that no Iſſue was joyned, and ill

Super ſe aſſumpſit, omitting the Defendant's Name

in

in the Replication, not ſaying who did waſte. Adjornatur.

Evans & al' verſus Pettifer.
Intr. Mich. ult. 328.

Bail & Principal join in a Writ of Error.

WRit of Error by Principal and Bail, held ill, and that they cannot joyn, according to Foreſt and Sandland's Caſe, Hobart 72.

Maſtin verſus Abdee.
Intr. Mich. 3. Trin. 4 Jac. 2. Rot. 575.

Uſury, what.

IT was agreed, That if Principal and Intereſt be in hazard upon a Contingency, it is no Uſury, tho' the Intereſt do exceed the allowed Rates of 6 l. per Cent. according to Shapley and Hurrel's Caſe, 2 Cro. 209. Vide 2 Cro. 508. and 3 Cro. 643. And when there is an hazard that the Plaintiff may have leſſer than his Principal, 'tis no Uſury.

Spencer verſus Durant.

A Covenant with two, by which they have a joynt Intereſt, cannot give ſeveral cauſes of Action by the words *cuilibet eor' obligamus.*

DEbt, & en Narr' upon it, after Oyer it appeared to be a Covenant with the Plaintiff and another, & omnibus & cuilibet eorum obligat' in 20 l. for performance, and Demurrer. Per Cur', It appearing to be a joynt Intereſt, each cannot bring a ſeparate Action. Vide Hob. 172. Slingsby's Caſe, 5 Rep.

Mich. 4 Jac. II. in Cam' Scacc'.

Piltarſe verſus Darby.
Intr. Mich. 1 Jac. 2. 424.

Debt on Covenant to pay ſo much quarterly for 4 quarterly payments arrear, without ſaying when due and ending, naught.

ERror on a Judgment in Debt in B. R. Narr' en Debt on a Specialty, whereby it is recited that Piltarſe was to go beyond Seas, and tranſact the Defendant's buſineſs there; he covenanted to pay him for ſeven years the Sum of 100 l. per

per annum quarterly, to begin at Chriſtmas 35 Car. 2. That on ſuch a day 100 l. for four quarterly Payments, were arrear and unpaid, and yet unpaid, per quod Actio accrevit, &c. Judgment upon Non ſum informatus. Upon Error in Cam' Scacc' it was urged to be ill, becauſe did not ſay then ended, and it did not appear for what time it was arrear. I argued, That it was well enough, that then ended was needleſs according to Taylor and Guy's Caſe. Sid. 409. Aſſumpſit to pay 8 l. per annum to a Vicar, and to begin on the 30th of May, and ſhews a Breach for two years ended the laſt day of May, which is two years and a day; yet on Demurrer held good, becauſe the word finit' was ſurpluſage, and then for two years was well enough. And the Caſe of Underhill and Devereux, 2 Saund. 71, 72. Scire Fac' to have Lands re-delivered which were ſeized on an Elegit, ſuppoſing a Satisfaction; the Defendant pleads in bar, Quod per magnum tempus, ſcilicet per duos annos poſt deliberat' the Plaintiff de injur' ſua held him out, and received the Profits. Serjeant Powis demurs, becauſe not ſaid px' poſt, nor which two years, and it might be after the Plaintiff's Writ purchaſed; but held good, and that it ſhould be intended ſecundum ſubjectam materiam, viz. px' poſt. So here it cannot be intended otherwiſe than adtunc finit'. If we ſhould bring another Action, they may plead this Recovery, with an Averment it was the ſame; but beſides, it muſt be ſuppoſed the two laſt years; but five of ſix of the Juſtices and Barons then preſent held it uncertain and ill; for that an Avowry for Rent is no Eſtoppel to demand Arrears before, according to Palmer and Stabick's Caſe, Sid. 44. and ſo Judgment was reverſed.

Clarke *Miles*, *verſus* Andrews.

PRohibition moved for, on ſuggeſtion that by our Law no perſon is to be impleaded in an inferiour Court, but for ſuch Matter as is acted, ariſen and accrued within the Juriſdiction of the Court; That one Moore at Weſtminſter in Com Midd', out of the Juriſdiction of the Court of the Poultry-Compter, coram, &c. became indebted to Sir Robert Clerk in 700 l. That Andrews intending, &c. had levied a Plaint there againſt Sir Robert Clerk; That a Summons iſſued, and Nihil habuit returned, ſecundum Conſuetud'. But that Moore having 1000 l. in his hands of Sir Robert Clerk's, was attached by the ſaid 1000 l. Ita quod of Sir Robert, & eſſet at the next Court, ad reſpondend' ſecund' Conſuetud', Prohibition to an inferiour Court for holding Plea of a matter out of their Juriſdiction, if a Plea is pleaded to their Juriſdiction before Imparlance.

whereas in truth the ſaid Moore was never indebted to the ſaid Sir Robert Clerk infra Jur' Cur' præd', nor ever became indebted to him in any Sum but the ſaid 700l. at Weſtminſter, & non alibi. Upon this ſuggeſtion I moved for a Prohibition, for that we had pleaded this Matter there, and the Plea was refuſed, and we had Affidavit thereof. I urged, that a Prohibition lies to an inferiour Court for holding Plea of a Cauſe out of their Juriſdiction; there is the Writ in the Reg. 98. founded on Weſtm' 1. cap. 35. which is commented in 2 Inſt. 229. Smith *verſ.* Bond. Hill. 17 Car. 2. B. R. Rot. 501. a Prohibition to Marlborough, on a ſuggeſtion that it aroſe out of the Juriſdiction, and Affidavit that it did ſo, even without the neceſſity of pleading it there, Warpman *verſ.* Smith, in Sid. 464. and Mod. Rep. 63, 64. to Briſtol, upon this ſuggeſtion, upon Sir Francis Winnington's Motion. If an Action be brought, and a Judgment there be pleaded, they muſt aver the Cauſe to have ariſen within their Juriſdiction; and it is the Province of this Court to reſtrain all inferiour Courts within their proper and reſpective Juriſdictions. That this Caſe is not different from another common Caſe; for the Suit againſt Moore is as a new Action in nature of a new Plaint; and that appears from the very form of pleading a Foreign Attachment, and from thence we muſt learn it, ſince they keep no formal Records till made up upon occaſion. In the Entry there is a ſuggeſtion that there is ſo much in his hands, a Proceſs againſt him, and day is given him; he comes in and pleads, and all this like a new Proceſs. The miſchief of incroaching Juriſdictions, deceiving and diſinheriting the King's Courts is as great in this as in the other Original Suit.

Suppoſing it only a means to make the Original Debtor to appear and put in Bail, that will not alter the Caſe; for if any Court Chriſtian, Admiralty, or other inferiour Court, doth meddle with any thing collaterally that is out of their Juriſdiction, this Court will and ought to prohibit them: As, if a Suit be by a Parſon for Tythes, and the Defendant plead that the place where is in another Pariſh, Prohibition lies, becauſe they meddle with that which is out of their Juriſdiction, tho' the original thing be of their cogniſance, and this comes in obliquely. If a Man be admitted, inſtituted and inducted, and a Suit is there for to avoid the Inſtitution, ſuppoſing it not valid, tho' the thing be of their cogniſance, yet becauſe the Induction, which is Temporal, and gives a Lay-Right, may depend upon it, a Prohibition lies, Sir Timothy Hutton's Caſe, Hob. 15. If a Man ſue there to prove

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a Nuncupative Will, tho' that be of their conuſance, and of none other, yet if ſuch Will revokes a Will in writing concerning Land, a Prohibition lies, Paſch. 14 Jac. Reynolds's Caſe. Roll. tit. Prohibition 285. Tho' the Subjectum circa quod be Spiritual, yet if the conſequence be a determination of a thing belonging to Common-Law-conuſance, this Court will prohibit; pari ratione in this Caſe.

As to the Admiralty-Court, it is the ſame: tho' things done on the High Sea belong to their Juriſdiction, yet if the conſequence be a determination of a thing not belonging unto their conuſance, a Prohibition lies, as in Bridgman's Caſe, Hob. 12. If a Man make an Obligation upon the High Sea for the Security of a Debt growing due before at Land, or ſhould make a promiſe to pay the ſame, this cannot be ſued in the Admiralty; and ſo it is è contra, Hob. 79, 212. they cannot hold Plea of an Agreement at Sea, and put in writing under Seal at Land.

A ſimilar Caſe is that of an entire Contract for above 40 s. and ſevered into divers ſmall Sums, and ſued for as ſuch in an inferiour Court, a Prohibition lies, becauſe it is to defraud and deceive the King's Courts, 19 H. 6. 54. Girling *verſ.* Aldas. Paſch. 22 Car. 2. B. R. 2 Keble 617.

There is no Objection againſt this, but may be againſt all Prohibitions to inferiour Courts; for the Debt follows the Perſon in the other Caſe as well as this.

The Common-Law-Courts ſhall draw the whole, if part be within and part without a particular inferiour Juriſdiction.

As to Turbill's Caſe, there is a great difference between that and this; for there Juriſdiction was undoubted; Mr. Turbill received the Money there, and that was only a Diſpute of Privilege, and yet in point of Privilege it was contrary to two expreſs Reſolutions in the very Point, as Lodge's Caſe, 2 Leon. 156. and Edward and Tethbury, 1 Leon. 189. And my Lord Saunders, 1 Saund. 67. thought it an hard Judgment.

As to the Cuſtomarineſs of the Proceeding, that's no Objection here, no more than it is in a conceſſit ſolvere; and yet there they will not pretend but that a Prohibition lies upon this ſuggeſtion, their Cuſtom only warrants for what is within their Juriſdiction.

In 2 Inſt. 229. on Weſtm' 1. cap. 35. my Lord Coke ſays, That tho' the Action be tranſitory, yet no man is to be attached by his Goods for any Contract, Covenant, or Treſpaſs done without, &c. tho' the man be paſſing through the Ville. And

this holds in our Caſe as well as in the other; and tho' there be no expreſs Caſe in this point of the Garniſhee's Debt ariſing out of the Juriſdiction, yet the Reaſon of the Law is plain; and upon theſe Reaſons I pray'd a Prohibition; at which Dolbin was angry, and ſaid no man would have made ſuch a Motion but myſelf, and wondred that I who had been concerned in the City ſhould have made ſuch a Motion. Holt ſaid, There was Reaſon in it, but our pleading of it was after Imparlance, and ſo we came too late, becauſe we did not plead in time. Prohibition denied.

Paſch. 1 W. & M.

Letchmore & al', verſus Thorowgood & al'.

Intr. Hill. 2 & 3 Jac. 2. 82.

VIde ſupra Caſu 73. I now argued it again upon this Point, That tho' by the Statute of Bankrupts the Property of the Goods be veſted in the Aſſignees, yet this Relation ſhall not work a Wrong to make the Officers Treſpaſſors, who had a good Authority, and took the Goods lawfully; and ſo is the Caſe of Baily and Bunning, Sid. 271, 272. Court clear, that the Verdict was againſt the Plaintiff, entire Damages being given, and that this Action lay not againſt the Officers, tho' Trover would againſt the Party; and ſo Judgment p Def.

Dominus Rex verſus Payne.

A poor perſon may gain a ſettlement by taking a Houſe, and being charged in the Poors Rate, without giving notice in writing.

ORder of Seſſions in Eſſex for removing a poor Man and Family in Malden there to another place, upon the account that he was a ſettled Inhabitant, by remaining above forty days after taking an Houſe, and being rated to the Poor there; held by the Court to make a good Settlement within the new Statute, tho' there was no Notice in writing given to the Church-Wardens of his coming; and that coming in publickly, by taking an Houſe and being rated in the Poors Rates, and ſo obſerved by the Officers of the Pariſh in their Pariſh-Book, is ſufficient Notice; and that the rather,

rather, becauſe by the Preamble of the Statute it is apparently meant only againſt private and clandeſtine removals, and not publick ones, of which the Pariſh takes notice it ſelf.

Humfreys *verſus* Vaughan & *Ux'*.

Debt verſ. Baron & Feme, and they appeared by Attorney: No Error, tho' the Wife be under age, becauſe the Husband may by Law make an Attorney, and appear both for himſelf and Wife.

Baron & Feme appear by Attorney, the Feme under age.

Cowne *verſus* Bowles.

TWO avow as Bailiffs, and have Judgment. Error brought, and Error aſſigned that one of them was within age, and appeared by Attorney: If ill? Vide 2 Saund. 212.

Dominus Rex *verſus* Ayliffe & Freke.

AYliffe was Attainted and Executed for Treaſon; Freke as his Executor brings a Writ of Error. Holt at firſt doubted if Executors could bring it, but agreed that they as well as the Heir might bring it in Caſe of Felony, according to Marſh's Caſe; and at laſt of all the Court held that there was no difference between Treaſon and Felony as to this Point, and that the Executor being injured by an erroneous Attainder, might bring the Writ of Error; tho' by ſome 'tis neceſſary to aver a Perſonal Eſtate, for otherwiſe he is no ways damnified; whereas an Heir is, tho' there be nothing deſcended to him, becauſe of the Corruption of Blood.

Error by an Executor to reverſe an Attainder for Treaſon.

Knight *verſus* Parry.

ON Motion for a Prohibition (the Caſe I did not take) it was held by Holt, That in caſe of Partowners of a Ship, if the Majority do ſend out a Ship, they ſhall be liable to thoſe who do not conſent, in caſe there be a Profit, but the Majority then are anſwerable for all Hazards: But if a profitable Voyage, who ſhall have Conuſance or Juriſdiction of

Partowners of a Ship, the majority may ſend her out without conſent of the reſt

of it, is the Quære. Agreed, That if they take Bail by way of ſtipulation, they may proceed againſt Executors there in their own way.

Garret *verſus* Dandy.

Debt on a Bottomree Bond to pay Money, and perform Covenants in *Oyer* for the Debt, and Err' brought by the Defendant, he is not bound to put in bail by the Statute.

DEbt on a Bottomree Bond, with a ſpecial Condition to pay 300 l. with Intereſt at the return of the Ship Prudent in thirty ſix months, with 32 l. per menſem for every month after, if not loſt or caſt away before; and alſo to perform Covenants and Agreements in a certain Writing or Bill of Bottomree made the ſame day. Defendant craves Oyer, and pleads the Statute of Uſury; The Plaintiff replies, Non corruptè fuit agreatum. Defendant demurs. Jud' pro Quer'. Writ of Error is brought in the Exchequer-Chamber. Mr. Serjeant Tremayne moved for liberty to take out Execution, no Bail being put in according to the Statute. I oppoſed it, and moved for a Superſedeas, Writ of Error being brought and allowed, for that no Bail was required by the Law in this Caſe; the Statute of the Queen doth not reach to it, for there it is only an Injunction on the Chancery to take it; the Statute of 16 & 17 Car. 2. doth only make that of King Jac. 1. perpetual, and enlarges it in no Caſes but after Verdict; and ſo our Caſe is out of that, and within none but the 3 Jac. 1. cap. 8. in any Action or Bill of Debt upon any ſingle Bond for Debt, or Obligation for payment of Money only, or upon any Action or Bill of Debt for Rent, or upon any Contract. Now ours is within none of theſe, it is not for payment of Money only, but alſo for performance of Covenants; and for this there are expreſs Authorities; as, Mich. 18 Car. 2. B. R. Callwood *verſ.* Ballard, Mr. Coleman pray'd Execution in Debt upon an Obligation to perform Covenants in an Indenture; Performance pleaded; Breach aſſigned in nonpayment of Rent; Verdict p Quer'. Coleman moved that Execution ought to go, unleſs the party put in Bail; and Wild the King's Serjeant oppoſed it; this Rent comes in by the way of collateral Breach, and the Action is not Debt for Rent, or for Money only, but for performance of Covenants; even in Debt on the Indenture, if the Breach were on reſervation of Rent, there muſt be Bail, but not in any Counterbond to ſave harmleſs, or Debt for a Penalty in any Articles indented; Et per Cur' Execution ſtay'd without Bail. 2 Keb. 131.

Vernett

Vernett *verſ.* Debuſhe, Trin. 19 Car. 2. B. R. Judgment in Caſe on a Bill of Exchange; Bail not required, becauſe the words of the Statute are Debt, and it is not to be enlarged, but rather reſtrained, 2 Keble 234. In Mich. 10 Jac. 1. Gilling *verſ.* Baker, 2 Bulſtr. 53, 54. a Bond for performance of Covenants. Debt upon an Arbitrement is held to be out of the Statute; Debt for Arrearages due upon Account held not within it, as is the principal Caſe in Bulſtrode. In Trin. 1680. there was an Action brought upon a Bond with a Condition to pay, perform and keep all Covenants in an Indenture. Defendant pleads Performance, and Demurrer general. Judic' p Quer', and no Breach aſſigned for nonpayment of Rent, but only a general Demurrer, becauſe there were Negative Covenants in the Indenture of Leaſe; and on a Writ of Error held in Communi Banco, per North, Ellys, Windham and Charlton, that there needed no Bail. This was upon debate; a Note of it I had from Mr. Goodall, then Clerk of the Errors, who noted the Caſe, but not the Names. In Paſch. 16 Car. 2. B. R. inter Dean and Chapter of Paul's and Capell the like Rule. I have a Copy of the Rule for a Superſedeas on Sir William Wild's Motion for a Writ of Superſedeas and Reſtitution, Execution being taken out for want of Bail. Beſides all this, the Reaſon of the Law is with us, for that the intent of the Statute was to require Bail where the Cauſe was plain, as in caſe of payment of Money only: but in other matters, as Covenants, there is more nicety in the Law as to Pleading, and Judgment might be had againſt another upon Points nice and difficult, and therefore ſuch Caſes are not mentioned, but admitted. Beſides, at the Common-Law a Writ of Error is in its own nature a Superſedeas, and forecloſes the hands of that Court where the Original Judgment was given, by a Remover of the Record; and therefore this Statute, which is introductive of a new Law, ought not to be conſtrued by Equity, or extended further than the words do reach, and it hath always received ſuch an Interpretation, as the Caſes I have cited do evince. Court took time to conſider of it, and look into the Caſes, and afterwards declared their Opinions that no Bail was needful, and gave Rule for a Superſedeas, which my Client had accordingly.

Dominus

Dominus Rex *verſus* Johnſon.

Excommunicato capiendo againſt one without a ſufficient Addition, *quære* if void?

DEfendant was excommunicated for refuſing to bring an Inventory in Court Chriſtian, and a Writ of Capias ſued, and he taken upon it; and being in cuſtody of the Marſhal pleads 5 Eliz. cap. 23. which enacts, That in the Writ Excommunicato capiendo there ſhould be Addition according to the Statute of Hen. 5. and then pleads the Statute of H. 5. and that in the Writ there was no ſufficient Addition, Et hoc parat' eſt verificare unde pet' Judic' & quod ipſe de Brevi p̄d' exoneretur. Demurrer to it. J being of Counſel againſt the Defendant, argued, That the 1 Hen. 5. cap. 5. doth not extend to this Caſe, for that muſt be an Original Writ, in which Exigent is awardable; it reaches not to a Record, becauſe the Plea is holden on a Plaint, and reaches not to a Return of Reſcous, per Coke 2 Inſt. 65. & per Coke ibid. 666. Regularly at the Common-Law, if a Man had no Name of Dignity, his Chriſtian and Sirname, without any farther Addition, had ſufficed; Then the 5th of Eliz. doth not make the Writ void, but was made on purpoſe to enforce the Writ, as appears by the Preamble. 12 & 13 Sect. as they are divided by Mr. Keble, ſeem ſeveral; but as they are in truth, and upon the Roll, they make but one joint Sentence, they are all but one Proviſoe (upon the Parliament-Rolls there are no Sections, Points, Colons, &c.) they muſt therefore be taken together: Provided alſo and be it Enacted goes to both the Sections, and then it is moſt evidently plain; then it is thus; If in Priſon, beyond-Sea, under Age, or Feme-Covert, they ſhall not incur the Pains and Penalties of the Act, but may plead ſuch matter in Bar of levying ſuch Pains, if he have not a lawful Addition, according to the Statute requiring it in Caſes of certain Suits whereupon Proceſs of Exigent are to be awarded or not, for the cauſes mentioned in that Act, then all the Pains and Forfeitures limited to be void, and by Plea to be allowed ſo; it doth not ſay the Writ ſhall be void, or the party diſcharged; and according to this Opinion are all the Authorities: If the Writ be delivered of Record, tho' it doth not mention any of the cauſes expreſſed in the Statute, it is good as for Coſts; but if a Capias, with Proclamations and Penalties therein, be awarded, theſe Penalties and Forfeitures only be void, Hughs's Caſe, 1 Cro. 197. This appears alſo from the King and Redmayne's Caſe, 1 Cro. 198. for there he pleads, quoad the Penalties and Forfeitures, that it was not

not for any of the cauſes mentioned in the Statute, and quoad the Excommunicato capiendo he pleads another matter, viz. the Pardon. Browne's Caſe, Hill. 3 Car. 1. is the ſame; 'tis in Benlow's Rep. 200. there moved that he ſhould be diſcharged of the Penalties, becauſe for none of the cauſes; but held by the Court he ſhould not be delivered from his Impriſonment until Abſolution. The Opinion of diſcharging abſolutely for want of one of thoſe ſpecial Cauſes, hath been exploded ever ſince King James's time; the Writ ought to contain a Cauſe of Eccleſiaſtical Conuſance, and that it doth here; and want of Addition is in the ſame Statute, by 5 Eliz. as want of one of thoſe cauſes; and therefore thoſe Authorities are expreſs to the purpoſe, as to the Caſe of Etherington, 2 Keb. 300. and Thwing's Caſe, ibid. 33, 34. becauſe no Writ was delivered upon Record, and that's the reaſon the Anonymus Caſe, 1 Cro. 566. Caſe 587. Court only avoids the Penalties, and not the Writ; and Rule was given accordingly, that he ſhould be detained till Abſolution.

No Bail on Writ de Hom' repleg' for one taken on a Capias Excommunicat' by 3 Ed. 1. cap. 15.

Notand', If the Writ do not mention him to be commorant in the Dioceſs (which Johnſon's Writ doth) this vitiates it, Moore 467. but no notice taken of any need of Addition.

Cary *verſus* Bacchus.

WRit of Error in Cam' Scacc' ſur un Judgment en B. R. en Caſe. Cary declares, That the Franchiſe and Liberty of Returning and Executing all Writs, Bills and Precepts out of the Courts of the King and his Progenitors within the Liberty of Weſtminſter is an ancient Franchiſe and Liberty; That the Plaintiff ſuch a day was, and yet is, ſeized of the Office of Bailiff of the Liberty aforeſaid, and as Bailiff of that Liberty of Right had, and ought to have, the Execution and Return of all Writs iſſuing out of the Kings-Bench directed to the Sheriff of Middleſex, and to be executed within that Liberty (except a place called the Sanctuary) and the Fees and Profits of ſuch Executions and Returns; That the Defendant, præmiſſ. non ignar', without the licence, and againſt the will of the Plaintiff, did break and enter, and the Goods of one John Eaſton, to the value of 49 l. by virtue of a Fieri facias out of the King's Bench, returnable tali die, in Execution for Debt, Damages and Coſts in the Writ certified to be recovered, did take,

Caſe by the Bailiff of a Liberty that has the execution and return of Writs, againſt one for entring his Liberty, and executing a *Fieri facias*, without ſhewing by what Right he claimed the Liberty, good.

whereby the Plaintiff lost the Execution and the Return of the Writ, and the Fees therefore due. Demurrer, and cause shewn, that non apparet quo modo the Plaintiff was seized of the Office, nor what Right or Title he hath thereto, &c. Judgment p Quer'. Inquiry of Damages to 49 l. &c. The general Error assigned. I argued for the Plaintiff, That this Declaration was ill, because it did not set forth his Title, nor that it was an ancient Office, according to Symonds and Seebourne's Case, 1 Cro. 325. where it was held necessary to alledge it an ancient House and ancient Lights, and that time out of mind the Lights were there; a Prescription is necessary to the House, tho' not to the Person, Earl of Rutland and Bowler, Palmer 290. a Prescription to the thing. But that which I insisted on chiefly was this, That a Subject cannot be seized of the Execution and Return of Writs of common Right, without Grant or Prescription; nay, a man cannot prescribe to have a Return of Writs, because they issue out of a Court of Record, and no Prescription can be of it, for that an Usage can neither create nor support it, according to the Abbot of Strata Marcella's Case, 9 Rep. 28. This is a Right not triable per Pais, but must commence by Grant. Now of common Right, the Execution and Return of all Writs belong to the Sheriff, as in Mitton's Case, and of this you take notice; and therefore to divest that Right, they ought to shew how they come to it; and supposing they have a Grant, or may prescribe, yet they ought to shew their Title by one or other, for that prima facie the Right is with the Sheriff: And none of the Cases that yet have been adjudged do come up to this; for in case of Water-courses and Lights, they all are founded upon a particular Reason, which fails in this Case, viz. That the Defendant's Act, being a stranger, was tortious; and then to say habuit & habere debuit, or de Jure consuevit, is good enough, because Possession is enough against a stranger; and Sands and Trefuse's Case, 1 Cro. 575. goes upon this very reason of a Tort: But here of common Right this belongs to the Sheriff, and it appears by their own shewing that what the Defendant did was by Authority from the Sheriff. All the Possessory Actions that are in this manner are against strangers, whose Act must be wrongful whosoever hath the Right: And I know of no one Case in the Law where this sort of Declaration was ever made against him that had the common Right. In the case of strangers the thing is reasonable in it self, and here against us it is as reasonable that they should shew their particular Right, how they come by it. C. J. Pollexfen, Your distin-

diſtinction is between him that hath Right and a ſtranger; but ſuppoſe two Grantees of two Fairs adjoyning, and the firſt brings an Action againſt the ſecond, &c. would not this Declaration ſerve? 'Tis a good way in all Caſes, and upon a Trial the Right muſt be proved, and ſo it muſt have been in your Caſe, if you had taken Iſſue; there is no inconvenience in this form of declaring. And the Judgment was affirmed.

Note, That the *Narr'* in *Vidian*'s *Entr.* ſur the ſeven Hundreds in *Gloceſter*, which was Sir *Robert Atkins*'s Caſe, was the Foundation of this Judgment.

Term. Trin.

1 Will. & Mar.

Sleigh *verſus* Chetham.

Intr. Mich. 1 Jac. 2. Rot. 96.

WRit of Error to reverſe Judgment in a Formedon in Remainder on a Settlement made by Sir Samuel Sleigh, wherein the Lands are demanded as Heir to Samuel Beeſon in Communi Banco. Le Caſe eſt tiel: A Formedon in Remainder; the Tenant appears by Attorney, and pleads ſeveral Pleas, and after Iſſue joined a Venire is awarded returnable Trin. at which time the Tenant doth not appear, but caſts an Eſſoin; the Eſſoin is challenged, that is adjourned to Hillary Term, and an Imparlance from thence to Paſch. and then becauſe the Tenant ſaith nothing to ſave his firſt Default, there is a final Judgment given. Mr. Serjeant Holt argued in this manner: Whether this Challenge to the Eſſoin ſhould have been adjourned or determined immediately? Whether this Challenge be good in Subſtance? Whether there ſhould have been a *petit Cape* awarded before Judgment final? This Challenge ought not to have been adjourned, but determined immediately, that is, in ſuch caſe where the Court can examine it preſently, and need not a Jury to try the Truth of it; and to delay it, is a diſadvantage to the Tenant. Now this is matter which appears to the Court, and there is no matter needing a Trial by Jury; here it is that there was an Attorney. 1 Cro. 511. Rex *verſ.* Sir John Dryden, there it was determined without any Adjournment, and an Adjournment is to the Damage of the Tenant: For if the Eſſoin had been caſt and quaſhed, the Tenant had liberty to appear the quinto die poſt; now by adjourning it he hath loſt the benefit of that Appearance, and the Demandant hath

loſt

loſt the Benefit and Opportunity of taking the advantage of ſuch default. Cok. Entries 339. there is the very Entry of this, when an Eſſoin was quaſhed, 9 Hen. 5. 12. there was a petit Cape awarded. They by adjourning the Determination of it have damaged the Tenant, that's Error. Supposing it ſhould be adjournable, yet it's ill, becauſe they ſhould have taken it that the Attorney was alive, but removed; for where the Attorney is alive and unremoved, the Attorney ought to have been eſſoined, it is on their part to aver, Dyer 304. The party who claims an Eſtate for another's Life, muſt aver his Life; and it need not come on the other ſide. In caſe you plead another Executor, and not named, you muſt aver his Life, 21 Edw. 3. 25. Raſtall's Entries 584. For this reaſon the Challenge to the Eſſoin is ill.

Suppoſe the Challenge good, and the Eſſoin well quaſhed, yet Judgment final ought not to have been given without the awarding of a petit Cape. I agree the quaſhing of an Eſſoin turns to a Default, yet a petit Cape muſt be awarded, for it is a Default ſaveable, and there is no way to ſave it but by the iſſuing of a petit Cape and its Returns; it is ſaveable becauſe caſt by a ſtranger without any precedent Authority from him, and he may come afterwards and it ſhall not be an Eſſoin to him, 14 Hen. 6. 4. If it be no Eſtoppel, then the Default may be ſaved afterwards, Bro. tit. Default Pl. 90. Then if it be a Default that may be ſaved, I am ſure he cannot do it but by a petit Cape. This is a Default after appearance, and to be ſaved only by a petit Cape, which awards Seiſin into the King's hands, then there is a Summons to the Tenant, &c. Now here is a Judgment on a Default after an appearance without the awarding of a petit Cape; and there are but two Caſes where this ought to be ſo, neither of which is ours; as, where there is a Default after the Merits of the Cauſe tried, 4 Hen. 6. 28. as on a Summons to hear Judgment, or the like. The Reaſon there was Special, becauſe the Cauſe was tried, and he had nothing to ſay if he did not ſave his Default: And ſo where it is a Default that is a Departure in the Law in deſpight of the Court, there needs no petit Cape; as, 9 Hen. 6. 48. 38 Edw. 3. 3. 12 Hen. 7. 10. That is the Reaſon given why a petit Cape ſhould be awarded, that he may be heard; but when he makes Default on a Special Day given, the Entry is, Quia receſſit in contemptum Curiæ; the ſame is of an Imparlance, if

of

of a Day given the ſame Term, no petit Cape, becauſe a departure in deſpight of the Court; but if to another Term, a petit Cape ought to go, 1 Bulſtrode 159. I would know what time the Tenant may ſave his Default in; can he do it before the Eſſoin be quaſhed? and that cannot be, becauſe it is no default till Judgment that the Eſſoin be quaſhed. Can he ſave it after? he cannot then, becauſe he is turned out of Court (ſay they) upon a Default. This is ſo great an Extremity, that by his miſtaken Eſſoin the party is put out of all power of trying the Merits of his Cauſe, Raſtal's Entries 274. 2 Inſtit. 314. & 11 Hen. 4. 87. like to this.

E contra it was argued, That this Default hath the mixture of a Contempt, 12 Hen. 4. 14. A petit Cape is only a Summons to call in the Defendant to ſhew cauſe why Judgment final ſhould not be upon his Default; and it is an incongruous thing in this Caſe to have a petit Cape upon this ſort of Default, for this is a Default that ariſes in conſtruction of Law upon an inſufficient Eſſoin, 'tis all upon the Legality or Illegality of the Eſſoin. Now pending the Argument of this, the Attorney was in Court; and when the matter was determined, they would have a petit Cape for the party to ſhew cauſe why he hath caſt this inſufficient Eſſoin, which hath been argued and determined inſufficient before.

Afterwards, Trin. 1 W. & M. Serjeant Levinz pro Quer' en Briefe de Error; the Errors here are two: 1. The Writ ought to have abated upon the Plea of bis petitum: 2. Judgment final ought not to have been given upon the Challenge, but a petit Cape. In all real Actions, upon a bis petitum the Writ ought to abate. Now this is well pleaded; for we ſay that the ſix Meſſuages are parcel of the thirty five Meſſuages: Now the demand of the Manor is certain, and thirty five Meſſuages, and ſix Meſſuages in Nutwell. If the Manor be well enough demandable by it ſelf, it is certain enough then when he demands a Manor and thirty five Meſſuages in ſuch a place, and ſix in another, our Plea is good. But the great Point is, here's a Formedon in Remainder, Iſſue joined, the Tenant caſts an Eſſoin after appearance by Attorney, and therefore the Eſſoin was diſallowed, becauſe having once appeared by Attorney, the Attorney is ſo till the end of the Suit, and the party is always in Court by Attorney. Where a thing to be done in perſon is required, as in caſe of Wager of Law on a non Summons,

Summons, there an Eſſoin may be, but not otherwiſe where there is once an Attorney; and the Books do warrant this difference, 4 H 6. 11. 2 Edw. 4. 15, 16. 2 H 5. 2. 20 H. 6. 4. 25 Aſſis' 17. Then the Eſſoin was not well caſt, and ſome Judgment ought to be given upon it; but here 'tis adjourned and adjudged, which ought not to be final without a petit Cape, 21 Edw. 3. 37. 3 H. 4. 4. 6 H. 4. 72. And there is a petit Cape awarded; tho' it was adjourned and adjudged, yet a petit Cape ought to go, 1 Edw. 3. 1. Pl. 2. 2 Inſt. 387. Here is an Imparlance from Hillary to Quindena Paſchæ, and ſo the Judgment is given upon the Imparlance. I agree upon the Imparlance and departure in contempt of the Court, Judgment final ought to be given, i. e. where the Imparlance is general, without any day certain, and the Tenant doth not appear being demanded, then a final Judgment. Brook Grand Cape 22. 2. 13. But here is an Imparlance till Quindena Paſchæ, ad quem diem the Tenant appeared by Attorney, and ſo there is no default, but the Attorney doth ſtill appear in Court; here is no default upon the Imparlance, ſo that Judgment is not given upon any default upon the Imparlance, but the Judgment is given purely upon this reaſon, that he did not ſave his firſt default on the Eſſoin; and in that caſe, if an ill Eſſoin be caſt, there ought to have been a petit Cape; here is Judgment now given upon the firſt Eſſoin, turned to a default. This difference is taken in Yelverton 211. If he appeareth at the day, he doth all that he ought. But here in our Caſe all the default is, he doth not ſay any thing to ſave his firſt default. But they object, To what end ſhould a petit Cape be awarded? I anſwer, Tho' he could not ſave the default, yet the petit Cape ought to be awarded; for the end of the Writ is to ſeize the Land, that's the principal end of it, and a Summons to ſave the default is but of Grace, 3 H. 4. 4. 11 H. 4. 72. Fitzherbert Voucher 86. Tho' the default cannot be ſaved, yet a petit Cape ought to go.

Serjeant Powell, è contra, the Quære is, in a Formedon or other real Action, If after Iſſue joined the Tenant makes a default, final Judgment ſhall be given? After Iſſue joined, the final Judgment for ſeiſin of the Land is to be. Vide Penryn's Caſe, 5 Rep. Williams *verſ.* Gwyn. 2 Saund. 46. The awarding of a Petit Cape is in favour of the Tenant, and the want of it will not be Error where it is not neceſſary, Fitzh. Judgment 228. 245. 13 H. 4. 8. 10 H. 6. 2. Fitzh. Judg. 152. Droit 27. Bro. Droit 4. 57. 3 H. 6. 55. Dyer 56, 98. 12 H. 7 10. Moore 403. Penryn's Caſe, is no mention of that Reſolution

ſolution in 5 Rep. Penryn's Caſe (quel inde) Littleton Sect. 51. 1 Inſt. 295. Hern and Lilbourne's Caſe, 1 Bulſtrode 159, 161. If in caſe of a Writ of Right it holds ſo, much more in a Formedon, or other real Action, becauſe in a Writ of Right the Right is for ever concluded. Vide Cook's Entries 171. 2 Cro. 35. Willoughby and Edgerton. If after the Iſſue join'd an Eſſoin be caſt, and adjourned and adjudged againſt the Tenant, 'tis peremptory, it turning to a default. Fitzherb. Eſſoin 53. 16. 138. 2 Hen. 4. 12. Dyer 104. 'tis a default peremptory. 'Tis true, in ſome caſes, where he does not appear at the Adjournment, it will turn only to a common default; but when he appears, and controverts the validity of the Eſſoin, and adjudged againſt him, it turns to a default peremptory, 45 Edw. 3. 9. Kelway 41. Fitzherb. Grand Cape 6. 1 Bulſtrode 159. A ſpecial Imparlance will warrant only a petit Cape, 2 Cro. 292. But when it is a general Imparlance, and a default, then final Judgment, 26 Hen. 8. 8. 12 Hen. 7. 10. Then quære if the Defendant's appearing after the Imparlance will alter the Caſe? The Defendant being in Court when Judgment was given, might have ſaved his default, by pleading Water, in Priſon, &c. and the petit Cape is only to bring the party in to hear Judgment, or to ſave his Default, Raſtal's Entries 112, 369. The ſeizing the Land into the King's hands is only as a Penalty. There are ſome other Caſes where he may appear upon the petit Cape, tho' he hath an Attorney, as when the Attorney is dead or removed, 5 Hen. 7. 3. But that he could not do here, for that would be contrary to the Record; ſo that a petit Cape was perfectly needleſs to bring the Attorney into Court, when nothing could be ſaid to ſave the default. 1 Rolls Abr. Tit. Default, 584. I know no Caſe wherein after an Appearance of the party in Court after a default, a petit Cape need to be awarded to bring in the party to ſave his default, when he was there preſent. On the whole, he pray'd the Judgment might be affirmed.

L. C. J. Holt. The Plea of bis petit' is ill, becauſe you ſay ſix Meſſuages, parcel of the Tenements aforeſaid, are parcel of the Manor, that is no more than to ſay parcel of the Manor is parcel of the Manor; but you ſhould have ſaid, Sir, parcel of the thirty five, are parcel of the Manor, and that would have been a good Plea. This Eſſoin is a default, but yet it is a ſavable default; for ſuppoſe the Attorney or party were in Priſon, an Eſſoin is no Eſtoppel, becauſe it is caſt by a ſtranger; If it had been a default without caſting of an Eſſoin, it had then been ſavable; now if it be an ill

Eſſoin,

Eſſoin, why is it not alſo ſavable? And when ſhall it be ſaved? Not till it be judged to turn to a default: He had day given him upon the Queſtion whether it was a default; but when it was adjudged againſt him, it turned to a default, and then he is thrown out of Court; and he hath no day in Court, but upon the Return of the petit Cape. Adjornatur.

Browne *verſus* Shore & *Ux*.

PRohibition. (Vide ſupra, pag. 2.) Narr' ſur Suggeſtion del Stat' for diſtribution of Inteſtates Eſtates, and that J. S. died Inteſtate; that A. and B. were his next of Kin; that A. died within a year after J. S. and before any actual diſtribution; that the Executors of A. ſued there for his part, &c. Demurrer.

One dies inteſtate, *A.* & *B.* his next of Kin, *A.* dies before diſtribution, his part ſhall go to his Executor.

Argued by Tremaine. The Quære is, Whether this Act doth veſt ſuch an Intereſt in the party upon the death of the Inteſtate, that if he die before diſtribution, it ſhall go to his Executors, as much as if he had lived till after an actual proviſion and receipt of his proportion? It plainly gives a preſent Intereſt, for there is no time limited or ſtated by the Condition of the Bond when the Inventory ſhall be exhibited or Diſtribution made, but it is left to the diſcretion of the Ordinary. Then there is another Clauſe in caſe of the next of Kin, which is alſo without time, and left indefinitely, i. e. preſently. The Clauſe of a years time is only for the benefit of Creditors, that they may not be ſurprized. As to the Caſe of Palmer and Allicock which was in this Court, there was but one Child, and ſo no diſtribution at all. And therefore ſome Opinions were, that nothing was veſted; the words are, ſhall deliver and pay, which ſhall give an Intereſt preſently, according to Oldham and Bateman's Caſe, 1 Rolls Abr. 31. where Money given to be paid to the Infant veſts ſuch an Intereſt as he may maintain an Action for. Dobbins è contra, There are no words in this Act of Parliament that veſt an Intereſt; before this Act the Ordinary did always endeavour to make diſtribution, as appears by Levanni's Caſe, 1 Cro. 202. Now this Act only appoints the method of diſtribution, and impowers him to take a Bond with a Condition to do it in this and that form and manner. Suppoſe it were a Couſin-German dies, and a Relation born after as an Enſeint, and the Number increaſes, if the

Intereſt were veſted at the time of the death, then they muſt have nothing. Now next of Kin muſt be meant next of Kin as they are at the time of the diſtribution, as in caſe of a Deviſe of a Term to A. and if he die without a Son, then to his Daughters, and he hath two Daughters at the time of his death, and another born after; the firſt Deviſee dies, all three Daughters ſhall take. Stanley *verſus* Baker, Moore 220. This Act hath been literally expounded, and therefore new Laws have been made to explain it: here's a Siſter of the half-blood that dies before ſhe had a Right to demand or ſue. In Bunhill and Newton in Scaccario, 1683. the Money was decreed to the Adminiſtrator of the Father, becauſe no Right veſted in the Son (as a Caſe out of the Statute, being but one Son.) L. C. J. Holt. It gives a preſent Intereſt; the Act of Parliament is the ſame as if the party had made his Will to this effect. The common caſe of a reſiduary Legatee who dies before probate, his Executor ſhall have Adminiſtration, and not the next of Kin to the firſt Teſtator; that proves this Caſe, a Right of Action, or Choſe in Action will go to Executors; the Proviſo for a year is to ſave the Adminiſtrator from a Devaſtavit, by not dividing till he ſees the Eſtate. As to Newton's Caſe, a Man having only one Child and dies, Whether that were within the meaning of the Statute? they did hold, that he needed not the Aid of the Statute, but had all at the Common-Law; and I doubt the Law as to that Caſe, for I think it an Intereſt veſted. Dolbin. I wonder that it was ever made a point: Suppoſe the Proviſo that gives a year had been left out, what then? Gregory of the ſame Opinion. Eyres. The deſign of the Statute was to make a Will for the Inteſtate. Conſultation per totam Cur'.

Strode *verſus* Osborne.

Intr. Paſch. 4 Jac. 2. Rot. 297.

WRit of Error on a Judgment in Communi Banco directed to Herbert, of a Judgment coram nobis, and the Record is, Placita coram Bedingfield, and then after Iſſue, there is an Entry of Bedingfield's death, and a ſuccedit of Herbert: Quære, If this be good? Urged per Thompſon, That the Proceedings in the Cauſe till Judgment are Placita as well as the Declaration, and here is part before Herbert. Per Holt & cæteros held ill, becauſe the Placit' was not before Herbert,

and

and the Writ of Error was quashed. He cites a Case in Rolls, 'tis Error.

Incledon & al' versus Burges.

Intr. Mich. 4 Jac. 2. Rot. 282.

Trespass for breaking his Close, and digging and carrying away Turf and Stones. Defendant pleads, That he was seized of a Tenement or Messuage, and had a Right of Common of Turbary there, and used to dig Stone to be used on his, &c. The Replication traverses the Plaintiff's Prescription; The Defendant rejoins, That such a Term one of the Plaintiffs brought an Action of Trespass against the Defendant, wherein he pleaded the same Prescription, and Issue joined upon it, and try'd and found for the Defendant. Plaintiff demurs. Exceptions were taken to the Prescription and Plea, because there they lay their Usage of it larger than the Prescription, for in that it is to be imployed upon the Messuage, they there say they did use the Stones upon the Tenement. Besides, their Prescription is void in Law, for they do not say there were ancient Quarries there. Then it was urged that the Verdict was no Estoppel, for Estoppels are to be taken strictly, for they neither give nor take away any Right; no man is bound by an Estoppel, but the parties and their privies; there was cited Brook. tit. Estoppel 14. 33 H. 6. 51, 52. A stranger shall not be prejudiced by it, as he shall not have any Advantage. If this Estoppel shall be good against both the Plaintiffs, then one of them will be hindred from ever trying his Right, they being joined with the other privileges from any Conclusion by that Verdict to which that other was no party. He compared it to the Case of Remitter, Litt. Sect. 672. Where is a Gift to Baron & Feme, and the Heirs of their two Bodies, the Husband aliens in Fee, and then retakes an Estate to him and his Wife for their two Lives, this is a Remitter in Deed to the Husband against his own Alienation, &c. E contra. As to the Exception to our Usage, we say we did use it in & super Messuagium & Tenementum præd', which is all one: We say they were Quarries time out of mind; and we say that time out of mind we have used to dig Stones there; then the Verdict is an Estoppel; for according to Farrer's Case, in all Personal Actions where there is once a Bar by Verdict and Judgment, it is a Conclusion. If this Man had given him a Release, would not that have been a Bar? In a quod permittat, the Verdict had been

Trespass

Justifie for Common of Turbary.

Rejoynder on Estoppel by Verdict.

fatal. Vide 13 Ed. 3. 2, 3, & 4. 7 Hen. 6. 8. A Verdict, whereupon an Attaint will lie, doth estop all parties and privies to say any thing contrary to the Verdict; otherwise where no Attaint lies. Upon this Verdict an Attaint will lie; the Nature of the Action is changed by the Issue; for where the Title is in question, there may be Aid prier, 15 Hen. 7. 9. 1 Hen. 7. 22. 12. So Warranty is pleadable in Trespass, where the Title is in Issue; in respect of the Issue it is pleadable, in respect of the Action it is not, 2 Rich. 3. 14. Bar in Detinue is pleadable to Account, 7 Hen. 6. 8, 9. Issue in a personal Action, when it tendeth to the Realty, is as conclusive as in a real Action, the joining of a stranger will not avoid the Estoppel, Brook Estoppel 90. Suppose them Joint-tenants, yet one of them may prejudice the other, and he shall be bound, unless he bring an Action of an higher Nature, Litt. Sect. 666, 667, 672. Husband is estopped, notwithstanding the Remitter.

Trespass laid in one Kings time, with a *continuando* to another King, *contra pacem* to the last King

Then there was Exception taken to the Declaration: That for a Trespass in Car. 2.'s time, with a Continuando to King James's time, and concludes contra pacem Domini Regis nunc i. e. of King James's time; Now this is as it were no contra pacem at all, and is not help'd by the Statute of Generall Demurrers; for many things are help'd by a Verdict, which are not help'd by a General Demurrer; and the Statute of Jeoffails in Car. 2. doth in terminis help this after Verdict, which shews that before it was not good after a Verdict, much less after a Demurrer. The Court gave Judgment for the Defendant on this point of the contra pacem, and therefore delivered no Opinion about the Estoppel, but only said, An Estoppel upon a Verdict goes a great way. Issue in Tail shall never falsifie it, Vide 1 Cro. 325. But if one man is estopped, and he joins another with him, whether this shall avoid the Estoppel, is a Quære. But Judic' p Def. on the Exception to the Declaration.

One estop'd by Verdict joins another with him in another Action.

Boson

Boſon *verſus* Sandford & *al*
Intr. Hill. 1 & 2 Jac. 2. Rot. 302.

CAſe for Goods loſt out of a ſmall Veſſel coming to London from Exeter, &c. On Not Guilty pleaded, Special Verdict finds the Delivery of the Goods to the Maſter of the Veſſel; that the Defendants were Proprietors of the Ship, and that there were ſeveral other Partowners; that the Maſter received Hire for the Carriage of the Goods; that the Owners were not preſent when the Maſter received the Goods; that the Goods were loſt; that they were worth ſo much; Et ſi, &c. The firſt Quære is, If the Proprietors are anſwerable, or only the Maſter? Whether, there being other Owners, the Action lies againſt theſe? 'Tis found the Plaintiff had no notice of the other Owners. This is like the Caſe of Executors; where only one doth act, Action lies againſt him only. Beſides, this matter ought to have been pleaded, and they cannot take advantage of it now; as, where one Joint-tenant brings an Action, a Joint-tenancy is pleadable; but if the General Iſſue be given, that advantage is loſt. Vide 3 Cro. 554. Deering *verſus* Moore. There this Action certainly lies againſt the Owners; for where the Maſter has the Advantage as the Owners have, the Freight, in this Caſe tho' the Servant receives it, he is anſwerable for the care of his Servant, 21 H. 7. 39. 11 H. 6. 16. Dyer 161. Lord North's Caſe. A Maſter is bound by the Contract of his Servant, Plowd. 11. Litt. Rep 374. If a Maſter ſend a Servant to buy Cloth, he muſt pay for it, 3 Cro. 711. 12 Hen. 8. 4. 9 Hen. 6. 53. They have a benefit by his Labour, and they ought to pay for his Negligence; their employing of him is like a General Contract with all that ſhould ſend Goods to be tranſported; and the Owners may unqueſtionably bring this Action for the Hire, if the Goods were well tranſported.

Levinz è contra. There are Twelve Owners of a Ship, they employ a Maſter, and give him a Sallary: Now in all things of Contract all the Contractors are neceſſary to be made parties; and we need not plead it, for he muſt prove his Declaration, and it is every days experience in caſe of Goods ſold. If we prove the Plaintiff hath a Partner, he is gone, for all are to be charged equally if it be a Contract; and this is ſo, or at leaſt ex quaſi Contractu. If the Owners are chargeable, 'tis becauſe of the implied Undertaking to carry them ſafe, which ariſes from the Contract the Law

ſuppoſes,

ſuppoſes, by reaſon of the Hire, which all have: Whether it be a Contract in Law or in Fact, you muſt bring all the parties in: Then whether the Owners of the Ship ſhall be anſwerable in point of Contract: You cannot charge the Maſter in caſe of Servants, but in point of Contract; you cannot charge them with Treſpaſs. It hath been adjudged it doth lie againſt the Maſter, as in the Caſe of Morle and Sluce, and ſhall it lie againſt the Owners too? The Action lying againſt the Maſter proves it doth not lie againſt the Owners; and in caſe it doth lie, you cannot charge the Owners ſo long as the Maſter is ſufficient; and they ought to have brought their Action in another manner, as in the caſe of Officers. Lord Chief-Juſtice. It doth certainly lie againſt them, becauſe they have the Profit: By the Civil Law the Owners are liable; but not as Owners, but as Imployers; for a diſſenting Owner will not be liable, for he hath not the Benefit of the Voyage; Either Maſter or Owners may bring an Action for the Freight, Ergo. ——— But here it is not brought againſt them all, there are others not made parties; and if it be brought upon the Contract, then all are bound; and by the ſame means as he takes notice of ſome, he may take notice of all, and therefore the Plaintiffs not knowing them is nothing to the purpoſe; but if it be founded upon the Tort, then he may have an Action joint or ſeveral. Suppoſe Debt upon the Statute of Tythes, and there are two Occupiers, it muſt be brought againſt both. Here it is not brought upon the expreſs Contract, but yet they have all the Recompence; ſo that the Reaſon why they are anſwerable goes unto all, and therefore I doubt it muſt be brought againſt all. Ayres. Action lies againſt a Water-carrier, and ſo is Nicholas and Moore in Sid. 36. But I doubt all ought to be parties. Gregory. They all make but one Owner; but whether it is of Neceſſity, or ought to be pleaded in Abatement, is a Doubt to me. Adjornatur. Pl. 101.

An Action will lie againſt Maſter or Owners for the loſs or ſpoiling of goods delivered to the Maſter of a Ship.

Action againſt Owners of a Ship ought to be againſt all.

King

King *verſus* Dilliſton.

Intr. Hill. 2 & 3 Jac. 2. Rot. 494.

Ejectment. Special Verdict finds the Lands in queſtion to be Copyhold held of ſuch a Manor, and that that Manor hath this Cuſtom in it, That if a Surrender be made to the Uſe of another, and he doth not come in to be admitted after three Proclamations at three Courts, that the Bailiff of the Manor may by Command of the Lord ſeize ſuch Tenement as forfeited; That there was a Surrender to the Uſe of J. S. and his Heirs; that there were three Proclamations; that none came in to be admitted; that the Bailiff did ſeize, &c. that J. S. before the firſt Proclamation died, leaving J. N. his Son and Heir, then and yet an Infant, under the age of ten years, &c. In the Common-Pleas there was Judgment, That the Cuſtom did not bind an Infant. Upon a Writ of Error now brought here, it was argued, That the Lord may ſeize notwithſtanding the Infancy; that Cuſtom is the Life of all Copyholds, and if they break the Cuſtom they are all at the will of the Lord; that a Surrender is a thing inchoate, and nothing paſſes till admittance; if the party dies before admittance, the Heir muſt be admitted; no Fine is due before admittance; and if the Lord have no remedy to compel admittances, he loſes the benefit of his Inheritance; this is a reaſonable time, Three Courts; it is his part to further it to get the Eſtate, and in truth it is to the benefit both of Lord and Tenant. I think there could have been no queſtion if the party himſelf had lived and been of age. Baſpoole *verſus* Long, 3 Cro. 879. Yelverton 1. Noy 42. Godbolt 269. is expreſs in it.

Ejectment.

Cuſtom to ſeize Copyhold for not coming to be admitted, binds an Infant.

Objection is, Sir Richard Lechford's Caſe, 8 Rep. 99. That an Infant ſhall not be bound by this Cuſtom. I anſwer, That he is not bound as it is a Forfeiture of the Eſtate, but as it is a Seizure quouſque he do come in and be admitted, the Lord ſhall hold it, and take the Profits only quouſque. An Infant is bound by a Condition in Fact, and ſhall loſe his Land for breach of it; as, if he do not pay Services for two years, he is liable to a Ceſſavit; he might marry, and yet if without Licence, he forfeited two years value of his Inheritance, Whittingham's Caſe, 8 Rep. 44. An Infant is greatly favoured in caſe of Deſcents, but here he is a Purchaſer; and where he is ſo, he ſhall not have his Age in a Real Action, 4 Edw. 3. 8. Perryman's Caſe, 5 Rep. The Privi-

lege

lege of Infancy is never extended to wrong a third person; the Law will not suffer an Infant to wrong another no more than it will to injure himself; here is only a temporary Forfeiture. Vide Saverne *versus* Smith, 1 Cro. 7. 2 Rolls Rep. 372. Latch 199. In case of Knight-Service Tenure, because he cannot have it to perform, &c. therefore the Lord hath the Land in the mean time; the prejudice can be nothing to the Infant, but it may be a great one to the Lord; till admittance the Infant cannot have the Land, for that remains in the Surrenderer, tho' he cannot alien it, or contradict his former Act, 1 Cro 383. in Sir Richard Lechford's Case. That was the Case of an Heir by descent, whose Ancestor was admitted, but here it is otherwise: That Case doth seem to allow that the Lord might seize till he did come and be admitted, and so is 2 Cro. 226. by Williams. He may seize in the interim, and take the Mesne Profits, and shall not be responsible for them.

Objection, That the Custom is not found for a temporary Seizure. I answer, That need not, for a General Seizure found is sufficient, and the Law makes the reasonable Exception, that it shall be but temporary in case of an Infant, and final in case of an Heir at full age. As to the Case of Rumney and Eves, 1 Leon. 100. That is the Case where the Ancestor was admitted, and the Infant came in by descent; here he is a Purchaser.

Mr. Baldock è contra. The Infant in this Case shall not forfeit. This General Custom doth not extend to an Infant. They seem to agree that a General Custom of Forfeiture shall not bind an Infant, as is Sir Richard Lechford's Case; this Special Custom which they would have intended was never found in all the Books: Then whether such a Custom be good that he shall forfeit conditionally quousque? Yet that is a particular distinct Custom from the other, and your Lordship can never judge any thing of it upon this which is found. Customs are not to be extended further than the very words. A Custom to seize generally as forfeit, and a Custom to seize quousque and during Infancy, are different Customs, meerly distinct: An Infant is not bound by a Condition in Law, as in the Case of Whittingham. As to a Cessavit, that is a Question not very plain. Then as to the consequent Inconveniencies, there are none in this Case, because the Estate remains in the Surrenderer.

Lord

Lord Chief-Justice Holt. You would prevent a Seizure by the Infancy of a man who hath neither Jus in re nor ad rem; he hath nothing in it; the Forfeiture here is because here is a Surrender to a man who will not take it, and yet the Surrenderor enjoys it still against his own Act. If a Copyholder of Inheritance dies, and leaves an Infant Heir, who doth not come in upon Proclamations, according to the Custom, the Lord may Seize; but still as is Lechford's Case, I agree, that he shall have the privilege of his Infancy to come in and be admitted, the Lord will lose his Fine else. Can you shew me any Case where the privilege of Infancy shall carry it so far as to wrong a third Person, as to lose a Man's Right? To delay it, it may; where is the mischief, the Lord shall Seize and Enjoy quousque? That is agreed as the Report is in Crook, it doth admit of this; here is a remedy for the Lord, and a provision for the Infant too, 'tis incident to the Tenure, and why is it more unreasonable in case of a Copyhold, than 'tis in case of Knight Service? Dolbin, It is the general Opinion of the Realm that an Infant is not bound during his Non-age: Besides, if the Jury find it seized as forfeited, we can never construe it to be a Temporary Forfeiture, Vide Noy 93. and Jones 157. An Infant may Enter when he please, and to say it is a Forfeiture, and avoidable again, I do not understand.

It was afterwards argued by Mr. Northey, pro Quer. in breve d' Error, and he urged the same things as were before, and also, that the Surrenderor shall not take advantage of the Heirs being an Infant, but the himself, or those claiming under him must only do it, according to 8 Rep. 42, 43. Plowden 375. 1 Rep. Earl of Bedford's Case. If an Office of Inheritance discend to an Infant, and he breaks the Condition in Law, 'tis a Forfeiture, and he is bound by it. If an Infant be Conusee of a Fine he must perform the Condition, Jones 390. 9 Rep. 85. Plowd. 364. The Custom seems to be fixed purposely for the benefit of the Fine, and the Estate in Law remains in the Surrenderor; the Lord hath no other way to get his Fine, or his Suit and Services, which otherwise will be lost. If an Infant makes a Feoffment 'tis a Temporary Forfeiture; the Infant cannot Enter before admission, and so loseth nothing but the Profits, which is by his own default in not being admitted, 3 Cro. 351. 1 Leon. pl. 357. As to the finding a greater Custom warrants the less, as is Baspoole and Long's Case, and 1 Leon. 1. and 1 Inst. 111. A Custom shall be applied according to the particular Matter, and every one shall be adjudged within it as far as they

can be, as in caſe of Foreign Attachments, a Corporation is within it, but yet ſhall not find Bail according to the Cuſtom, and ſo it was Ruled, Paſch. 29 Car. 2. Batterly againſt the Hamborough Company, Vide 2 Lev. 209. The Infant is as yet no ways concern'd in Intereſt, for he hath no Right to intermeddle with the Poſſeſſion or Profits till admiſſion, ſo that he is no ways prejudiced; here is no preſent Right appears to any but the Lord; the Surrenderor he hath none, he is bound by his own Act, and perhaps the Surrenderee will never take it, 'tis but reaſonable then that the Lord ſhould have it in the mean time; and 'tis found the Leſſee of the Lord was in Poſſeſſion till Ejected. Mr. Weld è contra'. This Cuſtom as it is particularly found is uncertain; 'tis found he ſhall Seize, but not what he ſhall do with it, whether he ſhall take it by way of Diſtreſs; if ſo, that gives no Intereſt wherein to found an Ejectment: May, he cannot ſo much as Plow the Land, 1 Cro. 492. and Plowd. 541. he can only take the natural Profits as they ariſe without Manuring; he is a Truſpaſſer in entring as for a Forfeiture; then if Judgment be given for him here, it muſt be as upon a Title of Forfeiture: beſides the cauſe of Seizure ought to be found; the Cuſtom is ill. It is if he come not to the Court, and pray to be admitted, and be not admitted, then a Seizure. Now here is a Seizure to be upon Non-admittance, and that tho' he do come in, and it be not his Default. As to this Forfeiture it muſt be by ſomebody. It cannot be by the Surrenderee till Admittance, he is no ways intereſted, and a Cuſtom cannot extend to Perſons not concern'd in the Mano; the Surrenderor is ſtill liable to do Suit and Service, ſo that here is no loſs of a Tenant; 'tis ſaid the Surrenderor ſhall not hold the Land againſt his own Act. But what hath he done? If his Deed take no Effect, the Land is ſtill his own, as in Caſe of a Grant of a Reverſion not Inrolled. The Infant here doth not in all reſpects take as a Purchaſor, tho' in ſome reſpects he doth, and therefore he ſhall have all the advantages of his Infancy, Vide Stiles 146. 2 Sid. 61. the taking of the Profits is a loſs to him. What doth the Lord loſe? His Fine; a Fine upon admiſſion is not a Tenure or Service, and therefore not within the reaſon of the Objection. An Infant if he be out of the Cuſtom as 'tis generally found, he muſt be out of it as to every part. Vide Stowell and Zouch, Plowd. 359. Lord Chief-Juſtice Holt. It is an abſolute Forfeiture in general; but an Infant ſhall have the advantage of his Infancy, when he comes in and prays to be admitted. Adjornat. pro Reſolutione Cur'.

Shuttle.

Shuttleworth *verſus* Garret.

Intr. Trin. 4 Jac. 2. Rot. 165, 965.

An *Indebitatus Aſſumpſit* lies for a cuſtomary Fine *ſuper Mortem*.

Action ſur le Caſe brought for a cuſtomary Fine due upon the death and change of a Lord by the Copyholder, laying quod indebitatus in ſuch a Sum for a Fine ſuper Mortem pro Tenementis ſecund' Conſuetud' Maner' præd', &c. Verdict on General Iſſue Non-aſſumpſit pro Quer. Moved in Arreſt of Judgment. That the Action doth not lie, becauſe it ſavours of the Realty, no more than indebitatus will lie for Rent, according to Brett and Read's Caſe; this is for a Duty which ariſes by a Cuſtom concerning Land, 'tis in nature of a Relief, and is in reſpect of the Tenure, Jones 329. 2 Cro. 599. è Con', It was argued by Hoyle and Levins, that this is a Flower faln; it is Debt, and why ſhould not an Aſſumpſit lie? If reaſonable 'tis a Contract, if unreaſonable 'tis void; Debt hath been held to lie; 'tis after a Verdict, this is no more than a Contract. If I agree to give my Tenant a Freehold Eſtate, and he agrees to give me a Fine for it, Action on the Caſe lies; ſo it does for the purchaſe Money upon Sale of Lands. It will not lie for Rent, becauſe it is entirely in the realty; this is but a Contract, there is no other remedy, for an Heir cannot enter for a Fine in his Anceſtors time; he may (per Holt) if it were forfeited and demanded. Here the Adminiſtrator hath brought the Action as for a Duty, and in an Indebitatus for Rent after a Verdict, you have intended an actual Promiſe. Debt lies for a Relief in caſe of Freehold, if like a Relief Debt lies, and if Debt an Indebitatus; where Wager would lie in caſe Debt were brought, an Indebitatus will lie. In Howard and Wood's Caſe, Indebitatus for the profits of an Office, there they founded a Contract upon a Wrong: In the Caſe of the Mayor and Commonalty of London *verſus* Boree, Indebitatus held to lie for Scavage Money; where Money is due the Law doth imply a Contract: In the Entry of Admiſſion 'tis Dat Dn'o pro fine; there's a Contract, this is the ſame. Holt, Suppoſe an Executor of Copyholder owed Money upon Bond, and paid this Fine, and has not Aſſets ultra, this would be a good Plea to Debt on a Bond, ſo that it is more than a ſimple Contract. But per Dolbin the Bond ſhall be preferred. Eyres, Debt lies for a Copyholders Fine, and for Scavage, and a ſtronger Caſe than this is the Caſe of the Lord North, 2 Leon. 179.

for Moneys due for the value of a Marriage, where the Regiſter gives a Writ de valore maritagij, this is a Sum in Groſs, a fruit faln, a Duty. Chief-Juſtice Holt, Indebitatus lies where Wager of Law will lie, but this ſeems of an higher nature, ſo that Wager of Law would not lie, if Debt were brought. Debt lies for a Relief by an Executor, becauſe no other remedy. If an Indebitatus lies then 'tis of a lower nature than Debt upon a Bond. Debt will not lie for the Rent Arrear of a Copyhold Tenement; but per Levins 'twill lie. Indebitatus lies upon a perſonal Contract for a Sum in Groſs, as pro rebus venditis, or if a Man Grants his Land for a Year, and the Party agrees to pay ſo much for it, this is a Sum in Groſs, for which an Indebitatus lies; but here both the Cuſtom and Tenure appear, and tis of an higher nature, ſo as the Action will not lie. Dolbin, 'tis a Sum in Groſs, and a Duty, for which the Adminiſtrator of the Heir to whom 'twas due upon the Death of the Lord, hath no other remedy but this or Debt; and I think this lies, for 'tis inferior to a Bond. Gregory, after a Verdict we muſt intend a Promiſe, and then it lies. Eyres, I think the Action lies, it being a fruit faln, and a Duty; and ſo by 3 Judic. pro Quer. Holt diſſentiente.

Deighton *verſus* Greenville.

Ejectment. ERror in Cam' Scacc' ſur' Judic' in Banco Regis ſur une ſpecial Verdict en Ejectment, tried at the Bar here upon the Demiſes of the Lord Huntingdon, and the Lord Scarſdale, and Elizabeth Lewis, of ſeveral, &c. which finds as to the Manors demiſed by Lewis the Defendants Not Guilty; as to the reſt they find that one Thomas Lewis was ſeized in Fee, and being ſo ſeized, the 9th of April, 20 Jac. 1. he acknowledges a Statute Merchant before the Mayor of Lincoln, to William Knight in 1200 l. Trin. 23 Car. 1. Iſaac Knight Executor of William, Sues out a Capias upon that Statute, on which a non eſt inventus is returned, then takes out a Writ to extend the Lands of Thomas Lewis; on which the Sheriff by Inquiſition did extend ſeveral Lands mentioned in the Inquiſition, which are parcel of theſe in the Declaration, and that the Sheriff delivered theſe to Iſaac Knight. 20 Novemb. 13 Car. 1. Thomas Lewis and John Lewis, enter into a Recognizance in nature of a Statute Staple, before Chief-Juſtice Bramſton unto Richard Gerrard for 1000 l. that John Gerrard the Executor of Richard procured this Recognizance to be certified

certified into Chancery, and thereon ſued out an Extendi facias, and had the Lands in queſtion extended and ſeized into the King's Hands, which were afterwards, 24 Car. 1. delivered unto John Gerrard by Liberate. 25 May 15. Car. 1. Lewis enters into another Recognizance to Sir Jervas Ellwayes, and William Burrough in 5000 l. that 10 Dec. 15 Car. 1. an Extent was had thereupon, and afterwards by Writ of Liberate bearing Teſte, 2 Feb. 15. Car. 1. and Returnable in Eaſter-Term following delivered to Elwayes and Burroughs, that the Manor of Mair en Mair, and five Meſſuages, &c. parcel were purchaſed of one Metham by Thomas Lewis by Fine and Deed dated . Dec. 2 Jac. and find the Deed and Fine in hec verba: That before this Purchaſe Thomas Lewis had the reſidue by Diſcent from his Father. That Iſaac Knight and John Garrard 1650. by their reſpective Deeds, granted all their Eſtates and Intereſts by virtue of the ſaid Extents, upon the two Statutes of Knight and Gerrard to one Edward Lewis, by virtue whereof he was poſſeſt prout lex poſtulat; that Edward Lewis being ſo poſſeſſed, and Thomas Lewis ſo ſeized of the Premiſſes, and in actual Poſſeſſion thereof, Thomas Lewis by Indenture 26 May 1657. for 4000 l. conſideration conveys to Sir John Lewis in Fee, and a Fine levied in Trin. 1657. to Sir John with Proclamations, and the laſt Proclamation was 1 May 1652. That at the time of this Fine levied, the Lands purchaſed of Metham were reputed to be parcel of the Manor of Mair. That Sir John Lewis being ſeized, by Will in Writing deviſed the Manor of Mair, and the other the Premiſſes in Queſtion to Edward Lewis his Brother, and to the Heirs Males of his Body, and for want of ſuch Iſſue to diſcend to his Daughters Mary and Elizabeth, and mentions in his Will, that theſe Lands were at that time demiſed to Edward Lewis for Life under a certain Rent. 10 Auguſt 1671. Sir John Lewis dies. That when Sir John Lewis his Will was made, and at the time of Sir John's death, the Lands in queſtion were in Poſſeſſion of the ſaid Edward Lewis, by virtue whereof he was ſeized prout lex poſtulat; That being ſo ſeized, Mich. 23 Car. 2. Edward Lewis levies a Fine ſur Conuzance de droit come ceo, &c. with Proclamations, the laſt Proclamation was 11 Jan. 24. Car. 2. That this Fine was to the uſe of Edward Lewis and his Heirs. That Sir John Lewis had Iſſue only two Daughters, Elizabeth and Mary his Heirs, and alſo Heirs to Edward Lewis. That Edward Lewis, 3 Sept. 26 Car. 2. died ſeized without Iſſue of his Body, That Elizabeth and Mary being Heirs to Sir John Lewis and Edward, entred, and were ſeized prout lex poſtulat; That Elizabeth married

married the Earl of Huntington, and Mary the Earl of Scarſdale, and that they entred and were ſeized; and that Elizabeth Lewis Widow, by virtue of an Aſſignment from the Executors of Edward Lewis after his death, being poſſeſſed of the benefit and intereſt of the Statutes to Knights and Gerrards, and the Extents thereupon prout lex poſtulat, in Truſt to permit the Earl to take the profits thereof before the Leaſes in the Declaration, demiſed to the Earls at Will. That the Earls being ſo ſeized, Ellwayes died, and Burroughs ſurvived and died, 1 May, 30 Car. 2. and the Adminiſtration to Burroughs, quoad that Statute of 5000 l. and the Extent thereupon is committed to Anne, Wife of the Defendant Bernard Greenvile. And the ſaid Earls being ſo ſeized, 31 July, 32 Car. Bernard Greenvile, and Anne his Wife Adminiſtrators de bonis non Adminiſtrat' by John Gerrard of Richard Gerrard and F. &c. acknowledge ſatisfaction upon the Statute of 1000 l. to Gerrard, and pray that Statute may be cancelled and vacated, and thereon 'tis vacated and cancelled. That Bernard Greenvile in the Right of Anne his Wife, as Adminiſtrator to Burroughs did enter upon the Earls, and was poſſeſſed prout lex, &c. That the Earls entred again upon him, and made the Leaſes to the Plaintiff, by virtue whereof he entred and was poſſeſſed prout lex, &c. That the Defendant Ejected him prout, &c. and concludes ſeverally, &c.

The Caſe is no more than this:

Thomas Lewis being ſeized in Fee of the Lands in queſtion, Enters into a Statute Merchant to William Knight, afterwards acknowledges a Recognizance in nature of a Statute Staple to Richard Gerrard, and then acknowledges another Recognizance in nature of a Statute. Elwayes and Burroughs, they firſt extend, and have the Lands delivered in Extent. Then Iſaac Knight Executor of William extends, and hath the Lands delivered by Liberate, and John Gerrard the Executor of Richard extends alſo, and hath the Lands delivered to him by Liberate.

Iſaac Knight and John Gerrard aſſign their extended Intereſts unto Edward Lewis.

Afterwards Thomas Lewis the Conuſor being in actual Poſſeſſion, levies a Fine with Proclamations unto Sir John Lewis and his Heirs, the laſt Proclamation 1 May 1658.

Sir John Lewis by his Will deviſeth to Edward Lewis, and the Heirs Males of his Body, and mentions in his Will, that thoſe Lands were before demiſed to the ſaid Edward for Life, under a certain Rent. Sir John Lewis dies, at the time

time when Sir John Lewis's Will was made, and at his Death, the Lands were in Poſſeſſion of Edw. Lewis.

Edward Lewis levies a Fine with Proclamations unto Francis Lewis, to the uſe of himſelf and his Heirs; the laſt Proclamation was Jan. 11. 24 Car. 2.

Edward Lewis dies without Iſſue. Sir John Lewis had only two Daughters, Elizabeth and Mary his Heirs, and alſo Heirs of Edward. Elizabeth and Mary enter, and were ſeized, and Marry the Leſſors of the Plaintiff.

Elwayes dies, and Burroughs ſurvives and afterwards dies, and Adminiſtratration to him quoad his Stat. and the Extent upon it is committed to Anne the Defendant's Wife.

Bernard Grenville, and Anne his Wife acknowlege ſatisfaction upon Gerrard's Statute, and that is cancelled.

The Defendant Enters; the Plaintiff upon him, &c.

Whether the Entry of the Defendant in Right of his Wife as Adminiſtrator to Burroughs, by virtue of Burrough's Extent was lawful or not, is the general Queſtion. In Banco Regis Judgment pro Defend'. Plaintiff brings a Writ of Error.

Mr. Trever pro Quer. The particular Queſtions in this Caſe are ſeveral.

Firſt, Whether the Fine levied by Thomas Lewis, he being then in actual Poſſeſſion, did diveſt all the extended Intereſt upon the three Statutes, and turn them to Rights, and whether that Fine, and five Years Non-claim do bar all thoſe Rights?

Secondly, Tho' the extended Intereſts were not barred by that Fine and Non-claim; the next Quære is, whether by the Demiſe of the Inheritance of theſe Lands to Edward Lewis, who at that time had the extended Intereſt upon Knight and Gerrard's Statutes by Aſſignment; theſe Intereſts were not merged and extinguiſhed in the Inheritance?

Thirdly, Whether (if ſo) Burroughs having a preſent right of Entry by that merger, was not barred abſolutely by the Fine of Edward Lewis, and five Years Non-claim?

Fourthly, If not abſolutely barred, yet whether he was not barred of ſuch Right as he had at the time of Edward Lewis's Fine levied?

Fifthly, If ſo, whether any new right of Entry be ſince accrued upon that Extent, either by the acknowledgment of ſatisfaction upon Gerrard's Statute or otherwiſe?

As

A Fine and five years Non-claim Bars the Intereſt of Tenant by *Statute Staple* before Entry.

As to the firſt Quære, the Fine that was levied by Thomas Lewis being then in Poſſeſſion, hath diveſted all the extended Intereſts, and turned them to Rights, and the five Years Non-claim thereon hath barred all their Intereſts, Thomas Lewis being then in Poſſeſſion. This Fine worketh by way of Feoffment, and conſequently turns all Eſtates to Rights, by reaſon the Fee-ſimple paſſes to the Feoffee, and ſo no Eſtate can be left in any Perſon elſe, and here the Intereſts of the Conuſees upon the Statutes, ſhall be diveſted and turned to Rights, notwithſtanding they had never actually entred; for they had the Poſſeſſion in Law notwithſtanding by the Extents and Writs of Liberates, and they had thereby a right of Entry, and conſequently ſhall be barred by the Fine and Non-claim, and ſo is Saffyn's Caſe, Rep. 123. A Man makes a Leaſe for Years of certain Lands, to commence after the determination of a Leaſe for Years then in being; the firſt Determins, the ſecond never Enters, but he in Reverſion enters and makes a Feoffment, and levies a Fine with Proclamation and five Years Non-claim.

In that Caſe it was adjudged, That tho' the Leſſee had never actually entred; yet he ſhould be barred by the Fine and Non-claim, becauſe he had a right to Enter, and ſuch an Eſtate in Law as by the Fine was diveſted: And there it was likewiſe reſolved, That the Intereſt of a Tenant by Statute Merchant, Statute Staple, &c. ſhould be barred by Fine and Non-claim: and ſo 1 Cro. 110. Leſſee years aſſigns over his Eſtate in Truſt of himſelf, and afterwards Purchaſes the Inheritance, and continues in Poſſeſſion, and levies a Fine, and five Years paſs; the Intereſt of the Aſſignee is barred, tho' he never actually entred. See 1 Cro. 201. Deviſee barred by Fine, tho' levied before the Deviſees Entry. And ſo 'twas held in the Court of Common Pleas. Trin. 28 Car. 2. upon a Trial at Bar there, Mod. Rep. 217. That a Tenant by Elegit, ſhould be barred by Fine and Non-claim, and that if an Inquiſition upon an Elegit be found, the Party before Entry have the Poſſeſſion in Law, and a Fine with Non-claim ſhall bar his Right, for before actual Entry he may have Ejectione firmæ or Treſpas; and the Caſe of a Statute Staple is the ſame where there is a Liberate executed, for then the Conuſee hath a right of Entry, or of bringing his Action before an actual Entry, and ſo ſhall be barred by Fine and Non-claim as well as Tenant by Elegit. And as Edward who had the Intereſts upon the two firſt Statutes of Knight and Gerrard, ſhall be barred by this Fine and Non-claim for five Years. So the ſame Fine barred the Intereſt

of

of Elways and Burroughs upon their Statute, which was the third and laſt.

And as to this Point the Caſe is thus:

Thomas Lewis ſeized in Fee, acknowleges a Statute to Knight, and afterwards acknowleges another to Gerrard, and afterwards another to Elwayes and Burroughs; Elwayes and Burroughs extend their Statute firſt, then Knight extends, then Gerrard extends. Edward Lewis purchaſes the Intereſts upon Knight's and Gerrard's Statutes. Thomas Lewis levies a Fine being in actual Poſſeſſion, and five Years Non-claim by any of the Conuſees,&c. Now this Non-claim will bar all; for tho' Edward Lewis had the precedent Statutes, and the Intereſt of Elwayes and Burroughs was but a Reverſion, expectant upon the Determination of thoſe two precedent Intereſts, yet theſe precedent Intereſts being but Chattels, and in nature of Intereſts for Years, and not Freeholds, tho' Elwayes and Burroughs had no general right of Entry at the time of the Fine levied, yet they might have made an Entry, or Claim for this particular purpoſe, to avoid the bar upon the Fine as well as he who had the precedent Intereſts, and ſhall therefore be barred by this Fine and Non-claim: And this is the ſame with Margaret Podger's Caſe, 9 Rep. 109. If Leſſee for Years be ouſted, and he in Reverſion diſſeized, and the Diſſeiſor levies a Fine with Proclamations, and five Years paſs, as well the Leſſor as the Leſſee is barred by the Non-claim, and the Leſſor ſhall not have five Years after the Term for years expired, for he had a right to Enter, and make his Claim, notwithſtanding the Leaſe for Years precedent; but it had been otherwiſe, if the Eſtate precedent had been for Life. So in this Caſe, Elwayes and Burroughs, who had the extended Intereſts in Reverſion expectant upon the two precedent Extents, thoſe being but Chattels, might within the reaſon of that Caſe have entred, and made their Claim, and therefore ſhall be barred for not doing ſo. In Plowd. Com. 374. Stowell and Zouch, 'tis ſaid, If Tenant for Years, or Tenant by Statute Merchant, or Elegit be ouſted, and afterwards a Fine is levied with Proclamations; that as well the Tenant for Years, or by Statute Merchant or Elegit, as he in Reverſion may Enter upon the Diſſeiſor, as well as the particular Tenant, which muſt be intended of an Entry only to make a Claim and Reveſt the Eſtate, and not of an Entry to take the Profits, for that cannot be done by him in the Reverſion, while the particular Intereſts continue: So that thereby it

doth appear, that Tenant for Years as to this purpose is the same, and that he who hath an interest in Reversion expectant, either upon a Tenancy for Years or by Statute, ought to make his Claim within five Years after the Fine, and shall not have five Years after the Lease for Years, or extended Interest determined; and if a Reversion in Fee shall be barred after five Years Non-claim, à fortiori an extended Interest in Reversion, which is but a Chattel, and of less consideration in the Law shall be barred thus.

A Fine and Non-claim bar a Reversion.

2. Tho' these extended Interests be not barred by the Fine of Thomas Lewis, and five Years after, by the Devise of the Inheritance of the Lands in question, to Edward Lewis, who at that time had the extended Interests in him of Knight's and Gerrard's Statutes, these Interests are merged and extinguished in the Inheritance, and then Elwayes and Burroughs are barred by Non-claim in five Years after that. Now these were merged, whether Elwayes and Burroughs Interests were a Reversion intermediate between the precedent Extent and the Inheritance, or an Interest de futuro only. If 'twere a Reversion, then that Reversion was divested, and turned to a Right by the Fine of Thomas Lewis, and so continued to the time of the death of Sir John Lewis, there being nothing done that appears to Revest it. When the Freehold came to Edward Lewis, then the Right which Burroughs had, could not prevent a Merger of Edward Lewis's Interest upon the two first Statutes, upon the Devise of the Freehold to him, for then he had the immediate Freehold, and the Inheritance came to him by that Will. Burroughs Interest in futuro being no Estate intermediate, but the Extents upon these two first Statutes must of necessity be merged and extinguished in the Inheritance; so that either the Extents upon Knights and Gerrards Statutes were barred by the Fine of Thomas Lewis and five Years Non-claim, or were merged and extinguished by the Devise of the Freehold to Edward Lewis, or forfeited and determined by the Fine of Edward Lewis, which is the next Point.

3. Edward Lewis's Fine.

Burroughs had a right of Entry by virtue of his Extent at the time of the Fine levied, and therefore he ought to have made his Entry, or Claim in five Years after that Fine; this is much stronger than Margaret Podger's Case, for there the Fine was not levied by the Lessee for Years, so as to commit a Forfeiture, or other extinguishment of the Lease for Years, whereby no absolute right of Entry was given to the Reversioner, but a right to enter by way of Claim to

avoid

avoid the Fine, yet that was such as that he had but five Years after the Fine; but here is an absolute right of Entry accrued to Burroughs, not only a right of Entry to make his Claim to revest his Interest, but a right of Entry and taking the Profits, and a right of Action against any Man that interrupts him; the particular Estate is drowned, and 'tis more than where Tenant for Life or Years levies a Fine; 'tis a Forfeiture, but determinable by the Entry of him in Reversion, which if he waives, he hath no right of Entry till death of Tenant for Years.

Now in this Case Burroughs could not by waving his Entry make these Extents to have continuances, because they were actually determined, and Burroughs had at the time of the Fine levied all the right of entring, or bringing Actions that ever he could have, so that the acknowledgment of satisfaction upon Gerrard's Statutes for the Extent being determined before, could not again be determined.

The right which Burroughs had at the time of the Fine levied, was barred by five Years Non-claim after the Fine, which was a present Right of Entry, by reason of the two first Statutes being barred by Thomas Lewis's Fine, or by the Merger in the Purchase of the Freehold and Inheritance of Edward Lewis, or upon Forfeiture wrought by the Fine of Edward Lewis; this cannot be denied, for being a present Right 'tis barred.

If Tenant for Life levy a Fine, and he in Reversion doth not Enter, or make Claim in five Years; he can never Enter for that Forfeiture, but must stay till a new right of Entry accrues to him by Death of Tenant for Life. And so is Plowd. Com. 573. and 1 Cro. 201. Fine and Non-claim barrs Devisee before Entry, Dyer 133. Now the Defendant had no other right than Burroughs himself had when Edward Lewis's Fine was levied.

No new right could accrue upon the acknowledgment of satisfaction upon Gerrard's Statute, for leaving Knight's out of the Case, and none but Gerrard's and Burrough's, and Extents upon them, and the extended Interest upon Gerrard's, so barred by the Fine of Thomas Lewis, and by five Years, and the Purchase of the Inheritance, and Fine of Edward Lewis's no new right of Entry could arise to Burroughs upon acknowledging satisfaction, because that first Extent was actually determined, and all the right that Burroughs could possibly have was accrued to him: This is after a threefold Determination of the Statute before: This is in no sort like the Case of Tenant for Life levying a Fine, that is no Determi-

termination of his Eſtate for Life, 'tis only a Forfeiture which gives a power of Entry, but till Entry for the Forfeiture the Eſtate for Life is not determined; but here the Extent upon Gerrard's Statute was wholly and intirely determined before ſatisfaction acknowledged.

Then Knight's Statute and the Extent upon that, ſtands in the Defendant's way; for though in truth it be determined and barred as I have ſhewn, yet the Defendant can take no advantage of that prior determination, becauſe of the Fine of Edward Lewis, and five Years Non-claim, ſo that as to the Defendant, 'tis all one as tho' the Extent upon Knight's Statute were actually in being; for that Extent was as much determined at the time when Edward levied the Fine, and therefore Burroughs ought to have made his Claim within five Years upon that: And if ever after he ſhall have any ſuch Right, he cannot pretend to it till Knight's Statute be ſatisfied by perception of Profits, or otherwiſe receive ſome new determination; and then he cannot have a right of Entry neither, but only a Scire fac', for an Extent upon a Statute ſhall not be avoided by Entry but by Scire fac', becauſe a Tenant by Statute is to hold, not only till his Debt and Coſts be ſatisfied which is certain, but till he be ſatisfied his reaſonable Damages and Charges beſides, which being uncertain muſt be reduced to a certainty by Judgment of this Court.

Suppoſe there had never been any Extent upon Gerrard's Statute, had the Defendant's Entry been lawful, or can he have any Right by virtue of Borroughs Extent, till ſome new determination of Knights Extent by ſatisfaction, or otherwiſe ſince the Fine of Edward Lewis? Whatſoever Determination there was of Knight's Extent, It was either before the Fine of Edward Lewis, or immediately wrought by that Fine, and therefore whatever right of Entry is in Burroughs, it ought to have been purſued within five Years after that Fine; now the acknowledging of ſatisfaction upon Gerrard's Statute can give Burroughs no better Right, than would have been if here never had been any Extent upon that Statute. Upon the whole matter,

The Extent upon Burrough's Statute was barred by the Fine of Thomas Lewis, and five Years Non-claim, or barred by the Fine of Edward Lewis, and Non-claim after that Fine; for when Thomas Lewis's Fine was levied, Burroughs had, tho' not a general right of Entry, yet he had a particular right of Entry by way of Claim to avoid the Bar; and when Edward Lewis's Fine was levied, Burroughs had an abſolute right of

Entry

Entry upon his Extent; the two firſt Extents being before that time barred, either by the Fine of Thomas Lewis, and Non-claim, or by the Merger upon the Will of Sir John Lewis, or by the Forfeiture and Extinguiſhment wrought by Edward Lewis's Fine, and therefore he ought to have made his Claim in five Years, or is barred, or at leaſt till ſome new Right comes which is not yet: For the acknowledging ſatisfaction on Gerrard's Statute can give no new Right, becauſe the Extent upon Gerrard's Statute was as much determined before ſatisfaction acknowledged as after. And beſides, Knight's Statute ſtands in the way; for as to them the Defendant Knight's Statute is ſtill in being, tho' in truth it be determined; and the Defendant can now take no advantage of it, becauſe he, or Burroughs under whom he Claims, ſuffered a Fine and Non-claim to incur after his right of Entry upon that Determination. But as to the Leſſors of the Plaintiff, that Extent is determined, becauſe we Claim under the Fine and the other Conveyances, by which it was extinguiſhed; but however, tho' the Extent upon Knight's Statute be determined, as well in relation to us as to the Defendant; yet the Plaintiff muſt have Judgment, for that the Verdict finds priority of Poſſeſſion in the Leſſors of the Plaintiff, and therefore they muſt have a good Title againſt the Defendant unleſs he hath a better.

Mr. Bonythen è cont', The Fine levied by Thomas Lewis can never be a bar to us, till the Intereſt of Gerrard's Statute were determined; the Statute of Fines, 4 H. 7. cap. 12. is expreſs, ſaving their Right to them which Claim within five Years; we had no right of Entry till the firſt Intereſt was determined, for if Burroughs had entred, he had been a Treſpaſſer, which is the beſt way of judging that there could not be an Entry. He cited Dyer 3. 3 Rep. 79. 3 Cro. 254. 220 Moor. 71. 9 Rep. 160. the doubt of a Fine levied by Tenant for Years, the ſame doubt was reſolved, Trin. 23 Car. 2. Rot. 1513. Paſch. 3 Car. 2. Baker *verſus* Hodſden, the Intereſt was not determined. Vide Noy 23. there muſt be five Years after the Determination of the firſt preceeding Intereſt. The Intereſt of Gerrard's Statute did determin by acknowleging ſatisfaction, and not before; the Intereſt of Tenant by Statute doth not determin by perception of Profits till ſatisfaction acknowleged. He cited Bro. Tit. Stat. 16. 1 Cro. 214. Jones 238. 1 Inſt. 298. Fulwood's Caſe, 4 Rep. 66. Vide Les Authorities.

Lord

Lord Chief-Juſtice Pollexfen. Can you prove that theſe Intereſts are Reverſions, or that they can take advantage of a Forfeiture, or are they like a future Intereſt for Years? Can you prove that the Intereſts of Statutes were ever taken as Eſtates in Reverſion or Remainder? Then ſuppoſing them Reverſions, if they are Reverſions for Years, then they may be merged, and if you take them for Remainders for Years, then the coming of them one with another into one Man's hands, there is no Merger in this Caſe, for then it is no more than a Term for ten Years, and a future Term for twenty Years, to commence after the firſt Determines: Suppoſing them as ſeveral Reverſions, then Edward Lewis is Tenant for Years, Reverſion to another for Years; muſt not the Reverſioner Enter in five Years after a Fine levied? If Gerrard's Intereſt be barred, what can the Entry of ſatisfaction do after? And certainly this Fine did bar his Intereſt. Suppoſe Gerrard had ſurrendered, would not that have determined his Intereſt? Suppoſe Leſſee for life, Remainder in Fee: Leſſee for Life is diſſeized, and a Fine, and five Years paſs, the Leſſee is barred, and the Remainder hath five Years after the Leſſee for Life his Death. Can the Remainder have five Years if the Leſſee for Life Surrenders, or can he Surrender after his Eſtate is barred? If theſe Extents are not Reverſions but like future Intereſts, then when they come together in one Man, that drowns both the Terms, for there is nothing to keep them aſunder. Knight's the firſt Statute is certainly barred: This was ſpoke upon breaking the Caſe. Sed Adjornat'.

Ayliff *verſus* Scrimſheire.

This Term a loſe Roll, *Baker* Attorney in it.

DEbt on a Bond. Defendant pleads a Letter of Licence to go abroad for ſeven Years without moleſtation, and Covenant not to Sue him, and if he did that he ſhould be diſcharged and releaſed of the Debt. Demurrer. Urged by Tremaine, that this is a good Plea, for a Bond may be defeazanced, according to Hedges and Smith's Caſe, 3 Cro. 623. and the Caſe of Mackbeth and Cobb, where this was held good: On the other ſide it was urged that it only was a Covenant, and the words ſhall be a Releaſe, amount to no more, and ſo is 21 Hen. 7. 24. Chief-Juſtice Holt, This is no Defeazance: If it be a Covenant perpetual, that is an abſolute Releaſe; but if it be a Covenant not

not to Sue within a particular time; that is no Releaſe, and you muſt take the remedy upon your Covenant; and ſo is Roll. Abridg. Tit. Extinguiſhment, 839. 3 Cro. 352. And Judgment was given per totam Curiam pro Quer'. A Covenant never to ſue a Releaſe.

Orbell *verſus* Ward.

Hill. 3 & 4 Jac. 2. Rot. 1018.

APpeal of Murther. Defendant comes in in propr' perſon' ſua & per *A. B.* Attorn' ſuum dicit quod, there is no ſuch Pariſh as St. Margarets, &c. and ſo pleads a miſnoſmer of the Pariſh in Abatement. Appellant Demurrs, It was argued that the Plea was naught, becauſe by Attorney, and becauſe he had not pleaded over. As to the laſt the Court held it well, becauſe 'tis good either way; the Appellee hath privilege of pleading over, if he pleaſes at the ſame time, and he may not; the Preſidents are both ways. Vide 3 Cro. 694. 2 Inſt. 313. Coke's Ent. 56. Bro. Tit. Appeal 44. 27 Aſſ. 3. As to the other 'twas held by the Court, That 'twas a Diſcontinuance, there being no Plea at all, for a Plea by Attorney ought not to be received, and ſo the Suit is diſcontinued; or elſe per Attorn' ſuum is Surpluſage, and then 'tis well enough, and ſo a good Plea, and this quacunque via data, 'tis againſt the Plaintiff, and Judgment was accordingly given p Defend' per totam Cur'. Vide Hesket *verſus* Lee, 2 Saund. 95. per Attornat' void. Appellant Pleads by Attorney. An appellant may plead over or not.

Simpſon *verſus* Merrille.

Intr. Mich. Ult. 370.

TReſpaſs for taking Goods, &c. Defendant juſtifies by a Judgment in an Hundred Court, and Proceſs thereupon. The Plaintiff Demurrs. Mr. Northey pro Quer. took divers Exceptions to the Plea, that they ought to ſhew for what purpoſe the Court was holden, and 'tis not enough to ſay a Court holden: They ſay, the Plaint was levied according to the Cuſtom of the Hundred, and do not ſay ſecundum Conſuetud' Cur' præd'. They ſay there was a Plaint levied in Treſpaſs ſuper Caſum, & taliter fuit p̄ceſs', that 'twas conſidered, the Plaintiff ſhould pay Coſts for his Default, unde Convictus eſt; this is ill, for in Caſe of an Inferior Court they ought not to plead it ſo, for that each part of Proceſs is Traverſable. They ſay not, that the Proceſs was Awarded Treſpaſs.

Awarded per Cur. The Suitors are ſet out to be the Judges, and the Proceſs is under the Seal of the Steward, & non conſtat, that he had any thing to do with the Court. Then as to the Proceſs they cannot have a Levari facias, their Proceſs is Diſtreſs infinite till ſatisfaction, they have no ſuch Writ: And ſo is 22 Aſſiz. 72. Noy 17.

Thompſon, The Law will take notice to what purpoſe an Hundred Court is kept. As to the taliter Proceſs' I know no Reaſon for a difference between the mode of pleading in an Inferior Court and here; anciently all was ſet forth, now it need not; if 'tis ſaid according to Cuſtom, you'l intend it good: And as to the Proceſs 'tis ſaid to be according to Cuſtom, and that ſhall be intended good unleſs the contray appear. Chief-Juſtice Holt. At Common Law no Levari can be; but the Quære is whether it may be by Cuſtom, and now the practice generally is ſo. As to the other point, In a Caſe in my Lord Hale's time, 'twas held to be good, tho' only ſaid taliter fuit pceſs', but here it doth not appear whether the Non-ſuit was before or after Appearance; if before, no Coſts; but yet if otherwiſe, you may have a Writ of Falſe Judgment. In this very point of taliter Proceſs' I was overruled in Sir Francis Pemberton's time, and a Year ſince in the Common Pleas. Then Northey urged further, they ſay unde Convictus eſt, which cannot be on a Non-ſuit. Adjornat'. Vide infra.

Dominus Rex *verſus* Lewellin.

COnviction for a Gun contrary to 33 Hen.8. The Conviction was for having a Gun in his Houſe: The Statute is, Uſe to keep in his or her Houſe, and perhaps it might be lent him, the words of the Statute ought to be purſued. Conviction quaſht.

Jordan *verſus* Powell.

Entr. Paſch. Ult. Rot. 595.

Caſe for Work and Labour as an Attorney and *inſimul Computaſſet*, Plea no Note delivered.

CAſe for Labour and Work as an Attorney in Suits, and for Money laid out, &c. and an inſimul Computaſſet, &c. Defendant Pleads the Statute of Kings James 1. and that no Bill or Note had been delivered under Hand. Plaintiff Demurrs, and urged, that in Special Action of the Caſe ſuch Plea was ill; and ſo was Eveling *verſus* Lavermore, Allen 4.

len 4. Unleſs Debt or Indebitatus generally were brought, but an inſimul Computaſſet is out of the Statute, and ill, and therefore ill as to the whole. Jud. p Quer.

Unſton *verſus* Milner.

Entr. Paſch. 30 Jac. 2. Rot. 1010.

ASſumpſit. Privilege of Attorney of Common Pleas pleaded after Imparlance, Demurrer. Plea ill. Judic' pro Quer'.

Dominus Rex *verſus* Abraham & al'.

INformation in the Attorney General's Name verſus the Defendant for a Riot. Demurrer, becauſe the Information is not good, and there ought to be Indictment or Preſentment. Winnington. On the clamour of ſome of the Houſe of Commons at Informations,&c. ſigned the Demurrer, and argued thus: No man is bound to anſwer any Criminal Charge, unleſs upon Preſentment or Indictment: He cited Glanville, cap. 1. Fleta lib. 2. cap. 52. fol. 112, 113. Magna Charta, no Man to be taken but per legale Judic' Par' ſuor', 2 Inſtit. 46. 5 Edw. 3. cap. 9. 25 Edw. 3. cap. 4. 43 Edw. 3. cap. 3. &c. and a great deal more which he particularized and anſwered in my Argument in the Caſe for the King, Vide infra.

Hubert *verſus* Fitzgerard.

Intr. Hill. 3 & 4. Jac. 2. Rot. 414.

ERror. Special Error aſſigned, that John Styles was returned a Juror, and Paul Sworn, & in nullo eſt erratum pleaded, that doth not admit the Fact, becauſe the Certiorari was prayed and no Return: Then another Error was, Ejectment for the Town and Lands of Kildarley containing 190 Acres; if it be not too uncertain, and ought to contain more particular quantities: If an Ejectment will lie of a villa Terræ.

Allen & Ux' *verſus* Grey.

Hoc Termino, looſe Roll, *Whitehall* Att'.

Ne unques accouple en loyal Matrimonie.

DEbt. Defendant pleads ne unques accouple en loyal Matrimony. Plaintiff Demurrs. Held an ill Plea, becauſe that puts it upon Trial by Certificate, which admits a Marriage, but not ſecundum leges Eccleſiæ; he ſhould have pleaded no Marriage in fact, and that would have been tried per Pais' Judic' p Quer.

Jackſon *verſus* Miles.

Hoc Termino, looſe Roll, *Clarke* Att'.

CAſe ſur' Aſſumpſit. In conſideration the Plaintiff would do, &c. the Defendant promiſed he would pay. Plaintiff avers that he did do, and ſhews no place where. Demurrer, and Narr' held ill, becauſe a Conſideration Executory is Traverſable, and conſequently the place needful, &c. Judic' pro Defend'.

Kirle *verſus* Clifton.

Intr. Mich. Ult. Rot. 21.

Releaſe pleaded to a Writ of Error.

WRit of Error brought, Error aſſigned, Releaſe pleaded; the Plaintiff ought not to have Judgment affirmed, becauſe there appears to be Error, tho' it ought therefore to be as a Bar to the Plaintiff, yet it ought to be a nil Capiat per bre'. Q. if any Coſts then pro Def. on Error.

Dominus Rex *verſus* Meeres & al'.

One takes a Lodging-room by the Week furniſhed, and has the Key delivered to him, and runs away with the Goods, not Felony.

INdictment at the Old-Bailey, 16 May laſt, againſt Mary Meeres and Suſan Vicars, for the ſtealing a Rugg and other Goods of Robert Geery: Upon Not guilty pleaded, a Special Verdict, That Suſan Vicars and her Husband lately deceaſed took a lodging Room in the Houſe of Richard Geery, furniſhed with the Goods mentioned in the Indictment from Week to Week, at two Shillings per Week; that the Key of the Door was delivered to the ſaid Suſan, which ſhe kept; That Suſan paid one

one Weeks payment for the Room and Lodging, and continued therein about four Weeks: That the said Susan and Mary on the day in the Indictment, and before the expiration of the fourth Week took and carried away the Goods. Et si, &c. Lord Chief-Justice Holt sent this Case to me and Mr. Northey to Argue for the Prisoner, and accordingly at Serjeants Inn I attended, and argued to this effect, That this is no Felony. And here are two things considerable; What interest Meeres held in those Goods; then what the Law makes a Felony, and so to apply both. Here is a good Lease from Week to Week, at the will of both Parties; the Lodger hath a Possessory Right against all Strangers, nay, against the Landlord himself; if he comes and takes the Goods out of the Room an Action of Trespass will lie; the Key of the Room is given, which is more than a bare use such as a Guest hath, this is an interest not determinable but at a Weeks end; here is an Hire paid for it, and tho' the Rent doth not in the Eye of the Law issue out of Goods, yet 'tis reserved in respect and consideration of them, and the more is paid for them than otherwise would be, according to Dubytoft and Courteen's Case, 2 Cro. 453. an Eviction of Tythes makes an apportionment of the Rent; where a Barn and Tythes are Let together, tho' the Rent be issuing out of the Barn only in point of remedy, yet 'tis issuing out of both, Tythes as well as Barn in point of render; the death of the Husband is no determination of the Estate at Will, according to Henstead's Case, 5 Rep. 10.

Then 'tis considerable, that in case of Bailment of Goods to keep, tho' the Bailor hath an Interest, yet the Bailee hath one too, and such a property as to maintain a Replevin, and so is 21 Hen. 7. 15. Pl. 23.

Besides, if no Interest pass, here's a Possession by the delivery of the Owner, and that is expressly found, and a separate Possession by his consent, which will much affect the Case when we come to consider what Felony is by our Law.

2. What makes a Felony concerning Goods. According to the Mirrour of Justice, Cap. 1. Sect. 10. Larceny is described to be the taking of any moveables, treacherousment against the will of the Owner, by an unlawful gaining the Possession of them: And then he says a taking is necessary to contradistinction to a delivery, and treacherousment, (which in the Old Books was the same with Felonice) because if the Bloyner did apprehend the Goods to be his own, and that he might well

take them, in ſuch Caſe he is not guilty of this Crime, nor where he apprehends that it pleaſed the Owner he ſhould have them; but of this (ſays he) there muſt be an apparent Evidence and Preſumption: Now from hence I could infer, that in thoſe antient Times, two things did excuſe a Tortious taking of Goods from the guilt of Larceny, viz. a conteſt or claim of Property, and a taking in purſuance of ſuch Claim; and this is allowed by conſtant experience; or a delivery, or conſent of the Owner that the Party ſhould have them; now in either of theſe Caſes 'tis not a Larceny, tho' the Perſon hath not the true real Property in the firſt Caſe, but is miſtaken; and tho' he doth exceed, or out-do, and go beyond the Authority of the Owner in the latter Caſe. To illuſtrate this, Glanvill lib.10. cap.13. Furtum non eſt, ubi initium detentionis habet per Dominum rei; if there be ſuch a conſent of the Owner, as argues his Truſt in me, and gives me a Poſſeſſion againſt all Strangers, there my breaking that Truſt, or abuſing that Poſſeſſion, tho' to the Owners utter deceit of all his intereſt in thoſe Goods it will not be a Felony, much leſs where I have a Poſſeſſion by his conſent, and maintainable againſt himſelf, as in this Caſe. And according to Glanvill, If a Man lend me rem ſuam ad uſum inde mihi percipiendum in ſervitio meo, the time being expired I am bound to make reſtitution; but if I uſe it at another place, or beyond the time agreed on, I am bound to make amends, but à furto excuſatur per hoc quod initium habet detentionis per Dominum rei. Pulton de pace Regni, Fol. 129. ſays, That the intent of Stealing to make it Larceny ought to be at the time when the Party doth firſt come to the Poſſeſſion of the Goods; tho' he hath an evil intent afterwards to convert them to his own uſe, 'tis not Felony in him, for no Felony is intended to be done but with violence, Vi & armis, which cannot be ſuppoſed in this Caſe, ſeeing they were delivered to him by the Owner of them, and ſo he came lawfully to them: Theſe are the words of the Book, A bare Poſſeſſion by the conſent of the Owner, nay, of one that is not Owner, even of a Wife, will make a taking not Felonious; for if ſhe deliver her Husbands Goods to a Stranger, and he runs away with them, 'tis not Felony. So is 13 Aſſiz.6. In 12 Aſſiz.32. If a Foreſter cuts Trees, and leaves them, and another time comes and carries them away, 'tis a Quære if it be Felony; much leſs ought it to be where the right Owner gives the Poſſeſſion. In 3 Hen.7.12. The Caſe of a Goldſmith, who had certain Stuff in his Cuſtody to work, and imbezils it,

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'tis no Felony, because he could not be said to take it Vi & Armis, when 'twas in his Possession by consent of the Owner, and yet there the Trust was to a particular purpose, and the conversion might be reckoned a determination of the privity as well as in our Case. In 7 Hen. 6. 43. is an express case for me; if a Man delivers Goods to keep, or lends goods to another, he may commit Felony of them himself, he hath but jus proprietatis, the Baylee hath jus possessionis: So is Gouldsborough 186. A Servant or Journey-man imploy'd to sell Goods, and receives Money for his Master's use, sells a considerable quantity and receives 160 Guineas for his Master, and goes away with 150 when discharged, and laies the ten in a private place in the Chamber where he lay, that being discharged his Master's House and Service, he afterwards in the Night time breaks open the House and takes the ten Guineas so hid; held no Burglary in a Special Verdict, Easter Sessions 1687. for that the taking the Money was not Felony, for tho' his Master's Money in right, yet his in Possession, and the first original act is no Felony; and if he had laid it Underground in the Garden, and afterwards come and took it away, This would have been no Felony, per Wright, Herbert, Atkins, Powell and Holt,&c. Now that was a Tortious Possession, ours was lawful; we could maintain Trespass, or Appeal for these Goods, &c. Felony is according to the original intent, but then it must be found there was such an intent, and in favorem vitæ nothing is to be intended, or presumed against the Party: There is nothing found of an intention to take away the Goods when they took the Lodgings, as there was in the case of suing the Replevin, 'twas ex animo; And so is Foorer's Case reported in Sid. 254. The form of Indictments is considerable here, it must be Vi & armis, &c. Felonice cepit as well as abduxit, and unless it be so 'tis naught, excepting in the 21 Hen.8.cap.7. where the carrying away is the Felony, as the Marginal Note in the new Dyer 5. is, that the Indictment in that case was only Felonice abcarriavit, and in no other Case is it good so: Suppose a Man Lease Land with a Stock of Sheep, and the Lessee sell them, or kill them, &c. that is no Felony, and here we have the Interest and Possession both by the Owners good-will at first.

Obj. The 13 Edw. 4. 9. A Carrier having Goods in a Box sent to London, carries them to Southwark, and there cuts open the Bale, takes the Money and runs away; held to be Felony, which perhaps was hard enough. I answer, in that very Case 'tis agreed, that if they had been delivered to keep

keep by way of Bailment, it had been otherwise; but besides in that case the Authority was but for a particular place, then the carrying to Southwark determined the privity, and then the breaking open the Box, and taking the Goods might be Felony; and 'tis there agreed, that if a Servant hath Goods to Sell, or for any other particular purpose, it would not be Felony, and that was the reason of making the Stat. of 21 Hen. 8. cap. 21. for at the Common Law where the Goods continued in the Master's actual Possession, it might be Felony, otherwise not, because of the particular Trust; Bailment to keep is no Felony, Dyer 5. Here is a Contract for the Goods, if that be broken, no Felony because a Contract at first. As to the

Obj. As to the Butler, Cook or Servant that hath the bare charge of Goods, may commit Felony of them, 21 Hen. 7. 14.

I answer, If a Bag of Money was delivered to a Servant for to carry to York, or to buy Horses with, 'tis no Felony, 'tis out of the Masters Possession and in the Servants, Stamf. 25. and the reason given for that of a Butler and Cook in Stamf. lib. 1. cap. 15. *Tit.* Larceny, and in 3 Inst. 108. is, because they have not the Possession but the bare Charge, they are in onere, not in Possessione, proni Coni pistoris says Coke; they cannot have Trespass or Appeal for them says Stamford, which we may have. One that hath an Horse lent him to Ride on, or a Weaver that hath Cloth to Work, no Felony, and therefore embezilment in some Cases made Felony. And as to that of a Servant, 'tis the Master's own Possession, and therefore he may maintain an Action for them, according to Latch. 127. Poph. 178.

Obj. The 27 Assiz. Pl. 38. the case of a Guest lodging in an Inn who took the Goods, &c. Sol. The same answer still; 'tis the Inn-keeper's Possession, and the Party hath the bare use of them, as, and while in his Possession who is Owner; here is an express Contract for the Goods, as well as for the Room; there's none but only for the Meat and Lodging: Ours is more than a bare use, at least here is a Possession, which could not be recalled as that of a Guest might, and others used. On the whole I prayed Judgment pro Prisonariis. Mr. Northy argued with me to the same effect, insisting chiefly upon the first possession by the Owners consent. Chief-Justice Holt thought it no Felony. Pollexfen thought it was, and that a Lodger had the bare use as a Guest hath, and that Fieri fac' against the Landlord would reach these Goods as

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is the conſtant practice. That no indebitatus lay for the Rent of the Room, which ſhews the Money was for the Room and not the Goods. Atkins, That 'twas no Felony, and that the Lodger had more than a bare uſe, and now adays Lodgings furniſht, and perhaps the greateſt part of the Houſe are taken by the Year, and there is no difference in the time. Nevil, no Felony. Turton, no Felony. Rokesby thought it no Felony, becauſe no intent found to Steal, either in the taking the Lodgings or in carrying away the Goods. Ventris of the ſame. But all thought it a Point deſerving very good Conſideration. Vide poſtea.

Mich.

Term. Mich.

1 Will. & Mar.

Dominus Rex *verſus* Cox Milit'.

SIR Thomas Cox of Glouceſterſhire appeared here upon his Recognizance given before the Lord Chief-Juſtice Holt in the Vacation, and an Information being filed againſt him and others for Riot, he was charged to plead to it as had been the practice. But upon Debate it was ſaid that he need not, and was not compellable, and was allowed to Appear and Imparle till the next Term.

Dove *verſus* Martin & al'.

CAſe againſt two Executors, one dies after Iſſue joyned before Trial: A Verdict pro Quer. Moved in Arreſt, &c. que le Suit eſt abate. Quære If abated ipſo facto, or only abateable by Plea. Agreed to be Error aſſignable.

Dominus Rex *verſus* Machin Burchet & al'.

Chief-Juſtice in *Eyre* cannot grant a Warrant.

DEfendant being taken by a Meſſenger of the Lord Loveſlaces, Chief-Juſtice in Eyre, by his Warrant to bring him before him where he ſhould be, being charged upon Oath for killing Deer and cutting down young Trees, ſome of the Trees being found in one of their Yards. Serjeant Pemberton moved for their Diſcharge, for that no Warrant can be granted upon Oath, but upon a Preſentment of the Verderors an Attachment lies. Manwood ſaith, There muſt be a Preſentment before there is a Warrant; here the Warrant is to bring them before him whereſoever he be. By

Charta

Charta de Foreſta no man is to be taken for Vert or Veniſon, but upon Indictment or Preſentment. Vid. 1 Edw. 3. cap. 8. N. B. 67. Reg. 80.

Treby. Attorney General. Here they are taken in the manner, the Wood and Timber which they cut is found in their Houſe and Yard. The Preamble of the Statute takes notice of perſons kept in Cuſtody by Foreſters and Regarders, but nothing is mentioned of the Chief Juſtice, but only of Miniſterial Officers. Vid. Manw. cap. 9. numb. 4. Crompt. tit. Juſtice in Eyre. In caſe of aſſerting, the party is to be taken preſently. The Ordinary Miniſterial Officers cannot do it, but the Chief Juſtice, which is a Supreme Judicial Officer, may. It is to be compared to a Conſtable and Juſtice of Peace at Common Law: A Chief Juſtice may take a Recognizance or commit, even out of the Foreſt, 1 Rolls Abr. 534.

Court. He may be apprehended if taken in the manner; it is but an Incroachment on the Common Law for Juſtices of the Peace to grant Warrants before Preſentment or Indictment; the Court of Attachments is in being, though the Swainmote is not, &c. The words of the Statute are general, No man ſhall be taken or impriſoned; the words are general, it is a general Law. As to the manner, he muſt be taken in it; the Chief Juſtice cannot ſend to take in the manner, for the manner muſt be at the time when the thing was done or committed; for if the Goods were found about him afterwards, that is not a taking in the manner, for he might buy them, or another leave them there, &c. The Warrant ruled to be void, and they were all diſcharged per Cur'.

Brookes *verſus* Cooke.

DEBT upon an Eſcape againſt the Defendant as Marſhal, ſetting forth a Judgment recovered by her as Executrix, and the party in Execution, and let at large. Freſh Purſuit pleaded. Verdict for the Plaintiff. Moved in Arreſt of Judgment, That the Plaintiff had brought the Action in the Debet and Detinet in her own Right, whereas the Recovery, which is the Foundation of the Action, was as Executrix. That the Action for the Eſcape ought to be brought in the ſame Right, it being of the ſame nature and kind, and a Remedy which the Law gives her to have ſatisfaction upon

Debt on an Eſcape, the Judgment being as Executor, ought to be in the *Detinet* only,

that Recovery which ſhe had as an Executrix, and this Courſe is an inverting of the nature of the Adminiſtration. Sir George Reynell's Caſe *verſ.* Langcaſtle, 2 Cro. 545. is expreſs that this Money will be Aſſets. Thompſon è con'. This is brought upon a Judgment by her, and an Execution upon her Suit, and therefore her own; beſides, it is help'd by the Statute of Jeofails, and ſo is Frewen *verſ.* Pope, Sid. 379. Debt for Rent upon a Leaſe, if the Teſtator in the Debet and Detinet, help'd after Verdict, and Comber *verſ.* Wotton in Sid. 342. Action againſt an Heir in the Detinet only, aided by the Verdict and the Statute of Jeofails.

Holt. Where an Executor brings an Action in the Debet where he ought not, it is help'd by the Statute; but the Quære is, Whether this Action be brought as Executor, or in her own Right? If this be ſo, and remains uncertain, it will remain uncertain ſtill, whether this Judgment be in her own Right or not. In Caſe of Trover or Treſpaſs, if it appears the Wrong was in her own time, though ſhe be called Executrix in the Declaration, yet it might be in her own Right; ſo here it appears uncertain.

Dolben. If Executor brings Debt and recovers, and then an Eſcape of the party, the Suit for the Eſcape muſt be as Executor, and ſo it is agreed in Holman and Chute's Caſe, 2 Cro. 685. And per Cur' Judgment was arreſted.

Salter *verſus* Kidley.

Intr. Trin. ult. 394.

COvenant on a Deed, reciting certain Articles made between A. and E. and that one B. ſhould perform all that on his part were to be performed, and that theſe Articles were made between A. and E. But by that Deed B. did covenant and agree to pay, &c. That B. did not pay, and that the Defendant hath not paid, & ſic infregit. Demurrer. It was argued, That B. was no party to that Deed, and ſo not bound, though he ſealed it, and it doth not appear that B. ſealed it but by way of recital, which is no Eſtoppel. Vid. 2 Cro. 359. 3 Cro. 56. 2 Inſt. 673. That in caſe of an Indenture between parties, none are bound but the parties.

Thompſon è contra, cited 40 Edw. 3. 5. That in a Deed, (and non conſtat by the Book, whether Poll or Indented) if there be a Covenant by another man, and he ſeals it, he is bound. Fitzh. Obligation 16. though the words are the

words

words of the Leſſee, yet if the Leſſor ſeal, he is bound.

Holt. This doth not appear to be an Indenture, it is per quoddam ſcriptum fact'.

Levinz. Though not an Indenture, yet if it be between parties, it is the ſame thing as to this, and none are bound but the parties. Thoſe old Caſes which Thompſon cites are all of Deeds in the firſt perſon; and then I agree, if it be, I *A.* do oblige my ſelf; and at the end, I *B.* do promiſe, &c. and both ſeal, both are bound. There may be ſeveral Deeds upon one Parchment; but this cannot be ſo, for this is thruſt in the midſt of all the Covenants, this can never be taken to be a ſeveral Deed; and therefore B. being not bound, we are not bound, for we are only to perform what he was obliged to perform, and non conſtat but in the Recital that B. ſealed, and a Recital in an Indenture is no Eſtoppel, though it be in the Condition of a Bond. 1 Inſt. 352. There is another fault; it is, B. held the Lands from the ſaid 13th day of April to the 15th of April, anno pximo, and a Breach is aſſigned in non-payment of Rent Arrear ad decimum quintum diem Aprilis: It was from the Thirteenth, ſo that it began upon the Fourteenth, and then it ends the Fourteenth, for there cannot be two Fourteenths in one Year.

Anſwer. If it had been Debt for Rent, it might have been ill, but in Covenant to ſay it was Arrear is well enough (Quære Differentiam) and finit' ad is excluſive.

Levinz. Suppoſing ad excluſive, that will not help it, for the Year ended the Thirteenth.

Holt. Why, cannot a man oblige himſelf by a Deed, if there be expreſs words for it, and he ſeals it? Suppoſe at the end of an Indenture it be, And be it known unto all men, That *A. B.* for himſelf covenants, &c. and he ſeals it, why ſhould not this oblige him? A man cannot take immediately where he is not a party; but where do you find that a man cannot give without being a party? In a Deed of Feoffment, a Warrant of Attorney to A. not a party, is good now, though formerly held to be otherwiſe. General Recital is not an Eſtoppel, but a Recital of a particular Fact is ſo. 1 Saund. 8. 1 Inſt. 52. Adjornatur.

Whitmore *verſus* Manucaptors *of* Wheeler.

Scire Fac' retornable *die Lunæ poſt Quinden Trin'.*

SCire Fac' Retornable die Lunæ poſt Quindenam Trinitat'. Defendants plead in Abatement, That Quindena Trinitat' is held on Monday, and ſo it ſhould have been in Quindena Trinitat'. Demurr'. Per Cur' held well enough, becauſe the Sunday is the proper Retorn-day, and ſo Lunæ poſt is well enough: But per Tremaine in Rodd *verſ.* Evans in this Court a Writ held ill becauſe ſo Retornable, in the Caſe of a Sheriff's Bond.

Boſworth *verſus* Ringole.

Intr. Trin. ult. Rot. 394.

IN a Scire Fac' Letters Teſtamentary ought to be ſhewn at the end of the Writ, if brought on a Judgment recovered by a Teſtator.

Young *verſus* Hundred *of* Tedcombe.

Huy & Cry.

At *S. prope quendam locum vocat'* M. *infra* the Hundred without ſaying *S.* was within the Hundred.

Need not alledge in the Declaration that the Robbery was in the High way.

ACtion upon the Statute of Huy and Cry, and after Verdict excepted in Arreſt of Judgment, That the Robbery is laid to be at S. prope quendam locum vocat' *Four Miles gate* infra Hundred' præd' in Com̃ *Dorſet* præd', and ſo not certain that the Robbery was in the Hundred; for it might be out of the Hundred, and yet nigh a place within the Hundred: But per Cur' infra Hundred' ſhall refer to both; beſides, 'tis after a Verdict. Another Exception, That it doth not ſay it was in the High-way. Court. The Law is, That it muſt be in the High-way, and otherwiſe they could not have had a Verdict; but this is laid according to the Statute, and the Preſidents in Raſtal and Cooke are accordingly without mentioning any thing of a High-way; beſides, it muſt in this Caſe be in the Day-time, but it need not be averred in the Declaration that it was in the Day-time. Iudic' p Quer'.

Hamond

Hamond *verſus* Purſell.

WRit of Enquiry awarded, retornable die Veneris prox' poſt Craſtiñ Aſcenſionis, which is out of Term, whereas it ſhould have been in Craſtin', held ill, but moved to be amended. Per Cur' not amendable, for if the award were right, they would mend the Writ and Return by it; or if the Writ were right the Award might be amended by it, but both being ſo, held ill, and not amendable.

Writ of Enquiry, returnable out of Court.

When amendable.

Matthews *verſus* Cary.

Int. Paſch. 3 Jac. 2. Rot. 320.

TReſpaſs for breaking and entring his Houſe and taking a Silver Tankard, and detaining it till he paid 5 l. The Defendant pleads, that the Plaintiff was preſented for a Nuſance, and upon that Preſentment was amerced 5 l. and that the Defendant took it by Warrant from the Dean and Chapter of Weſtminſter, whoſe the Leet was, &c. The Plaintiff replies de injuria ſua ꝓpria abſq; hoc that he was Guilty of the Nuſance; the Defendant Demurrs. Bonython, The Preſentment is not Traverſable, and ſo is 5 Hen. 7. 3. 41 Edw. 3. 26. Bro. tit. Preſentment en Court, 1. 5. 45 Edw. 3. 8. 'Tis enough to juſtifie the Officer from being guilty of a Treſpaſs, that there was a Preſentment and Amerciament, and whether true or not is not for the Officer to conſider. Court, In Treſpaſs 'tis ſufficient to juſtifie the Officer that there was ſuch a Preſentment, becauſe this Action tries the Authority, whereas in Replevin the Suit is not ſo much for Damages as to try the Right, and there 'tis not enough to ſet out an Authority as to make out the Right. Thompſon, They have not ſaid per mandatum of the Steward, for in Treſpaſs they cannot juſtifie without a good Authority, and that the Steward only can give. In Wilſon and Hardingham's Caſe, Hob. 129. 'tis by Precept, 3 Cro. 698. Per Popham a Bailiff cannot Diſtrain without a Warrant; but by Gaudy he may, but that was in Replevin; but here the Defendant is not ſaid to be the Lord's Bailiff. Vide More 847 per mandatum of the Conſtable neceſſary, More 873. a Precept is neceſſary. Bonython è cont', Good without a Warrant from the Steward; 'tis a Duty for which the Lord may Diſtrain

Treſpaſs.

Juſtifie by a Warrant on a Preſentment in a Court Leet.

Mandatum of the Steward omitted.

ſtrain or bring Debt. If it be lawful for the Lord to Diſtrain, it will be good when his Servant does it: Here is an Intereſt veſted, and ſurely the Lord may Diſtrain without leave from the Steward. In the Earl of Bedford's Caſe, 3 Cro. 14. in an Avowry is no Precept, 26 Hen. 8. 8. no need of a Precept, Coke's Entries 119. Greſley's Caſe, 8 Rep. no mention of any Warrant. Godfrey's Caſe, 11 Rep.

A difference between a juſtification in Treſpaſs, and an Avowry.

is none. Court, In an Avowry as Bailiff to the Lord you need not, but in Treſpaſs you are there to juſtifie your Authority, and that muſt be by Warrant from the Steward. Upon preſumption all Perſons are preſent in the Leet, was the old reaſon why it was not Traverſable. Vide 3 Cro. 187. 3 Leon. Moore 75. he muſt alledge the truth of the Fact, and the Eſtreat drawn out, or Warrant; the Steward cannot amerce; antiently two were Sworn to affere, now the

A Jury cannot amerce.

ſame Jury do both; but the Jury may not amerce certainly, without any afferement, the Judgment is quod Amerciatur, then the Jury aſcertain it. Dolbin, You ought to ſay there was ſuch an Offence committed, and a Preſentment. Holt, You need not in Treſpaſs where you do juſtifie. Stephens *verſus* Hayes, C. B. 30 Car. 2. If you juſtifie out of the Admiralty Court, muſt you not ſay, 'twas infra Juriſdiction'? Holt, No, you need not, becauſe perhaps there was no Cauſe of Action, they muſt alledge, that 'twas not; but Avowry goes to the Right whereas Treſpaſs doth not. Vide 1 Leo. 242. In an Avowry the command is not Traverſable, but where you juſtifie a Treſpaſs, you need not aver the thing but the Authority. Vide Raſtall's Entries 606. 3 Cro. 885. Thompſon's Entries 311 & 22. 346 & 29.

Holt and Eyres, The amerciament ought to be the Act of the Court, and the affeering to be by the Jury, the Jury cannot amerce; the Caſe in Hobert 129. is not Law. Dolbin, The Jury do amerce, and there are Affeerors particularly for that purpoſe appointed: If the Jury amerce (ſays Holt) to a particular Sum, then there is no need of an Affeerement. Dolbin, For want of a Warrant the Plea is ill, and ſo per Cur' Judic' p Quer'.

North

North *verſus* Carroth.

Hoc Termino loſe Roll, *G. Wooward* Attorney in it.

THE ſame Caſe and the ſame Rule; but only two Exceptions more were taken to it. They plead an Act of Parliament held die Eliz. per prorogat', ill, becauſe that was the firſt Day of Seſſion, tho' they were by Writ called on a former Day, and without Sitting ordered to that Day, Dyer 203. Per Holt 'tis well enough, for 'twas a Parliament held by Prorogation that Day; tho' according to Dyer it would be ill to ſay held the firſt Day, and continued by Prorogation, for they never met and yet were Prorogued. Another Exception was, They ſay that the Abbot and Covent were ſeized, whereas it ſhould be the Abbot in Right of his Covent.

Stephens *verſus* Etterick.

COvenant. Writ of Enquiry Awarded, Executed and Return'd, but not Filed. Sir Francis Winnington moves to diſcontinue. Quer. If it could without Conſent of the Defendant; he urged that it might with leave of the Court. This Judgment is but the Award of an Enquiry, 'tis an Interlocutory Act of the Court; there is nothing reduced to a certainty, 'tis a Direction of the Court more than a Judgment; Death of one or another abates the Suit; in Caſe of a Special Verdict it may be. Earl of Oxford's Caſe, 1 Cro. 1 Saund. 30, 37. Where the Writ is abateable by the Death of the Party, It is Diſcontinuable by the Plaintiff. Mr. Criſpe è Contra. A Continuance is where both Parties have a day to appear. A Diſcontinuance is where the Party is put out of Court, becauſe he doth not appear. He cited Raſtall 144. Siderf. 14. Dyer 195. Here is no Opportunity, for here is no Dies datus. Curia. In Roll's Abridg' Tit' Contin' is this very Queſtion put upon a Verdict, and held he cannot. Here is no difference, here is a Judgment by Nihil dicit, and an Enquiry awarded and return'd. If the Plaintiff will not enter a Continuance, the Defendant may in this Caſe. Dolbin, He cannot diſcontinue without conſent, and ſo ruled per Cur'.

Plaintiff diſcontinues after a Writ of Enquiry of damages.

Palmer

Palmer *verſus* Keblethwaite.
Ent. Paſch. 36 Car. 2. Rot. 448.

CASE Narr', That the Defendant did maliciouſly throw down, and break a great part of an ancient Dam, whereby he did divert a great part of the Water of the ſaid River quæ currere Conſuevit & debuit to a Mill of the Plaintiff. The Defendant pleads, That the place where the Dam ſtood was the Defendant's Soil; that by means of that Dam the Water run to a Mill of the Defendant's, and ſo to the Plaintiff's. That the Defendant's Mill fell down, and ſo the Water was diverted. Demurrer, Plea agreed ill. Argued that the Declaration was ill, becauſe doth not preſcribe for this Water-courſe, nor doth he ſay it was an ancient Mill, ſo that it doth not appear to be matter preſcriptible; all that is under the per inde is no expreſſion of the antientneſs of the Mill. Vide 1 Leo. 273. Raſtal *verſus* Hanford, Surely 'tis not enough to ſay he was ſeized of a piece of Land, and the Water run thither, with a per quod, he loſt the Water that run thither: This is no more than if he had no antient Mill. Per Hoyle, If there be a good Cauſe of Action laid in our Declaration, 'tis with the Plaintiff: If there be an Injury done by the Denfendant to the Plaintiff, and Damage accrewed to him by it, the Action lies. Bracton lib. 4. cap. 3. Lutterell's Caſe, 4 Rep. Here is both; now where the Action is brought upon the Preſcription or Right, it muſt all be Preſcriptible; but where the Declaration is upon the Poſſeſſion againſt a wrong Doer, there we need not ſay that it was time out of mind, 1 Cro. 499. 575. Palmer's Rep. 200. I rely upon Eden and Marche's Caſe there put, and Mr. Juſtice Dodderidge's Opinion there; beſides I may have a property in the Water for other Uſes than that of my Mill, and then 'tis well laid here. Fletcher *verſus* Palmer, 15 Car. 2. Caſe for ſtopping up Lights, held an Action lay for the Lights of a new Houſe. I need not ſay the Houſe is ancient, where a Gutter is ſtopped. If we bring an Action for not doing a thing, we muſt ſay 'twas antient, but if we lay a Miſfeazance it is otherwiſe. In Thelwels digeſt of Writs, de Executor', The Executor may bring an Action for a Cheſt againſt a Stranger, tho' it do with the Writings belong to the Heir. Chief-Juſtice Holt ſaid, ſuppoſe a Water-courſe runs to my Ground, and I have no uſe for it, and one upon another Ground diverts it before it comes

to

to mine, will an Action lie? Is not this the ſame, muſt you not lay ſome uſe for it? But you will ſpeak to it again, &c.

Sleigh *verſus* Chetham.

NOW Treby argued pro Quer' in breve de Error, That the Judgment final is Erroneous, for that a petit Cape ought to have been Awarded; an Eſſoin is an Allegation of an excuſe for Non-appearance; if not legal, it is as if there were none: There are but two ſorts of defaults; one before Appearance, and one after; in the latter Caſe the Party is to be brought in upon a petit Cape; another ſort of default which is improperly called ſo, is where a Man imparls to a time certain, and being called the ſame Term and doth not appear, this is called a departure in deſpight of the Court. 1 Inſtit. 259. This ill Eſſoin when turn'd to a default, which was when 'twas judged ill, was a ſavable default, and then a petit Cape ought to have iſſued; this amounts to no more than a default, and was ſavable by the Death or Impriſonment of the Attorney, 5 Hen. 3. 7. Raſtal 585. 12 Hen. 4. 14. 11 Hen. 4. 87. This is a real Action and concerns the Freehold, and is a matter of the greateſt value, and the greateſt favour is given to the Poſſeſſors of it. In perſonal Actions a default after Appearance is Peremptory, 1 Inſt. 134. The Law gives great delays and benefits to the Poſſeſſor of Land; by this haſty Judgment the inconvencies hapning to the Tenant is the loſs of his Freehold: Nevertheleſs his default was ſavable; now there is no way to ſave it, but upon this Proceſs of petit Cape; he could not ſave it before it was adjudged, and he could not ſave it after, becauſe by the default he was turned out of Court; this Method takes away the opportunity of receiving the Wife or Remainder to come in and be Tenant by Receipt, 11 Rep. 39. Dyer 315. 341. 103. the Feme was received upon the Return of the petit Cape. Then for Authorities, 9 Hen. 5. 12. a petit Cape was awarded, 1 Cro. 517. Jones 412. 1 Roll. Abr. 45 Edw. 3. 19. Kelway 41. 3 Hen. 4. 4 Dyer 24. *Vide le* Caſe *ſupra.*

All theſe Caſes are but one, and ſtronger than thoſe; for there was an ill Voucher, and yet a petit Cape awarded.

Obj. Here is the Party called in ad Salvandum defaltam, and he did not, and ſo is the Entry made.

Anſw. He could not ſave his default, for no Man can do it but when he comes in upon Proceſs. The Defaulter was

not in Court to ſave his default, having no Summons or Proceſs to call him: He was not there as a Party appearing for that purpoſe, he was only there to defend his Eſſoin as it was challenged, but not to ſave the default, 7 Hen. 4. 14. An Eſſoin was caſt, the Tenant was reſummoned, becauſe the Court had adjourned it, and taken time to conſider of it.

Obj. This default is after Imparlance, and therefore Judgment final.

Anſw. None of their Caſes come up to the purpoſe when they are diſtinguiſht and underſtood: For all their Caſes are to be underſtood of an Imparlance to a Day certain, or a Day uncertain in the ſame Term in which the Imparlance was taken: This is the true intendment of all theſe Books, and I do agree, that ſuch a default as a departure in deſpight of the Court will be Peremptory, Bro. Tit. Departure, 7 Hen. 4. 19. that Book gives the reaſon of it becauſe the Term is but one Day, 2 Saund. 46. Milborn's Caſe, 2 Cro. 292. Yelv. 1 Bulſtr. that being a default after Appearance, is when it is a default upon Imparlance immediately after it, and then he may be more ſtifly held to it, becauſe the continuance is by Imparlance; but this continuance here is not by the Imparlance, but by an Adjournment two Terms after.

Obj. That in a Writ of Right, a default after the Miſe joined upon the meer Right is final; but the Caſe of Penryn, 5 Rep. 85. is quite contrary to the Caſe of Milbourn, and ſo is the Book of 38 Edw. 3. 13. 39 Hen. 6. 16, 17. becauſe 'tis a departure in deſpight of the Court. But admitting it to be a Special Caſe, and no Argument to be drawn from it; and ſo is 39 Hen. 6. 16, 17. yet the Book ſays, it is in that ſingle Caſe, and not to be extended further, 12 Hen. 7. 10. gives the reaſon for it, becauſe 'tis the higheſt Writ; there are other proceedings in that than in any other Writ. In a Writ of Right there is no challenge to the Inqueſt; the Tenant muſt begin to give Evidence on the Iſſue of meer Right, for he is quaſi Actor, and hath a perpetual Judgment for him for an Enjoyment, 1 Inſt. 294. If a Releaſe be pleaded 'tis triable by another Common Jury, and a default after that is not Peremptory, Bro. Tit. Droit. 30. 48. Statham's Abr' Tit. Droit, the laſt placito ſave one. In all Caſes where default is, except on the meer Right a petit Cape ſhall go, and the default is not peremtory. As to the 24 Hen. 6. 28. that may be anſwered, becauſe the matter was tried.

Pender.

Trinder. The Judgment final was well given. An Eſſoin caſt when he had an Attorney was an ill Eſſoin, and then the Eſſoin being diſallowed that turns to a default. If a Tenant make default before Appearance a petit Cape Iſſues; if it be after Appearance and a General Imparlance, there is Cauſe for a final Judgment, becauſe 'tis a deſpight to the Court, otherwiſe on a dies datus given by the Court, there Iſſue was joined and a Venire was awarded, and at the Return the default was; this is a very great delay to the Party, and a Contempt to the Court; ſuch is fatal, if after the Miſe or Iſſue joined, Fitzh. Judgment 245. 228. 161. 152. Droit 27. 1 Inſtit. 295. If ſo in a Writ of Right where Judgment is fatal and final, much more here in an Action of inferior nature. Before Iſſue joined 'tis otherwiſe, 2 Saund. 45. 2 Cro. 35. Egerton *verſus* Willoughby. This is a Special Default, and ſuch a kind of Criminal Default as is mixt with a Contempt, that will produce a final Judgment even before Imparlance. The caſting of an ill Eſſoin, and Demurring to a Challenge is a great Contempt, and much greater than a default on a General Imparlance, which is agreed to produce a final Judgment. If the Tenant had made default upon the Day of the Adjournment of the Eſſoin, that would not have produced a Judgment final; ſo if he had waived it; but if he ſtands the Argument of the Eſſoin, that is adjudged againſt him, it turns to a Contempt, Fitzh. Abridg. Grande Cape 6. 12. Bro. Grand. Cape 4. 45 Edw. 3. 14. 21 Aſſiz. pl. 17. and in Moore 711. the Party is eſtopped to ſay the Attorney is dead or removed, becauſe he appeared by him, and that would be contrary to the Record, 2 Cro. 521. Vide Fitz. Eſſoin 16. 138. Bro. Eſſoin 32. 12 Hen. 4. 14. If he appear and ſhew not his Warrant for the Eſſoin, he ſhall loſe his ſeizin of the Land; beſides a petit Cape is uſeleſs in this Caſe, for that is to bring him in to excuſe his default, and he can alledge none of theſe excuſes; for this is not a common default, but a ſpecial one by caſting an inſufficient Eſſoin. A petit Cape is dilatory in its Nature, and therefore 'tis a kind of diſcretionary thing, for it is not an Error, if awarded where it is not neceſſary: On the whole he prayed an affirmance of the Judgment. Adjornat'.

Vide Fitz. N. B. 9. Writ of diſceit in nature of *Audit' querel'*.

Judic' afterwards affirmed per tout le Court.

Croſs *verſus* Gardner.

An Action will lie againſt one that hath Poſſeſſion of Goods, and ſells them as his own, and they are not.

3 *Cro.* 44. *Jones* 196. 1 *Roll's Abridg.* 91. On bare affirmation.

CASE. Nar', That there was a Colloqium between the Plaintiff and Defendant, concerning certain Oxen in the Defendant's Poſſeſſion and the Sale of them. That the Defendant did then and there affirm them to be his own. That the Plaintiff ratione inde, did buy them, and gave ſo much. That in fact the Oxen were J. S. his, and he ſeized and took them. On the General Iſſue, and Verdict pro Quer', 'twas moved in arreſt of Judgment, that the Declaration is ill, for here is no Warranty. An affirmance of Right will not amount to it; for it ought to be Warrantizando vendidit; nor is here any deceit, for it is not ſaid, knowing them to be none of his, and he might come to their Poſſeſſion as Executor, or they might be like his own, and in the night his own removed, and theſe put in their places, and ſo he not guilty of any falſity.

E cont' urged, that here is a Colloquium laid of them, and we bought them truſting to that affirmation which was falſe, and that is a deceit. A Man having poſſeſſion of Goods ſells them as his own, an Action lies for the deceit. And at laſt upon much debate Judgment was given pro Quer'. Theſe Caſes were cited, 2 Cro. 474, 196, 197. 42 Aſſiz. 8. Moore 126. Kenrick's Caſe, Roll. 1 Abr. 96. Harvey *verſus* Young, Yelverton 40.

Lee *verſus* Libb.

Intr. Hill. 1 & 2 Jac. Rot. 497.

EJectment by Leſſee of the Heir at Law. The Defendant claimed by a Deviſe, found in a Special Verdict thus. That John Denham made his Will in January, 1678. That there were two Witneſſes to it, which ſubſcribed their Names in the preſence of the Teſtator. That he made a Codicil, Decemb' 1679. and by that confirms his Will in what is not altered, and gives away ſomewhat otherwiſe than in the Will, and there are two Witneſſes to it; one of thoſe to the former and one more; the Quære is, if theſe make three Witneſſes to the Will.

Thompſon. The Clauſe of the Act is thus: All Deviſes of Land ſhall be void, unleſs atteſted and ſubſcribed by three Witneſſes in the preſence of the Teſtator. Now here are not three Witneſſes to either; as theſe are two diſtinct Writings,

tings, ſo there is a Years diſtance of time between them: The Will hath but two Witneſſes which ſubſcribed to the Will. Then the third, that is to the Codicil, he did not ſubſcribe to the Will, ſo he never ſaw the Teſtator ſign his Will; his Hand which is ſubſcribed to the ſecond Writing is not a ſubſcription to the Will.

Treby, è contra, The firſt is ſubſcribed by two Witneſſes. As in Woodroff and Brown's Caſe; he makes an Addition to his Will, and declares that he had made it, and doth teſtifie it, and declares this to be a part, and then Brown and one Head ſubſcribe it: This is a Subſcription by three Witneſſes; the firſt and ſecond Writing are to be taken together, and do make but one Will. A Man may make his Will in ſeveral Writings, and thoſe Writings may be made at ſeveral times; no Man can think all his Thoughts, much leſs write them all at once, and if tackt by the mind of the Teſtator, theſe ſeveral Writings do make his intire Will. Suppoſe he publiſhed it before two Witneſſes who did ſubſcribe, and then afterwards he republiſhes before a third Witneſs, this is a Will atteſted by three Witneſſes, tho' at ſeveral times. 'Tis true, the Papers are not affixed together, and there is no neceſſity by the Law that they ſhould be ſo; ſuppoſe in ſeveral loſe Sheets, and one Witneſs ſubſcribe to one Sheet, and another to another, and a third to a third, that is good, if all are preſent to the laſt Sheets publication. If ſeveral Sheets are wrapt up in a Paper, and all ſuperſcribe the covering Paper, would not that be good? He compared it to Mollineux's Caſe, 2 Cro. 144. Noy 117. Two things together may make that good which ſeverally they cannot, juncta juvant; both together were plainly the intended Will of the Party.

Dolbin. The ſigning of the Will is not neceſſary to be in the preſence of the Witneſſes, but their ſubſcription muſt be in the Teſtator's preſence.

Chief Juſtice Holt. The Teſtimony of the Witneſſes is to be to all that the Statute hath made neceſſary, and the ſigning of the Party is one thing neceſſary, and the ſealing is a ſigning.

Dolbin. In the Earl of Eſſex's Caſe, before this Statute, agreed, that one Sheet was found in Eſſex, and another in Staffordſhire, and made but one Will.

Eyres took exception to the Verdict. It is not found that the third Witneſs to the Codicil did ſubſcribe in the preſence of the Teſtator; but only that he did ſubſcribe ut teſtis, and not ſaid expreſly in præſentia Teſtatoris. But per Treby

the

the fact was ſo. And that was amended by conſent afterwards, &c. Adjornat'.

Skinner *verſus* Kilbys.

Intr. Tint. ult. Lilly Attorney

Averring a Plea where ought to conclude *al pais*, matter of ſubſtance.

COvenant. Breach in not repairing. The Defendant ſays he did repair, & hoc parat' eſt verificare. General Demurrer. Urged pro Quer', That the Plea was ill, becauſe he did not conclude to the Country. Winnington for the Defendant. Where the Negative is firſt and the Affirmative afterwards, he need not conclude to the Country, becauſe the firſt Negative is the full ſtop. But per Cur' no difference which is firſt. Then he argued that 'twas but matter of form, and well enough on a General Demurrer. But per Cur, 'Tis ſubſtance and material, according unto 2 Saund. 190. and Dove and Bayley's Caſe, 3 Keble 127. Judic' pro Quer.

A Stranger *habuit jus ante dimiſſionem* entred good.

It was held by the Court, that in Covenant habuit jus & titulum, &c. is well enough in breach for the Entry of a Stranger, becauſe you know not his Title; but however you muſt ſay, habuit ante dimiſſionem, for if it were ſince, 'tis ill, becauſe it might be from the Plaintiff himſelf.

Saunders *verſus* Ferryman.

AN Habeas corpus to the Sheriff of Berks. One Beaver, who return'd ſeveral Actions and Executions upon the Defendant, and alſo ſpecially that he did Eſcape, and he retook him and detained him pro Cauſis ſupradictis, yet he was turned over to the King's Bench. And per Cur', He may there charge him with an Action. And that reſolution in Ridgeway's Caſe, 3 Rep. 52. That the Sheriff may retake and detain, tho' ſo poſitively laid down there, is not in Popham's Rep. 42. And in Moore's Rep. 660. is the clean contrary delivered for Law.

Wilkins

Wilkins *verſus* Wilkins.

Hoc Termino, loſe Roll. Brabon Attorn'.

CASE. Narr', That the Defendant had received divers Goods of the Plaintiff to Trade withal, and to render an Account to the Plaintiff, and promiſe to render an Account. The Defendant pleads in Abatement, that he received them as Bailiff for the Plaintiff, and was to account for them, and prays Judic', if compellable to Anſwer this Bill. Demurrer. Argued, that Account lies, and not Caſe, that here he cannot have allowance. Beſides, Bail is not required in Account, as 'tis in this Action. Goodfellow, Either the one or the other lies, 1 Inſtit. 172. Dyer 20. Hawkins *verſus* Parke, 1 Roll's Rep. 52. Covenant lies, if by Deed, as well as an Account.

Chief-Juſtice Holt. The inconvenience is, the giving a long rambling account in Evidence to the Jury; and there is no Caſe where a Man acts as Bailiff, but he promſes to render an Account.

Dolbin, An expreſs promiſe will make him chargable. And afterwards per tout le Court, the Plea was over-ruled, and Judgment pro Quer'.

Lewis *verſus* Weeks.

DEBT on a Judgment in an Hundred Court. Nil debet pleaded. Verdict pro Quer'. Moved by Mr. Northey in Arreſt of Judgment, that the Declaration is ill, becauſe only ſaith recuperaſſet, and doth not ſet out the Proceſs, nor ſo much as the Plaint. Per Cur', Upon debate held good after a Verdict, becauſe upon the Trial they muſt prove it all, or elſe could not have had a Verdict; for where Executor brings Debt for Rent on a Leaſe by the Teſtator, and doth not ſet forth the Title his Teſtator had, and it might be ſuch as the Rent ſhould go to the Heir; yet after Verdict held they would intend ſuch a Title in the Teſtator, as ſhould give the Executor the Rent. Judic' pro Quer'.

Debt on a Judgment in an inferior Court. *Nil debet*, ſhewing any proceedings only *recuperaſſet*, good after Verdict.

Hill *verſus* Dade.

Intr. Paſch. 3 Jac. 2. Rot. 21.

COvenant. Demurrer. Judic' pro Quer', Inquiry. Moved in Arreſt that the Narr' ſet forth an Indenture, and then in that a Recital of ſeveral Indentures, and then (intended for a Recital too) Cumq; per unam al' Indentur' inter, &c. and then ſays, Et ulterius teſtatum ſit per Indentur' præd', the Covenant upon which the breach is. Urged that the præd' ſhall refer to the Indenture laſt mentioned, unto which the Defendant is no Party, and it cannot be a Recital, for 'tis a new Commencement, Cumq; per unam al' And præd' muſt refer to the laſt Antecedent. The Court inclined 'twas ill, Adjornat'.

Peirce *verſus* Smith.

Intr. Trin. 3. Jac. 2. Rot. 1160.

EJectment. Special Verdict finds, That one Basket being ſeized in Fee made his Will, and deviſes the Lands in queſtion to his five Executors for 99 Years for the payment of his Debts and Legacies, with power to make Leaſes, &c. and after the Determination of that Term, then to his Brother John Basket and his Heirs. And the Teſtator does further Will, That if the Brother gives Security for payment, &c. he ſhould have it immediately: The Teſtator Dies, J. B. with the aſſent of the Executors enters, and made ſome Leaſes and took the Profits; Then he levies a Fine, and five Years paſſed, and then he dies above five Years ſince, the Debts unpaid; & ſi, &c. and whether the Fine be a bar to this Term for 99 Years, and whether 'twas diveſted and turned to a right at the time of the Fine levied: If it were not, the Fine will be no bar. If an entry be made upon a Term for Years with an intent to diſplace him and uſurp the Poſſeſſion, that doth turn it to a Right, but it muſt be an actual Expulſion, and without the Conſent of the Party, If this Term were not diveſted, 'tis not barred, according to Margaret Podger's Caſe, 9 Rep. Seymour's Caſe, 10 Rep. 2 Inſtit. 517. The reaſon why a Man is barred by a Fine is, becauſe he doth not make a Claim, and he that is in Poſſeſſion need not make a Claim. Now here is nothing to put the Executors out of Poſſeſſion. The entry of John

Basket

Basket the Brother into these Lands, doth no ways divest the Term, but rather affirms it. Cestuy que Trust is always Tenant at will to the Trustees. Basket was but a Tenant at will, and that because he came in by their assent; now a man cannot be a Wrong-doer where the party agrees to it. Blundel *verf.* Boughill, 2 Cro. 302. Jones 315. Latch. 53. is express in it; and by Littleton sect. 17. this is but an executing and affirming the Term. But then they say he took the Profits, and let parcel of the Land to pay Debts; this is no divesting, no Evidence of divesting; it was but a Contract, it divested nothing, it turned nothing into a Right. He demised parcel to Undertenants for years, but it is not found that they entred, and then it was only a Contract: Here was no intent to turn the Term into a Right; the Lessees claimed only for one or two years, not for ninety nine, much less for a longer; these Under-leases are good between the parties, but as to the Termers for ninety nine years, they are but Licences from J. B. to enter, Peaseley *verf.* Blackman, 2 Rolls Abr. 285. It is not a divesting but at election; and since they do not admit themselves dispossessed, the Law will not judge it so, Dyer 61, 62, 173. 1 Leo. 171. Blundel's Case is cited in Latch. 53. and 1 Rolls Abr. 661. and approved there. —— Litt. Inst. 588, 589. Freeman *verf.* Barnes. Sid. 458. A Term that is not to attend the Inheritance cannot be barred, says that Case, Latch 75. It is not the intention, but at the election of the party whose Interest is to be divested. Farmer's Case, 3 Rep. is sufficient for me; the Fraud there afterwards in paying the Rent was not the occasion of the Judgment, for the Fine operated what it could at the time of levying it, 2 Bulstrode 138, 139.

Then consider the Inconvenience will be great: If a Mortgagor let his Land by Lease, and then levies a Fine, this will not bar the Mortgagee's Term.

Henry Gould p Def. The words of 4 Hen. 7. make it plain, so that we are within the Letter of the Law; after the ingrossing it is to conclude as well privies as parties. Then come three savings, the last is to such persons such Action, &c. There are three Cases where Fines are no Bar; Where there has been Fraud, where an Incapacity in the party, and where the Interest was not divested, an Interest for Years, though not executed, is barred. Saffin's Case, 5 Rep. 123. Fraud is not to be presumed if not found, and so is 10 Rep. 56. Crispe and Pratt's Case. 1 Cro. This is not a Lease at will, as is Blundell's Case; there it is said, That he entred and occupied at will; here it is, That he entred by Consent,

but alſo that he took the Profits, and not ſaid by the like Conſent. An Entry by Conſent ſhall never veſt any thing, as in the Caſe of Baſtard and Mulier, 1 Inſtit. but taking the Profits is more. But ſuppoſing it a Leaſe at will, whether it be a Diveſting, or Diſplacing, or Diſſeiſin, it is all one, if the party be out of poſſeſſion; ſo that Entry or Claim is neceſſary, that is enough to make a Bar, according to Margaret Podger's Caſe. Tenant in Tail being Leſſee at will, he levies a Fine, it muſt paſs and carry away his Eſtate in poſſeſſion as well as his Eſtate in Tail; for a Fine is a Feoffment upon Record; a Fine cannot work by Fractions, but muſt carry away the Whole; Saffin's Caſe is full to this. Then the Termers Entry is neceſſary, and conſequently Claim is neceſſary, and Intereſt may be barred, though never turned to a Right, as is Sid. 459. He cited Iſham and Morris's Caſe, 1 Cro. 109. for it ſeems ſtrong for him. Vide Mayor and Commonalty of London and Alford's Caſe, 1 Cro. 575.

Holt. Where an Entry is neceſſary to veſt an Intereſt, ſuch Right will be barred, that is the true Reaſon of the Reſolution; a Deviſe veſts an Intereſt without Entry; then If they are diveſted of this, is the Queſtion. 1 Inſtit. 112 Here is Five years Non-claim after John Baskett's Death who was Tenant at will; were there Acts done, and a Poſſeſſion continued againſt a Termer, a Fine may bar; but where another perſon continued the Poſſeſſion by Five years, it may be a Quære. To be argued again.

Perkins *verſ.* .....

Mandamus for a Fellowſhip in a College.

Winnington moved for a Mandamus for him to be reſtored to a Fellowſhip in a College in Cambridge, and per Cur' denied, becauſe there was a Viſitor there; and in Dr. Goddard's Caſe here denied, Dr. Robert's Caſe denied, and in Dr. Merrit's Caſe to the College of Phyſicians.

Dictum fuit per Holt, That every College hath a Viſitor either by appointment of the Founder or the Law: If a Lay one, the Founder or his Heirs; if an Eccleſiaſtical one, the Biſhop of the Dioceſe.

Note, In an Aſſize of Nuſance, a *Capias* lies not upon the Judgment, becauſe it lay not in the Meſne Proceſs.

Dominus

Dominus Rex *verſus* Speake.

ERROR. Indictment for Treaſon, and on the finding it, 'tis Præcept' per Cur' Vicecom quod venire faceret: Ill, becauſe it ſhould have been non omittat' quin caperet. Reverſed.

Rawlinſon *verſus* Oriet & *al'*.

Hoc Termino, *G. Wooward* Attorney.

TReſpaſs for taking Goods againſt two Defendants. They plead in Abatement, That the Plaintiff had ſued a Bill againſt one of them for the ſame Treſpaſs, and yet depending. Demurrer. Argued p Quer', That this doth not abate againſt the other, and cited 14 Hen. 6. 3. for where the matter ariſes on the Plaintiffs part, they may join in a Plea of Abatement, but where it ariſes on part of one of the Defendants, he only can plead it, 13 Hen. 7. 14. therefore both ought not to join in this Plea.

Two Defendants join in a Plea in Abatement, an Action depending againſt one.

Tremayne è contra. The Plea is good, and ſo is the Earl of Bedford's Caſe againſt the Biſhop of Exeter and Wilſon, Hob. 137. There they plead in Abatement, That another Quare Impedit was brought againſt one of them; and Judgment of the Court is, That the Writ ſhould abate. The Pleading is in Winch's Entries 892.

Holt. The reaſon why another Action pending ſhall abate the ſubſequent Action is, becauſe of the double Vexation; now the other is not vexed, and therefore no reaſon that it ſhould abate as to the whole. Where you plead a Miſnoſmer, it ſhall abate only as to him, unleſs where the Death of one ſhall abate the Writ, as when upon a Joint-Contract, otherwiſe if in Treſpaſs.

Eyres. According to Ferrers and Andrews's Caſe, 3 Cro. 667. the other Defendant, who is privy to the Action, being party in the Treſpaſs, may take advantage of it, to plead in Bar where there is a Recovery or Bar in another Action, and no reaſon why he may not as well in Abatement. Adjornatur.

Parſons *verſus* Bickmead.

PLEA amounting to the General Iſſue, good upon a General Demurrer.

Trippet *verſus* Eyre.

In Com̃ Banco.

A ſubmiſſion to Arbitrators, and if no Award, to chooſe an Umpire; they chooſe one that refuſes, *quære* if they can chooſe another?

DEBT on a Bond in Communi Banco, Conditioned to perform an Award. On the Pleading, the Caſe was thus: Submiſſion to two Arbitrators, and in caſe they make no Award, then to the Award of ſuch Umpire as they ſhall chooſe; they chooſe J. S. for Umpire, he refuſeth to intermeddle; they chooſe another, he makes an Award. If good? For on one ſide it is ſaid they have executed their Authority, and cannot make another; on the other ſide, he was no Umpire that refuſed to make an Award, and therefore none was choſen by them but this.

Fitz-Gerald *verſus* Clanrickard.

Intr. Mich. 2 Jac. 2. Rot. 120.

ERROR on a Judgment in Banco Regis in Ireland. If want of a Warrant of Attorney be aſſigned for Error, you muſt pray a Certiorari to certifie that there is none; and if no Certificate, then the Error falls to the ground. The ſame is for want of Admiſſion of a Guardian, which is upon another Roll, (viz.) the Philazers, and therefore you ought to pray a Certiorari when you aſſign that for Error. Per Holt.

Dominus Rex *verſus* Fairfax.

Juſtices may compel a man to take an Apprentice againſt his will.

ORder of Seſſions upon a man to take an Apprentice, moved to be quaſhed by Serjeant Powell, for they cannot compel any man to take an Apprentice againſt his will; the effect of the Statute is to make an Infant's Indenture of Apprenticeſhip valid, notwithſtanding his Non-age; and the Statute ſays, as the parties ſhall agree, which governs

the

the whole Clauſe, and ſhews plainly it was not their deſign to make it compulſive. Then for the 43 Eliz. cap. 2. par. 5. theſe words, where they ſhall ſee convenient, will not bear ſuch a conſtruction as to make it compulſory; whereas before they could only bind them to Tillage, now they can bind them to other Trades, for that they make a Rate for it; beſides, had they this Power, there would be no occaſion for a Stock of Money to do it with. Then by 1 Jac. 1. cap. 25. that enables the Maſter to take and keep them. Objection. The General Practice. I ſay that ariſes upon this miſtake of the Judges Reſolutions in Dalton's Juſtice; whereas Twiſden ſaid they were never the Reſolutions of the Judges, they were drawn for the purpoſe as reaſonable, but never agreed unto.

Objection. That the Act then will have no effect. 'Tis a miſtake, for they may raiſe a Stock. Then Pyne's Caſe, Hill. 29, 31 Car. 2. is expreſs, and Twiſden declared it to be the Opinion of all the Judges then. Sid. 411.

Somers è contra. That they may compel. The words are plain, where they ſhall ſee convenient; thoſe Reſolutions were ſo agreed and brought in by Hide, and none but Mr. Juſtice Jones did differ from them, and the ſettled Practice hath been all along accordingly, Sid. 99. and the end of the Statute of Jac. 1. was to excuſe the Maſter from the Penalties of former Laws.

Holt. The Statute meant ſomewhat when it gave a Power to raiſe a Stock, that the Maſter ſhould have Money with them, I think otherwiſe it were needleſs, ſo that by my Opinion they cannot compel.

Dolben. In 1662. Dominus Rex *verſus* Gilliflower, before Foſter, it was reſolved that they were compellable, and Foſter declared that it was ſo reſolved in the beginning of King James's Reign. In 12 Car. Hutton and Crooke declared it for Law at Derby. In Pyne's Caſe ſeveral of the Judges did tell me that they were of a different Opinion, and I think the Practice is according to the Law.

Gregory. The Inconveniencies will be greater the other way by mighty Cares; if a Servant be diſorderly the Houſe of Correction will reach him. Eyres. Where a Statute gives a Power it gives all that is neceſſary to that Power, the Juſtices have power to diſcharge the Apprentice; I take it, they have diſtinct Powers, they may bind to Husbandry by Compulſion, but not to others without Money.

Holt

Holt. Then in Husbandry only they can bind by Compulſion. Dolbin in 6. Car. 1. whether an Apprentice may be impoſed on a Clergyman, and all the Judges in England gave their Opinion for it. Sir Bulſtrode Whitlock's Memoirs 16. and in Bulſtrode's Reports are moſt of the Reſolutions that are in Dalton; but the Order was quaſhed becauſe made by the Seſſions originally, and not by Appeal, and Holt ſaid becauſe it was not in Husbandry: But per touts les autres Judges, le partie eſt compellable al prender un Apprentice, ou al meins en Husbandry.

Duppa *verſ.* Gerrard.

Vid. les Pleadings Trin. ult. Rot. 21.

SPecial Action of the Caſe for Fees for being Knighted, as a cuſtomary Duty upon the Debit' & conſuet' fore ſolut', and an Indebitatus for ſo much in that manner due for his Fee, as ſuch an Officer, &c. Demurrer al' Narr'. Judic' pro Quer' according to the Caſe of the ſame Plaintiff againſt Stephens in Com' Banco ſome years ſince.

Breas *verſus* Baſpoole.

Entr. Trin. ult. Rot. 22.

COnſideration paſt is not traverſable, agreed without much Debate, on aſſumpſit, &c.

Brandling *verſus* Milbanck.

Ent. Paſch. 4 Jac. 2. Rot. 316.

A general Judgment againſt an Heir on a falſe Plea.

ERror ſur Judgment en Com' Banco. Debt ſur' Oblig' againſt an Heir, he pleads payment by his Anceſtors, Judgment general is given againſt him. Hoil argued, that this is ill; the Caſe of Davis and Pepyes in Plow. 440. was never adjudged. 1 Cro. 437. held that non eſt factum pleaded to Annuity brought againſt an Heir, upon the Deed of his Anceſtors will not produce a general Judgment, and in the Caſe of Bowyer againſt Rivelt, Pop. 153. that Caſe of Pepyes is denied to be Law, and ſo is it in Jones 1688. and of this Opinion was Dolbin ſtrongly, and that there was no reaſon why an Heir ſhould be more charged upon ſuch a Plea than an Executor.

Holt. An

Holt. An Heir is bound expreſs by Name; an Executor only repreſents the perſon of the Teſtator, and upon Nil Dicit a general Judgment, and ſo are ſeveral Caſes, Rolls 2. Abr' Tit' Heir, and a ſpecial Judgment would have been Erroneous, unleſs prayed by the Plaintiff, and per him Gregory and Eyres (againſt Dolbin's Opinion) Judgment was affirmed.

Coleman *verſus* Sherwyn.
Hoc Termino, Moore Att'

COvenant (on the word Demiſe,) breach that the Defendant, and another by his Command did enter, &c. the Defendant in his Plea Traverſes, abſque hoc that the Defendant and the other did enter modo & forma, &c. Demurrer. Plea argued to be ill, becauſe if either did enter it is a good breach, and therefore the Traverſe is ill .... E con' it is a joynt Covenant. Three Demiſe, and none have any thing. Covenant ought to be brought againſt all of them; they ſay that the Defendant and two more let the Land by Deed Poll, and averr, that J. S. was ſeized in Fee and ſo by their own ſhewing there was no Eſtate; now the Covenant in Law muſt be fixed upon ſome Eſtate, and ſo is Ware's Caſe, Rolls Tit' Covenant 520.

Court. Holder and Taylor's Caſe in Hobert is expreſs, that Covenant lies upon the word Dimiſi, and ſo is Fitz-herbert Tit' Covenant. If the Leſſor himſelf do enter, &c. as to the other point, three do demiſe, one enters; this is well enough, for it is his own Act, and in Conſtruction each did demiſe; it is a general Covenant as to their own Acts, and the Traverſe is good, for he Traverſes it as the breach is laid, and in a ſpecial Iſſue you need not ſay, nec eorum aliquis, as you muſt upon a general Iſſue; and the Court did accordingly hold both Declaration and Plea to be good, and therefore the Demurrer ill. Judic' pro Defendente.

Trevil-

Trevillian *verſus* Seccombe.
Entr. Trin. 3 Jac. 2. Rot. 788.

Several Outlawries pleaded in Abatement.

CAſe. Defendant pleads ſeven ſeveral Outlawries of the Plaintiff in ſeveral Actions; and in abatement to this the Plaintiff Demurrs, and urged that it was ill, and that doubleneſs of Plea is a fault in all Pleas in abatement as well as in Barr. E con' urged per Tremayne, that Paſch. 25 Car. 2. againſt Vaughan in this Court, two Outlawries were pleaded, and upon his importunity Adjornat', though per Cur' you may as well plead twenty ſeveral Excommunications, whereas any one diſables; ſuppoſe one of the Outlawries be ill pleaded, who ſhall have Judgment? Sed Adjornat'.

Sympſon *verſus* Inhabitants of *Penryth*, &c.

DIſtringas for throwing down Fences, &c. quaſhed, becauſe there were not fifteen days between the Teſte and Return. Then moved to be amended; but per Cur' all miſtakes in not following of Inſtructions are not amendable by the Statute of H. 6. but ſuch only as are proper to ariſe from the direction of the party, as debet & detinet where ought not to be is not amendable: The Teſte of an Original is not amendable, becauſe it is not form, and becauſe it is not from the Inſtruction of the Client but a miſtake of the Law, and denied to be amended, V. Rolls Tit' Amendment. Writ of entry Teſted 14 Feb. Ret' Octabis Pur' not amendable.

Chamlet *and* Ux' *verſus* Griffin.

CAſe for words ſpoken at ſeveral times, and moved in arreſt of Judgment, that ſome were not Actionable. Hooper prayed Judgment, becauſe admitting that, yet if the latter words are of the ſame Senſe Explanatory of the former, it will be well enough, tho' of themſelves they are not Actionable, and that was the difference in Jackſon's and Tanner's Caſe in 1. Cro. 327. Adjornat' Quere de hoc.

Bickerſtaff

Bickerſtaff *verſus* Holden.

DEBT on the Statute of Tythes. Per Cur. no need of a Capiatur, becauſe 'tis not Tranſg' & Contempt. Notwithſtanding Beecher's Caſe Oldfeild and Lee, Inhabitants of Witherley, held well enough without it.

Bradſhaw *verſus* Swanſton.

PRohibition denied in a Suit for Tythes on Suggeſtion of a Compoſition, for per Cur. the Law hath been taken otherwiſe.

Parker *verſus* Gage.

TRover. On Non cul. A Trial before Chief Juſtice Holt. The Queſtion being about an Houſe ſeized for a Heriot. Held by Holt, that either Heriot Service or Cuſtom is ſeizable off the Manor, becauſe it lies en prender; an Heriot Service is founded on antient Tenure. A Suit Heriot reſerved by Deed cannot be taken off the Manor. Heriot not ſeized off the Manor.

Saunderſon *verſus* Nicholle.

UPon Evidence Ruled per C. J. Holt, that in Debt plene Adminiſtravit admits the Debt, but otherwiſe in an Action on the Caſe, or in an Indebit. Aſſumpſit, for there the Plaintiff muſt prove the Debt; and per Holt in proof of a plene Adminiſtravit, if the Action be Debt on a Bond, and you offer payment of a Bond, on plene Adminiſtravit, proof muſt be 'twas a Debt by Bond, that 'twas Sealed and Delivered; but to Debt on ſimple Contract you need only prove payment, becauſe if no Bond 'tis a good Adminiſtration in that Action. Where pleading *plene Adminiſtravit* admits the Debt.

Term. Hill.

1 Will. & Mar.

Thursby *verſus* Halburt.
Intr Mich. Ult. 435.

An Award to Sue a Bond with Sureties, avoids only as to the Sureties.

DEbt on a Bond with Condition to perform Award, the Award is that the Defendant ſhould Seal and Execute a Bond with Sureties of the penalty of 200 l. for payment of 100 l. and thereupon the Plaintiff to Releaſe.

Nul tiel Award pleaded, the breach aſſigned was that the Defendant did not become bound. After Verdict pro Quer. Sir Francis Pemberton moved in Arreſt of Judgment that there was no good Award, for that 'twas void, being concerning the Act of a Stranger.

Per Cur. It is void only as to the Sureties, but good ſo as to bind the Party to become Bound.

Per Pemberton, then it is only an Award on one ſide, for the Releaſe, is not to be given, but upon Sealing ſuch Bond, and ſuch Bond with Sureties never being to be Sealed, there is not to be any Releaſe and conſequently the Award void; and cited the Caſe of Barney and Fairchild, in Roll. 1. Abr. 259. Award that A. and his Son ſhould paſs an Eſtate, and that 8 l. ſhould be paid, &c. and in Arreſt of Judgment held ill, becauſe void as to the Son being no Party, and that being the conſideration why the Money was to be paid; and the Money being to be paid in conſideration of ſuch aſſurance the Award is void, though there be other conſideration on both parts in the Award. And per Cur. the principal Caſe ſtated till moved on the other ſide. Vide poſtea.

King

King *verſus* Dilliſton.

Entr. Hill. 2 & 3. Jac. 2. Rot. 494.

ERror on Judgment ſur Special Verdict en Ejectione firmæ in Com' Banco. It was now argued by the Judges Seriatim. Eyres, The point is whether John Freeman the Infant be bound by this Cuſtom ſo as to make a Seizure or Forfeiture. The Court of Common Pleas have adjudged it pur Defendants, and I think well, and that Judgment muſt be affirmed. Firſt, I take it that we cannot intend this Seizure found in this Special Verdict any otherwiſe than as an abſolute Forfeiture, and not a Temporary one, there is no qualification found, for we muſt intend it as they have found it; they are two diſtinct Cuſtoms in their Nature: It is true, a reaſonable intendment is to be made upon a Verdict, but that muſt be where nothing is found to impugne it, Hob. 262. and Morice and Prince's Caſe, 1 Cro. 521. is expreſs that we cannot intend any thing otherwiſe than they have found it, as Demand and Denial of Rent found ſhall not be intended upon the Land: The ſame is in 2 Rolls Abridg' 698. In Aſhfeild's Caſe, Jones 157. an Infant Copyholder makes a Feoffment in Fee, 'tis no Forfeiture at all, but when he pleaſes he may Enter.

A Fact not found cannot be intended in a Verdict.

If the Cuſtom had been expreſly found, that an Infant or Man of full age do not come in it ſhall be a Forfeiture, this had been good, for an expreſs Cuſtom may bind an Infant; and ſo is Seeme's Caſe 1 Leonard 266. Of the Lord's appointing one to receive the Profits during Non-age: So 'tis in the Caſe of an Office, a Condition expreſs will bind an Infant. Whittingham's Caſe, 8 Rep. 44. So 1 Inſtit. 246. Infancy ſhall be no Privilege where the publick Repoſe of the Realm is concerned, or againſt the King.

Cuſtom binds an Infant.

The Quære is only whether this Cuſtom as here found generally will bind, or doth extend to an Infant; and I think it doth not, becauſe he is not by expreſs Words within it. Firſt, the Rights of Infants are much favoured, 1 Inſtit. 246. and the reaſon is the preſumption in Law, that the Infant doth not know his Right. Infant ſhall have his age in a Ceſſavit; That I think is the better Opinion upon compariſon of the Books, tho' ſome ſeem againſt it, 2 Inſtit. 401. 9 Rep. 85. 1 Inſtit. 380. 'Tis true, in ſome Caſes an Infant hath no Privilege, as in Caſe of Church, Life and Liberty, 1 Inſtit. 233, 234. where the Statutes give a remedy by an

Action he is bound, otherwiſe where an Entry is given, as in Caſe of the Statute of Mortmain.

A general Cuſtom ſhall not bind an Infant. All Cuſtoms are to have a reaſonable intendment, as if a Cuſtom be for an Infant to make a Feoffment, Infant Tenant in Tail cannot do it, but only Tenant in Fe-ſimple, Rolls 1 Abr' 567. Yelverton 1. 3 Cro. 879. Remainder man not bound by the Cuſtom, becauſe it muſt be taken ſtrictly. In Sir Richard Lechford's Caſe, 8 Rep. the Cuſtom is to be intended, ſo as the Heir be of full age, ſound Memory and out of Priſon. Infants are exempt by reaſonable conſtruction out of Statutes, though within the general Words, Merton cap. 6. Stowell's Caſe, Plowd. 364. Infant is not within the meaning of the Cuſtom, he is not within the Words of it; for that is for thoſe that had a Right to come in after ſuch a Surrender. Now the Infant was not the Man who had the Right to come in then, but the Father. He is here found to have no other Title than that of Son and Heir to his Father. A Copyhold ſhall diſcend according to the common Rules of the Law, unleſs particular Cuſtom alter and order it otherwiſe, and therefore the Infant is not within either meaning as to a Temporary or abſolute Forfeiture. Infant is not within other Cuſtoms, and ſo is Aſſiz. 5. Rolls 1 Abr' 567. Jones 157. Noy 92. There is no neceſſity to conſtrue the Infant within this Cuſtom, there being no prejudice to the Lady of the Manor; for 'tis not found that the Lady was to have a Fine, and we cannot intend it being matter of Fact not found by the Jury, and no Fine is found to be due; the Lady wants not a Tenant, for till admittance the Surrenderor continues Tenant, and from him ſhe is to have her Rights and Services, 3 Cro. 346. Yelv. 16. I take Sir Richard Lechford's Caſe to be expreſs, for our Caſe is in the nature of a Diſcent as theirs was, ours is ſtronger; there the alteration was by the Act of God, to which the Lord of the Manor was no way privy, but here 'tis by their own Concurrence, viz. accepting the Surrender, 1 Leon. 1 co. Rumney and Eves's Caſe is expreſs, that Infant is not bound to come to any Court for admittance during his Non-age. The ſame in Anderſon and Heywood's Caſe, 3 Leonard 221. I am apt to deny the Opinion of Juſtice Williams in Crooke, which is an Opinion Obiter, and to which the other Judges ſpeak nothing, nor is it mentioned by Cro. I conclude the Judgment in the Common Pleas is well given.

Gregory.

Gregory. Whether the right of the Infant be forfeited by reaſon of his Non-claim is the Quære And I conceive his right is not forfeited. If the Surrenderee die before Admittance, the Heir ſhall have the Land, 2 Siderf. 37. 61. Blunt and Clerk's Caſe, the Heir hath ſuch a right to keep the Poſſeſſion againſt the Lord, that he cannot be removed till he doth ſome Act to forfeit it: The Intereſt of the Surrenderor is bound by the Preſentment of the Surrender in Court, his Intereſt is determined by the Preſentment, for till then 'tis no Conveyance, but after Preſentment the Lord is bound to take notice of it; and it lies not in the power of the Surrenderor to do any act to weaken his Surrender. And ſo is Burgoine and Spalding's Caſe, Cro. Car. 283. and in Rolls 1 Abr' 500. 'tis ſaid the Eſtate remains in the Surrenderor till Preſentment, and from thence he inferred, that after Preſentment 'twas in the Surrenderee, becauſe the Lord was bound to admit according to it, Quære Conſequentiam, car le Ley eſt autrement, and ſo agreed by all the other Judges. Here is nothing but the Title of the Infant concerned in the Queſtion, ſo that here the Infant being the Perſon concerned by reaſon of ſuch his Infancy is not to be preſumed able to proſecute his Claim; he cited Noy 92. Jones 157. Of an Infants Feoffment not making a Forfeiture, and if voluntary Acts ſhall not prejudice an Infant, much leſs ſhall an omiſſion damage him; here is a cuſtomary Right diſcended to him, and the Jury have expreſly found it ſo, and therefore an Infant cannot reaſonably be preſumed within the Cuſtom.

Dolbin. The Judgment ought to be affirmed. Copyhold Lands are ſurrendred out of Court to the uſe of one Freeman and his Heirs. Freeman dies before the next Court, then the Surrender is preſented, and the Infant does not come after three Proclamations, and then the Cuſtom is found, &c. Quære Whether an Infant be bound by this Cuſtom: And I take it the Infant is out of it by the reaſon and conſtruction of the Law, and I cannot agree with my Brother Eyre, that a Cuſtom to bar an Infant expreſly would bind him, for I think 'twould be void, but that is not our Caſe. This is agreeable to the Reaſon of the Law in other Caſes; a Fine at Common Law barred all People that did not claim within a Year and a Day, but an Infant was excepted: I argue from the reaſon of that Caſe. It is the juſtice of the Common Law to privilege Infancy, as in Stowell's Caſe: To make an Infant or Madman to uſe Reaſon that have no Reaſon, would be an unreaſonable thing: In the Doctor and Student

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an Infant is excuſed by the Law of Reaſon, now if he ſhall be exempted out of the Common Law, much more from a Special Cuſtom. Here is the Caſe of an Heir of a Surrenderee, which is ſtronger than where the Heir of a Copyholder is an Infant, for there the Lord wants a Tenant, here he doth not, for without my Brother Gregories Opinion, I take it, the Surrenderor continues Tenant. The Cuſtom and Uſage of moſt Copyholders is ſo. I was Steward of Twenty ſix Copyhold Manors, and in every one of them was this Cuſtom. Our conſtant Entry was nulla Proclamatio quia Infans.

Obj. It ſhall be a Forfeiture quouſq; and when he comes and tenders his Fine he ſhall be then admitted, and tho' the Cuſtom be found generally, the Law ſhall make ſuch a reaſonable conſtruction.

I Anſwer, not. I take it that an Infant is generally out of it, and thoſe who argue on the other ſide do ſay that an Infant is exempted in part, why not then in the whole? By the Common Law for a Fine he needed not have claimed within a Year and a Day, why then ſhould he not have time here after he comes of Age, whereas he is exempt generally?

Obj. The Lord then ſhall loſe his Fine.

Anſwer, No Fine is due till Admittance, and ſo he cannot properly be ſaid to loſe that which he never had. But conſider the loſs of the Infants Inheritance, and ſet it in the Scale with the Lords Fine; the Lord hath only the Fine delay'd till the Infant comes of Age: By moſt Copyhold Cuſtoms the Lord appoints a Guardian for an Infant, and himſelf is bound to come in within three Proclamations after he is of Age, and he can have no Eſtate, becauſe he cannot be Tenant by the Cuſtom till he be admitted; but when he is admitted, I think the Lord may ſet a Fine with regard to the time of his delay of being admitted, as four Years for inſtance inſtead of two. In ſome Manors, as Harrow on the Hill, Hayes and Croyden's Caſe, If a Stranger purchaſe Land he ſhall pay five or ſix Years value for a Fine, but a Copyholder ſhall only pay two pence, or the like; and a Lord may Increaſe his Fine upon this account as well as upon that. As to Stowel and Zouch's Caſe that will not reach us, for that is not grounded on 4 Hen. 7. which was to deſtroy Claims. The Opinion of Dyer, That there are many Manors in England where the Cuſtom is, that Non-admittance within a Year and a Day ſhall forfeit, though an Infant, that is his Opinion, but I think he is out of the Cuſtom,

ſtom, beſides as to the finding of this Verdict, here is no Title found, it is not found that the Land ſhall be forfeited, but only that the Bailiff ſhall enter and ſeize as forfeited, and without a Forfeiture the Lord cannot maintain an Ejectione firmæ, &c.

Lord Chief Juſtice Holt, E cont. My Brothers have argued very much upon the Privileges of Infants, moſt of which I do agree to. But that which governs my Opinion is this, That during and until the Heir of the Surrenderee be admitted, the Eſtate of the Copyhold remains in the Surrenderor, and then the Eſtate of the Lord remaining in the Surrenderor, the Infancy of the Heir of the Surrenderee cannot affect this Caſe, Yelverton 145. 3 Cro. 345. the Surrenderee till admittance hath neither jus in Re nor ad Rem, nor hath the Party any remedy if the Lord refuſe to admit, 2 Cro. 368. So that it is plain the Infant till Admittance is a meer Stranger to the Eſtate, and that being conſidered, it is very ſtrange that his Infancy ſhall protect another Man's Eſtate. If an Infant makes a Feoffment and dies without Heir, the Feoffment is void, and none ſhall take advantage of the Infancy; the Lord by Eſcheat ſhall not, becauſe a Stranger. If an Infant Tenant in Tail make a Feoffment and die without Iſſue, none that are Strangers in Blood ſhall take advantage of the Infancy, and here the Surrenderor whoſe Eſtate the Land is, is a meer Stranger.

The Infant is at no prejudice. Is it any more to the Infants loſs, or diſadvantage whether the Lord or the Surrenderor have the profits; the Forfeiture is committed by the Surrenderor not by the Infant, i. e. in making ſuch an Eſtate to ſuch a Man, who will not come in and take it up, and why ſhould he enjoy againſt the Lord?

'Tis a Forfeiture, but defeazable. Firſt, becauſe 'tis a Condition annexed to the Eſtate, this being the Cuſtom of the Manor, 'tis the Law of the Place, and being Copyhold he muſt perform the Conditions required. Infant making a Leaſe for Years, 'tis a Forfeiture but voidable by an Entry when he pleaſe, Latch. 199.

This Cuſtom that obliges the Infant is to intitle the Lord to a Fine. Infancy ſhall be extended to delay a remedy but never to endanger it, and here a Fine is incident by the Common Law to all Copyholds; ſuppoſe the Infant dies the Lord can never have conſideration of his former Fine. Where the Anceſtor is bound, and a remedy is to be had againſt an Infant, he ſhall have his Age, becauſe he ſhall not be intangled in Buſineſs, but that is only a delay; where

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an Infant has Right, as if a Diſcent be caſt, his Right ſhall not be taken away by a wrong doer through his Lacheſſe: But here is a quite different Caſe, the Lord is in danger of loſing his Fine. Feme Covert is Heir to a Copyholder, and there are three Proclamations made, and ſhe and her Husband do not come in, the Lord ſhall Seize, and tis a Forfeiture during the Coverture, 1 Cro. 7. The reaſon of Coverture is the ſame with that of Infancy; if you ſave it to an Infant you muſt ſave it to a Feme Covert, for there is no difference.

Sir Richard Lechford's Caſe hath been inſiſted on as an Authority in the Point, the Caſe is certainly Law. If he comes in and prays to be admitted, he ſhall be ſo, and ſo here. Crook held the Heir bound though beyond Sea. Williams that argued it firſt, ſaid the Lord is at no miſchief and may ſeize quouſq; and take profits quouſq; &c. I look upon it as the Agreement of all the Judges. As to 1 Leon. 100. that was not the point in Queſtion, but a ſaying no ways neceſſary to the Caſe. No Man is bound to come in, but only, if and when there are Proclamations. Infant Freeholder that holds by Knight Service, the Lord ſhall take the profits. There is no more reaſon for that than for this of baſe Villenage; the reaſon of the other is, becauſe tis an incident to the Tenure. Is it not ſo here in this Caſe? The reaſon why the Law takes care of Infants is to preſerve the Inheritance not the mean profits, here is no loſs to the Infants Inheritance in this Caſe, nor any benefit to him by the other conſtruction, but only to the Surrenderor; wherefore I am of Opinion that the Judgment is ill; but becauſe all my Brothers are of another Mind, it muſt be affirmed.

Lee *verſus* Libb.

Vide Supra. 60.

A Will with one Witneſs and an other confirms the Will with one Witneſs not within the Statute.

SEE the Caſe and Arguments before. Chief Juſtice Holt now delivered the Opinion of the Court, The Quære on this Special Verdict is, if this be a good Will. We are all of Opinion, that this is not a good Will within the Statute: Here is a bequeſt, a Deviſe not atteſted by three Witneſſes. The Act requires that the Party Sign the Will in the Preſence of three Witneſſes, the third Witneſs is not a Witneſs to the firſt, and cannot prove the firſt, whereas the three Witneſſes are to prove all things the Statute requires. Judic. pro Quer.

Edleſtone

Edleſtone *verſus* Speake.

Intr. Trin. Ult. 243.

EJectment, Special Verdict. Upon a Trial at the Bar the Jury finds that the Plaintiff's Leſſor is Heir at Law to J. S. That J. S. by Will according to the Statute deviſed the Lands in queſtion to the Defendant. Then they find another Writing publiſhed by the Teſtator, as his laſt Will in the preſence of three Witneſſes, revoking all other and former Wills, and that the Witneſſes to this laſt ſubſcribed their Names thereto in the Hall adjoining to the Room where ſhe was, but in ſuch a place that ſhe could not ſee the Witneſſes, which laſt Writing gave the ſame Land to the Defendant. Et ſi, &c.

A good Will deviſes Lands, another Will deviſes the ſame Lands to the ſame Perſon, but not atteſted by three Witneſſes in the preſence of the Teſtator, no Revocation of the firſt Will.

Williams argued pro Quer. That this laſt is a good Writing to Revoke within the Clauſe in the Statute of Frauds and Perjuries, though it be not a good Will to paſs Lands: I agree it no good Will, becauſe the Witneſſes did not ſubſcribe their Names in the Teſtators Preſence, and therefore the Deviſe is a void Deviſe of the Lands in queſtion; that is a requiſite neceſſary by a poſitive Law, and not to be helpt by any Conſtruction or other Intendment; 'tis a Conſtitutive Law, and therefore ſtrictly to be purſued; but though it be void as to a Deviſe of the Lands, yet 'tis a good Revocation within the words of that Clauſe, that no Will ſhall be revoked, but by ſome Will or other Writing, declaring the ſame. Here is a Writing declaring the ſame; the Clauſe about Wills is cautiouſly penned, it doth not make the Will void for want of ſubſcription of Witneſſes, 'tis only all bequeſts of Lands ſhall be void; ſo that it remains ſtill as a Will, and it being a Will, and declaring all other Wills to be revoked, 'tis a Will to all other purpoſes except a Deviſe of Land: 'Tis a Writing within the Clauſe of Revocation, it hath all the Circumſtances required in and by that Clauſe. A little thing would make a Revocation formerly; by the 32 of Hen. 8. of Wills there is nothing of what ſhall be a Revocation, and Dyer 143. a Revocation might be by word of Mouth; if there be Facts inconſiſtent with an Intention or Will to give the Land, they make a Revocation, as the Sale of Land is a Revocation, though when it is repurchaſed a Republication will do. A Will is but an Ambulatory Inſtrument, an inchoate Act that may be repealed by a very ſmall matter: Upon this

Act, if a Man makes a Will according to these Circumstances, a Feoffment will be no Revocation, for 'tis not within the express words of this Clause, but ours observes that Clause intirely. A Devise by Parol was void as to make a Devise; yet before this Statute 'twas a Revocation. A Feoffment without Execution was held a countermand of a Will in Montague and Jeffery's Case 429. the same in Rolls Abridgment, tit. Devise 514, 515. A Devise to Persons incapable of taking, tho' void, is deemed a Revocation, & pari ratione here; so tho' no good Will, yet 'tis a Revocation.

Mr. Finch è cont. 'Tis not said to be in her Presence, but however I'le agree it not a good Will, and we Claim by the other; and if this second be an alteration, it must be as a good Will, and then the Land is ours that way too; or else as 'tis a Writing; 'tis no alteration as 'tis a Will; the first is a Devise of Lands, and now that cannot be altered but by a Will that concerns the same thing, (viz.) a Devise of the Lands another way, and this is not pretended to: How can a Will be called a Will when every Devise in it is void? A Will concerning Land cannot be good if the Devise of that Land be void, and a Will concerning Land cannot be revoked, but by another Will concerning the same Land, and therefore the last Will being void as to the Land 'tis no Revocation; the intent was to prevent the mischief of parol Revocation, now here is no Will that hath revoked it; then here is another Writing, now this is no Writing within the meaning of the Act, for the meaning is a Writing operating as a Will. A Man has a power of Revocation by Deed or Writing, and he makes a Will, this is a Writing, and yet 'tis no present Revocation, though it be a Writing; this last confirms the Devise of the former, and how that can be a Revocation is hard to be imagined. To make a Revocation it must be a Writing declaring his intention to make the Devise void, whereas here his intention is to make a Will confirming of the former; his intention here was to declare it a Revocation no otherwise than as a Will, and then he intended it to confirm the first, and so he concluded it no Revocation.

Lord Chief Justice Holt to Mr. Williams, Is this an act inconsistent with the first devise of the Land, or doth this any ways contract his former intention of giving the Land to the Defendant? And afterwards Judgment was given for the Defendant.

Note,

Note, It was ſaid by Chief Juſtice Holt, and not denied by the reſt of the Court, that if a Deviſe be to A. and B. and their Heirs, and A. dies before the Teſtator, the other ſhall have the whole by Survivorſhip. A Deviſe of Lands to two, one dies before the Teſtator. the whole ſurvives to the other.

Nightingale *verſus* Adams.

HEld by Chief Juſtice Pollexfen upon Evidence in this Caſe at Guild-hall, in a Replevin for Goods taken by Order of the Eaſt-India Company, as Interlopers in the Indies, that no Replevin lies for Goods taken beyond the Seas, though brought hither by the Defendant afterwards.

Note, That if a Woman gives a Warrant of Attorney and then Marries, you may file a Bill and enter Judgment againſt both by the practice of the Court. Ruled upon motion. A Woman gives a Warrant of Attorney and marries.

Held by Chief Juſtice Holt upon the Statute of Limitations, That Dublin or any other place in Ireland is beyond Sea within the meaning of that Clauſe in that Statute, Ruled ſo by him upon conſideration. *Ireland* beyond Sea, within the Statute of Limitations.

Memorandum, That in Chambers and Garret's Caſe this Term the Lord Chief Juſtice Holt refuſed to permit me to urge or argue any Exception to a Declaration upon a Demurrer to a Plea in Abatement.

Term. Paſch.

2 Will. & Mar.

Price *verſus* Langford.

Entr. Hill. 2 & 3 Jac. 2. Rot. 1059.

Ejectment. Special Verdict.

EJectment, Special Verdict. The Caſe was, that J. S. was ſeized of Lands in Fee, as Heir of the part of his Mother, and he and his Wife with Warranty Levy a Fine, to J. N. and J. D. and they by the ſame Fine do grant and render, to the uſe of the Husband and Wife, and the Heirs of their two Bodies, Remainder to the right Heirs of the Husband; the Quære was, if this did alter the diſcent or change the Eſtate ſo as to make the Heirs by his Father to be Inheritable?

Mr. Row pro Quer. That it did not, That the Fine alters no Eſtate, but that it remained as it was before.

The Law ſhall reject the new Title and judge the Heir in of the old: So it is in Caſe of Deviſe to an Heir, the Law ſhall reject the Deviſe and judge him in of the Eſtate diſcended: In a Fine ſur Grant & Render the Conuſee paſſes nothing, but in reality the Conuſor's intention governs the whole; a Feme Covert need not to be examined in it, Dyer 311. Moore 45. an uſe may be of a Fine ſur Grant & Render, though the Opinion was otherwiſe formerly, Popham 104. 3 Leon. 11. 8 Hen. 4. 12. 6. If the Conuſee of ſuch a Fine were Leſſee for Years, that would not extinguiſh the Term, and that is an Argument he hath no poſſeſſion, 2 Cro. 612. 7 Rep. 39. 1 Cro. 191. 15 Edw. 3. Fitzh. Petition 2. A Conuſee of ſuch a Fine cannot Forfeit; ſuppoſe the Conuſee of ſuch a Fine were a Villain to the King, might the King have ſeized the Land? Suppoſe he were an Abbot, would that be within the Statute of Mortmain? He cannot bring a quid juris clamat. becauſe he hath no Eſtate, there is no inſtance in which he hath a Seizin as to found that Writ; 'tis like the Caſe of a Sur-

Surrender of a Copyhold, and there is never any Eſtate in the Lord, he is but an Inſtrument, 1 Leon. 102. Lord Cromwell's Caſe, 2 Rep. Held there, that the Conuſee of a Fine was moſt like a Demandant in a Recovery, who is only a formal Inſtrument for the Conveyance of the Land, Dyer 172. 1 Inſtit. 365, 366.

Then further a Fine ſur Grant & Render is a fine Executory, and here is no Execution found; whether he is not put to a Scire facias, or whether the Eſtate may not be executed by an Entry is a Quære; but if the latter, yet here is no ſuch Entry found as will Execute this Fine, for it is intravit clamans ut hæres, and that will not do, Fitzh. Scire facias 65. An Entry Clamans is not ſufficient; 'tis not every Entry that will ſeem to veſt an Eſtate, 1 Saund. 119. Entry in Ejectment will not amount to an Entry to avoid a Fine.

Hooper è cont', This doth alter the Eſtate; for the firſt Inſtit. is expreſs, that by a Reinfeoffment he taks as a new Purchaſor. He cited as poſitive and expreſs Authority the Caſe of White and Geerich, Cro. Eliz 727, 792. and Sir Moyle Finche's Caſe, 6 Rep. And as to the Caſe of Uſes thoſe come not up to this; for the Uſe goes according as the Land ſhould have done, if no ſuch Conveyance had been.

The word Render ex vi termini imports that he had the Eſtate in him. 'Tis true he could not bring a Quid juris Clamat', becauſe the inſtant it was in him it goes to the other. Then for Warranty, it may be annexed to it, Cro. Eliz. 17.

Chief Juſtice Holt. The Caſes of Uſes come not to it; for before the Statute they were but things in Equity. It is an Eſtate in the Conuſee, and the Render is a new Purchaſe: Now upon an Uſe at Common Law, he could not reenfeoff to the Heirs of the part of the Mother, becauſe there could be no ſuch Uſe.

This is a Conveyance at the Common Law, the Conuſor now claims under the Render: The Caſes of Uſes are different. If a Feoffment be made to a Man attainted before, and he reinfeoff, the King ſhall have it. Which ſhews the Eſtate was in him; and this Fine and Render is a Feoffment and Refeoffment at Common Law.

Judic' p Defend' per totam Curiam. Vide 1 Inſtit. 73.

One ſeized of Lands as Heir to his Mother, levies a Fine with Warranty, *ſur Grant & Render*, to his own right Heir, the Render is a new Purchaſe and ſhould make the Eſtate deſcendable to the Heir of the Father

Aiſhcombe

Aiſhcome *verſus* Le hundred de Spelholme.
Ent. Hill. ult 901.

Two Servants and each Robbed of Money, one only Swears not ſufficient to charge the Hundred with the Money each had.

TReſpaſs. Special Verdict. The point was, That the Plaintiff had two Servants who had each Money in their ſeveral Portmantles, and only one Swears (the other being a Quaker) if this be ſufficient to charge the Hundred with the Money each had, both being Robbed, within the Statute of 27 Eliz.

'Twas urged, That this Statute had been conſtrued favourably for Relief, and that as to Notice to the next Ville, it hath been held that it is ſufficient for one in the Company to give Notice, though the words ſeem literally to mean the Party Robbed: If a Servant be Robbed, the Maſter may bring the Action, which is only by conſtruction, and cited the Caſe of Jones againſt the Hundred of Bromley in Kent, argued Michaelmas 1658. Ent. Hill. 1656. An Action for a Robbery committed upon his Wife's Servants and himſelf, and the Maſter's Money taken from the Servant. The Quære was, if the Maſter's Oath were ſufficient without the Servant's, and held ſufficient. Glynn ſaid there needed not ſeveral Affidavits. 'Twas urged that though the Money was in the Poſſeſſion of the Servant, 'twas in conſtruction of the Law in the Maſter's Poſſeſſion; now ſince the Maſter may bring the Action, the caſe is the ſame; beſides the two Servants are but as one Man.

Lord Chief Juſtice Holt. The Statute of 27 Eliz. is made in favour of the Hundred, the Maſter's having the Action is by the Statute of Wincheſter, by this the Perſon muſt take the Oath from whom the Money was taken. 'Tis true, the Maſter is Robbed becauſe of his Property, but the Servant is the Perſon from whom the Money was taken, and this Act was never extended by Equity againſt the Hundred. As for the Caſe of Jones, its not to the purpoſe, for there the Maſter was actually preſent and the Party Robbed, and ſo there is a great difference. The Court inclined for the Defendant. Sed Adjornatur.

Agreed by all, that if on Evidence it appears the Robbery was by Combination, the Hundred is not liable.

Vide Stiles 156. 319. Roll Tit. Teſtimony in Tit. Trial. vide poſtea.

Memo-

Memorandum, That upon Evidence in an Aſſumpſit for Wares ſold it was held by Chief Juſtice Holt, That if a Man ſends his Servant with ready Money to buy Meat or other Goods, and the Servant buys upon Credit, the Maſter is not chargeable. But if a Servant uſually buys for the Maſter upon Tick, and the Servant buy ſome things without the Maſter's Order, yet if the Maſter were truſted by the Trader, the Maſter is chargeable. In what Caſes the Contract of the Servant will bind the Maſter.

Note, That the Continuances in Cheſter are always General, and have no Day certain.

Trin.

Term. Trin.

2 Will. & Mar.

Brickwood *verſus* Fanſhaw.

Entr. Hill. ult. Rot. 750.

3 *Jac.* 1. That an Attorney ſhall deliver a Bill, doth not extend to inferior Courts.

CASE for Fees as Attorney and Sollicitor in ſeveral Cauſes for the Defendant, both here and in the Burrough Court of Malden in Eſſex.

The Defendant pleads the Statute of 3 Jac. 1. that no Bill was delivered under Hand.

Demurrer, and per Cur. held to be out of the Statute becauſe it doth not extend to inferior Courts, and Judic' p Quer. Vide Allen 4. that doth not extend to Caſe upon a Special Promiſe.

Newton *verſus* Trigg.

Ent. Mich. 1 Jac. 1 Rot. 226.

An Innkeeper as ſuch no Bankrupt.

TReſpaſs. Special Verdict. The Point was, if a Man keeping an Inn and buys his Provender, &c. and vents them in his Inn as Innkeeper, be within the Statutes of Bankrupts.

Argued by Serjeant Tremain that he is not a Trader within them: An Innkeeper cannot ſet his own Prizes, but is bound to reaſonable Prizes; a Tradeſman may ſell to whom he pleaſes; an Innkeeper cannot refuſe his Gueſt, 2 Cro. 609. He doth not get by buying and ſelling, he gets by the price and hire of his Lodgings, by the Profit or Uſe of his Kitchin; the Profits from the Stables do not ariſe from the Hay only but from the Standing: Pratt *verſus* Criſpe, 1 Cro. March. The Building of Ships makes not a Man a Trader.

Sid. 461, 491.

Chief

Chief Juſtice Holt. An Innkeeper ſeems to be different, for he is not an univerſal Trader to all Perſons, but only to all Travellers that come. Beſides, he is not capable of ſelling at his own Prices, for this Court or the Judges of Aſſize may ſet them; he has not the Liberty of a free Trader. But I can ſee no difference between a London Innkeeper and one upon the Road in the Country.

Dolbin. The reaſon in Criſpe and Prat's Caſe was, becauſe 'twas his own Hay and his own Oats, here 'tis found he buys all and therefore different; he hath a Stock pro Negotiando.

Eyres ſaid he thought the better Opinion to be that he was out of the Statute. Sed Adjornatur. vid. poſtea.

Mordant *verſus* Thorold.

Intr. Hill. ult. Rot. 340.

SCire facias by the Executor of a Tenant in Dower on a Recognizance according to 17 Car. 2. to pay the mean Profits, if Judgment be affirmed. Demurrer.

An Executor of Tenant in Dower can not bring a *Scire fac'* on a Recognizance to pay mean Profits on affirmance of Judgment

Pemberton. The exception is, that this is a perſonalty and gon with the Perſon. I ſay its become a Duty, and the Recognizances make it ſuch and aſcertains it was ſuch, tho' there be a Scire fac. requiſite to adjuſt the quantum: This is like a Covenant to pay all the Profits that ſhould be incurred during the Suit; the Scire facias is but ancillary, an help to aſſiſt the Execution of the Recognizance: The Caſe of Ayleway and Roberts will not come up to this, for that was in point of Tort and not of Duty.

Levins è cont. In all Actions of Tort it matters not whether Plaintiff or Defendant dies, all is gone. Will the putting in a Recognizance alter the nature of Damages by the Common Law? That is, to make them recoverable where they are not, as here are none, there being a Death in the Caſe. Beſides, this is not a Scire facias upon the Statute, but at Common Law for to have the Damages aſcertained, and the Statute gives the Recognizance only for what Damages were recoverable before. But by Pemberton the Statute goes further, it gives Damages from the time of the Judgment till the Affirmance.

Chief Juſtice Holt, There can be no Suit on this Recognizance, till there be a Judgment for theſe Damages, and conſequently the Recognizance doth not any ways alter it. The Scire fac. to aſcertain the Damages muſt be as at Com-

mon Law, and the Common Law Rule is Actio perſonalis moritur cum perſona. Why ſhould not an Executor have an Action of Waſt, but only the reaſon of the Common Law that it dies withthe Party. We can award nothing after the Parties Death, becauſe it doth ariſe Ex delicto, and no intereſt veſted till they are aſſeſſed. Judic. pro Def. nil Capiat per breve.

Syms *verſus* Tyms.

DEBT on a Judgment, Writ of Error pending pleaded in Abatement. Demurrer. Judic. pro Quer. for a Reſpondeas ouſter, according to Lenthall's Caſe, ult. Termino.

Rousby *verſus* Manning.

To ſtand to an Award ſo that it be made ready to be delivered.

DEBT on a Bond conditioned to perform an Award. Nul Award pleaded. Replication ſetting forth the Award and Breach. Demurrer.

The exception taken was, becauſe he did not ſay according to the Condition, that it was made ready to be delivered to the Parties, but only in Scriptis.

Chief Juſtice Holt. It ſeems unneceſſary, for an actual delivery is not requiſite by the Condition, and a bare making in Writing, imports it's being ready to be delivered to the Parties. Adjornat. Vide Trin. 27 Car. 2. Jenkynſon *verſus* Allan, Roberts *verſus* Marriot, and 2 Saund. 73. 2 Keeble 513.

Hall *verſus* Wyborn.

Entr. Mich. Ult. Rot. 641. vel 671.

Defendants being beyond Sea did not avoid the Statute of Limitations.

CASE. The Defendant pleads the Statute of Limitations, 21 Jac. The Plaintiff replies, That the Defendant was beyond Sea; The Defendant Demurs. The Quære is if a Defendant's being beyond Sea did avoid the Statute of Limitations.

Argued by Tremaine that it did, for the Law compels no Man to Actions fruitleſs, as to Sue a Man, when there can be no fruit of the Action, and perhaps never will Return. Beſides, there is a great Fine to the King upon an Original and no Perſon in capacity to Anſwer: This is to take advantage of his own Laches, which the Law

Law will not allow; and there is no reaſon it ſhould be ſo then when the Plaintiff is out of the Realm, for he may Sue by Attorney or Friend though abſent; we cannot Sue the Defendant unleſs he comes in Perſon, Swayn *verſus* Stephens, Jones 252. Cro. Car. 246.

Serjeant Thompſon p Defendente. The words of the Proviſe are plain, only to mean the party Plaintiff, and cannot extend to the Defendant.

Dolbin. This hath been an old queſtion and never ſettled, and doth deſerve to be better argued, the Quære is not if the Defendant be within the Proviſo, but if within the Purview of the Act, if when the Defendant be beyond Sea the Act ever intended to bind by ſix Years.

Lord Chief Juſtice Holt. If a Defendant beyond Sea be out of the Statute, then if he Returns after the ſix Years he is ſtill out of the Statute.

Gregory. There was the Caſe of Sir George Bynion and Evelyn, 14 Car. 2. The Statute of Limitations pleaded; Replication that the Defendant was per tot. tempus præd. priviledged as a Parliament Man, and Demurrer, and held a Bar, and that the Priviledge did not avoid the Statute. Adjornatur fore bene deliberand. Afterwards Judic. p Def.

Beard & Ux' *verſus* Franks.

RUled per Cur. that in pleading the laſt poor Priſoners Act, you muſt plead the firſt Act in 1671. and then the laſt gives the ſame Authority, and that he was in Priſon the firſt of May, and 'tis not enough to plead the laſt Act; and accordingly Plea over ruled in this Caſe, and Judic. pro Quer. Pleading the Poor's Act.

Allen *verſus* Darby.

Entr. Hill. Ult. Rot. 314.

REplevin quod cum, and Avowry to it ill, and Demurrer. And held per Cur. that the Defendant could have no Return, becauſe his Avowry was ill, tho' the Narr. in Replevin was ill, and therefore the Replevin was quaſhed, without Judic. for a Return. No Return where the Replevin is ill, and the Avowry is ill.

Dominus Rex *verſus* Comit. Salisbury.

DEfendant committed on an Impeachment for Treaſon. in being reconciled to the See of Rome. By the Act of Pardon, the Offence is pardoned the Parliament being adjourned. The Defendant was brought hither by Habeas corpus and moved to be diſcharged. Denied per Cur. becauſe the Impeachment is in a Superior Court, and the Pardon muſt be pleaded there: The Comitment was Judicially by the Lords, and they could not here take Cognizance of it, and ſo was remanded to the Tower.

Term. Mich.

1 Will. & Mar.

Boſon *verſus* Sandford *& al'*.
Entr. Hill. 1 & 2 Jac. 2. Rot. 302.

Caſe againſt ſome of the Partowners of a Ship for Goods loſt by the neglect of the Maſter. On general Iſſue the Defendants may take advantage of the Plaintiffs not naming all the Partowners.

CASE againſt the Defendants as Common Carryers between Exeter and Lond. by Water in a Ship for Hire. Non cul. Special Verdict finds that there was a Maſter of a Veſſel who acted, that the Goods were delivered to him and loſt, that the Defendants were Proprietors, and that here are others not named, &c.

Argued pro Quer. That this is an Action grounded on the wrong, and it may be joint or ſeveral at the Election of the Plaintiff, and he hath Election to bring it either on the Tort or Contract, and here he hath brought it on the wrong. As 'tis here, tis purely grounded on the wrong; the Contract or Charge is but Inducement. The giſt of the Action is the wrong, the Non-feazance and neglect. The general Iſſue is Non cul. The Damages ariſe from the wrong: A Releaſe of any part would Releaſe the whole; and cited Juſtice Morton's Caſe, Paſch. 21 Car. 2. that where the Action ariſes Ex delicto, moritur cum perſona, Hutton 121. Swallow and Emerſon, 1 Inſtit. 38. Mathew and Hopkins, Paſch. 16 Car. 2. We have not relied on the Agreement but on the wrong: And further argued, That this ought to have been pleaded in Abatement, for thereby the Plaintiff would not have delay'd, but might have come to the knowledge of proper Parties. And beſides, he ought to have given us a Title to a better Writ, and cited Blackbourn and Grove, Trin. 26 Car. 2. Ent. Hill. 24 & 25 Car. 2. Rot. 1216. If two Tenants in Common bring an Action, Advantage ought to be taken of it by way of Plea. And there is no difference between Plaintiff and Defendant as to that matter: Upon an Aſſumpſit I agree it ſo, becauſe 'tis non Aſſumpſit modo & form a

forma, but otherwiſe in Action upon the Right, as Debt upon a Bond in Whelpedale's Caſe, on non eſt factum.

Mr. Attorney è cont. If he will bring the Action againſt the Owners he muſt bring it againſt them all; this ſounds in wrong, but it ariſes from a breach of Contract and Duty; 'tis brought againſt them as Proprietors, and this wrong depending upon a breach of Contract muſt be meaſured by the Contract. The Contract in Law is with the Proprietors. The great reaſon why they are liable, is becauſe they have remedy for the Hire. Now they are all to have the Hire, and it is unreaſonable that all ſhould have the Hire, and yet ſome only pay for the Damage: The Contract is the matter of the Action; the caſe in Hutton is, that it muſt be brought againſt both the Occupiers; here is a perſonal Contract raiſed by Law and ſounds rather like a Debt: This can never be a good Plea in Abatement, for it amounts to the General Iſſue, as in an Aſſumpſit, the Defendant can never plead that he and another did aſſume, for it amounts only to the General Iſſue, and may be taken advantage of in Evidence: As to the Caſe of a Bond it muſt be agreed to them, that ſtands upon a very different reaſon, becauſe the Action ariſes thereupon, the ſeveral fact of every one of the Defendants, in its own Nature the Bond is ſeveral, for one Man's Sealing is not another's Sealing; and if the other Seal not, 'tis his Bond ſeverally, but here they all appoint the Maſter jointly, they Officiate alike.

The next Term the Judges delivered their Opinions Seriatim pro Defend. Dolbin Hæſitante.

Eyres. I agree no difference between a Land and Water Carrier, for both are chargeable, Sid. 36. the Maſter of the Ship by the Common Law is no more than a Servant to the Owners, and he hath no power over the Ship and Goods; the power which he hath is by the Civil Law, Hobt. 111. and 'tis plain the act or default of the Servant ſhall charge the Owner; he cited Dyer 161. 238. Plowd. 11. 8. 2 Roll. Abridgment 567. 3 Cro. 711. 4 Leon. 123. Moore 776. This Action ought to have been brought againſt them all, for they are chargable only upon the account of the Hire, which they all received; 'tis an Action founded ex quaſi Contractu, and the Law implies an Agreement and Contract to have the Goods carried ſafely and without Damage. Southcott's Caſe, 4 Rep. 83. That there is ſuch a Contract is plain, for they may have a quantum meruit for their Hire. Now what is in its Nature Joint, the Plaintiff cannot Sever; in Caſe of an expreſs Promiſe 'tis plain, Noy 135. In caſe of Money levied on a Fieri

a Fieri facias, and not anſwered to the Party, the Action of Debt muſt be againſt all, the Sheriffs of a City or the Coroners of a County, and yet 'tis grounded on the wrong, but being ex quaſi Contractu it is joint, 2 Sand. 345. 1 Roll. Abr. 921. Hob. 216. 260. The Verdict hath expreſly found that none were preſent but only their Servant, who was the Maſter; and they are only chargeable by implication of Law, and therefore equally liable, Hutton 121. Mod. Rep. 198.

Object. That it ought to have been pleaded in Abatement.

I do agree where one Joint-Tenant, or Tenant in Common brings an Action perſonal, and the Defendant pleads in Bar, he ſhall never take advantage of it, More 466, 2 Cro. 183. 1 Sid. 49. Mod. Rep. 102. 3 Cro. 584. But I think the Defendants could not have pleaded this in Abatement, for in the Plaintiffs Declaration he charges them with an expreſs Contract of their own, and then they had been liable without their Companions, becauſe of that particular Act of their own; and ſo the Defendant could not plead other Part-Owners. 'Twas in the Plaintiffs Election to charge them either on an expreſs Promiſe, or one the Contract implied in Law, which could not be diſcloſed but on Evidence. Here he hath not declared according to his Caſe, for it was twenty, and he hath ſaid by three, 3 Cro. 882. 2 Roll. Rep. 350. and 26 Hen. 8. 5. By Verdict a Suit may be abated as well as by Plea: As to the Plaintiff's being a Stranger, that is nothing, for he having declared upon an expreſs Agreement, he is to do it truly at this peril, and ſo concluded for the Defendant.

Gregory, ad idem, The firſt Quære is, if the Owners are liable and not the Maſter only; but I think the Maſter as this Verdict is found, was only a Servant, Hob. 17. The Owners are the Carriers, they have the ſole Profit, and the Maſter hath nothing but certain Wages: The Maſters act doth bind the Owners, Plowd. 12. Littleton 324. Then whether they are not equally bound, and conſequently if they ought not all of them to be ſued. The Maſter was Servant to every one of the Owners, the Plaintiff might have taken notice of all the Owners as well as of ſome. 5 Rep. 129. is not like this. 3 Cro. 584. doth come ſomewhat neer to this; but here is no perſonal act of the Parties, here is an Agreement in Law which ſeems joint in its Nature; here it is not the ſame Promiſe which he declared upon, for the Law raiſes it againſt them all, the

joint

joint charging them is the very Foundation of the Action, and therefore he concluded for the Defendant.

Dolbin. The Action lies againſt the Owners and it ought to have been brought againſt them all. Here is no expreſs Contract, and then a Promiſe which the Law raiſes againſt them all, it ought accordingly to be brought againſt them all. But 'tis doubtful if it ſhould not have been pleaded in Abatement. I think they might have pleaded it in Abatement, and therefore I think the Plaintiff ought to have his Judgment.

Chief Juſtice Holt. The Quæres are if this Action be well brought againſt ſome of the part Owners? If the part Owners, the Defendants, may take advantage of this upon Evidence?

Conſider upon what account they are anſwerable. Firſt, The Maſter is liable and may be ſued alone. The Mariners may have their account againſt the Maſter, the Maſter may Sue for the Freight; he is ſuch a Perſon as may be Sued. The part Owners are chargeable, becauſe they take upon them the fitting of the Ship and have the benefit of it; the part Owners are anſwerable as imploying and having the benefit of the Voyage; they are not chargeable as by reaſon of their Intereſt; for if ſome do not agree and the major part do, the others ſhall not have any advantage of the Freight, ſo that 'tis their having imploied the Ship: But here they are Partners in common Carriage, and there is no difference between them, they have a Joint-Truſt repoſed in them. This Action is grounded upon the Truſt and that doth imply a Contract: Then in all Caſes where the Action is grounded on a Contract, all that are privies to the Contract ſhall take advantage of this omiſſion on the general Iſſue; one is not a Carrier alone: The Declaration is, that the Defendants ſuper ſe ſuſceperunt, 'tis the undertaking of the Maſter, and that is the undertaking of all; 'tis the ſame as if he had ſaid ſuper ſe aſſumpſerunt in conſideration of a promiſe to pay the Hire, that the Goods ſhould be ſafe carried; it may be ſo alledged, and ſo it was, 2 Cro. 262. and then advantage may be had of it on the general Iſſue. The very taking of the Goods is a general Conſideration, tho' he be not a common Carrier, Palmer 523. and the Declaration held good tho' not ſaid to be a common Carrier, and the acceptance of the Goods makes him liable. All the Miſkeazance in this Caſe is but for a breach of Truſt. A common Carrier is as much bound to carry Goods as an Innkeeper

is

is to lodge a Guest: Here the Imployment is joint, 'tis like a Joint-Office, a breach of Trust in one is so in all; here the finding of the Jury varies from the Imployment in the Declaration; the Reward is joint to be paid to them all, and so the consideration is joint, 2 Cro. 189. 'tis the Reward that raises the Action because of the Advantage. Now the Reward being the reason to charge them the manner of charging them must be the same. Suppose these Defendants had alone brought an Action for the Hire, this Plaintiff, then Defendant, might have taken advantage of this on the general Issue. The Case of 5 Rep. is good Law, because 'twas his Deed modo & forma. If the other had died it would have been his Deed. The Deed is his severall Act though the lien be joint: There is a great deal of difference between declaring upon a Deed and upon another Contract. How could this be pleaded in Abatement, that there were other part Owners? That would not do, for if I have part of a Ship mortgaged to me, I am not answerable, but it is the Imployment doth charge me. Suppose they had said that they simul cum the other super se susceperunt, absque hoc that they did assume modo & forma, for you must have traversed so; Now what would this have been, but the general Issue, as in 7 Hen.4.8. But in those times there was no general Issue pleaded for any Non-feazance or Neglect, but they always plaeded specially, and traversed some particular point in the Declaration, 3 Cro. 369. Moore 355 If no general Issue could be pleaded, it were somewhat: That Case of Hen.4. was upon a real Charge, this is upon a personal Contract, Hutt. 122. I cannot distinguish it from this, It appeared there was another Joint Occupier, and Advantage taken of it on the general Issue, because the Duty arose there from the Occupation: If the Plaintiff will charge the Owners, he must charge them in such manner as they are chargeable, he might have charged the Master alone, and so per Cur. Judic. pro Def.

Dominus Rex *verſus* Inhabitants de Hermitage in Com. Dorſet.

WRit of Enquiry of Damges for Fences thrown down in the Night. Held per Cur. That there was no need of notice of the Execution of the Writ, becauſe Traverſable; but per Cur. quaſht, becauſe Intereſſatus fuit pro reſiduo cujuſdam Termini, where it ought to have been poſſeſſionat. fuit: It might have been a concurrent Leaſe, or a Leaſe not commenced, and no poſſeſſion laid; 'twas ill.

In debate of this, it was agreed per Cur. that a Grantee of Common might have this Writ, Owner of the Waſt may have it, Grantee of the Herbage might have it, Vide Kelway.

Dominus Rex *verſus* Berchet, *&* al'.

An Information for a Riot in breaking Fences and Incloſures in *Hartfordſhire* lies in the *Crown-Office.*

INformation for a Riot in breaking the Fences and Incloſures of Mr. Guys at Tring in Hartfordſhire.

Sir Francis Winnington argued laſt Term for the Defendant, that no Information doth lie in the Crown Office, and ordered to be argued again this Term, for which I was prepared to argue it, but none being ready to juſtifie their Demurrer we had Judgment pro Rege per tout le Court, que giſt. My intended Argument was as followeth.

The Queſtion is, if this Information doth lie; if the Defendant be bound to anſwer to it? That it does, I ſhall prove by theſe following Steps. Firſt, By ſhewing that an Inqueſt is not neceſſary in all Caſes to inforce a Defendant to anſwer the King's Suit, and the reaſon why, and apply that reaſon to this Caſe, and then ſhew that even in ſome capital Caſes it is not requiſite, and that in all Caſes not capital there is no neceſſity of it, and ſo evince that this method of Proſecution is no ways contrariant to any fundamental Rule of Law, but agreeable to it: And then ſhew the conſtant uſage of this method and the approbation it hath had from the Judges and Lawyers of all Ages and in all Reigns, even before octavo Caroli, as well as ſince; even before and after Empſon's Law as well as under it, and that that Law doth no ways affect this Caſe, and then anſwer that, and the other Objections ſtarted on the other ſide.

The

The Rule which I agree to and lay down as my foundation is this, That no Man is to answer the King's Suit without some Record importing his Charge; but that if there be any matter of Record or Suggestion or Surmise upon Record, or Information filed as of Record for the King, importing the charge of an Offence; that this may, if the King pleaseth, serve instead of an Inquest or Verdict either by Indictment or Presentment, and that the Party thereupon shall be compelled to plead to it as a Presentment.

I do not mean this of Treason or Felony, though there are two Cases even in that too; nor do I mean to prove it by new Offences created by Statute or Informations enacted to be for them; but Offences at Common Law, or such as are made de novo, and no particular mode of Prosecution appointed. The King's Suits are of three natures. Either

First, In matters of meer Right and Property, where Freehold or Inheritance is concerned. 'Tis true, there must be an Inquiston or Office to entitle the King to either Suit or Service, and so is Kelway, 201. Dyer 74. but in other Cases a Suggestion or Information filed of Record for the King will serve instead of them where an Office is no otherwise requisite, which is the same as an Inquest in our Case; I will not cite particular Cases, the Books are full of them, as Bro. tit. Surmise, Pl. 5. 9. 30. 32. that a Suggestion or Information (which he uses promiscuously, and therefore with him as synonimous Terms) of a dying seized under a Term in Chivalry, or a Devise by Will of Goods to the King, that in those Cases such Information upon Record will serve instead of an Inquisition. I urge this only to shew that in matters of great concernment, as Inheritance, two Juries are necessary to give the King an unavoidable Right, as in Case of Crimes, where life is concerned, by Grand and Petit Jury; otherwise in lesser matters.

2. In matters that are part Crime and part Interest, It must be agreed that an Inquest is not necessary to intitle the King to a Suit, or to compel the Criminal to answer; and for that there is a notable Case in 35 Hem. 6. fol. 7. an Information for unlawful taking and detaining certain Jewels of the Crown, which was a rank Trespass, and a Plea was to it of the City Custom, for that Shops being Markets overt, &c. Upon arguing the Demurrer, 'twas urged that this matter ought to have been prosecuted by way of presentment, which would be matter of substance to enforce the Party to answer, and not by bare Information, the which was denied by the Attorney General, and it was accordingly

ly judged pro Rege. The reaſon why I urge this, is becauſe their Arguments tend to overthrow all Informations, as I ſhall ſhew preſently. It muſt be further agreed, even that an Information lies for intruſion into the King's Land, and uſurpation of his Royal Franchiſes, and yet theſe are Crimes, and are Vi & armis, and incur Fine and Impriſonment. Exporting Goods out of England not paying the Cuſtom due by Common Law is an offence at the Common Law, as is Dyer 43. Theſe are ſuable here, or in the Eſchequer, and puniſhed by Fine upon Information; and it will be difficult to aſſign a difference between theſe and other Offences; for they are againſt the Crown, and all tend (though not in æquali gradu) to the Diminution of the King's Honour and Revenue, and he hath as much Right to a Fine after an Offence committed, as he hath to a Cuſtom Duty (which he hath by the Common Law, Dyer 43.) and by them he is ſuppoſed in the Eye of the Law to ſupport and maintain his Courts of Juſtice, as by the other to keep the Seas open and ſafe for Trade; nor can I ſee any reaſon why an Indictment ſhould not be as neceſſary in theſe Caſes as in ours. But to come cloſer:

3. In matters directly and ſimply Criminal, a Preſentment is not requiſite. That there muſt be a Record, We agree to be neceſſary, and ſo is the Law declared 28 Ed. 3. cap. 3. that no Man ſhall be put to anſwer, without preſentment before Juſtices, or matter of Record or due Proceſs of Law according to the old Law of the Land; a Record was neceſſary, becauſe Proſecutions were uſed by the Attorney ore tenus, both before the King in his Privy Council, and before the King's Council in Camera Stellata. Now this very Act they have been pleaſed to urge as on their ſide, but how properly your Lordſhip muſt Judge, for 'tis ſo far from maintaining their Aſſertion, that none are compellable to anſwer but upon Indictment and Preſentment, which are all one (only the former is drawn by a Clerk, the other is made by themſelves informal) that this Law doth plainly declare, that there is ſome other legal way to charge a Man with a Crime, beſides thoſe two, for what elſe mean thoſe words, or matter of Record or due Proceſs of Law? and 'tis in the diſjunctive. Now 'tis a known Rule in interpretation of Statutes, that ſuch a ſenſe is to be made upon the whole, as that no Clauſe, Sentence or Word ſhall prove ſuperfluous, void or inſignificant, if by any other conſtruction, they may all be made uſeful and pertinent. If their conſtruction be right that nothing but Preſentment is meant, then all the

the reſt is nonſenſe becauſe it hath no meaning. But my Lord, none of theſe old Laws are ſo weakly penned, they have a meaning and a ſtrong one too; there is a due Proceſs to charge a Man with a Crime beſides that of Indictment; there is a thing of Record beſides that of Preſentment, and that is an Information, which I ſhall preſently prove agreeable to the old Law. This Act makes it plain to me, either there is ſomewhat elſe or not: If not, this Statute is miſtaken. If there be, 'tis an Information or ſomewhat elſe; but there is no other, Ergo, &c. It cannot be Appeals; for that is the Party's, not the King's Suit. Therefore this Act is ſo far from prohibiting the Caſe of Informations, that it ſtrongly implies and ſtabliſhes them.

That a Record is equivalent to an Indictment or Inqueſt, there are two inſtances. One in caſe of capital Crimes, where a Record importing the charge thereof is ſufficient to compel the Party to anſwer to it.

1. If an Inqueſt be againſt A. and he confeſſes it, and by Bill approves B. as Guilty, and afterwards waives his Approver by confeſſing his Bill to be falſe, the King may notwithſtanding proceed to Arraign and Charge B. upon that Bill as at his Suit, and B. is and ſhall be compellable to anſwer to it, and ſo are the Books, 3 H. 6. 80. and agreed ſo in 47 Ed. 3. 5. and many others.

2. In an Appeal of Murder if the Appellant becomes Nonſuit, the King may proceed to charge the Appellee, and he muſt plead, and may be tried, condemned and executed upon it, though no Inqueſt againſt him; and ſo are all the Books, 11 Hen. 4. 41. 4 Hen. 6. 15. 4 Edw. 4. 10. the ſame in Yelv. 13. Criſpe and Virol's Caſe. This I urge to ſhew that an Inqueſt by a Jury is not always and indefinitely neceſſary. That to charge a Man upon Record is not contrary to the fundamental Rules of the Law, as is pretended. But to come cloſer;

In matters meerly Criminal but not Capital, the finding of a Jury is not requiſite, 39 Hen. 6. 41. as abridged by Bro. Tit. Surmiſe pl. 3. there is this Reſolution, that where a Suggeſtion is made to the Court, that a Reſcous was committed upon the Sheriff, Coroner, or the like, it was affirmed by Nottingham then Attorney General, and Arderne Chief Baron, and Laicon did not deny it, that the Court ſhall award Proceſs againſt the Offender: And it is agreed clearly by the Reporter (ſays Brooke) that upon a Suggeſtion thereof they would award Proceſs. Its not upon the return of a Reſcous, for that was reſolved ill on an exception taken to it. 'Tis true, Bro. makes a queſtion, ſi tantum in Scaccario vel in aliis

aliis Curis; but if there, then ſurely here to whoſe Juriſdiction all ſuch Matters are moſt proper. The Abridgment ſpeaks it indefinitely on a Suggeſtion. Beſides, in all Caſes of Contempts to a Court no Preſentment is neceſſary, no not ſo much as to convict; for if done in facie Curiæ, a Record may be made of it, and a puniſhment judicially inflicted, and that executed immediately, as was done in Mr. Reading's Caſe. But to come home to the point before you.

In Caſes of Crimes of which the Court can take no notice but ab extra, an Information is ſufficient to found Proceſs, and hath always been thought ſo even in all Caſes; and for that I'le go backwards even to Edw. 4. and further. I'le not name the laſt Reign, becauſe perhaps they will Cavil at the Authority, though in this they only followed their Predeceſſors.

In the Reign of Car. 2. were abundance: I remember two not printed, and thoſe were by Sir William Jones *verſus* Harrington for words, and againſt Johnſon for nothing; and argued by Sir Francis Winnington there pro Rege in Mich. 21 Car. 1. Information here againſt Parris and others for cheating a young Lady, and unlawfully procuring a Warrant of Attorney to confeſs a Judgment in a very great Sum, and a Verdict and Judgment, and the Parties fined and committed. After debate in Arreſt of Judgment, Sid. 431. Trin. 19 Car. 2. Inter Indictamenta num° 9. an Information by Sir Thomas Fanſhaw, as Coroner and Attorney againſt Ope Dodge and other Corniſh Men for unlawfully getting one of themſelves Sworn of a Tales in order to give a Verdict for a Defendant in Treſpaſs; and Saunders offered to move in Arreſt of Judgment, but was bid by Hales to bring his Writ of Error, and there was Jud' quod capiantur ad faciend' finem cum Domino Rege. 'Tis reported with the Information at large in 1 Saund. 300, 301. Hill. 15 and 16 Car. 2. Information againſt Alderman Sterling and others for Conſpiracy, to take away the Gallon Trade; and Judgment on debate, Sid. 174. And no doubt but in all theſe Caſes, but an Information lay, and yet they were all controverſial and adverſary Suits. Trin. 15 Car. 2. 'twas delivered as Law by Keeling, and agreed per Curiam, that if any Information be exhibited by the Attorney General, or the Maſter of the Crown Office, the Court may quaſh it upon motion, becauſe 'tis ex Officio, Sid. 152. Paſch. 15. Car. 2. One againſt the Inhabitants of Yaxton in Oxfordſhire for not repairing an Highway, and much debate upon motion, and no queſtion of this Point, Sid. 140. Here is plainly the Opinion of Hales, Keeling,

ling, Wyndham, &c. nor did my Lord chief Juſtice Vaughan much differ from them, for he affirms them to lie here as well as in the Star-Chamber. Buſhel's Caſe 152. ſpeaking of Jurors being fined, &c. he ſays, no Man can ever ſhew that Jurymen have been puniſht upon Informations either in Law, or in the Star-Chamber, for barely finding againſt Evidence, except where Imbracery or Subornation were joined, which ſhews it is a ſuppoſition that Information did lie for ſuch Offences, and yet they are ſuch as are not within any particular Statute that directs this Method of Suit. They were ſo common in Car. 2. time, that they are got into our Precedent Books of pleading. In Vidian's Ent. 213. is one exhibited by Sir Th. Fanſhaw *verſus* Juſtinian Paggit Senior, for neglects and abuſes in his Office of Cuſtos Brevium, as for an offence at Common Law, and fol. 215. are two more of the like nature, one of which is againſt Wilkinſon the ſix Clerk for cheating Sir John Marſh, Longvil, and Bluck of a Deed of Articles and Cancelling it, all which ſhews the Opinion of the Lawyers in this Point, for the laſt was at the inſtance of Lawyers; and Vidian was well known to be a good Clerk, and a curious obſerver of what paſt here.

Then for the late times, Paſch. 1658. in ſuperior' Banco, one for Forgery againſt Charles Dudley, the titular Duke of Northumberland, for Forging the Entry of a Marriage between Sir Robert Dudley and Fr. Vavaſor Lady of Honour to Queen Eliz. in the Regiſter Book of Eaſt Greenwich in Kent, and a Trial on it, and much debate in Arreſt of Judgment, and the Party fined 200 l. by Glynn and Newdigate, which was (ſays the Book) more than he was worth, 1 Sid. 71. Hill. 1650. Banco ſuperiori Inform' *verſus* Mayne and two Juſtices of Peace, for not enquiring of a Riot according to the Statute of 2 Hen. 5. cap. 5. which was committed near their reſidence, and Verdict and Judgment after debate, niſi cauſa pro cuſtodibus, &c. Stiles 245, 246. and 'tis obſervable that the Statute which commands the Inquiry, and upon which the Information was grounded did not give an Information, ſo that it is the ſame with an offence at the Common Law. In Stiles Practical Regiſter which was printed 1657. and is a Bundle of Obſervations ſaid to be taken from the Mouth of Mr. Serjeant Roll, there he hath a whole Chapter upon this head of Informations, diſtinct from a long one of Indictments, and twenty Rules made in thoſe times concerning them, which ſufficiently ſhews the approbation of their uſe even in thoſe days: I'le name one verbatim, Mich. 1649. B. S. An Information may be preferred in this Court againſt the

the Inhabitants of any Town or Village in England, for not repairing the High-ways which they are bound to Repair. Then he gives this Reason for it, for this Court may punish Offences done against the Weal publick all the Nation over, and many other Rules & dicta Judicum are there observed, which shews the sense of the Lawyers of that age, &c.

In the Reign of Car. 1. there are abundance of Precedents and Resolutions. Pasch. 14 Car. 1. One Freeman was brought by Habeas corpus, being committed for a Riot and Rescous of one taken by a Messenger, and a Day was given to File an Information, or prefer an Indictment against him, and then said that they were frequently such Informations for such and other like Misdemeanors. Cro Car. 578. Hill. 15. Car. 1. In Stenon's Case, an ill practice appearing in one Spicer an Under-sheriff; the Clerk of the Crown was appointed to draw an Information for the Misdemeanor, Cro. Car. 566, 567. Mich. 8 Car. 1. One against Ward and Lynne for stopping a Common way, and a Special Plea and Demurrer to it; and after Argument and much Debate a Rule for Judgment. Hill. 266, 267. Pasch. 8 Car. 1. against the Mayor and Commonalty of London for permitting a Riot and Tumult, wherein Dr. Lamb, was Slain and none of the Offenders taken, and held to lie, Ibid. 252. and the same Term against Sir James Wingfield and others for a Riot; and on the Trial urged strongly by Noy that the default of one should bind the rest, but resolved to be as several as in an Indictment, Ib. 251. Hill. 6 Car. 1. two several Informations against Strowd and Hobart, for their several Escapes out of the Gate-house, but no doubt of this thing, though they had good Counsel and much debate upon the Trial. Cro. Car. 209. Mich. 2 Car. 2. Motion was made for an Attachment against an Officer of the Marshes of Wales, for arresting a Court-leet Juror while upon Duty, whereby the King's Court was disturbed; the Court denied the motion because not an Officer or Process of their's, but directed an Information against him here in this Court for that Misdemeanor. Latch. 198. Mich. 5 Car. 1 One in this Court against Elliot, Hollis, &c. for a Misdemeanor, a Plea to the Jurisdiction and over ruled, a Cause much debated, and this Point started, but by one of their Counsel, viz. Mr. Calthrope, and answered as slightly by the Attorney that there were many Precedents. This Judgment was impeacht in Parliament, but this never objected as I can find by any of the Historyes of that time, which is a strong Argument that the Parliament thought an Information to lie, if the matter had been within their Jurisdiction; and

if

if they had thought otherwise, we should unquestionably have heard of it; as Rushworth hath it in his Appendix to 1 Vol. pag. 56. 'tis plain by the very Note that this Point was never started or questioned: That Grievance complained of was restrained of liberty of Speech in Parliament and breach of that Privilege; the words are, that the Information for matters done in Parliament, and the same appearing in the Information, was a breach of Privilege. Nothing can be a stronger Argument, that it 'twas illegal and why? not because 'twas an Information, but because the Crime charged, if any, was committed in Parliament, and upon the Debates in Parliament in 1667. when reversed, as appears by Cro. Car. 606, 607. this was the Matter insisted on, and Strowd's Act urged as the ground of the Reversal.

I beg your Lordships pardon for urging one instance more in that Reign, for Informations by the Attorney even in an higher Court than this. In 2 Car. 1. One exhibited by way of Articles, and subscribed by the then Attorney in the House of Lords against the then Earl of Bristol, for diverse high Crimes and Misdemeanors both here and abroad; the same was received by the Lords as a Charge, and entred in their Journal upon Record, the Party forced to plead to it, and he did so, and the same entred in like manner; both are to be seen at large in Dr. Francklin's Annals of Jac. 1. and Car. 1. Paginis 123, 124, &c. The same was done in 17 Car. 1. Information by Attorney against the Lord Kimbolton, and the five Members of the Common's House.' Tis true my Lord, this last was but a melancholy Precedent because of its consequence, for 'twas noted a breach of Privilege as 'tis in Nalson's Collection, Vol. 843, 844, 870. but I do not find it noted illegal because 'twas not by Presentment or Impeachment; but the reason of their censure was, because the Attorney had broke their Privilege in medling with Members, and such against whom (they said) he had no proof to make good his Charge. I urge this only to shew that in all these Debates we no where find an Information censured as illegal, quà & quia talis; and if an Inquest had been thought universally requisite and necessary, it would certainly have been touch't upon these occasions.

In the next preceding Reign, viz. Jac. 5. 1. our Books do not take so much as notice of Informations in this Court; for Hobert and Cook who were then Attorney Generals preferred most of theirs in the Star-Chamber; which I shall prove presently to be a strong Authority for us, as even by the Common Law of England: Yet even in this Reign

there are many Informations upon the File which I shall not trouble your Lordship with, because antient ones will be of more Authority. Mich. 17 Jac. 1. B. R. Information that where by the custom of the Realm to avoid annoyance of the High-ways, a publick Carrier should not carry in any Waggon above two Wheels, and above 2000 Weight: That he had carried with 8 Horses, 4 Wheels, and above that Rate of Weight from Oxford to London, by the which the High-ways were become unpassable. Edgerlin's Case, Jenkins Cent. 7. Case 15. pag. 284. and the Party fined and imprisoned. Mich. 9 Jac. 1. Here was a Trial at Bar on an Information on 2 Hen. 6. cap. 15. against fastning Nets or Trunks cross over any great River, &c. and much debate on the Trial, and yet this Act gave no Information; its reported 12 Rep. By 21 Jac. 1. cap. 4. Notice is taken of Informations by the Parliament as usually preferred by the King's Sworn Officers; that Statute prescribes the manner how Informations shall be by the Attorney for the time being, and by other Officer or Officers for the time being, this is a full Authority for their allowance.

Pasch. 25 Eliz. amongst the bundle of Indictments of that Term, are several Informations by the Clerk of the Crown, they are in disorder and no numbers or figures to make search by, &c. I read some my self, one in the Name of Miles Sands Coroner, and Attorney of the Queen, for a riotus Assault and Rescue against Richard Bynsdale, a li. lo. markt upon it: The Parliament in her Reign allows them by 31 Eliz. cap. 5. that Penal Prosecutions shall be within a year, &c. there is an express Proviso; that it shall not extend to any Officers of Record, as have in respect of their Offices lawfully used to exhibit Informations; now here is the Judgment of Parliament that there were Officers to exhibit them, and those that are meant must be the Attorney and his Deputy, the Coroner. For I know no other, and were it otherwise, that long Proviso had been needless. But to go higher,

Pasch. 1 & 2. Ph. & Mar. num. 46. Int. Indictament, Information against Plowden and others for departing from the Parliament without License, &c. exhibited by Griffin then Attorney, with a dat Curiæ hic intelligi & informari as now are usual, and six of them submitted to Fines; and Plowden Pleads with an idle Traverse like that of a Lawyer in his own Case, but no scruple if an Information lay: Nor does Cook make any question of that, but only about the Courts Jurisdiction of the matter, because Parliamentary. 'Tis reported, 4 Inst. 17, 18.

Mich.

Mich. 6 Edw. 6. was an Information by the then Attorney, pur le Roy ſolement *verſus* Michael Harcourt on the Statute of Maintenance; the ſame is cited, 7 Rep. Caſe of diſcontinuance of Proceſs; the ſame in Dyer 53. I know they will ſay the 32 Hen. 8. cap. 9. gives an Information, but non conſtat, this Information was upon that Law. Beſides, with ſubmiſſion, I think the Objection founded on a plain miſtake, for that none of thoſe Laws do give an Information to the King: The common words are, Such a part to the King, and ſuch a part to him that ſhall Sue for the ſame in any Court of Record, by Bill, Plaint, Information, Action of Debt, &c. in which no Eſſoin, Wager of Law or Protection ſhall be allowed: Now 'tis plain this only gives it to the Party; for Wager of Law never lay to the King's Suit. Now if the King pleaſeth he may Sue for the whole penalty as well as Pardon the whole; and therefore Informations can no more be ſaid to be given to the King by thoſe Laws than an Indictment is which is not named: Now they muſt agree that Informations have been frequent for the King for the whole penalty on thoſe Statute Offences, and therefore they are of as ſtrong Authority as thoſe of Common Law Offences. But I'le mention no more of theſe becauſe of this exception. I muſt confeſs, I know of no Statute that gives an Information to the King but Empſon's Law, which I ſhall ſhew preſently not to concern this Caſe.

In this Reign of Hen. 8. there are abundance, and the reaſon why there were ſo few after it, was as Sir Th. Smith ſaith in his Common-wealth of England, the Star Chamber was not ſo much frequented, till after this Reign, and the good effect it had in proſecuting and humbling this great Cardinal, Trin. 23 Hen. 8. Rot. 10. Information by Sir Chriſtopher Hales then Attorney General, againſt ſeveral for a Nuſance in an High-way in the County of Oxford contra pacem & in malum exemplum, and Imparlances and other formal Entries made as now; Hoc vidi Trin. 23 Hen. Rot. 12. The like by the ſame Attorney General, in the ſame form againſt the Mayor and Bailiffs of Oxford, for ſtopping a Ditch and filling it with Filth, ad nocument', and Imparlance, hoc etiam legi, Trin. 23 Hen. 8. Rot. 12. (inter Indict' & placita Coronæ.) The like by the ſame Attorney againſt Dr. Ligham a Chancellor, for maintaining the Authority of Rome on a Statute of Premunire. On Non cul', a Jury ready to give their Verdict at the Bar, he expreſly fatebatur quod non potuit dedicere Information'. Hoc etiam legi ibid. Rot. 16. againſt Dr. Robert Cliff, on 16 Ric. 2. and after a Trial a Judgment of Premunire entred for ſeizure

of Lands, Goods, &c. Ibid. Rot. 17. Simile verſus John Baker, Ibid. Rot. 18. againſt Thomas Pelles, Ibid. Rot. 19. Simile verſus Adam Traverſe, Ibid. Rot. 22. Simile verſus Rowlandum Phillips; all theſe I ſaw and read in the Treaſury at Weſtminſter. Trin. 35 Hen. 8. Rot. 32. Information againſt Tho. Martyn un' Clericorum & officiar' hujus Curiæ for a Cheat in Warwickſhire, and a Fine on him. Mich. 25 Hen. 8. Rot. 32. Information againſt Richard Bpp——of Norwich, and Judgment of Premunire againſt him thereon. Now 'tis obſervable that theſe Informations do recite the 16 Ri. 2. cap. 5. and by that the Party is to be attached to anſwer before the King and his Council (which was there the Court of Star-Chamber) or by Writ of Premunire, which (ſays Crompton Jur' 69.) was to be ſued out of Chancery, and they might be impleaded in B. R. by Bill as in Cuſtod' Marr', and by Information in the Crown Office as appears by theſe Precedents, and by both it appears there was no need of Indictment, though the Offence was meerly criminal. Mich. 16 Hen. 8. Rot. 15. Information againſt the Dean and Chapter of Wells, pro erectione cujuſdam molendini aquatici ad nocument' and laid in Somerſet, and a cognovit nocument' entred. Trin. 13 Hen. 8. Rot. 12. againſt Thomas Wile, & al' for not repairing of Grove Lane in Oxford. Trin. 13 Hen. 8. Rot. 11. Simile *verſus* Katharinam Prioriſſam de Littlemore for not repairing a way called Stoneford Lane. Mich. 12 Hen 8. Rot. 42. Simile per Attorn' Regis verſus Will' Gregory de Sydingborn in Kent, pro non obſervat' vigiliar' in nocte & aliis vigiliis. Trin. 12 Hen. 8. Rot. 42. Devon. Simile verſus Tho. Jule, & al' pro maletractione Will' Wolfe ſuper deliberat' brevis Regij eidem Thom' & aliis direct' pro reſtitutione bonorum Will' Shelton. These were all Offences at the Common Law. Mich. 12 Hen. 8. Rot. 21. Simile per Attorn' Regis againſt John Williams pro obſtupatione Regiæ viæ in Tutton in Southampton. Trin. 8 Hen. 8. Rot. 43. Worceſter. Simile againſt Sir John Savage Sheriff there, for a Treſpaſs, Contempt and Misbehaviour in his Office. Paſch. 12 Hen. 8. Rot. 4. Oxon'. Simile per Attorn' Regis againſt John Traverſe, & al' pro non reparatione Regiæ viæ nuncupat' le Cawſey ducent' a parte vocat' Oſney Bridge uſq; paſſagium vocat' Hinckſey Ferry. Trin. 23 Hen. 8. Rot. 32. Information by Sir C. Hales verſus Robertum Cliff, & al' quare Clauſum apud Villam Weſtmonaſter' fregerunt & alia enormia. Paſch. 23 Hen. 8. Rot. 32. againſt the Mayor and Bailiffs of Oxford pro nocument', Mich. 20 Hen. 8. Rot. 22. Information by Will' Fenner Coroner againſt Abraham Price pro inſultu ſuper quendam, &c. All the laſt there are Docquetts of them on their Roll in the

the Crown Office kept for that purpoſe, though the Informations are not there but removed.

In this Reign of Hen. 7. there are ſeveral Precedents of Informations in the Crown Office. Mich. 20 Hen. 7. Rot. 6. One for a Treſpaſs and Contempt againſt Henricum Gerves Clericum, and in Paſch. 23 Hen. 7. was an Information by the then Attorney General, James Hobard *verſus* Milles, and others for a Cheat in levying of a Fine in another Man's Name, in contemptum Regis ad malum exemplum, and in form as is now: 'Tis printed as a Precedent in Moyles Entries 22. under the title Commitment; but becauſe Empſon's Law may be thought to affect this time (though in truth it doth not, as I ſhall ſhew preſently) I will therefore go beyond it. In Trin. 9 Hen. 7. Rot. 26. Information againſt Robertum Brandon, & al' pro Tranſgreſſione & Contempt. Hill. 9 Hen. 7. Rot. 13. Conſimile Mich. 9 Hen. 7. Rot. Information againſt Petrum Edgecombe, & al' ad numerum 69. pro Tranſgres' & Riott', & omnes fecerunt finem cum Rege: Theſe were all Common Law Offences, and there are Docquets of them in the Crown Office to this very day. In Trin. 18 Hen. 7. there is among the bundle of Indictments of that Term, an Information by James Hobart againſt John Sygrave, for preſenting one Richards in Court Chriſtian, for calling the Defendant Thief, to the prejudice of the King's Courts; Hoc vidi & legi apud Weſtm' in the upper Treaſury over the Parliament Houſe.

Paſch. 22 Hen. 6. Rot. 32. Information againſt Tho. Piccard pro Tranſg'. Ibid. Rot. 34. Simile verſus John Gaſton pro deceptione. Trin. 22 Hen. 6. Rot. 40. Simile verſus Richardum Dodd pro Tranſgr'. Mich. 22 Hen. 6. Rot. 15. Simile verſus Martin Blake pro Tranſgr', Hill. 23. Rot. 15. pro manutentione, and this was before the Statute which gave Information to the Party that would Sue for the Penalty. Paſch. 34 Hen. 6. Rot. 25. Inform' pro manutentione verſus John Gawtree. Ibid. Rot. 34. are ſeven ſeveral Informations.

Beſides, I found upon ſearch of the Rolls inter placita Coronæ in Trin. 22 Hen. 6. Rot. 20. ſeveral Entries where the Informations are not entred, a Proceſs awarded on the Suggeſtion of Tho' Greſwold qui ſequitur pro Domino Rege, &c. de placito Tranſgr', and an Attachment. And Rot. 25. throughout the whole Roll, abundance of ſuch Entries. Tho' Greſwold qui pro Domino Rege ſequitur verſus Robert' Arnold, & al' de placito Tranſgr' & Contempt' contra formam Statut' de venatoribus, and upon that there is an Award of Proceſs; Hoc vidi, and in all others 'tis entred Indictatus, &c.

Paſch.

Paſch. 5 Edw. 4 Rot. 4. Walterus Travet impetitus pro intratione Liberæ Chaſeæ Domini Regis & fugatione Damarum. Mich. 5 Edw. 4. Rot. 4. David John, impetitus pro inſultu & verberatione Johannis Green. Ibid. Rot. 21, Ludovicus John, impetitus pro fractione clauſi Domini Regis. Ibid. Rot. 22. Thomas May, & al' impetit' pro inſultu & verberatione Robert' Howſter. Ibid. Rot. 25. Rogerus Wyche, & al' impetit' pro inſultu & verberatione Will' Spicer. Mich. 12 Edw. 4. Rot. 18. Robert' Ruſſel, impetit' pro inſultu & verberatione. Hill. 12 Edw. 4. Rot. 39. Jacobus Reeve, & al' impetit' for Foreſtalling. Hill. Rot. 41. Johannes Weſt impetit' ſupra Stat' de manutentionibus. Of theſe there are Memorandums in the Crown Office. In this Reign upon the Rolls I find in Hill. 12 Edw. 4. Rot. 17. Johannes Weſt, qui pro Rege ſequitur verſus Johannem Lyſons & Johannem Reeve, for Foreſtalling de placito Tranſgr' & Contempt' & non venit, and an Attachment awarded. In Mich. 5 Edw. 4. Rot. 22. I find John Doyle outlawed for Maintenance, unde impetitus, &c.

Trin. 1. Rich. 2. Rot. 17. Information by Tho' Shardlow Coroner & Attornatus Regis verſus Johannem Wotton pro inſultu.

Paſch. 3 Edw. 3. Coram Rege Rot. 9. Indorſ. Southampton. The Biſhop of Wincheſter was Attacht ad reſpondend' Domino Regi de eo quod cum inhibitus fuit diſcedere abſq; licentia, he departed from Parliament, &c. and Adam de Fincham the then Attorney qui pro Domino Rege ſequitur prays Proceſs, and the Biſhop pleads to the Jurisdiction of the Court & Idem qui pro, &c. Demurrs. I urge this to ſhew that Indictment or Preſentment was not always neceſſary even in thoſe days. The Record is recited at large, 4 Inſt. 15. 'Tis true, my Lord Coke ſays, this was by Original Writ, but 'twas not upon an Inqueſt.

Amongſt the Lord Hale's Manuſcripts in Lincolns Inn Library, there is a Book figured Liber I. the Title is, Placita a primo Edwardi primi uſq; 18. It ſeems to be an Alphabetical Table to the Records of thoſe 18 Years, and there I find under Title Information (which is a diſtinct Head from that of Indictment) theſe following Notes. Information, Trial, Paſch. 10 Edw. 3. Rot. 15. Information for a Nuſance. Paſch. 13 Edw. 3. Rot. 106. Information againſt the Juſtices of Ireland, committitur into Ireland. Trin. 18 Edw. 3. Rot. 27. Contempt and Slanderous words puniſht by Information. Trin. 21 Edw. 1. for breaking the Aſſize of Bread. Trin. 13 Edw. 1. Majus, Nuſance for ſtopping a Common River puniſht by Information, and the Jurisdiction of the Court well Aoucht.

Trin.

Trin. 18 Edw. 1 Mich. 18 & 19. Edw. 1. Majus. All theſe I find there in diſtinct lines. I confeſs I have not ſearcht for the Records themſelves for want of time.

Beſides all this, there is the continual uſage of the Star-Chamber, which as appears by the 16 Car. 1. cap. 10. which aboliſhes that Court, had no redreſs or remedy to puniſh Offenders, but what might properly be had in other Courts, meaning this, which in truth is the ſupreme for Pleas of the Crown, all being here coram Rege ſans Addition, therefore the Parties there declare the Law of the Land not to be as they would have it, viz. univerſally to require a Preſentment. There were always Informations for Riots, Aſſaults, Menaces, Libels, Slanders, Falſe news, Forgeries, Perjuries, Extortions and other Miſdezances, &c. which in Queen Eliz. & Jac. 1. were very common: I'le not cite particulars, 'twould be endleſs, the Reports are full of them.

But I'le go higher, becauſe of the Statute which they ſay erected that Court. If we may believe the Lord Coke, he ſays, 4 Inſtit. 62. that the 3 Hen. 7. cap. 1. did not erect that Court, but confirm and eſtabliſh it; adding the two chief Juſtices as Judges, and impowering of them to examin the Defendant upon Interrogatories. He quotes many Authorities of Offences puniſht there; but becauſe Mr. Prynn in his Epilogue to, and on 4 Inſt. cavils at three of them, I'le not name them, but others, which will ſufficiently declare the antiquity of the uſe of Informations, 28 N. 2 Hen. 7. One Bigot was fined 40 Marks for a Riot, and in the Year-Books are ſeveral Cales Coram Rege in Camera Stellata, as 22 Aſſ. Pl. 22. and Regiſt' 124. is a Writ to appear Coram Rege & Concilio ſuo; and in 24 Edw. 3. 33. Information before the King's Council for going armed within his Palace: Its in Bro. tit. Contempt. Pl. 6. in Cot' Abr' 300. Cavendiſh was fined 1000 Marks for a Slander on the then Chancellor, 7 Rot. 2. and there are abundance, which I'le not mention in Ruſhworth's Collect. 2 Vol. 475, 476, 477. and 4 Inſt. 62, 63. and in truth ſo many, that that was the terror of the People, and upon that occaſion were the complaints by the Commons, becauſe they were convicted without a Jury, not becauſe 'twas by Information. Some will have the Star-Chamber no Court of Record, becauſe their Proceedings are in Engliſh. But if that were an Objection, then all the ancient Parliament Rolls and Acts of Parliament before Hen. 6. which are moſt inrolled in French, not in Latin, and many Charters,

Charters, Writs and Commiſſions enrolled in French, and the Statutes ſince 1 Hen. 6. muſt be no Records.

'Tis high time now to anſwer their Objections. But here my Lords I would firſt obſerve the reaſon and uſe of a Preſentment or Indictment, it is to apprize the King of ſuch an Offence committed, as 'tis of an Office, to inform him of a title in civil matters. The Jury only preſenting, they do not accuſe or pray Proceſs, ſo that 'tis plainly for the ſake of the King as well as the Subject, or rather more upon his Account that there ſhould be ſuch inquiries; but if the King's Court be otherwiſe informed by a Record its ſufficient for him, but ſay they

Objection, Its inconvenient for the Subject, and many needleſs Informations may be exhibited without cauſe, to the veration of the Subject, and no remedy againſt the Officer.

Sol. Here is no inconvenience to the People. Here's a Trial per pais, fair notice, liberty of pleading Dilatories as well as Bars. Here's Subpœna and Attach' as much time for defence, charge, &c. for the Proſecutor makes up the Record, &c. then in caſe of malicious Proſecution, the Perſon which Proſecuts is known by the note to the Coroner, according to the practice of the Court. 'Tis true, no Action lies againſt the Attorney or Coroner; no more does it againſt a Grandjuror or Proſecutor; as was ruled in the Lord Macclesfield's Caſe in Scaccario, and long before that in Agard and Wild's Caſe, in Bridgman's Rep. 130, 131. and the Reaſon given for it is becauſe they are upon their Oaths, and ſo they are here as Officers upon Record.

Objection 2. Magna Chara, cap. 29. That nullus liber homo capiatur vel impriſonetur, &c. niſi per legale judicium parium ſuorum vel per legem terræ.

Sol. That this method of Proſecution no way contradicts that Law, for we ſay this is per legem terræ & per communem legem terræ; for otherwiſe there never had been ſo univerſal a practice of it in all Ages. Beſides, per judicium parium in that Law is intended only of Trials per pares, not of an Accuſation; and it hath always been conſtrued ſo, and uſed as an Argument for it, and ſuch a Trial the Defendants might have had in this caſe if they had ſo pleaſed; and no Man is to be puniſht upon an Information, but after ſuch a Judicium parium ſuorum, unleſs he confeſs the Fact, either expreſs by a Cognovit, or implied by default of pleading his Cauſe on ſuch a Trial.

Objections,

Objection, That Glanville and Fleta ſay that Crimes are to be proſecuted by preſentment.

Sol. I may with ſubmiſſion to your Lordſhip deny their Authority, and for doing ſo the Books would warrant me, as in. Fitz. Grand Abr. tit. Gard. 71. 'tis held by all the Court, that Bracton, Glanvil and Fleta were never taken for Authors in our Law, and in Stowell's Caſe, Plowd. 357. Saunders Chief Baron when he quotes Bracton and Glanvil, ſays, he cited them not for Authority, for they were not Authors in our Law, but he uſed them only as ornament to his Diſcourſe; and Catlyn ſays the ſame thing, when he quotes them, fol. 358. But however to give them a more particular anſwer. Glanvil cap. 1. was cited the laſt Term, but I ſuppoſe 'twas only to make a good ſound with Fleta, for I can find nothing in him about it; and Sir Francis Winnington muſt have good Eyes to read one word to the purpoſe in all the Book, for cap. 1. is nothing but Placita Civilia & Criminalia divided and diſtinguiſht, and Lib. a. cap. 15, 16, 17, 18. is nothing but a diſcourſe of an Aſſize and the Jury to try it, nothing to this effect.

As to Fleta Lib. 2. cap. 52. fol. 112, 113. it is a diſcourſe of the King's Court in the Sheriffs Turn & alibi; all that he ſays is of the Articles of Enquiry. Then Sect. 39. de Vic. & ballivis in turnis & viſibus de franco Pleg' de malefactoribus inquirentibus, Statut' eſt, that if they take and impriſon any Man in any other manner than they were indicted by twelve Jurors, who ſet their Seals to ſuch Indictments, Treſpaſs ſhall lie for a falſe Impriſonment.

Now to anſwer this. 1. 'Tis plainly no Law, nor the Author a Lawyer; for by our Law there is no need of a Seal to any Indictment, but only to an Inquiſition of Office. 2. If there were need it relates only to Sheriff's Turns, and thoſe inferior Courts and not to the King's Bench. 3. If it were Law, it muſt certainly extend to all the particulars there mentioned, as Articles of Inquiry, and conſequently no Information would lie for Intruſions, or deceiving the King of Wreks, our uſurpation of Royal Franchizes without Authority, for theſe are all particularized there.

Objection 4. In 7 Edw. 3. 26. The King brings a Writ againſt the Sheriff upon the Statute againſt making of undue returns of Jurors, that 'twas there held that the King was not to be anſwered unleſs he were appriſed by Indictment or Preſentment, &c.

Sol. I Anſwer the reaſon there was becauſe there was Proceſs uſed; there was a Writ awarded for a Tort, a wrong to the Crown before the King's Court was appriſed; that there was ſuch offence committed by ſome matter of Record. The words of Hillare, Sir, We apprehend that the King will not be anſwered to this Writ, before that he be appriſed of it per inditement vel auter manner, whereupon he prayed Judgment of the Writ; the miſtake was, the Writ iſſued before any Judgment found or any Information filed, and the words ou auter manner implies it. In all the Caſes Sans eſtre appriſe is with an, &c. whereſoever 'tis named. Now in our Caſe, here is the Court appriſed, here is dedit Curiæ hic intelligi & informari before any Proceſs; this is done by a Sworn Officer filed of Record. Beſides in Kelway 19. it was held otherwiſe, and in 5 Edw.3.33. the ſame Exception is overruled in Caſe of a Writ of Champarty, and the Party ruled to anſwer, and did ſo.

Objection 5. 26 Edw.3. fol.20. A Writ of Reſcous for the King held naught for the ſame reaſon as in other Caſe afore named.

Sol. I give it the ſame anſwer, becauſe the Writ iſſued before the King was appriſed by any Information, &c.

Objection 6. In 2 Inſt. 46. Coke in his Comment upon Magna Charta ſays, No Man ſhall be taken, (i. e.) reſtrained of Liberty by Petition, or Suggeſtion to the King or his Council, unleſs it be by Indictment or Preſentment.

Sol. By Petition or Suggeſtion can never be meant of the King's Bench, for he himſelf had preferred ſeveral here; that is meant only of the King alone, or in Council, or in the Star-Chamber. In B. R. the Information is not a Suggeſtion to the King but to the Court upon Record. Beſides, his Text Warrants no ſuch Comment, for page 49. where he explains per legale Judicium parium ſuor', he ſays it extends only to the King's Suits for Treaſon, or Felony, or Miſpriſon, for in leſſer, or other offences a Nobleman may be cited by other than his Peers, viz. by Commons; all which doth ſhew that this Lord doth not require a Preſentment by a Jury of Peers, for if it did it muſt extend to Peers as well as others, and then I am ſure it was never obſerved ſince it was made: Beſides, per legem terræ includes any due Proceſs of Law.

Obje-

Objection 7. That Informations were brought by Empſon and Dudley; that 11 Hen. 7. cap. 3. was the firſt that introduced them into our Law.

Sol. I anſwer firſt, Informations were given to the Party Informer in many Caſes before by particular Statutes, as by the Statute of Liveries in Ew. 4. his time, and ſeveral in Hen. 6. time. 2. That of Informations for Common Law Offences, I have ſhewn your Lordſhip many Preſidents of before this time. 3. I have ſhewn you ſeveral juſt after it was repealed, which was 1 Hen. 8. cap. 6. beſides. 4. This Law never introduced them into the King's Bench at all, nor did it any ways concern this Court, for it is only thus; That Juſtices of Aſſize, and Juſtices of Peace ſhall have power upon Information before them made for the King, to hear and determin at their diſcretion. Now what was this to the King's Bench? Beſides, there was an expreſs Proviſo, That the ſaid Informations ſhould not reach any Perſon dwelling in any other Shire than there where ſuch Information was given, ſo that it not only gives no power to the King's Bench, but expreſly excludes them: Now how this could introduce Informations into this Court, I know not.

Beſides, the Proſecution by Information was not the thing complained of by that Law, but the determining by diſcretion, and not ſecundum legem & conſuetud' Angliæ; and my Lord Coke complains there was no Trial by a Jury. Empſon and Dudley's Crimes were the inflicting Penalties which the particular Statutes never intended, and procuring falſe Informations and undue Offices, and refuſing to admit Traverſes where by Law they ought; this was their Crime as appears by the Indictment againſt them, 4 Inſt. 198.

Objection 8. That Coke 3 Inſtit. 136. ſays, That the King cannot put any Man to anſwer but by Preſentment or Indictment.

Sol. I wonder truly why that was urged, for it plainly proves my Poſition laid down at firſt: The words are, The King cannot put any to anſwer but his Court muſt be apprized of the Crime by Indictment, Preſentment or other Matter of Record; which is what I at firſt affirmed, and here it is an Information filed of Record.

Objection 9. That the 5 Edw. 3. cap. 9. ſays, That no Man ſhall be attached by any Accuſation, nor forejudged of Life or Limb, nor his Lands or Goods ſeized into the King's Hands againſt the form of the great Charter, and the Law of the Land.

Sol. We ſay this is not contrariant to the great Charter as is ſhewn afore, but is agreeable to the Law of the Land, and a practice founded upon it, and always appeared by the profeſſors of it till now.

Objection 10. the 25 Edw. 3. cap. 4.

Sol. That is plainly meant againſt the proceedings before the King and his Council, and not here in this Court; and the ſame is no more than the requiring the due courſe of the Law to be obſerved, which we ſay is here, and this is ſecundum legem, for that the Precedents, Cuſtoms and common judicial proceedings of a Court are the Law, and ſo is 1 Cro. 527, 528. The Lord Mounſon's Caſe, and 4 Rep. 53. and abundance more.

As to all the Petitions and Complaints in Parliament againſt calling People to anſwer unjuſtly to their great Vexation, they were occaſioned by the exorbitant proceedings of the Council, and not of this Court, nor do any of them mention it, nor are they aimed at in it, as is apparent throughout all Sir Robert Cotton's Abr. 105. 133. 178. 54, 55. 67. 179. 295. 620.

In anſwer to Cavendiſh's Caſe which is, 1 Anderſon 156. and was urged not as pertinent to the point, but as hortatory to your Lordſhip to follow the example of thoſe Judges, who notwithſtanding the Queen's Letter did keep to the Law; I think that might have been ſpared at this time of Day, when there is no occaſion for it; but in anſwer to Sir Francis Winnington who cited it, I'le give him two for his one: The firſt is the, 13 Hen. 7. fol. 23. that a Counſellor ought not to be heard to ſpeak againſt common Precedents. And the other is the ſaying of Sir J. Priſot who was a learned Judge in Hen. 6. time, it is 33 Hen. 6. fol. 41. If we ſhall adjudge contrary to received Precedents, 'twill be of evil example to the young Apprentices and Students of the Law, inſomuch that they will not know what to give Credence to, whether old Books or new Judgments.

Upon the whole matter after ſo long an uſage, ſo much approbation from the Judges and Parliaments, ſo many publick directions in Court for them, and no complaint of their illegality till now, and ſo plain a conſiſtency as they have with every fundamental and other Rule of Law, for to deſtroy this without Act of Parliament, will be as much againſt Magna Charta, as the contrary is agreeable with it, which is as plain as the words of it, and therefore I pray Judgment for the King.

Jenkyns.

Jenkyns. Cent. 3. Caſ. 9. cap. 108. ſays, that buying of Debts was Maintenance at the Common Law, and puniſhable by Indictment or Information.

Judgment was given per tout le Court pro Rege; tho' Winnington ſaid, he thought the Lords had determined no Information to lie when they reverſed Sir Samuel Barnadiſton's Judgment; but Mr. Juſtice Eyres affirmed the contrary, and that 'twas for other Errors and not that; tho' Baron Lechmere argued there to that purpoſe, much to the ſame effect as Winnington had, and that he told him that it was his Opinion, and he had furniſhed Sir Francis with the materials of that his Argument. Judic' pro Reg'.

Witherley *verſus* Sarsfeild.

Ent. Mich. 2 Jac. 2. B. R. Rot. 645.

ERROR in Cam' Scaccar' upon a Judgment in the King's Bench, where the Plaintiff declared in Caſe upon the cuſtom of Merchants, That if any Merchant or other Trading Perſon make, and direct any Bill of Exchange directed to another, payable to any Merchant, or any other Trading Perſon, and the ſame Bill be tendred, and for want of acceptance be proteſted, that in ſuch a caſe the Drawer by the cuſtom is chargable to pay, &c. That the Defendant at Paris did draw a Bill on his Father here in London payable to the Plaintiff, that the ſame was preſented, but refuſed, and he according to the cuſtom proteſtavit ſive proteſtari cauſavit prædict' billam, &c. whereby he became chargable, and in conſideration of the Premiſes did aſſume, &c.

A Bill drawn by a Gentleman Travelling beyond Sea for Education, will be within the cuſtom of Merchants.

The Defendant pleads, that he was a Gent. the Son and Heir of Dr. Thomas Witherley, and at the time of drawing the Bill was a Traveller, and at Paris for his better Education, &c. And that he was neither then, nor any time from his Birth hitherto a Merchant or Trader, or did ever deal as ſuch, and that he was then at Paris as a Gent. and Traveller as aforeſaid, abſq; hoc that he is or ever was a Merchant, or Perſon trading by way of Merchandiſe between Paris and London, vel alibi ubicunque prout the Plaintiff ſuppoſes. Et hoc paratus eſt verif.

The Plaintiff Demurrs, and ſhews for Cauſe, that the Plea amounts to a general Iſſue, is double, uncertain, and wants form.

Judgment

Judgment for the Defendant in B. R. and the Plaintiff brings a Writ of Error.

I argued for the Plaintiff, that this Plea was ill, because it did amount to the general Issue, and we had shewn it for Cause. It answers no more than might be given in Evidence. It answers the Assumpsit only by way of Argument. Besides, here is an Assumpsit grounded upon consideration of all the Premises which are a consideration executed, and consequently not Traversable; Otherwise where 'tis Executory; and so is the Anomymous Case, 3 Cro. 250. and Smith and Hitchcock's Case, 3 Cro. 201. and 1 Leo. 252. Indebitatus. Plea that he gave Bond for that Money, absque hoc that he was indebted aliter vel alio modo, and held ill, because a Traverse of the Consideration which is not Traversable, and amounts to the general Issue; and though but matter of Form, yet shewn for Cause it's all one. Besides, the matter of this Plea is ill, for 'tis repugnant in it self; for he admits himself to have drawn the Bill, and yet Traverses that he never was a Merchant, whereas the bare negotiating of a Bill of Exchange makes him a Merchant for that purpose; the very act of taking up Monies in a Foreign Country, and undertaking for the repayment here by Bill of Exchange is such an act of Merchandize, as you will take notice of. Moneys now are become Merchandize, and some Mens business is wholly in its Exchange. The Rates and Profits of Exchange are now certainly known; a Man may be a Dealer or Trader in one sort or kind, that is not so generally. Though he be not a Trader so as to be capable of being a Bankrupt, yet he may be a Trader to oblige himself by his own Act. The Parliament in the last Statute of Bankrupts made a Quær', whether a Man that had a Stock in a Company was a Trader, and therefore by express Provision did except them. So that a little matter will make a Man a Trader. Besides, the inconveniency will be great both at home and abroad, and work a manifest wrong. If a Bill be payable unto him he has the advantage of it, tho' a Gentleman, pari ratione he ought to be bound. If a Traveller's Bill drawn beyond Sea shall not inforce a Payment upon a Protest, our English Gentry must suffer in their Credit, when by their Laws they are answerable, though not as Merchants, and by ours must not. The necessity and usefulness of transferring Money easily by Bills of Exchange commands all the Encouragement imaginable, and therefore I prayed a reversal.

Holt

Hoil è contra. By their own ſhewing he muſt be a Merchant, elſe not within the Cuſtom, and was to have traverſed that, and they have confeſt it by their Demurrer.

Chief Juſtice Holt. 'Tis not every Plea that amounts to a general Iſſue that is ill, and the cuſtom is the foundation, and the Plea is an anſwer to that, and therefore well enough. But this drawing a Bill muſt ſurely make him a Trader for that purpoſe, for we all have Bills directed to us, or payable to us, which muſt be all avoidable, if the negotiating a Bill will not oblige, &c.

Then Hoyle took exceptions to the Declaration as uncertain, becauſe ſaid proteſtavit ſive proteſtari cauſavit, which is uncertain. To which I anſwered, that the one was ſurpluſage, and the other was good; if it had been cauſed to be proteſted, this proteſt would have been good Evidence of it. If it had been proteſted, our cauſing it to be proteſted would have maintained it. Beſides, this is all admitted by their Plea; for they agree that it was proteſted, but ſay that they were not bound to pay it, and ſo we had Judgment reverſed.

Afterwards I moved in Banco Regis for Judgment for the Plaintiff, and ſhewed them the Caſe of Claxton *verſus* Smith, quel vide ſupra, where was Judgment for the Defendant in Banco Regis, and that Judgment reverſed, and afterwards Judgment in Banco Regis for the Plaintiff upon the Remittitur; and ſo was Faldoe *verſus* Rude, Yelv. 76. Ent. Trin. 2 Jac. 1. Rot. 267. And accordingly we had Rule for the Plaintiff for Judgment, whereby my Client got his Debt on a Writ of Enquiry from the Bail, the Defendant being gon for Ireland.

Carter *verſus* Downiſh.

Ent. Hill. 3 & 4 Jac. 2. B. R. Rot. 831.

ERROR in Cam' Scaccar' in Judgm' in B. R. where the Plaintiff declared in Covenant of a Deed, reciting that the Plaintiff had Covenanted to deliver 1000 Kintals of Newfoundland Fiſh, or ſo much as ſhould be made in that Seaſon, the Defendant Covenanted that the Defendant would pay ſuch Bills of Exchange as ſhould be drawn on the Plaintiff his Executors Adminiſtrators or Aſſigns in the dwelling Houſe of Rorbert Aylewin Merchant in London, and alledges that there was a Bill drawn payable to them at 40 days ſight: That the ſame was preſented, accepted, and not paid, &c. The Defendant pleaded, that within the 40 days after

after the Bill was ſhewn the Plaintiff by Endorſment on the Bill according to the Cuſtom of Merchants appointed the Payment to Mr. Herbert Aylwin or his Order, and that he endorſed it to one Taſſell; That the Defendant within 40 days did pay to Taſſell One hundred pounds, part thereof, and afterwards tendred in the Houſe of Aylwin, the Three hundred pounds reſidue, which was refuſed. Et hoc parat' eſt verific', &c. Demur', and joinder in Demurrer. Judgment pro Quær' in B. R. and the Defendant brings a Writ of Error. General Error aſſigned.

I argued pro Quær' here, that this Plea was good.

The Exceptions taken to it were two.

1. Becauſe we do not ſet forth a particular Cuſtom to warrant our Endorſment.

2. Becauſe we do not plead the Tender with an uncore priſt.

The Judges ought to take notice of the Law of Merchants being part of the Common Law.

To the firſt we ſay, That the Law and cuſtom of Merchants doth warrant the Endorſment of Foreign Bills of Exchange, and for that all the Book Caſes on Foreign Bills of Exchange are a proof; and tis as plain, that ſuch an Endorſment doth really transfer the property of the Money, or Contents in ſuch Bills to the Endorſee, and that all this Law of Merchants is part of the Law of the Land; and your Lordſhips are obliged to take notice of that, as well as of any other Law, 1 Inſtit. 182. The Law of Merchants is part of the Law of the Land, they are the very words of Cook; It is not like a particular Cuſtom, which is confin'd within a certain Precinct in the Realm, but it is of univerſal Extent, and concerns the whole Realm; Nay, reaches further, for it is jus gentium, and concerns all Countries where Traffique is uſed: You do take notice of that part of it, which diſtinguiſhes it from other intereſts in point of Survivourſhip, that jus accreſcendi inter mercatores pro beneficio Commercij locum non habet, and this is per legem Mercatoriam, which is pro bono publico, 1 Inſt. 182. Debts or Duties as well as Wares ſhall not ſurvive, 38 Edw. 3. 7. The words are, 'Tis the Law of Merchants, &c. In the 2 Inſtit. 58. in the expoſition of Magna Charta, cap. 30. de Antiquis & certis Conſuetud. he calls them ancient and lawful cuſtoms of the Realm per legem Mercatoriam, which is a part of the Common Law, theſe are the very words of the Book in 2 Inſt. 404. on Weſtm' 2. cap. 23. habeant de cetero Executores breve de computo, &c. Cooke ſays by the Common Law Executors ſhould not have account before that Statute; but per legem Mercatoriam an Action of Account did lie for Executors; and our Books take notice of it,

it, and no need for ſetting forth a particular Cuſtom for this.

In Fitz N. Br. 117. If two Merchants occupy their Goods and Merchandiſes in Common, one of them ſhall have an account againſt the other, ſicut per legem Mercatoriam, ſo that you take notice of that, and ſo is the Reg. 135. If Foreign Merchandiſes be waived, if they belong to Merchants, the Law takes notice of them and exempts them from Seizure, 13 Edw. 4. 9. In the ſame place 'tis ſaid, that the Law of Merchants is known throughout the Realm, Nay, the World. In Holland's Caſe, 4 Rep. 76. concerning general Statutes, 'tis agreed, that Acts of Parliament concerning Myſteries or Trades are general Acts. I urge it only for the reaſon ſake, which, is that, though it only contains under its name particular Perſons, yet being of general influence and concern, the Judges will take notice of it: In Fitz. Abr. Tit. Account 127. the Writ was general as Receiver, but the Account was particular, and yet ruled to be well, being as Merchants; whereas if the Writ were formed on a particular Cuſtom, the Writ ought to be ſo, as in a rationab' parte bonor' for common part, &c.

But ſuppoſing it not good by, &c. yet it amounts to an Appointment: The Covenant is to pay Bills to him, his Aſſigns or Order; This Endorſment ſhall make an Aſſignee or Servant. It ſhall amount to deſignatio perſonæ to receive, though not ſo as to transfer the Property to Sue for and recover, and then our payment of the 100 l. will be as good payment to him being made to his Servant or Order.

As to the ſecond, a tender and refuſal amounts to a Payment and Performance: As in caſe of a Bond for performance of an Award without an uncore priſt, 1 Inſt. 207. Peitoe's Caſe, 9 Rep. 79. In Underhil and Devereux's Caſe, Hill. 21 & 22 Car. 2. 1 Sanders 71. Scire fac. to have reſtitution on Extent upon allegation of Receipt of ſo much profits, and tender of the reſt: Exception taken to it becauſe no uncore priſt, but yet over-ruled; and in Ledgingham and Pophir's Caſe, Mod. Rep. In Replevin, Avowry for not doing Service. Plea of a Cuſtom in the Manor at ſuch a time and place in lieu of ſuch Services, Suit and Tender and refuſal held good. Beſides, uncore priſt is no where neceſſary that I know of, but where the Duty is demanded; here is only Covenant, which is not to recover the Duty, but Damages. But were it otherwiſe, whereſoever the Money is payable to a Stranger, or at a particular place, there needs no uncore priſt, as in Moore 37, num. 122. Debt on a Bond conditioned to pay to

Tender and refuſal pleaded to a Covenant to pay Money.

the obligee or ſuch as he ſhould appoint. Defendant pleads that he appointed J. M. and the Defendant tendred, and J. M. refuſed, good without an uncore priſt. And the reaſon is plain, becauſe the Plaintiff was never to have it, but the Stranger, and he ought no more to have it now than before, 1 Anderſ. 4. Powell and Nevill's Caſe is the ſame; and tis in Dyer 150, 151. Pl. 84. per Catlin and Griffin. Where it has a particular place of payment appointed, there it cannot be paid in another place, and ſo no need of an uncore priſt. And ſo is the Caſe of Nicholls and Fitz. John, Trin. 7 Hen. 4. 18. 'tis Pl. 17. and held good without it, becauſe not bound to tender in another place; ſo is Perkins 15.

Tremayn e contra, That to ſet forth the cuſtom of Merchants here is as neceſſary as in any Caſe, and that there was no reaſon of a difference between a Declaration and a Plea as to this purpoſe, and that an uncore priſt was neceſſary, as is the Caſe of Newton and Newton, Rolls 2 Abr. 523. That if a Man Covenant to pay the Plantiff ten pounds after Michaelms, and before Eaſter; that Plea of tender and refuſal is not good without ſaying uncore priſt.

Law of Merchants part of the Common Law, and the Judges ought to take notice of it without ſpecially ſetting it forth. Where damages in demand tender without *uncore priſt*, a good Plea.

Lord Chief Juſtice Pollexfin. As to that of the Law of Merchants, I think we are bound to take notice of it, as we do of that againſt Survivorſhip and Account, and this is as well known; and their Declaration is, that he did draw Bills ſecund' Conſuetud' Mercator', and if this be good, theirs is ſo.

Then for uncore priſt, there is no neceſſity for it in any caſe of Covenant, where Damages and not the Debt is in demand.

Ventris. As to the Appointment, This will not make an Order at Common Law, becauſe there are two Endorſments; and if I give my Servant an Authority to receive, he cannot authorize another; otherwiſe if but one; then payment to the firſt Endorſee would be a payment to the Perſon, therefore you here depend upon the Law of Merchants, which at preſent I think we ought to take notice of.

They all enclined to reverſe the Judgment; but upon Tremayn's Importunity Adjornatur.

Note, The Caſe cited by Tremayne in Roll's Abridgment, It was Debt, and ſo not to the purpoſe, and the next Term the Judgment was reverſed, the Court holding our Plea to be a good Plea.

Watſon

Watſon *verſus* Clarke.

I moved for the diſcharge of a Rule for a Procedendo in an Action for calling one whore in London, but before Declaration, or any thing done there but plaint, we bring an Habeas corpus, and I oppoſed the Procedendo because they made no return of it; here was nothing did appear to the Court of the Cuſtom, and they ought to return it.

Prohibition does not lie for a Suit in *London*, for calling a Woman Whore.

C. J. Holt was of that Opinion: But Dolbin ſaid the conſtant practice upon Oath made by Affidavit is that the words were ſpoke in Latin, and ſo they got a Procedendo, againſt the Opinion of Holt Chief Juſtice.

Dominus Rex *verſus* Geary.

ERROR to reverſe an Attainder of Treaſon, in an Indictment at a Seſſion of Oyer and Terminer, for levying War in Somerſetſhire, with Monmouth and his Adherents; And the Defendants Adtunc & ibid. vener' in propriis perſonis ſuis Et petunt audit' indictament' Et eis legitur, quibus lectis & auditis dicunt & quilibet dicit quod ſunt & quilibet eſt Culpabilis modo, &c. ſuper quo viſis & per curiam hic intellectis Conſiderat' eſt per eandem cur' hic quod, &c

Attainder of Treaſon.

Upon Argument I did urge theſe Errors. 1. That though the Indictments be in Latin, yet they are not to be read to the Priſoner but in Engliſh: For 'tis the matter, and not the form they muſt anſwer to. In other Countries the Priſoner hath nothing but a verbal charge againſt him, and ſo is the expreſs reſolution in Sir Henry Vane's Caſe. Sid. 84. 2. A Man cannot plead to a capital Crime but in Cuſtody, and non Conſtat here that he was in Cuſtody; there is no Entry Qd' comiſſus fuit, &c. as the Precedents are. In Mrs. Calai's Caſe on a Writ of Error, 'twas held to be Error, becauſe he did not ſay in whoſe Cuſtody ſhe was, but only in Cuſtodia generally, and that was a Judgment on Commiſſion of Oyer and Terminer. 3. Here is no Arraignment, and by the Common Law a Man ought to be arraigned, for he may plead Miſnomer, or want of Addition, and the like; and all the Books,

Indictment for High-Treaſon read in *Engliſh*.

No Entry that the Priſoners ſued was in Cuſtody.

No Arraignment.

as Stamford, Coke, Hales, and the reſt do all ſpeak of Arraignment as neceſſary, for according to Hales 212. a Man at the time of his Arraignment ought not to be in Irons. And as I am informed in Hambden's Caſe the Entry is allocatur quid dicere poſſit, and ſo are the Precedents in Raſtall's Entries 455. Tit. Pardon, Statim allocutus de premiſſis ei impoſitis, So is Coke's Enties 532. and in the Earl of Leiceſter's Caſe, Plowden 387. 'Tis in all theſe Et Commit' & ſtatim duct' ad barram allocut', theſe are all Confeſſions too. 4. There is no allocutus before Judgment; and all the Precedents are ſo; and the Law requires that of neceſſity; for he might have a Pardon to plead, or he might move in Arreſt of Judgment. Per Cur', Judgment reverſed.

No *Allocut'* before Judgment.

But by Dolbin, Oyer of the Indictment is Tantamount to an Arraignment, though for any thing appears that might only be a Copy given, as in Civil Cauſes, and not read in Court.

All held the laſt to be a fatal Exception.

African Company *verſus* Bull.

Policy of Aſſurance.

CASE brought by the Plaintiff upon a Policy of Aſſurance.

The Defendant pleads a Cuſtom of Merchants, that if any Writing or Policy of Aſſurance be made and ſubſcribed upon any kind of Goods on board any Ship, ſuch Goods are to be deemed upon account, and ſuch a number of Aſſurers ſhould ſubſcribe ſuch Writing to pay divers Sums of Money, as ſhould amount to the value of the Goods mentioned to be aſſured; then all other Enſurers that ſhould ſubſcribe after ſuch number by which the Money ſo ſubſcribed amounted to the value of the Goods, were uſed to be diſcharged from payment of the Sums they ſubſcribed, though ſuch Goods were wholly loſt, and were to return their premium. That the Policy in the Declaration was upon Account that the Goods the Plaintiff had on Board, were worth but 2240 l. That 23 Men had ſubſcribed 100 l. each, &c. That the Defendant was the next Subſcriber; that by reaſon of thoſe Subſcriptions before his, he was diſcharged from his Promiſe, &c. and bound to pay back his Premium, and did offer the ſame, &c.

The

The Plaintiff replies, That if any ſuch a number Subſcribe to the value, and none prove Inſolvent, then to be diſcharged, abſque hoc that there is any ſuch Cuſtom as the Defendant hath alledged. And Iſſue is joined upon it; and at the Trial they proved it very plainly and fully by all the Exchange; and that there was never an inſtance to the contrary, but one payment on purpoſe ſince the Action commenced; that where the Policy is upon the Account, and not upon Goods valued certain or value blank, the laſt Subſcribers are not bound as in the latter Caſes they are; and we had a Verdict for the Defendant.

Mr. Serjeant Levins moved in Arreſt of Judgment, that this was an impertinent Plea, and the Cuſtom unreaſonable that any ſhould be diſcharged till ſatisfaction of the whole loſs, when ſome prove Inſolvent.

I anſwer'd him, that as to the Plea, though ill on Demurrer, yet good after Iſſue joined and tried; at moſt it doth but amount to a general Iſſue, and that ſhould have been ſhewn for cauſe on a Demurrer; but here is a Verdict. If non cul' be pleaded to an Aſſumpſit, 'tis good after Verdict; ſo payment without Acquittance to Debt on a ſingle Bill. Nil debet to Treſpaſs is not proper to Treſpaſs, and therefore ill; but if the Plea hath the colour of a Bar, and doth not contain matter of Bar, as Accord without ſatisfaction, 'tis good, Yelv. 227. 3 Cro. 495. Moore 692. 3 Cro. 259, 778. Moore 687. Beſides, we did give this in Evidence as we might on the general Iſſue; But their importunity impoſed on the Court that we ought to have pleaded it, and we were forced to pay 24 l. Coſts for this Liberty, and by conſent in a Rule we did it.

Then as to the reaſonableneſs of the Cuſtom, 'tis highly ſo; for 'tis equal between Inſured and Inſurer; for the laſt Subſcribers return their Premium (except 10 l. for Subſcribing) if there be no loſs, when the value of the Goods amount not to reach them; nor are the firſt Subſcribers at any diſadvantage, for they keep their Premium if the Goods come home ſafe when we return ours; and in truth thoſe to whom the value will not reach are never obliged. And as to the Inſolvency of ſome, we anſwer that each in inſurances do only engage for his own Sum, and to make good the loſs of Goods, ſo far as the Sum he ſubſcribed amounts to, not to make good others Inſolvency; and there never was a Cuſtom better proved; for if ten Subſcribe a 100 l. each, and the Goods be 950 l. the laſt ſtands at half loſs.

This

Policy of assurance subscribed on Goods on Account to pay to the value of the Goods, whosoever subscribe after, their subscription shall be void, a good Custom.

This was proved. If no Goods come home, the Insurer hath all his Premium returned, and so 'tis for his advantage, to have this Custom preserved; and these kind of insurances are made upon accounts when a Merchant doth not know whether his Factor will send home any Goods or how much.

Curia. The Plea is ill, if upon a Demurrer; but good after Issue joined, and you put them upon it, and the Custom is reasonable; and per totam Curiam, Judgment for the Defendant.

Term.

Term. Hill.

1 Will. & Mar.

Nightingale & *al' verſus* Bridges.

TRover and Converſion de bonis & catallis ſequent' viz. de una Nave, vocat' the James Friggat, oneris cent' & trigint' doliorum decem bombardis Anglice Guns cum omnibus armament' apparat' tormentis velis funibus munitionibus, proviſionibus, ſclopis, Cymbis, & aliis ſuppeditamentis eidem Navi ſpectan' ſive pertinen' ac etiam ducent' & duodecim ponder' librat' cibi vocat', &c. Non cul' pleaded. Trover.

The Jury find that Car. 2. by Letters Patents dated the 27 of September, Anno Regni ſui 24. To the Royal African Company Company of England, (being a Body Corporate) did Grant to them all the Regions Countries Coaſts and Places, &c. beginning at the Port of Sally in South Barbary incluſive, and extending from thence to Cape de Bona Eſperanza incluſive, with all the Iſlands near adjoining to thoſe Coaſts, and called by the name of South Barbary, Guinea, &c. and all Ports, Harbours, &c. To hold to them and their Succeſſors from the making the ſaid Letters Patents for the Term of 1000 Years. And Grants Licence to them and no others, to ſend Ships, &c. And to have all Mines of Gold and Silver there, &c. and the whole, entire, and only Trade and Liberty of Trade there, any Law or Statute to the contrary notwithſtanding, and none other of his Subjects to frequent, viſit, or Trade in thoſe Places, &c. prohibiting any to Trade there unleſs by Licence firſt had, under pain of our Indignation, and Impriſonment of their Bodies during our Pleaſure, and the Forfeiture, and loſs both of Ships and Goods whereſoever found, &c. with power to enter into, Search and Seize Ships and Goods, &c. one moiety of the

Forfeiture

Forfeiture to the King, the other to the Company: It alſo Erects a Court of Judicature to be held at ſuch a place as the Company appoints, to conſiſt of one learned in the Civil Law, and two Merchants, &c. the major part, (quor' un' the Lawyer) to have Conuſance and power to hear and determine all Cales of Forfeiture and Seizures for Trading thither. The Jury find further, 4 Septemb. 1684. the Company granted a Commiſſion under their Seal to one John Laſtall, reciting the Grants and Powers of their ſaid Charter to command him, Captain and Commander of the Orange Tree Friggat, then in their Service, and all Subordinate Officers and Seamen to Seize all Ships Trading, &c. and whatſoever they take in their outward bound Voyage, they are to carry to Land ſafe, and there to deliver them to the Agent and Council of Factors, there to be proceeded againſt in the Court of Admiralty there eſtabliſhed. That John Bridges the Defendant was one of the Officers in the Ship called the Orange Tree at the time of ſetting out, and at the time of making the ſaid Commiſſion. That the 28 of Febr. 1693. the Company made another Commiſſion to Henry Nurſe, James Hulet, W. S. and R. W. or any two of them, reciting the power of their Charter, did conſtitute and appoint them Judges of the Admiralty there, and to execute thoſe Powers according to ſuch Inſtructions as they ſhould ſend. That John Laſtall before taking of the Plaintiffs Ship died; that John Bridges after his Death was Commander of the Orange Tree Friggat, that the Plaintiff being Owner of the Ship and Goods in the Declaration, did Trade in an Infidel Country, in, and with theſe Ships and Goods to certain places within the Limits of that Company. That John Bridges did Seize, take, and carry away the Plaintiff's Ship and Goods upon the high Sea in his outward bound Voyage, and afterwards carried them to the Fort of Lane Corſe in Africa aforeſaid, againſt the Will of the Plaintiff, and the Maſter and Seamen. That at the Defendants inſtance there was a Proceſs in the ſaid Admiralty Court againſt the ſaid Ship; That none appearing for her there was a Condemnation, &c. Sed utrum the Defendant be Guilty, Ignorant, &c. Et ſi pro Quer. Damages to 4300 l. and Coſts to 2 l. 3 s. 4 d. Et ſi pro Defend', &c.

This Special Verdict was obtained at the Importunity of their Majeſty's Council for the Defendant; I therefore was prepared to argue as follows pro Quer'.

The

The Quær' is, whether any thing here found can justifie the taking and carrying away the Plaintiff's Ship and Goods. I am to argue that here is nothing, either precedent or subsequent that can justifie the Defendant's taking.

I shall not controvert the legality, usefulness or necessity of settled Companies for the managers of Foreign Trade, nor the Prerogative of the Crown in erecting such Societies, nor the giving Liberty exclusive of others. At present it seems to me an unnecessary task to deny, or disprove the validity of the prohibiting Clause; but my Lord, my Endeavours shall be to make out this, that the Defendant had no power to Seize; that Clause in the Charter is void and illegal, that their new erected Court is illegal being for this purpose in particular, and that if it were legally constituted, yet the Condemnation subsequent will not justifie the precedent Tortious Conversion: And that lastly they have not pursued their Charter.

A Clause in a Charter giving power to Seize the Goods of every Person, illegal and void.

It cannot be denied me that the Subject of England hath an undoubted Property in his Goods and Possessions; now this Property cannot be transferred or divested, but by the consent of the Owners, either express or implied, as by Gift, Derelection or Forfeiture; this last only concerns our present Question. It must be agreed, that the Common Law hath not ordinarily made this our Trade, as found in the Special Verdict, to be a Forfeiture or Cause of Seizure: I believe they will not contend this, that antecedent to their Charter, our Trade was unlawful under pain of losing Ship or Goods, and then the King cannot by any Prerogative whatsoever, create either a new Cause or a new mode of Seizure, and either of them will serve my turn.

To the altering of a Property of a Subjects Goods, a Parliamentary assistance is requisite, and that is the fittest way for ordering that Fundamental Propriety which the Subject hath in his Goods, because each Subject's Vote is included in whatsoever is there done: An Act of Parliament hath the consent of many Men, both past, present and to come; as 'tis in Hob. 256. The Statutes that have been made for this purpose are an Evidence of this, or otherwise they were needless, idle and unnecessary: Those Acts that regulate those that take away, and those that enforce a new purveyance upon the King's Royal Progresses do sufficiently prove this. The King's Prerogative as 'tis given, so 'tis bounded by the Law: I shall first shew it by some more general Authors, and then more particulary and

cloſely demonſtrate it, to be ſo in the Caſe now before your Lordſhip.

Bract. lib. 1. cap. 8. fol. 5. ſays thus: Ipſe autem Rex non debet eſſe ſub homine ſed ſub Deo & Lege, quia lex facit Regnum, attribuat igitur Rex legi quod lex attribuit ei, &c. and in lib. 3. fol. 132. Rex non poteſt gratiam facere cum injuria & dampno alieno, quod autem alienum eſt dare non poteſt per gratiam ſuam; May, though it be for the publick good, he cannot do it without the implied conſent of the Proprietors in Parliament, as I ſhall ſhew preſently. Though the Authority of thoſe ancient Treatiſes hath been ſometimes controverted, yet they have always been allowed as Evidence of the Fundamental and general Conſtitutions of the Realm. But to uſe more modern Authorities.

Vaughan's Rep. 337, 338. In Thomas and Sorrell's Caſe, 'tis laid down as a Fundamental Rule, that in Life, Liberty and Eſtate, every Man who hath not forfeited them, hath ſuch a Right that the Law allows him to defend, and means for ſo doing, that if it be violated, it gives an Action to redreſs the wrong and puniſh the wrong-doer.

19 Hen. 6. 63. The Law is the higheſt inheritance which the King hath, for by it the King and all his Subjects are ruled, and if the Law were not, there would be neither King nor Inheritance.

Davis's Rep. 40, 41. The Kings of England have always claimed a Monarchy Royal, not a Monarchy Seignoral; under the firſt (ſays he) the Subjects are Freemen, and have a Property in their Goods, and Freehold in their Lands, but under the latter they are Villains and Slaves; and my Lord, this Property was not introduced into our Land, as the reſult of Princes Edicts, Conceſſions and Charters, but was the old Fundamental Law, ſpringing from the original Frame and Conſtitution of the Realm.

8 Rep. 92. In Francis's Caſe, Coke ſets down this as a Rule, quod noſtrum eſt, ſine facto, ſive defectu noſtro amitti, ſeu in alienum transferri non poteſt; And the Common Law gives a true Property in contradiſtinction to the ſuperintendant Power, and for this purpoſe it diſtinguiſhes between Bondmen, whoſe Eſtates are at their Lord's Will and Pleaſure, and Freemen, whoſe Property none can invade, charge or take away, but by their own conſent; a ſeveral Property in the Subject is ſo ſacred as nothing more. The King cannot dig for Salt-peter in a Manſion Houſe or Barn filled with Corn, without the Owners conſent, 12 Rep. 12. he cannot alter the

courſe

courſe of deſcent, or by Charter make Land to be deviſable which was not ſo before, or make it deviſable when 'twould otherwiſe deſcend to a ſingle Heir, 49 Aſſiz. 8. And ſo è con', he cannot make it deſcendable to the Heir where 'tis dividable, as in Gavelkind; for if otherwiſe, there had been no need of the Act of Parliament concerning Kentiſh Lands: He cannot dig for Gravel in the Inheritance of his Subject maugre ſon ſoen, (ſays the Book) againſt his Will, 11 Hen. 4. 28. A Cuſtom to pay Toll for all Cattle driven over a Mans private Freehold, ſhall prevail againſt the Prerogative and bind the King, 46 Edw. 3. cited in Plowd. Com. 236. Lord Berkley's Caſe, all which proves a Property in the Subject. But to come cloſer.

No Forfeiture can be of Goods by Charter without an Act of Parliament; and ſo is the 2 Inſtit. 47. in his Coment upon Nullus liber homo diſſeiſſitur——de Libertatibus ſuis, which he interprets property in Goods, as well as other Franchiſes and Liberties which the Subject hath: This Charter and Clauſe can give no power therefore to Seize a Man's Goods, as aforfeited, which the whole matter found ſhews they did, for that no ſuch Forfeiture can be created or made by Charter. Even for defence of the Realm, the King cannot Seize a Man's Goods without his conſent in Parliament, and this was Mr. Hambden's Caſe tempore car. 1. Much leſs can it be done for the private Benefits of a particular Company; and 'twas agreed by thoſe who argued in that Caſe for the King, that the Subject could not loſe the Property of his Goods but by Act of Parliament.

Now this Property being ſo preſerved by the Law, the King cannot by any ways alter this Law but in Parliament, or make that a Forfeiture or cauſe of Seizure, which was not ſo before: For as Forteſcue ſays, cap. 9. fol. 25. a King of England cannot alter or change the Laws of the Land at his own pleaſure. And the ſame thing fol. 84. cap. 36. thus: He cannot take away any of his Subjects Goods without ſatisfaction for them; nor can the King by Parliament or Charter impoſe any new Penalty or make any new Offence; and for that the 31 Hen. 8. cap. 8. is a full and expreſs Authority, for by the Statute (which was the wonder of the Age) the King might with the advice of Councel, two Biſhops, two Chief Juſtices, and others, make Ordinances for the puniſhing Offences, and impoſing Penalties, which ſhould have the force of a Law, but with this Proviſo, That no Man's Property or Goods ſhould be impeached; nor the Common Law, or Statute Law of this

Realm prejudiced, and yet however it was thought so dangerous a power, that the Act it self was repealed, 1 Edw. 6. cap. 12. 12 Rep. 75. The Case of Proclamations about Buildings, 'tis there held, that the King cannot by his Prohition or Proclamation, or otherwise (says that Book) create an Offence which was not an Offence before, for that is to change the Law, which was not in his power, and there in that Folio is cited the Case of an Act made, by which Foreigners are licenced to Merchandize within London. Hen. 4. by Proclamation prohibited the Execution of it, and that it should be in suspence, but usque ad prox' Parliamentum, and that resolved by the two Chief Justices, Chief Baron, and Baron Altham, that a Proclamation cannot alter, or make an Offence: Now Charters and Proclamations are both of the same equal Authority, both under the Great Seal.

But perhaps they will object, That Infidels are alien Enemies, and to Trade with them is unlawful, and therefore a Seizure lawful.

To which I give a double answer. 1. By denying the Assertion: And 2ly by denying the Consequence.

1. It was not unlawful at the Common Law, for that is Coeval with the Inhabitants of this Island. I shall not attempt to prove it's Antiquity, though I might prove it here even before Livy's time, and consequently prevalent here before Christianity, and then it could be no Crime, and no Statute since hath made it so, nor can I find any pretence for such an Opinion in the Books; there is nothing but Michelbourn's Case, in 2 Brownlow, and that is but a short and imperfect Note of a Case, and all that it amounts to is this: That the King may restrain his Subjects from Commerce with them, which argues nothing to this purpose here in our Case, and 'tis plain that Commerce is allowable with the Jews, which according to the Gospel are greater Enemies to Christianity than the Gentils are.

That it was not unlawful antecedent to their Charter, appears from the Statutes, for they open the Seas to all Merchants for all manner of Trade, as 18 Edw. 3. Stat. 2. cap. 3. that the Seas are open to all manner of Merchants to pass with their Merchandizes where it shall please them, 2 Rolls 180. Besides, the Charter prohibits Trade there, not because it is inhabited by Infidels, but doth indefinitely forbid all but the Company, whether the Country shall be Christian or Pagan.

2. Its no Argument that they were Infidels, and Trade with them might be prohibited, that therefore the Goods

ſhould be forfeited; no more than the power of the King to reſtrain Card-playing would confiſcate the Cards which in Darcy's Caſe, 11 Rep. is agreed. I'le ſuppoſe their Principle true, that they are perpetui inimici, and then according to that notion a Trade with them is Treaſon, as an abetting of the King's Enemies; and yet even in that Caſe there ought to be no Seizure of the Offender's Goods till Conviction, or at leaſt Indictment or Inquiſition: But further, I'le ſuppoſe their Charter makes it unlawful, yet it cannot impoſe the penalty of Confiſcation of Goods, for by Magna Charta no Man is to be diſpoſſeſſed of his Property but by legale judicium parium ſuorum. And my Lord, I take it for a truth, that in all Parts of the World where the Engliſhmen are under the Government of any Engliſh Subjects, their Rule muſt be the Laws of this Land, and if they puniſh without Jury, they may be puniſht for it by Action of Treſpas when they return hither, and this we have in practice here every day in caſe of the inſolency of Governors in Plantations, as in the Eaſt Indies and Barbados, and they cannot proceed there but in the methods allowed here. Trial by a Jury is the right of every Engliſh Subject all the World over, whereſoever Engliſh Men have the Command by Authority derived from the Crown of England: Now the Law of England ſays, That if Goods be forfeited for an Offence, there muſt be a conviction of the Offence in the Methods of the Common Law, and thoſe Methods cannot be altered but by Act of Parliament, the King can no ways change it; even in the caſe of Felony he cannot alter the Execution from Hanging to Beheading; for that ſo, he would alter the nature of the Sentence, 12 Rep. 130. nor can the King Erect a Court of Admiralty to do ſuch Work in the ſame, 12 Rep. 30, 31. There were Commiſſions in Engliſh under the Great Seal directed to divers Perſons within the Counties of Bedford, Bucks, Huntington, &c. to inquire of divers Articles, as Depopulation of Houſes, Converſion of Arable Land into Paſture, &c. though theſe things were Offences, yet the Commiſſions were held illegal becauſe unuſual and in Engliſh, and not ſaid how they ſhould enquire: In Hill. 9 Jac. 1. there was a Quær, if the Juſtices in Wales might be by Commiſſion, and held they could not, for the 24 Hen. 8. cap. 28. which gave power to alter, change, and reform all matters, &c. being ſo dangerous a power was held not to go to the Succeſſors, 12 Rep. 48. The King cannot Grant, that

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any one ſhall be ſued otherwiſe than according to the Engliſh Common Law, as the Caſe of the Chancellor of Oxford, 8 Hen. 6. 19. A Grant that the Vice Chancellor ſhould not be ſued for Debt or Treſpaſs concerning his Office void, pari ratione, he cannot appoint a Man to be ſued according to the Civil Law, and ſo was the Grant to the Univerſity, that they ſhould ſue in the Vice Chancellor's Courts for Cauſes infra Oxford ill, and 13 Eliz. an Act was made for it. Jenkins 2. Cent. 88. In 42 Aſſiz. plac. 5. there was a Commiſſion under the Great Seal to ſundry Perſons of Credit, to take the Body and Goods of H. without Indictment and due Pleading of Law, and damned as unlawful; and much the ſame is our Caſe with that of Oxford. Agar's Caſe is expreſs, that ſuch Grant was void in 8 H. 4. 2 Rolls 164. He cannot erect a Court of Equity, 12 Rep. 51. 113. and 13 Rep. 32. he cannot at this Day make a Manor, March and Smith, 1 Leon. 26. He cannot create an Honour but by Act of Parliament. King and Levet. 1 Bulſtr. 196. He may grant Conuſances of Pleas within a certain Precinct, but not otherwiſe than ſecundum legem & conſuetudinem Regni, 12 Rep. 51. Now the Offence, if any, was upon Land, It was Trading in an Infidel Country, ſo that ſuppoſing it an unlawful thing it ought not to have been ſeized firſt, nor condempned in that manner. In Sander's Caſe, they are ſo very ſhie of this Clauſe, that when Oyer was craved of their Patent and ſet forth, they cautiouſly omitted this Clauſe for the Forfeiture of Ship and Goods as aſhamed of it, and this was taken notice of both at Bar and Bench. The Prerogative was then ſtrained even to the utmoſt, and yet agreed by them all, that this Clauſe was not juſtifiable; and in that very Caſe 'twas agreed by the Bench that the diſtinction between Infidels and others as to this purpoſe was Trivial: The King's Prerogative and Superintendence over Trade was the Topick inſiſted on; the other was preſſed at the Bar, and ſo is Jeffenſ's printed Argument.

In the Caſe of the Ruſſia Company erected by Philip and Mary was ſuch a Clauſe as this, but they never ventured to uſe it till made effective by Act of Parliament, 8 Eliz.

Objection, Their taking was only a Seizure in ordine ad. &c.

I anſwer, 'Tis not found that they had Information of our Trading, and 'tis found generally that they took and carried away the Ship and Goods; and now to ſeize before Suit, and without Suit is much at one. Beſides, the power under which they juſtifie is to Seize as forfeited, and at the Defendants requeſt 'tis condempned as forfeited, and the

moſt

whole tenor of the Juries finding is that way. The Defendant was no Officer of the Admiralty, and therefore his Service could not be by Authority from that Court in a way of Process, or in order to Examination, or the like; and therefore his Seizure was certainly Tortious, for he had no power but under that Clause in the Charter which is void in Law. Then this subsequent going to their supposed Court of Admiralty cannot justifie that Tort. For first, I think by the Authorities cited the King cannot erect such a Court only to condemn Goods upon a supposed offence according to the Charter without a Jury. Then their Court is constituted not to proceed according to the Charter, but according to the instructions which the Company should from time to time send for that purpose. As to Hughs and Comelin's Case, Mich. 34 Car. 2. Banco Regis, that was Trover brought against the Vendee of a Ship taken by the French in time of War, and condemned as a Dutch Prize, and afterwards bought by the Defendant. The reason of that Judgment was the credence we give to those Courts abroad; but here we bring not our Action on a demand and denial after the Sentence against one that bought it upon credit of that Sentence, but for an actual Conversion before; here is a Seizure by English Men, under pretext of a void power, and a sham Condemnation afterwards to justifie it.

In the Case of Beake and Tirrell last Easter Term in this Court, where in Trespass the Defendant pleaded a Caption as a Prize, and a Condemnation by the East India Petit Admiral, pursuant to it; I remember one of the reasons alledged by your Lordship for over-ruling that Plea was, that the subsequent going to the Admiralty could not justifie the first illegal Caption.

Here is no War to warrant a Seizure, no Proclamation or other profession of Hostility, but an Amity implied by their Charter that prohibits us as to Trade there, which supposes that otherwise it would have been lawful for us.

The Argument from the Writ of ne exeat Regnum affects not this Case, though it might in the question of Trade, if an Action or Information had been brought for it.

The Charter requires the Admiralty Court to be held before two Merchants, and non constat by the Sentence found that either of the Judges were Merchants.

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The other ſide thinking the pretence of Forfeiture too groſs to be inſiſted on, had no Counſel to attend to argue it, ſo that we had Judgment niſi, before the end of the Term. And the laſt day of the Term Mr. Serjeant Tremayn took Exception to our Declaration for its uncertainty. 1ſt. It being proviſionibus which ſignifies Victuals, and that might be Victuals out of the Ship as well as in it, and no quantity or certainty mentioned, he urged it was ill. 2ly, It was ducent' ponderis librat', which ſignifies pounds weighed, i. e. the weights themſelves, and therefore ill, or otherwiſe 'tis uncertain which is meant, and therefore ill: He excepted to ſome other words, &c.

Exceptions to the Declaration. *Proviſionib'* uncertain *Ducent' ponderis librat'* pounds.

The anſwer I gave, that the word ſignifies only neceſſaries for the Ship, and muſt ſo be intended here, for 'tis eidem Navi ſpectant' ſive pertinent'; ſo that 'tis reduceable to a certainty, and when ſo, 'tis well enough; as in caſe of a Study of Books, yet well though incertain how many or what ſorts; becauſe there is an addition of Study which limits and aſcertains it. So was the Caſe of Mayhu and Flower in Sid. 98. in Trover de plancis granariis, Anglice Planks of the Granary, otherwiſe it had been of Planks generally. And ſo is the Caſe of Elphique and Acton, 2 Roll. 763. for a Library of Books. So Trover will lie of a Trunk with divers Goods in it. Prior and Tuft's Caſe, 1 Kell. 825. So for a piece of Linnen, a parcel of Thred, a pack of Linnen, a piece of Brandy, if ſo certain that the thing may be known, and the Jury may be ſuppoſed able to value it, 'tis well enough. Beſides, in Trover there needs not that preciſe and exact certainty as there doth in a Replevin; there the thing it ſelf is to be returned, here Damages only, and the Books are full with an abundance of Caſes, where in Trover greater latitude is allowed than in other Actions.

A difference where the Jury find for the Defendant generally, and where they find as to part for the Defendant, and part for the Plaintiff and ſome part of the demand is inſenſible.

This is after Verdict, and not on Demurrer. As to the other Exceptions I urged, that being after a Verdict it muſt be intended that Damages are given only for what is ſenſible; ſo that if ſenſible, its enough, for then the Jury could know and value it. If not, no Damages were given for it, but for the other things that are ſenſibly expreſſed; as in caſe of divers words ſpoke at one time, and that reſembles this. But in Trover I cited divers Caſes where it was ſo adjudged after Verdict, eſpecially the Verdict being generally for the Plaintiff. Otherwiſe ſay ſome Books if the Jury find the Defendant Not guilty as to part, and Guilty as to the reſt; for then ſay they, 'tis plain the Jury conſidered every part, and gave Damages for every ſuch particular ſo found.

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The Court held all pro Quer'. And as to the firſt, Chief Juſtice Holt held, that proviſionibus was well enough, though it ſhould be meant Victuals upon Land, for Navi pertinent' made it certain enough. And ſo we had Judgment for the Plantiff.

Phyler *verſus* Boſon.

ERROR upon Judgment in Trover in the Provoſt Court of the Mayor of the City of Exeter.

For the Defendant in Error, I argued, that the Writ was abated, for it was a Writ upon a Judgment in quadam loquela coram tunc Majori & Ballivis Civitat' Exon' ac Ballivis Cur' Provoſtiæ ejuſdem Civitat' & coram,&c. The word returned is, Placita, &c. in Cur', &c. tent' Coram Johanne Gaudy, Johanne Dandy, Henrico Newcombe & Olivero Muſtian, Ballivis dict' Civitat', &c. Now the Record is not removed, for they are not ſaid to be Bailiffs of the Provoſt Court, but only Bailiffs of the City. Its true, the Writ may be directed to many, and returned by ſome of them, as by one Sheriff, Bailiff, yet the Placita returned muſt be before the ſame Perſons which this Writ ſuppoſes the Judgment to be; and in truth there is no ſuch Court, as before Mayor and Bailiffs and the Bailiffs of the Provoſt Court, for they are two diſtinct Courts, viz. one before Mayor and Bailiffs, and another before the Bailiff of the Provoſt Court; and if Guy and Adam's Caſe be Law, that they are ſeveral Stiles then either may do; this is neither, for tis not Ballivis Cur' Provoſt': And the Writ was quaſht per Cur'. Vid. le Caſe de Spry and Mill, Stiles 203. Dyer 206. Sid. 139. 2 Cro. 313. Dyer 188. of ſeeming uncertainty in Trover to have warranted the Declaration, but theſe were not uſed becauſe the Writ abated.

Record *Coram Majori & Ballivis Civitat' Exon' ac Ballivis curiæ Provoſtivæ ejuſdem curiæ*, and the *Placita coram Ballivis dict' Civitatis*, not the ſame Record.

Lechmore *verſus* Toplady & al'.

TRover and Converſion in Communi Banco. For the Defendant we pleaded Judgment in Banco Regis upon Special Verdict in Treſpas for the ſame Goods, and the Goods in the one and the other were the ſame, and Converſion, and taking the ſame, &c.

The Plaintiff Demurred, and upon Argument the whole Court were clearly of Opinion that 'twas a good Bar, upon the Authority of Ferrer's Caſe; and that notwithſtanding the Caſe of Putt and Royſton in Banco Regis adjudged by Pemberton. Contra. Which Caſe my Lord Chief Juſtice Pollexfen ſaid he was never ſatisfied with, and as he remembred a Writ of Error was brought, and the Judgment queſtioned; but afterwards agreed, that he ſaw no difference between a General and a Special Verdict. However they all thought a Judgment in the one a Bar to the other, for that the Actions were of the ſame nature, and Judgment for the Defendant.

Judgment in Treſpaſs on a Special Verdict for the Defendant is a good Plea in Bar to Trover for the ſame Goods.

I did not argue this, becauſe in Comuni Banco, but adviſed and drew the Plea; and ſo my poor Widow was quit of them at Law in both Courts.

Rottenhoffer *verſus* Lenthall.

DEBT on a Judgment in the Caſe againſt Lenthall as ſuperior Officer, for an Eſcape permitted by Ellis, in which we had 500 l. Damages on a Writ of Enquiry.

The Defendant Pleads in Abatement a Writ of Error pending. I Demurred, and upon Argument it was held, per tout le Court to be no Plea, and that the Law was always taken to be ſo till one Caſe in Sir Francis Pemberton's time, when a difference was made between in Bar and in Abatement. But per Cur' 'twas all one, and Judgment for the Plaintiff. And afterwards they pleaded it in Bar, and we had Judgment. Vide 2 Keble 653, 659, 753.

Abatement to Debt on Judgment, a Writ of Error depending.

Venable

Venable *verſus* Daft.

CASE for words ſpoken the fifth of November laſt. The Declaration was generally, as of Mich. Term, and Verdict for the Plaintiff and 30 l. Damages.

Mr. Northy and I mov'd in Arreſt of Judgment, for that the Declaration was of the firſt day of the Term before the Cauſe of the Action did accrue, according to the Caſe of Jenkinſon againſt Thompſon, in Information' qui tam, &c. But my Lord Chief Juſtice Holt declared himſelf diſſatisfied with the Judgment in Jeffrys time, which was to the contrary, and Judgment was arreſted.

Term. Paſch.

2 Will. & Mar.

Lacker *verſus* Harcourt.

An Attorney Defendant has no Privilege to change the Venue, but where the Plaintiff did lay his Action in *Middleſex*, the Defendant did change Venue.

CASE againſt the Defendant laid in Somerſetſhire.

I moved to change the Venue upon the Account of the Defendants Privilege, as an Attorney and Clerk in Court, and to have it laid in Middleſex, and ſhewed ſeveral Rules wherein it had been done, as for Mr. Bathurſt, and urged the practice for it, and the reaſon of that practice, viz. their ſuppoſed conſtant attendance on the Court here; but denied by Chief Juſtice Holt, & ceteros tacentes; for that they have no ſuch Privilege. For the Plaintiff in a Tranſitory Action may lay it where he pleaſeth. But if an Attorney be Plaintiff in a Tranſitory Action, and he lays it in Middleſex, the Defendant ſhall not change the Venue upon the Common Affidavit.

Meredith *verſus* Allen.

Ent. Hill. Ult. 20.

Defendant on Bottomree Bond pleads the Ship was loſt, the Plaintiff replies not loſt without ſhewing a breach of the Condition, and held good.

DEBT on a Bond.

The Defendant craves Oyer of the Condition, and (it being a Bottomree Bond) the Defendant pleads that the Ship was loſt.

The Plaintiff replies 'twas not laſt, Et hoc petit quod inquiratur per patriam.

The Defendant Demurrs, and ſhews for Cauſe, that no breach was aſſigned in the Replication. And I argued that 'twas ill; for that the Condition was to pay Money, and now

now upon Oyer the Condition was become part of the Declaration; and then upon the Plaintiff's Declaration, there is no cauſe of Action without breach of the Condition in the Replication. And I agreed that after Verdict it might be helpt, for then it ſhould be intended the Money was not paid: But here 'twas upon Demurrer. I cited the Caſe of Hayman and Gerrald, Mich. 19 Car. 2. in this Court, in Saunders and Sid. But Dolbin ſaid, that Judgment was diſapproved at that time, and 'twas not Law, and Saunders anſwers it in his reporting of it. And Chief Juſtice Holt ſaid the true difference is, where the matter pleaded admits and ſuppoſed a non-performance, there is no need to alledge a breach; and ſo Judgment was given for the Plaintiff.

Stone *verſus* Gilliam.

COvenant in a Charter Party. The Iſſue joined was, That the Plaintiff's Factors at Bourdeaux parati fuerunt & obtulerunt prædicto defendenti to load on Board his Veſſel there ſeven Tuns of Brandies. Evidence.

The Evidence was, that the Factors having put on board ſome Wines by the Defendants conſent; and having bought more for the Plaintiff, and brought them to a Ware-houſe upon the Key in order to load on board, that they went to the Defendant, and told him there was more to put on board, and offered them to him for to ſend them on board. That he replied he would take in no more, for that his Ship was full; whereas in truth he had room. But the War coming on, and Freight advancing, and but two Veſſels there, he took in other Mens Goods. What good Evidence of a tender to load Goods on board a Veſſel.

The Point inſiſted on by Mr. Northey was, that this was no good tender within the Iſſue, not being brought to the Ship ſide and there refuſed: And upon that we had a Verdict for Security, and the Point reſerved to my Lord; whereon we attended him at his Chamber. And I argued, that the Evidence maintained the Iſſue, that we did offer to the Maſter to load them on board, and we are bound to do no more by this Iſſue. Beſides, the nature of the thing requires no other tender, the Goods not being portable, but cumberſome. That the uſage and way of dealing is no other than to bring them to a Ware-houſe on the Key, and then ask the Maſter when we ſhall ſend them on board. That his refuſal and filling the Ship made any other tender idle, and lex non cogit ad inutilia. We are not here on a tender within

within a Condition which is to defeat an Estate, and therefore strictly to be construed; but ours is on a Charter Party where the Agreement and intent of the Parties are most considerable. The Quær. here is, if this be Evidence of an obtulerunt, according to the Agreement.

A difference between a tender of loading on board cumbersome Goods, and such as are not.

The Lord Chief Justice Holt took a difference between the Case of cumbersome Goods, and those which are portable. That if a tender be to be made of cumbersome Goods to a Ship, which is moveable from one part of a Key to another, I am not bound to carry them to the Ship side: But if I bring them to a convenient place from whence I may load them on board, and offer the Master to send them on board, that this is a good tender, &c. And as the Attorney informed me, my Client did accordingly receive his Money.

Knight *versus* Cole.

Scire fac'.

Releasé pleaded.

SCire facias on a Judgment in Banco Regis by Sir John Knight, William Eyres and John Knight, against John Lawford for 6000 l. That Sir John Knight and William Eyres died, &c. That John Knight survived: That he made his Will, and made John Kent, Thomas Kent, and Mr. Downing Executors and died: That they took on them the execution of the Will and proved it; That Kent died, and William Downing survived him; That Lawford made his Will, and made Mary his Daughter, then and yet Wife of Thomas Cole Executrix, and died: That Mary proves the Will: Thomas Knight and William Downing brings the Scire facias against Cole and Ux', and upon a Scire feci returned they come and plead, That Thomas Knight and William Downing ought not to have Execution, for that William Downing by Releasé under Seal did acknowledge to have received on the date thereof, of, and from the said Thomas Cole and Mary his Wife the Executrix of Lawford, the Sum of five pounds, being a Legacy given by the said Lawford's Will to the said William Downing, and did inde Exoneravit the said Cole and his Wife, of, and from the said Legacy, and from all Actions, Suits and Demands whatsoever, which the said William Downing had had, or then had, against the said Cole and his Wife, for any matter or cause whatsoever, from the beginning of the World, &c. Plaintiff Demurrs. Defendant joins in Demurrer.

The

The laſt Term 'twas argued by Serjeant Trinder, and Serjeant Powell. And this Term by Serjeant Levins and my ſelf.

I argued for the Plaintiff, That firſt, this Releaſe was no Bar, if it had been made by the Teſtator, and the Scire facias by him, notwithſtanding the general Words: Secondly, Suppoſing it otherwiſe, yet no Bar to a Suit as Executor; and Thirdly, Suppoſing that otherwiſe, yet no Bar to a Suit as joint Executor with another.

If it had been in the caſe of a perſonal Right 'twould be no Bar; for though there be general Words, and the largeſt that can be uſed, yet its apparent upon the whole contexture of it, that the conſideration and occaſion of giving it was only a particular demand; and the Law muſt make that reaſonable intendment upon the whole, as will reſtrain the general Words from effecting a diſcharge of that particular, which was never intended or thought on by the Parties. The intent muſt and ſhall govern it; and this is agreeable to the Rules of Law in other Caſes, of Covenants and the like, which are but Agreements of the Parties. Its agreed in all the Books, that general Words may be reſtrained by particular Words, 1 Inſtit. 146. Deeds are not taken in a grammatical Conſtruction, but according to the intent of the Parties. Here 'tis plain the Intent and Contract went no further than the Legacy; and this Rule is the reaſon of the Judgment in Noke's Caſe, 4 Rep. And 'tis a certain Rule, that general Words ſhall be reſtrained by particular, according to the intent if they are all in one Sentence; as is Jervis againſt Plead, Cro. Eliz. 615. Dyer 240. 255. Moore 58. Latter Words reſtrained by the former, as well as è contra; And ſo is that Caſe of Broughton and Cornway in Moore 58. and in the Earl of Clinrickard's Caſe, Hob. 275. and divers material Caſes put: When in the firſt part of a Deed the Agreement is about a particular thing expreſſed in the latter, general Words ſhall be reſtrained by the former; and ſo is Garnsford and Griffith's Caſe, 1 Saund. 60. and Sir George Trenchard's Caſe, Latch 90. and Napper's Caſe, Winch. 74. In Roll. 2 Abr. 409. is the Caſe expreſly the ſame with this; The Words are, If a Man receive 10 l. of another, and by his Deed acknowledge the Receipt of it, and thereof Releaſe, Acquit and Diſcharge him, and of all Actions, Suits and Demands; by this nothing is releaſed but the 10 l. and the Action and Demand for it, for the latter have a reference to the firſt, and are ſo limited by them, Trin. 5. Jac. Banco Regis, cited by Tanfeild

General words in a Releaſe of all Actions, Suits and Demands whatſoever reſtraieed by the intent of the Party.

feild d'eſtre iſſint adjudge. And this is the ſame with ours in every reſpect, Here the intent is much more manifeſt by the ſpecification of what the 5 l. was for, viz. the Legacy, and that was all that was intended in the other Caſe; where the Sum only is mentioned, it might be intended by Agreement to be in ſatisfaction of every thing: Here it cannot be ſo. In Abree and Page's Caſe, in Hetley 15. in Debt a Releaſe pleaded of all Errors, Actions, Suits and Writs of Error whatſoever, and a cognovit ſee for concluſu of, and from all Writs or Suits, Actions of Error or Suits whatſoever againſt him the ſaid, &c. and becauſe of the apparent intention only to Releaſe Errors, held that nothing elſe was releaſed. And 'tis ſaid by Hutton at the end of the Caſe, that 'twas adjudged in this Court, in a Writ of Annuity, a Releaſe pleaded that the Plaintiff acquitted him of one half years payment, and releaſed to him all Actions, Suits and Demands, and reſolved it did only bar him but of the arrerages of Rent, which is much the ſame with that in Rolls Abrid. 409. Morris and Wiſe, Mich. 29 Car. 2. Banco Regis, 3 Keble 814. I have a Note of it too. Covenant to ſave harmleſs from a breach in the Teſtator's time. The Defendant pleads a Releaſe to him as Executor made by the Lord Grandiſon, who married the Widow, &c. of all Demands, and all Rights in the brewing Veſſels, and in the perſonal Eſtate of Sterling, vel aliter, and held no bar. Though nothing be liable but the perſonal Eſtate of the Teſtator, yet the intent being particular, it ſhall not be conſtrued general, though the words are ſo. Anciently a Releaſe of all Demands releaſed a growing Rent, but the latter Opinions are different. Hen and Hanſon, Hill. 14 & 15 Car. 2. Rot. 1822. In Sid. 141. Debt on a Bond for performance of Covenants: Performance generally pleaded. Replied, breach in Non-payment of Rent reſerved. The Defendant pleads a Releaſe of all Demands. Held ill, and the reaſon aſſigned in Siderfin is the intent of the Parties. For the Releaſe being upon an Award intended only to releaſe things in controverſie ſubmitted. And that a Releaſe and the general Words in it ſhall be reſtrained and bound up according to the intent of the Parties. Theſe are the words of that Report. And as 'tis in the 1 Keeble 511. he ſaid, that the word Demands being put in company with other words, ſhall be reſtrained by them; as power to Executors to diſpoſe, let and ſet, gives no power to Grant. And that though the word diſpoſe would carry it, yet theſe general words have been reſtrained ever ſince Littleton's time. This was the Opinion of

Wind-

Windham, and his words, as that Book hath them: In all the caſes about Releaſes ſince Car. 1. time, I find that Caſe in Rolls to be cited, and never denied to be Law as I can find, in any of them.

2. But that which I moſt inſiſt on is, that this Releaſe extends only to Demands in his own Right, and not as Executor, 1 Leon. 263. The Lord Grandiſon and the Counteſs of Kent's Caſe. By Dyer and Manwood upon Evidence in Debt, If Executors grant omnia bona ſua, the Goods which they have as Executors do not paſs. And ſo is 10 Ed. 4. 1. 6. per Danby. Cont', If an Executor hath no Goods in his own Right; for if they grant ſuch and ſuch a thing in particular, there it will, ut res magis valeat quam pereat. I agree, there are ſome old Books to the contrary: But the Modern Opinion is as I ſay; and ſo is Dorrel and Colling's Caſe, 3 Cro. 6. Adminiſtrator grants omnia bona & catalla ſua, a Term which he hath as Adminiſtrator ſhall not paſs, for 'tis not ſuum, he hath it not in his own right. But if he hath a Leaſe in a particular Manor or Farm as ſuch, and grants all his Right in that Manor or Farm, the Term will paſs, becauſe he had no other right in it, and his intent was to paſs it: But by general words it will not paſs. The ſame reaſon here, and more ſo, becauſe this Demand he hath not upon his own Account, for he is a joint Executor. The words are ille habuit in the ſingular number, and can therefore be only taken for that which is ſingle, not with the other Executors, and this in common Parlance and with the Lay gents is always ſo underſtood. In pleading a Tenure or Seizin of Land, it muſt and will be intended a ſole Seizin, much more ſo in Grants or Releaſes, where the intent and Agreement is to govern the Conſtruction: In the Caſe of Stoakes and Stoakes, which Mr. Juſtice Dolbin cited in 1669. there is a Docquet of it, 2 Keble 530. Debt on a Bond, Condition to pay younger Childrens Portions. The Defendant pleas a Releaſe of all Actions, Suits and Debts on his own Account. And on Iſſue upon his own Account or not, a Verdict for the Plaintiff. And moved by Simpſon in Arreſt of Judgment, that 'twas a Jeofail; for none can ſay 'twas not on his own Account being in his name, except in Equity. But per Cur. the Releaſe of that releaſed only what he had the ſole diſpoſition of; much more ſo here when 'tis plain, this is no Suit which he himſelf had. And as to the words any matter or thing whatſoever: I anſwer, it is not for any other matter, as it might have been, and that ſhews the intent to mean no other than this, (viz.) any

An Executor releaſes all Actions, Suits and Demands whatſoever, extends only to Demands in his own Right.

matter or Cauſe concerning the Legacy, as in the caſe of Rolls, all Demands, conſtrued to be as concerning the 10 l. And there is no difference between Covenants and Grants as to this particular, of conſtruing by intent.

Serjeant Levins è contra, A Releaſe by one Executor is certainly a Bar to both; and Demands is the largeſt word that can be uſed. As if an Executor releaſe all Actions, it will diſcharge Actions he hath in his own right, as well as thoſe he hath as Executor, 3 Cro. 164. Gillam's Caſe, 159. 759. Cont. Arnold and Bridgod, 2 Cro. 518. 318. Then my Lord Chief Juſtice Holt declared, if it had not been in the caſe of an Executor, 'twould be a Bar, becauſe perhaps the Conſideration of paying the Legacy without Suit was the having a general Releaſe; and we are to favour Releaſes as tending to repoſe and quiet. But this is not his own Suit: A Servant may have an Action, and that as for bona ſua taken from his Poſſeſſion; but its 'not in his own Right. In Fitzh. N. B. 79. Executor brings not an Action as for bona ſua, if taken in the Teſtators time, but quæ fuerunt Teſtatoris Dorrel and Collins's Caſe is 24 Eliz. and that of Leonard when it was doubted, 19 Eliz. which was before that in Cro. and then all the Judges gave their Opinion that it was not his. Quas habuit, is what he had in his own Right, he himſelf, it muſt be in his own Right, and not as Executor, much leſs as a joint Executor. Sed adjornat. pro reſolutione Cur.

Then the laſt Paper day they all ſeriatim delivered their Opinions.

Eyres. The Releaſe is no Bar, becauſe 'tis plain by the penning of it, that their intent was to releaſe no more than what he had in his own Right; for thoſe words which he had, following the general words, do reſtrain them to that which he had in his own Right; William Downing could have no Scire facias in his own Name, for all muſt join. In 29 Edw. 3. 26. in a Releaſe, held there that the Action being in another's Right, there muſt be ſpecial Words to releaſe what he hath as Executor.

General words reſtrained by the intent.

Gregory. The Releaſe is no Bar, it appearing upon the whole body of the Deed that the original intent was but to releaſe the 5 l. Legacy, and the acknowledgment of ſatisfaction is proinde: And according to Dyer 255. the general Words ſhall be reſtrained by the particular Beſides, any other Conſtruction would work a prejudice to a third Perſon, as the other Executors and the Teſtator.

Dolbin.

Dolbin. The words are ſufficient to releaſe it, but the intent muſt guide us. If he had been ſole Executor, the Releaſe only releaſes the 5 l. becauſe this is not that which he had; according to Dorel's Caſe, 3 Cro.

Lord Chief Juſtice Holt. I think the Caſe in Rolls no Law; 'tis only cited by Tanfeild; but yet here in this caſe the general Words are not ſufficient, for if the particular Words had been out, it would not have been a Releaſe, for it can releaſe only what he hath in his own Right, for he hath it and his own are all one, and this is not his own. An Executor may have Treſpaſs for taking Goods in his time, quare Bona & Catalla ſua, becauſe of the Poſſeſſion. And ſo may a Servant, Brownl. 155. But if for Treſpaſs in the Teſtator's time, the Words are quæ fuerunt Teſtatoris, the Goods are not his. If there be any thing to paſs without it, then theſe Words ſhall not paſs it, and ſo per tot' Cur' Judic' pro Quer'.

An Executor releaſes all Actions Suits and Demands whatſoever, which he had for any Cauſe whatſoever, Extends only to them in his own Right and not as Executor.

Biſſe *verſus* Harcourt.

Ent. Hill. Ult. 217.

INdebitatus Aſſumpſit for 400 l. had and received to the Plaintiff's uſe againſt Simon Harcourt. We plead that he was attainted of Treaſon, and ſo conclude in Abatement, if we ſhould be compelled to anſwer him. The Plaintiff replies a Pardon before the Action or cauſe of Action accrewed (viz.) ante tempus confectionis aſſumptionis. We Demur and pray Judgment, if we ſhall be compelled to anſwer. They join in Demurrer, as if 'twere a Bar praying Judgment & dampna. Held per Cur' to be a Diſcontinuance.

Attainder of Treaſon pleaded in Abatement.

Pardon.

Abatement.

The Plainitff replied and concludes *petit judic' & dampna ſua*, a diſcontinuance.

Darrach *verſus* Savage.

INdebitatus Aſſumpſit for 40 l. received to the Plaintiff's uſe. Non Aſſumpſit pleaded; and upon the Trial the Evidence, was a Bill of Exchange or Note under the Defendant's hand dated the 22 of Febr. 1687. directed to a Merchant in London, Pray pay to Mr. . . . . *Darrach* or his Order the Sum of 40 *l.* and place it to my Account, value received, witneſs my Hand. The Money was never demanded of the Merchant till the Action brought; Upon the Evidence my Lord reſerved the Point to his own Conſideration at his Chamber.

Where they insisted, that my Client was still chargable, and that Paper was no payment, and that the Defendant still continued chargable till the Note was discharged.

I urged for the Defendant, that having no other Evidence but the words value received in the Note, the same shewed the Parties own Agreement to take the Merchant for his Pay-master: That otherwise here would be an apparent injury to us, if he would not demand it in a convenient time. That there was above two Years and no demand from us, or him of the Money.

A Note drawn on one to pay Money for value received is a good discharge of a Debt, tho' the Note be not paid unless the Creditor returned the Bill in convenient time.

Lord Chief Justice Holt held that such a Note should be deemed payment, and that the Plaintiff was satisfied with the Merchant as his Debtor, if he did not within convenient time resort back to the Drawer for his Money. For his keeping his Bill so long in his Pocket was an Evidence, that he thought the Merchant good at that time, and that he agreed to take him as his Debtor: And so we had my Lord's Opinion for the Defendant upon deliberation: And by the Rule of Reference my Client had his Costs. Stacey Attorney for the Defendant.

Martin *versus* Sitwell.

INdebitatus Assumpsit for 5 l. received by the Defendant to the Plaintiff's use, Non Assumpsit pleaded.

Upon Evidence it appeared that one Barksdale had made a Policy of Assurance upon Account for 5 l. Premium in the Plaintiff's name, and that he had paid the said Premium to the Defendant, and that Barksdale had no Goods then on Board, and so the Policy was void, and the Money to be returned by the custom of Merchants.

At the Trial I urged these two Points. 1st, That the Action ought to have been brought in Barksdale's Name, for the Money was his, we received it from him, and if the Policy had been good 'twould have been to his Advantage; and upon no account could it be said to be received to Martin's use, it never being his Money. Besides, here may be a great fraud upon all Ensurers in this, that an Ensurance may be in another Man's Name, and if a loss happen then the Ensurer shall pay, for that some Cestuy que trust had Goods on board: If the Ship arrives, then the nominal Trustee shall bring a general Indebitatus for the Premium, as having no Goods on Board.

To

To all which the Lord Chief Justice Holt answered, that the Policy being in Martin's Name, the Premium was paid in his Name and as his Money, and he must bring the Action upon a loss, and so upon avoidance of the Policy for to recover back the Premium. And as to the inconveniences it would be the same whosoever was to bring the Action, and therefore the Insurers ought with caution to look to that before-hand.

Then 2ly, I urged that it ought to have been a Special Action of the Case upon the custom of Merchants, for this Money was once well paid, and then by the Custom it is to be returned upon matter happenning ex post facto. I argued if the first payment were made void, then the Law will construe it to be to the Plaintiff's use, and so an Indebitatus Assumpsit will lie. But when a Special Custom appoints a return of the Premium, an Indebitatus lies not, as for Money received to the Plaintiff's use, but a Special Action of the Case upon that particular Custom.

Indebitatus Assumpsit for Money received to the use of him named in the Policy for Mony paid by another as *Premium* on a void Policy.

To which Chief Justice Holt answered me with the Case adjudged by Wadham Wyndham, of Money deposited upon a Wager concerning a Race, that the Party winning the Race might bring an Indebitatus for Money received to his use, for now by this subsequent matter it is become as such. And as to our case the Money is not only to be returned by the Custom, but the Policy is made Originally void, the Party for whose use it was made having no Goods on board; so that by this discovery the Money was received without any reason, occasion or consideration, and consequently it was Originally received to the Plaintiff's use: And so Judgment was for the Plaintiff against my Client.

Indebitatus Assumpsit for Money received to his use, for the Money deposited on a Wager, lies.

Term.

Term. Trin.

2 Will. & Mar.

Shatter & *ux'* *verſus* Friend.

NArr' ſur Prohibition', upon ſurmiſe that the Defendant there ſued for a Legacy of 10 l. and the Defendant offer'd proof of its Payment by one Witneſs, but was rejected.

Defendant for to have a Conſultation pleads, that before the Prohibition ſued, there was a Sentence. The Plaintiff Demurrs.

Mr. Squib argued for the Plaintiff, that in their Forms of Proceedings they ſhall follow their own courſe, but not in matters of Subſtance; The end of a Prohibition is to preſerve the Common Law; the matter of Evidence is the chief and material part of the Suit. Teſtamentary matters were originally of temporal Juriſdiction. And here Dolben interrupted him, and ſaid, That Henſlo's Caſe was not Law; for Selden ſays, no Man can ſhew the contrary when it began. 'Tis in Lindwood by the Special Law and Cuſtom of England. Then he proceeded to cite Authorities, which were, Hutton 22. 2 Rolls Abridg' 300. 2 Rolls Rep. 490. Littlet. Rep. Cevill and Scott's Caſe, Latch. 117, 217. 3 Bulſtr. 242. 3 Cro. 88. Moore 957. 413. 3 Cro. 66. cum multis aliis, &c.

I argued è contra, that no Prohibition ought to go, 1. Becauſe 'tis intirely of their Conuſance. And 2. becauſe they were come too late after Sentence. 1. No Man can deny that the original Cauſe is of their Conuſance; and then the Rule in the Regiſt. 58. is full; quod non eſt conſonum rationi quod cognitio acceſſorij in Cur' Chriſtianitatis impediatur, ubi Cognitio Cauſæ principalis ad Forum illud noſcitur pertinere; and upon that Rule is a Conſultation fram'd in the Regiſter: And where their Law and ours differs in the manner of Proceeding, and they go according to their own way and contrary

Prohibition for refuſing the proof of payment of a Legacy by one Witneſs.

contrary to ours, yet no Prohibition, as Palmer's Case, Hill. 14 Jac. 1. Banco Regis, in Rolls 2 Abridg. 298. Cootnel's Case, there in the same Book is the same. And if they proceed contrary to our Rule, an Appeal lies for that gravamen: In Bridgman's Case, Hob. 12. its taken as a Rule, that if the Cause be within their Jurisdiction, it shall be presumed they proceed according to their Law, and then an Appeal lies if otherwise: Nay, in Case of refusal of proof by one Witness Prohibitions have been denied.

I agree there have been many granted, as Hob. 188 & 247. 3 Cro. 88. and many others; but my Lord, the reason of the Law is clearly on our side, as that 'tis intirely of their Jurisdiction, and never can be tried in the Courts temporal. There can be no dashing or crossing of Sentences or Judgments, and our Law always requires two Witnesses when that the Trial is by Witness, and never doth admit of one but where the Trial is by the Jury of the Neighbourhood: And for Authorities there are abundance for us too, as in 2 Rolls 299, 300. Proof of a Will by one Witness cited, yet no Prohibtion, because of their Jurisdiction. Then as to this of payment of a Legacy, in 4 Jac. 1. It was strongly controverted in Brown and Wentworth's Case, and so much as that a Narr' was ordered, and a Demurrer, and as cited in Rolls 2 Abridg. 300. 'twas agreed on the Motion, that proof of a Testament by one Witness refused, was no cause for a Prohibition; and the reason was the same as in our Case; and no difference can be assigned. As 'tis in Yelv. 92. if offer'd for a Revocation and rejected: There was Popham and Williams against the Prohibition, and their reasons are very strong, because the thing was meerly Ecclesiastical, and for which the Party could have no Relief at Common Law; and the King's Courts can no ways be Intituled to it, therefore they must go their own way; whereas if 'twere a thing which might come into the Common Law Courts, there might be crossing of Proofs, and to prevent that Prohibitions have been granted, that the proof or Sentence there might be no bias's to a Jury here, but never where the whole matter was of their Conusance. The Case of Roberts, 12 Rep. 65. is plain and full, Mich. 8 Jac. 1. Libel for subtraction of Tithes. The Defendant offers proof of Demise by one Witness, and rejected: And a Consultation upon a deliberate consideration of all the Cases before that time, and this per totam Cur'. And in Fuller's Case there cited by Wray, and all the Judges, 'tis laid down as a Rule, Where the original belongs to the Ecclesiastical Court, the

determi-

determination of that which depends upon it doth belong to the Judges of the ſame Court: Their proceedings are part of the Law of the Land, and to be taken notice of and allowed as ſuch, and their Juriſdiction is to be preſerved: But the greateſt Authority of all, is the Opinion of all the Judges in the 2 Inſtit. 608. where they do all under their Hands agree, that if the queſtion be upon payment of Tythes or Legacy, or ſuch like incidents, we are to leave it to the Trial of their Law, though the Party have but one Witneſs. But where the matter is not determinable there, but in the Court Temporal, there lieth a Prohibition, either upon or without ſuch a Surmiſe. In 4 Car. Warner and Barret's Caſe, Hetley 87. 'tis a Quær. again, and there Yelverton makes a good diſtinction where its meerly Eccleſiaſtical, as for a Legacy of a ſum of Money, there proof of payment is of the nature of the thing demanded, and conſequently is intirely within their Juriſdiction, and they may proceed their own way, for they have Juriſdiction of the proof and matter both, and there is no Rule there in that Caſe of a plene Adminiſtravit by one Witneſs, though the Opinion ſeems to be for a Prohibition, becauſe the matter of that Plea is Common Law, and then being of Common Law nature, a Common Law proof ſhould be received, otherwiſe not; and this ſeems founded on a great deal of Reaſon; for otherwiſe no Bounds can be ſet, where they ſhall be allowed to proceed according to their own Law, and where according to ours.

Juſtice Twiſden and ſome others have always held ſtrongly againſt Prohibitions in this matter: And he did uſually affirm that ſince 4 Car. no Prohibition was granted, becauſe they refuſed a ſingle Witneſs; for this Court hath no Conuſance of the matter, and therefore they muſt proceed by their Law, and not by ours where the Jury are inſtead of Witneſſes, and one ſuppoſed to know the Fact as being of the Vicinage; and Teſtimony of Witneſſes by our Law is no concluſive Evidence, but is and ought to be left to the Jury, Hill. 9 Car. 1. B R. 2 Roll. Abridg. 299. Sect. 10 Yells and Sir Edw. Powell's Caſe, a Parſon Sues in a Court Chriſtian for not ſetting out of Tithes for double value on 2 Edw. 6. The Defendant ſurmiſed that he ſet them out, and they refuſed the Teſtimony of one Witneſs; no Prohibition, becauſe they have Conuſzance, Prince againſt Hewet, 15 Car. 1. In Sid. 161. held that they have been denied ever ſince Jones's time, and was denied in that Caſe of Saunderſon againſt Hawſon, Trin. 17 Car. 2. B. R. denied on plene Adminiſtravit offered to be proved by one Witneſs, becauſe its properly triable before them, and

for

for the gravamen an Appeal lies, 1 Keble 939. and in that Case of Mitford against Emerson 19 Car. 2. denied, because the principal matter was of their Jurisdiction, 2 Keble 225. 'Tis true, that afterwards in the Case of Desbrough and Richardson, Hill. 27. Car. 2. 'twas granted, but 'twas a much different Case from ours, as I said before; for that was a complicated Plea, and contained matter of Common Law, and therefore Common Law proof may be received. But here Plea of Payment is of the same nature with the demand, and consequently of their own Cognizance. Besides, as to the consequence, there can be no distinction or bounds framed, but that this will destroy all their proceedings: For at this rate no allowance can be of any Ecclesiastical proof; but in all Cases they shall be compellable to receive whatsoever proof a Jury doth usually Credit, for no Subject matter can be more entirely of their Cognizance than this: Besides, Mr. Squib agrees it in the Case of a Will, and how to distinguish them I cannot imagin.

Then as to the second Point; 'tis after Sentence. In Hob. 79. in Sir J. Wait's Case and many others, the Rule is express, that for any thing not appearing in the Libel; But for matters that are meerly suggested that are Collateral to the Libel, no Prohibition after a Sentence.

Chief Justice Holt. As to the last they come soon enough, for they could not come till they were aggrieved by refusal of proof, and that was not known till Sentence, as that of Citation out of the Diocess, that is the first instance, and by a litigating there the Party admits their Jurisdiction: But here is no such matter. Prohibition after Sentence.

Then for the other, the Opinion of all the Judges, 1 Jac. seems mighty strong with me.

Eyres. I know of no Law in England that allows proof by one Witness; for where Trial is not by Jury but per Testes, there must be two in all Cases.

Dolbin fortiter for the Prohibition, that 'twas an unconscionable unreasonable thing to disallow the proof. And as to that which I insisted on as to the dashing or crossing of Sentences and Proofs, the Court of Chancery will relieve, and enjoyn the Party Plaintiff not to proceed, and why should not we? Afterwards, Mich. 2 Will. & Mar. the Court delivered their Opinions Seriatim.

Ridings *verſus* Edwin *& al'.*

Caſe againſt the two Sheriffs of *London*, for an Eſcape from the Serjeant.

CASE ſur Eſcape againſt the Sheriffs, declaring on a Plaint in one of the Counters Coram H. Edwyn and a Precept to take, ita quod haberet Corpus ad prox. Cur. Et ſic de Cur in Cur. quouſq; placit' terminetur Niſi interim inveniet Manucaptores. That the Serjeant took him virtute inde, and had him in the Cuſtody of the Defendants then Sheriffs of London in the ſaid Compter; That they contrary to their Duty let him go at large, &c. Demur.

For the Defendant I argued that the breach was ill, not ſaying that he did not find Bail, for they are to keep in the Compter, juſt as the Serjeant was to keep him, i. e. according to the Precept. And 'tis not like the Caſe of a Latitat here, for there the command of the Writ is expreſs and poſitive to have the Body; in our Caſe 'tis only Conditional; and if not Conditional, 'tis a diſjunctive Precept, and then 'tis ill, for then they ought to alledge the Negative of both parts, as in Covenant. 'Tis true, it may come of our part, but if they have not aſſigned a good breach of our Duty, they have no cauſe of Action upon their Declaration. Suppoſe it were a Covenant from a Bailiff or Gaoler not to let go without order, 'twould be no good breach to ſay he did let go contrary to his Duty and Covenant. So for not to alien without Licence or to enjoy without diſturbance; this ſtands now indifferent in Conſtruction, and may have two intendments, and then the Rule is to take it moſt ſtrongly againſt the Plaintiff, Powell againſt Bradley, Yelv. 36. Chandflower againſt Preſtly, Yelv. 30. Vide Jenkins and Hancock's Caſe, in Sid. 30.

But per Cur. held well enough, he was in our Cuſtody, and if bailed it ought to come on our ſide.

Then I argued that both Sheriffs are not liable, but only whoſe Compter 'tis. I agree a Man may be Gaoler and Judge both, as in Dunne and Palies's Caſe, Roll's Abr. 806. But then its only in the ſingular number; and ſo it ſeems the Caſe of Donant againſt Ratcliff late Sheriff of London, 3 Cro. 185. and in 2 Leon. 29. Caſu 33.

And the reaſon of the thing ſeems for it; for as to Latitats and Writs from this Court they are but one Sheriff, but there they are ſeveral; each Sheriff hath his diſtinct Officers, and thoſe of one Compter cannot arreſt on a Plaint in the other, nor can they carry to another Compter than that in which the Plaint

Plaint was. And in their own Declaration, 'tis that he was taken by a Miniſter and Officer of Sir H. Edwins one only Sheriff: And in Husband and Cole's Caſe in 2 Keb. 147. held that the Command of the Sheriff of that Compter will diſcharge the Serjeants. In the Counteſs of Rutland's Caſe, 6 Rep. 'tis agreed that if one be arreſted by a Plaint in one of the Compters and carried thither, the Sheriff of the Compter may not carry him to his own Houſe: As to Minor's Caſe, Dyer 66. againſt both Sheriffs, that is for one eſcaped out of Ludgate: Hern's Pleader 129. 'tis againſt the Sheriff in the ſingular number. That in Raſtal 83. is the City of Norwich againſt Balk.

It was urged on the other ſide that all the Precedents are againſt both, they make but one Sheriff: In Brown's Formul. Placitand' 1 Part 49. is one Precedent; but that in Vidian's Ent. 15. another againſt both; and divers others ſaid to be ſo, which are not mentioned in Print. Adjornatur.

Dehers & al' verſus Harriot.

CASE on a Bill of Exchange: And on the Trial a doubt ariſing, my Lord Chief Juſtice Holt reſerved the Conſideration of it afterwards at his Chamber.

The Caſe was, A. draws a firſt and ſecond Bill of Exchange payable by himſelf in Dublin to B. or Order, for value received of him. B. ſometime after the ſaid Bill was due, negotiates the ſame with the Plaintiff, and endorſed it to the ſaid Plaintiff by Order for value received of him. The Plaintiff on the ſame day endorſed the ſaid Bill to D. living in Dublin, where the Bill was payable, which endorſment is as follows, Pray pay to *D.* value on my Account, ſigned by the Plaintiff: The firſt of the ſaid Bills is at the ſame time ſent away to D. and in it's carriage was loſt, and a third Bill not being to be had, the Drawer A. being abſent and gon into Ireland leaſt the ſecond Bill ſhould miſcarry, as the firſt did, an exact Copy of the ſecond Bill is ſent unto the ſaid D. and demand of payment being thereupon made, the ſame is refuſed, becauſe the Money was ſeized by Tyrconel, and a Proteſt is made upon that Copy for Non-payment, wherein the Party that was to pay the Bill, gives for his anſwer, that the Monies he deſigned for the diſcharge of the ſaid Bill were attached in his Hands, and therefore he could not pay it, which Proteſt was produced by the Plaintiff, together with the ſaid original ſecond Bill.

A Bill of Exchange is made payable to *A.* who indorſes it to *B.* who indorſes it to *C.* which is proteſted for Non-payment *B.* may bring an Action on this Bill notwithſtanding his endorſment.

The first Objection was, that the Plaintiff could not bring the Action, because by the endorsment to D. the interest in the said Bill was transferred.

I urged that according to the Custom of Merchants the Endorsment was made for the Account of the Plaintiff, and D. if he could was to receive the Money for the Plaintiff as his Servant, and we had proved that D. had no interest in the Monies; and the Endorsment restrictively without Order, is a material circumstance amongst Merchants, to conclude the Endorsment was intended and made for the Account of the Plaintiff, and the words value on my Account do imply it, and by the Custom of Merchants, the Protest for not payment being made returned to the Plaintiff (though the Bill had been for the Account of D.) he the Plaintiff being an indorser and possessed of the said original second Bill and Protest, hath right in his own name to sue and receive the Monies from the Defendant, and upon payment sufficiently to discharge him; and to this did abundance of Merchants subscribe their Names and Testimony. Then the Plaintiff went from this to another Objection.

Whether a Protest can be made upon a Copy.

In what Cases a Protest may be made on the Copy of a Bill of Exchange.

To which I answered, and twenty Merchants attested their Customs to be; That in such a case of necessity as this, where a third Bill could not be had from the Drawer, and one was casually lost in carriage, a Protest might be upon the Copy, especially where the refusal of payment was not for want of the original Bill, but meerly for another cause, so that the Party who was to pay did not insist on the original Bill to be delivered him; And accordingly my Lord was of that Opinion, and we had Judgment for the Plaintiff.

Note, That some Merchants said, that if a Bill be negotiated by Endorsment after the Bill was payable, no need of a Protest at all. Others, that a Protest must be in some convenient time. All agreed, that if there were an Acceptance, the Protest must be at the day of payment; if at sight, then at the third day of Grace, and that a Bill negotiated after Day of payment was like a Bill payable at sight. They all agreed that if a Bill were lost, and the Drawer might be resorted to for a new Bill, then no Protest could be upon a Copy: But where a Bill was lost, and no new one could be had, and the Party did not insist to have the original Bill, but refused payment for another reason, there such Protest made upon a Copy for Non-payment was good: See the printed Case of my Clients. 'Twas said by them

them, that in France if a Bill be not preſented in two Monthes, the Drawer was not anſwerable, and in Holland in ſo many Poſts.

Coan *verſus* Bowles & al'.

ERROR on a Judgment in Banco Regis in Replevin, where Coan complained of the taking of ſix Hogs in quodam Campo vocat', &c.

The Defendant avow as Bailiffs of one J. Kennet, Et bene Cogn' Caption' averior' præd' in quibuſdam tribus acris parcel of a certain Copyhold Eſtate of the ſaid Kennets, and becauſe the Beaſts were there Damage Feſant they take them, &c.

The Plaintiff replies, that they were in the ſaid Field vocat, &c. the Copyhold of H. abſq; hoc that they took them in three Acres, &c. Iſſue joined thereon.

On the Trial Coan is Non-ſuit. The Jury aſſeſs Damages to the Avowant to two pence, and Coſts to 40 s. And there's Judgment that the Avowant ſhall recover dampnum ſuum præd' ad 40 s. and 2 d. and Coſts de incremento to 10 l. 19 s. 10 d.

Coan brings Error and Aſſigns for Error that one George Say, one of the Avowants was an Infant under Age and appeared by Attorney, &c.

I argued for the Plaintiff in the Error, that Judgment ought to be reverſed. There are but four ſorts of Suits in our Law; Either in propria perſona, per Attornat', per Guardian' or per prox' Amicum: Regularly and generally ſpeaking the firſt two are the common ways, and the others are priviledges given to Infants under Age.

The ſeveral ways by which a Defendant may appear.

At the Common Law all Appearances were in proper perſon (except the Caſe of Infants,) whether of Plaintiff or Defendant, Demandant or Tenant. An Infant he never could, nor yet can ſue or be ſued in propria perſona, and ſo is the expreſs reſolution in the Caſe of Dawks and Pieton in Stiles 216. And at the Common Law no Man could make an Attor' (much leſs an Infant) but on a Writ by the King's Prerogative de Attornat' faciendo, and ſo is Fitz. N. B. 27. Until the Statute, &c. without ſuch Writ, all the Entries of Appearance both for Plaintiff, Demandant, Defendant and Tenant were in propria perſona; now no ſuch Writ ever was known for an Infant; and the Writ ſuppoſes the Party able to conſtitute an Attorney, and commands the Court to receive

An Infant cannot appear by Attorney.

and

and admit it; As for Infants there was another provision, as if he Sues, then the Court to admit and appoint a Prochein Amy or Guardian; and if he be sued, then a Guardian that should be answerable to the Infant; this was generally done by the Infant to some able, skilful Officer of the Court that was known for such his qualifications, and so is 2 Inst. 261. now by the Writs and the Statutes coming to enable appearance by Attorney in lieu of a personal Appearance it would never be thought to extend to an Infant, who could never Sue in propria persona but only per Guardian'.

Besides, the reason is plain; An Infant is not supposed at discretion able to chuse a fit Person ad respondendum for himself, no more than he can do any other Act of legal validity, &c. He cannot make an Attorney, he cannot force the Court to allow him one; and in Fitz. N.B. 27. E. is a Writ to the Justices commanding to receive an Attorney for one Defendant, and a Guardian for another that was deins Age: From whence I also infer, that the joining a Man of full Age with an Infant doth not alter the case. By Westmin' 2. cap. 15. 2 Inst. 390. in omni Casu quo Minores implacitari possunt, concessum est quod si hujusmodi Minores elongati sunt quæ minus personaliter sequi possint propinquiores amici admittantur sequi pro eis. And my Lord Cooke says upon that, whether Essoined or not, he shall Sue per Prochein amy, for Essoinment is put in this Act to shew what mischief may fall out in this case; from whence I infer, that where an Essoin might be cast by Attorney for a Person of full Age, an Infant had no such advantage, and therefore this Law was made, which argues that he could make no Attorney.

Two Avowants, one an Infant appears by Attorney.

I'le not argue against an Avowant's being quasi Actor, for I take it to be all one in this Case; for where an Infant is Plaintiff, he shall not Sue by Attorney; and though he recover, which is to his advantage, and no prejudice accrues by such his Appearance, yet 'tis Error. And so is Bartholomew and Dighton's Case, Cro. Eliz. 424. the same in Reve and Long's Case, 2 Cro. 5. Infant appears by Attorney, and held Error by all the Justices and Barons, for that is admitted by all the subsequent Questions there how it should be tried; and the Justices of the King's Bench too held it Error, as is plain by that Report, for they only doubted if the Exchequer Chamber could try an Error in Fact. In Beecher's Case, 8 Rep. 58. 'tis held to be Error, because cannot by Law make an Attorney, but by reason of some Contempt or Default is to appear in Person, and doth not, as on a Capias or Exigent. But here he cannot do so at all: And where he is Defendant

he

he cannot appear by Attorney, and that is agreed in King and Marlborough's Case, 2 Cro. 303. in an Ejectione firmæ.

Obj. That here the Infant was joined with other Defendants.

That will not affect this Case, and so is that Case of King in Crook Jacobi; for there were several Defendants, and that reason would make good an Appearance by Attorney where they are all Defendants, which is agreed in Fowis's Case, cannot be, and the reason is the same in both; for if an Infant and another Man join in a Feoffment and make a Letter of Attorney, this is not good, nor can it in any sort take away the imperfection of the Infant's Act: The Attorney is made by, or for every one of them: When others are joined the Case is the same; for the thing in demand is gained or lost by one who had no Warrant. Now an Infant cannot be an Attorney for another, 1 Hen. 5, 6. and therefore 'tis said he cannot appear by Attorney: Now for a Man that cannot make an Attorney, there is no reason he should be able as Bailiff to Avow by Attorney, because others are joined with him. Besides, the Case of a Feme Covert Infant though joined with her Husband, who hath power to act for her, yet if by Attorney 'tis Error; and so is the 22 Hen. 6. 31. Baron and Feme Infant sue for taking away a Villain, &c. by Attorney, ill. In the 14 Edw. 3. Age 88. Cessavit against Husband and Wife, the Husband appeared by Attoney, and the Wife by Guardian; and on a Suggestion that she was of full Age, the Guardian was ordered to bring her into Court, and several other Cases there are cited in Holland and Jackson's Case, Bridgman's Rep. 73, 74, 75. though the principal Case there was not adjudged, because the Writ of Error abated by Death.

Obj. That 'tis in anothers Right: That will not alter the Case; though an Avowry as Bailiff is the Title of another, yet in many respects the Suit is the Parties own, &c. as to Costs, &c. 'tis therefore not like the case of an Executor, and yet even there the greater number of Authorities, and the reason of the Law seems to be, that an Infant Executor cannot appear by Attorney, as 3 Bulst. 180. by Dodridge and Haughton, who then were only present. Infant though Executor ought to Sue by Guardian; though in auter droit, he still continues an Infant; for otherwise he may be triced says the Book. Wild and Rumney, Stiles 318. Infant Executor, Defendant by Attorney, Error. And Rolls denied any difference between Executor and another, for the same reason, because

cauſe Infant ſtill. As to the Caſe of Bada and Starkey, Cro. Eliz. 541. that Infant ſole Executor, Plaintiff ſuing by Attorney is not Error, becauſe in auter droit; that is contradicted in Foxwiſt's Caſe, 2 Saund. 213. for there 'tis agreed, that if it were ſole Executor, 'twould be no Quer. and in 2 Cro. 441. 'tis ſaid that Judgment of Bada was afterwards reverſed.

As to the Caſe of Cotton and Weſtcot, 2 Cro. 420, 441. Infant Executor, the Defendant pleading by Attorney it is Error. 'Tis true, there is a difference taken where Infant Executor is Plaintiff, and where Defendant. But the reaſons there do fail when duly conſidered; for though by a falſe Plea he may charge himſelf de bonis propriis, ſo in the other Caſe he may be amerced pro falſo clamore ſuo, which he cannot be when he Sues by Guardian; ſo that the reaſon is the ſame whether Plaintiff or Defendant, Plaintiff Infant may be prejudiced in miſconceiving his Action in bringing it againſt an inſolvent Perſon, and then a Recovery bars him to Sue any other of the Parties, as in Trover or Battery.

In Foxwiſt's Caſe, Sid. 449. 'tis agreed, that Infant Executor Defendant cannot appear by Attorney becauſe of the Damage, tho' as Plaintiff 'tis ſaid he may, becauſe no Damage: And in truth that Caſe goes upon diſtinctions that bear no weight, as 'tis in Sanders, and eſpecially in Mo. Rep. 296. Twiſden oppoſed it ſtrongly and with reaſon, for they agree, that if ſole Plaintiff or Defendant Executor it is Error, and that if all Defendants 'tis Error; and agreeing that no ſenſible difference can be made, for if the joining do alter it, why not when Plaintiffs as well as when Defendants; if the auter droit does it, why not when Sole as when joined with others?

The Damage accruing to the Infant is nothing; the Quer. is if he can make an Attorney, if it be a legal Appearance; and conſidering that he cannot appear in propria perſona, that making Attorney was never a privilege for him, and the Reſolutions being as they are, I do humbly conceive it Error, and therefore pray that the Judgment may be reverſed.

Mr. Baldock è contra, argued from the difference in Cotton and Weſtcotts and Foxwiſt's Caſe, that all the Perſons make but one Executor, and ſo in Avowry they all make but one Bailiff; that here the Avowant is an Actor; that he is to have return and a Judgment; that the Plaintiff in a Replevin may plead in Abatement of the Avowry. But after Verdict for the Plaintiffs, 'tis helpt by 21 Jac. 1. That here is a Verdict for Coſts.

Chief

Chief Juſtice Holt. If Infant Sole Executor appear by Attorney, 'tis ill, as well as when in his own Right; for the Infancy is perſonal, and the diſability in his Perſon: Ruſſel's Caſe, 5 Rep. an Infant Executor cannot releaſe a Debt: If there were two Executors perhaps that may make a difference, that one may make an Attorney for both, becauſe he may diſpoſe of the whole Eſtate of the Teſtator's: The next Term all the Judges ſeriatim delivered their Opinions.

Eyres. The Judgment ought to be affirmed, but I think this is well aſſignable for Error, though it might have been pleaded in Abatement: As in Foxwiſt's Caſe, a Plaintiff in Replevin may plead in Abatement, as well as when he maks Conuſance; but yet it may be aſſigned for Error, as in 2 Cro. 5. 2 Cro. 651. 1 Rolls Abr. 781, 783. For matters in and before the Writ, if not pleaded in Abatement, no advantage can be taken of it by Error, but otherwiſe where 'tis after the Writ, ſuch things may be Aſſigned for Error: But here it is no Error; the Avowants making Conuſance, as Bailiffs, they are in Law but as one Bailiff: And the diſability of the Servant ſhall not prejudice the Maſter: I cannot diſtinguiſh from the Caſe of Executor, and the reſt being joined with them; 'tis well enough, Cro. Eliz. 541. Whether Plaintiffs or Defendants it makes no material difference; but if it did it would not Rule in this Caſe, for according to 7 Rep. 23. an Avowry is in nature of a Count; ſo in the 3 Inſt. 303. and the Bailiffs when they make Conuſance are Plaintiffs and ſhall have Judgment for them, and may Sue out Judicial Writs, and may carry down the Cauſe to Trial, Vide 48 Edw. 3. 10. Cro. Car. 534.

But admitting he were really a Defendant, I ſee no reaſon of difference, it being in auter droit; and Judgment given for them, 'tis all one; A Bailiff is as much in auter droit as an Executor. If a Replevin be againſt Maſter and Servant, and the Servant makes Conuſance as Bailiff, and the Maſter pleads non Cepit, the Servant ſhall not have a Return, for by his Maſter's Plea his Conuſance is turned into a Juſtification, 2 Rolls Abridg. 433. and therefore I think Judgment to be affirmed.

Gregory. Judgment ought to be affirmed, but yet I think Infancy may be aſſigned for Error; but here it is in auter droit; he makes Conuſance as Servant to his Maſter; here all the Bailiffs make but one Bailiff, as in the other Caſe all the Defendants make but one Executor.

Dolbin. Judgment ought to be affirmed. Infant Executor can neither ſue nor be ſued by Attorney, but here they are but one Bailiff, and Judgment is for them; I think 21 Jac. 1. hath helpt it too. 'Tis true, 'tis not within the words; for there 'tis thus Where the Plaintiff doth recover by Verdict; now here the Avowant is Plaintiff, and though there be a Non-ſuit upon full Evidence, I think 'tis within the Equity of the Statute; the deſign of the Statute was where the Cauſe was tried, I think he is within it, eſpecially where Damages and Coſts are recovered: Methinks he is more properly a Plaintiff than he that brings the Replevin, for he begins the Suit by Diſtreſs, and he has a Verdict for Damages upon his Adverſaries Non-ſuit after Evidence.

An Infant Avows and appears by Attorney pleadable in Abatement, not aſſignable for Error.

Chief Juſtice Holt, That this is not aſſignable for Error, though I think nothing of its being in right of another and joined with others, for though he does act in the right of another, yet if he does miſcarry, Damages are to be recovered of his own proper Eſtate, and therefore he is liable to the ſame Damage in this Caſe, as in any other: So if Infant Sole Defendant Executor, appear by Attorney 'tis ill, if Judgment be againſt him. Infant Executor releaſes without receiving the Debt, 'tis void, Ruſſel's Caſe: A miſcarriage is as fatal to him and works a Devaſtavit, 2 Cro. 442. He charges himſelf directly if he miſpleads: Then the joinning of others makes no diſtinction; the Complaint is that he and others took the Plaintiff's Cattle unjuſtly, now ſhall the Infant ſuffer by the Fault of others? For perhaps the Infant was not reſponſible, and if he had his Guardian perhaps he would not join with them, he would inſiſt on ſome other Plea, as non Cepit. Beſides,

The Caſe of an Executor doth not come nigh this; for there though they be ſeveral, they muſt all join, there is a neceſſity for them all to join, and therefore one Attorney will ſerve for all, but here its otherwiſe; here is no neceſſity for them to join or to be joined: An Infant is compellable to attorn in a quid juris Clamat, yet he may diſavow his Attornment when of Age: In caſe of Executorſhip he muſt join: But yet I think it not aſſignable for Error; for it was a matter which the Plaintiffs might have taken exception to, by Plea to the Avowry: In all Caſes where a Man hath time to take his exception to a particular matter, and lapſes his time, and goes to the Trial of the Cauſe, he ſhall never have advantage of that by Error; this might have been pleaded in Abatement of the Avowry, but here he admitting him thus to appear and anſwer it, admits the Conuſance

ſance to be good and well made: Suppoſe a Feme Covert brings an Action againſt a Man as a Feme Sole, the Defendant Pleads in Bar; he ſhall never aſſign this for Error: If ſhe makes an Attorney, this will not be aſſigned for Error, 1 Rolls Abridg. 781. There is againſt me Dighton and Bartholomew's Caſe, Cro. Eliz. there this Error was aſſigned, but the ſame Book of the Caſe of Bade and Starky is contrary, for there's no difference between an Infant in his own Right and as Executor; the reaſon of Starky's Caſe was, that there was Judgment and no advantage taken of it. 2 Cro. 5. is alſo againſt me, but then the Exchequer Chamber was graſping at Errors in Fact (but that there has been overthrown ſince, for no Errors in Fact are examinable there) and this enclined them to hold at that time, that this was aſſignable for Error. They agreed the matter of his own or anothers right to be nothing: Infancy is a perſonal Priviledge, and none ſhall take advantage of it but he himſelf. And it ſeems hard that a Stranger ſhall take advantage of it. Then for me there is 48 Edw. 3. Waſt againſt a Guardian, and pending the Plea he ſhews that the Plaintiff was an Infant; and reſolved that they could not take notice of it, becauſe he had not taken advantage of it by Plea at firſt: So when there is a Man of Age appears by Guardian, and the other Party admits him ſo to appear, he is thereby concluded, becauſe he hath admitted him ſo to appear: So is the 17 Edw. 3. 70. and therefore Judgment muſt be affirmed.

Term. Mich.

2 Will. & Mar.

Shatter & *Ux' verſus* Friend.

VIde le Caſe ſupra. Now this Term the Court delivered their Opinions Seriatim.

Eyre. The Prohibition is well granted. I admit that where the Eccleſiaſtical Court proceeds in a matter meerly Spiritual though their proceedings be contrary to the Common Law, yet no Prohibition lies, Noy 12. 2 Rolls Abr. 300. 12 Rep. 65. 1 Rolls Rep. 88. 2 Inſt. 608. goes upon the diſtinction between the ſurmiſe of having but one Witneſs to prove, and the Court's diſallowing of one Witneſs. But I think a Prohibiton ought to go, becauſe they have diſallowed the Proof by one Witneſs of a temporal matter, but this is only incident to a matter within their Jurisdiction. He cited Hut. 22. Hob. 147. Moore 413. Popham 59. 3 Cro. 88. and Moore 907. and 3 Cro. 666. Yelvert. 92. Hob. 188. Richardſon and Disborough's Caſe, Rolls 2 Abridg. 300. And if the Law were otherwiſe 'twould be a great inconvenience to Executors and Adminiſtrators; for upon an Appeal the Party would be remedileſs; and as to that of after Sentence; it was granted after Sentence in Moore 907. and 3 Cro. 88 Bagnal and Stokes's Caſe.

Gregory, for the Prohibition. One Witneſs is ſufficent to Charge him at Common Law, and if one Witneſs ſhould not be admitted to prove Payment, 'twould be a great inconvenience.

Dolbin

Dolbin for the Prohibition, that it ought rather to be after Sentence than before, for then it is that it appears that they have disallowed the Proof; it is the most rational thing in the World, that a Prohibition should go, for this is a meer Temporal thing, and then they ought to proceed according to Common Law; sufficient Proof or not is the common Case of all Mankind that are or shall be Executors or Administrators.

Lord Chief Justice Holt for the Prohibition, and that he doubted it at first, because he thought upon Appeal they would themselves have relieved against the disallowance of any such Proof, but he found they all insisted on it, that one Witness was never allowable though of never so much Credit: Whereas Proof by one Witness is sufficient in our Law. That this is a Temporal matter, and then they ought to go according to our Law.

If it be for a Revocation, one Witness is enough, Yelv. 12. and the 1 Inst. 6. is a particular Case; but if there be a Trial of a Challenge, one Witness is enough by our Law, and so it is in the case of a Summons, Fitzh. N. B. 97. 23 or 33. H. 6. 8. it is de consuetud' Regni, that they have Conusance of these matters, Linwood 174. and therefore they must proceed according to our Law; In case of Tythes, their Law requires notice to the Person, but our Law requires no such thing, 2 Rolls 302. He also observed that the resolution in 2 Inst. of all the Judges was Pasch. 4. Jac. 2. and yet in the very next Term in Brown and Wentworth's Case, which was Trin. 4. A Prohibition was granted: And so I think this Point is setled though no answer made to the Concession of all the Judges, only that some of them broke it the next Term.

Bachurst *versus* Clinkard.

CASE against the Defendant as Sheriff of Kent, reciting a Judgment at the Plaintiff's Suit against William Dyke, for 400 l. and a Fieri facias thereon delivered to the Sheriff, that though Dyke had divers Goods and Chattels, yet he had neglected to Seize them, and made a false Return of nulla bona, non cul. pleaded, on a Trial before the Lord Chief Justice Holt. The Case was thus. Dyke, Brown and others were Partners of several Sums of great Value. Brown being indebted, a Fieri facias was sued against him, and thereon these Goods were all seized, and in the Sheriffs Custody, and consequently

Goods in Execution tho' wrongfully, are not liable to an Execution.

ſequently not liable to the Plaintiff's Execution: Held by Holt Chief Juſtice, that being once ſeized and in Cuſtody of Law they could not be ſeized again by the ſame or an other Sheriff, and if they were ſold thereon, ſuch bargain would be void. Held alſo, that though they had joint and undivided intereſts, yet only the ſhare or part of Brown, and no more could be ſeized upon the Execution againſt Brown's Goods, and conſequently Dyke had Goods, and ſo the Return was falſe, and we had a Verdict and Judgment for 200 l. being the value of our Debt.

Note, Both theſe Points were reſolved in Court the Day before by him in his Argument, inter Etkins and Weſterne, and not denied by any of the Judges. And I ſaw Chief Juſtice Pollexfen's Opinion under his Hand upon this occaſion, that on Execution againſt one Partners Goods, only his ſhare or part is liable.

Buxton *verſus* Home.

DEBT on a Judgment. The Defendant pleads that he was taken in Execution, and voluntarily permitted to eſcape, and the Plaintiff conſented to it.

The Plaintiff replies, that he did not conſent, Et hoc petit quod inquiratur per patriam.

The Defendant Demurrs. The Plaintiff joins. I did offer to argue it for the Defendant, but having begun and opened the Record as before, was ſtopt by Juſtice Dolben, that it was a plain ſetled Point; and to that the reſt concurred, that the Sheriff cannot take him again. But againſt the Party Plaintiff it is no Bar. And Chief Juſtice Holt ſaid, an Action of Debt did lie though perhaps not a Scire facias. So they all gave rule for Judgment for the Plaintiff without having any Argument, which was intended as follows.

Quære if any difference between Debt and Scire facias quoad hoc.

The Plaintiff ought to Sue the Sheriff and not the Party. The Plaintiff is at no loſs, for he hath his remedy againſt the Sheriff; the Debt is as it were transferred; the Sheriff is anſwerable in Debt, and he is now become Debitor ex delicto, and there is no reaſon why he ſhould have two remedies: and by this Error of the Sheriff he hath bettered his remedy; he truſted the Sheriff with the Cuſtody of him; and there

there is no reaſon if he be once diſcharged why he ſhould be liable without a new Contract; this is neither a negligent nor a permiſſive Eſcape, but a voluntary one. The Books make a great difference between voluntary and permiſſive Eſcapes. Suppoſe he recover in his Action againſt us, yet he may have Debt againſt the Sheriff upon the Eſcape, who is anſwerable; and ſo is Offley and Payne's Caſe, 1 Leon. 237. In Action on the Caſe by the Sheriff againſt the Priſoner for an Eſcape, he Pleads that the original Plaintiff had ſued, recovered and received ſatisfaction, and that acknowledged upon Record.

There is both reaſon and authority for me, and neither againſt me, as I hope to Evince.

In Linacre and Rhode's Caſe, 2 Leon. pag 96. pl. 117. Linacre's Body was taken in Execution on a Statute; The Sheriff voluntarily lets him at large, and afterwards the Conuſee ſued Execution of his Land, and an Audita querela brought by the Conuſor, and argued ſtrongly that the Execution was entire, and all diſcharged. But reſolved per Cur' that Execution might be ſued of Lands and Goods, but not of his Body. And agreed in arguing that Caſe by the Counſel of the other ſide, that if B. be taken in Execution and voluntarily permitted to Eſcape, that B. is fully diſcharged, though it be by Act of the Party, for the Plaintiff hath had a full Execution.

14 H. 7. 1 Bro. tit. Eſcape 2. in Banco Regis per omnes. If a Man whoſe Body is in Execution Eſcape, the Plaintiff hath no remedy but againſt the Gaoler.

Bro. Novel Caſes, 5 Edw. 6. Sect. 412. Debt on Eſcape againſt a Sheriff. He pleads that a former Sheriff had the Party in Execution and willingly permitted him to Eſcape, that afterwards he retook him and Impriſoned him, and then the Defendant was made Sheriff, and permitted him to Eſcape; and held a good Plea; for being once permitted to Eſcape the ſecond Impriſonment was not in Execution for the Party, and ſo is Bro. Eſcape 45.

In Rigdeway's Caſe, 3 Rep. 52. Count on an Eſcape. Freſh purſuit pleaded. Reſolved that if he be taken on a freſh purſuit, he ſhall be in Execution for the Party though out of his view: But if permitted to Eſcape by conſent of the Sheriff he ſhall be for ever diſcharged, and have the benefit of it. And the reaſon they give for it is good; becauſe in the firſt caſe he ſhall not take advantage of his own wrong; but here he ſhall, becauſe of the conſent: Savage and Beckham's Caſe, Moore 597. Eſcape by the Sheriff. The Defendant pleads that the Gaoler led him Extra ambitum goalæ & ultra ripas Sabrinæ.

And

And held ill, because did not positively and directly say that he voluntarily permitted him to Escape, and then the Bar had been good.

There the Sheriff could never retake him, and he could never be in Execution for the Plaintiff if retaken, and consequently 'twas a full Execution as to his Body, and consequently his Body is discharged, whereas 'tis otherwise on a negligent Escape.

The Case of Mason and Clayton, Cro. Car. 255. is on an Escape against the will of the Sheriff, and so it is in Rolls 1 Abr. 901. Tremilian and Roberts in Rolls Abridg. 902. is on motion in Arrest of Judgment, and the reason of that and Alanson is founded on an untrue reason, viz. that the Party shall not take advantage of his own wrong, for there the Party was guilty of no ill, and no reason the Sheriff could not retake him; he did what he lawfully might, and for any thing he knew to the contrary it might be by order of the Plaintiff, so that the reason fails here.

In Kellway 2. It was a doubt if an Escape against the will of the Gaoler if there could be a new Execution; but no question then, but they took it, if with the will of the Gaoler it would not.

In the Case of the Sheriff of Essex, Hob. 262. it was held he could never be in Execution again, though the Party would yield it to him and the Plaintiff will allow it, because being let to go abroad voluntarily by the Gaoler the Execution was utterly discharged, which was according to the Case in Brook.

As to Ridley and Mazile's Case, 3 Kell. 105. that was contra voluntat. of the Sheriff.

As to the Case of Vintner and Allen, Carter's Rep. 212. that was because not said voluntarily, and so is the reason given by the Judges in that Book.

Execution of the Body lay not at Common Law, but is given by the Statute as the best and most forcible remedy; the Body stands as a satisfaction while the Party is alive.

When the Plaintiff took him in Execution he chose this as his best remedy; he could not but foresee that the Sheriff might set him at large, 'twas his own folly to chuse an Executio caduca. The Plaintiff is not a perfect Stranger to the Sheriff, for he hath trusted the Sheriff by suing a Ca. sa. He might have sued another Execution. As to the Sheriff being a poor Man, that is never to be presumed, for the Law hath provided otherwise, &c. As to a Combination possible; no Man surely will combine against himself. As to the Sheriff dying,

dying, the Party might have died, and ſo that is all one: Phillips and Stone' Caſe, 2 Leon. 119. pl. 162. Debt upon an Obligation per Vicecom. Plea that it was given while in Cuſtody upon retaking after an Eſcape. Held expreſly that if eſcaped with the permiſſion of the Gaoler, the Execution is entirely gone and extinguiſhed, and the Party at whoſe Suit he was taken ſhall never reſort to him that eſcaped, but ſhall hold himſelf to the Gaoler for his remedy. But if he Eſcapes of his own wrong, the Gaoler may retake him, till the Plaintiff hath made his Election, whether he will Sue him or the Party.

In the Declaration the Plaintiff ſaith that he had no Execution on the Judgment, which is falſe. Theſe ſhort Notes I had prepared; and in truth when I had demurred I knew not of the Judgment in Alanſon and Butler's Caſe, in Car. 2. which is true Law, and ſetled, that an Eſcape againſt the will of the Sheriff, either Plaintiff or Sheriff may retake. On Eſcape with conſent of the Gaoler, the Party hath only remedy to take, not the Sheriff; if with conſent of the Plaintiff, then neither Plaintiff nor Sheriff can retake him, though Debt be unſatisfied.

Edmondſon *verſus* Walker.

PRohibition. The Defendant Walker Libels in the Admiralty Court as Executor to her Husband Nehemiah Walker, late Maſter of the Ship Parlarmitan alias Henſon, and the Ship and Apparel, and hath the ſame decreed to be ſold for payment of the ſaid Maſter and the Seamens Wages. Then ſhe by a ſupplemental Libel ſurmiſes Edmonſon to be in Poſſeſſion of certain Sails belonging to the ſaid Ship, which by the ſaid Decree were to be ſold, and the ſaid Edmondſon to have been admoniſhed to render an Account of the particulars thereof, and to deliver them to John Cheek the Marſhal of that Court, that they might be ſold according to the Decree. But Edmonſon hath neither given an Account nor delivered the Sails, and therefore prayed that he might be Attacht donec, &c. That Edmondſon did tender an Account then of there Main Sails, two Fore Sails, &c. and Decreed to be Attacht until he had delivered them. Prohibition. Suggeſtion claimeth Property.

The Plaintiff Suggeſts the Statute of Richard, and that the Admiralty had nothing to do with Land affairs, and that all Pleas of Treſpaſs, Caſe, &c. were pertaining to the Courts of the Common Law. That one Taylor formerly Maſter

of the ſaid Ship, and Owner of the ſaid Sails was indebted to the Plaintiff in 80 l. for the ſaid Sails and other Sails of him bought at Stepney. That being ſo indebted he did afterwards at the ſame Pariſh deliver the ſaid Sails in the Libel mentioned to him as a Pledge for the Debt aforeſaid, to be detained quouſque the ſaid Debt was ſatisfied. That he was not yet ſatisfied, that he detained them, viz. at the Pariſh aforeſaid.

Upon this Suggeſtion I moved for a Prohibition, for that the Admiralty had nothing to do therewith, becauſe our Poſſeſſion and Detainer was at Land; And beſides we had Property veſted in us at Land; and if we had none, yet the Tort which we were guilty of, was at Land, and therefore determinable only at Common Law: The reaſon why Wreck is determinable at Law, is becauſe tis always caſt upon the Land, 2 Inſt. 168. Where part is triable at Common Law, and part by the Admiral Law, the Common Law ſhall be preferred, 12 Rep. 79. Capper and Jones, 2 Rolls Rep. 493. 4 Inſt. 142. If a Man take a Maſt floating at Sea, and draws it to Land claiming admiral Juriſdiction; Action lies not againſt him for this in the Admiralty, but at Common Law, becauſe the Tort was at Land. Major of Harwich's Caſe, Mich. 10 Jac. 1. Rolls Abr. 533. Hildebrand's Caſe, Hill. 13 Jac. B. R. 1 Roll 285. Owner ſends a Ship to the Indies to Merchandize, it commits Piracy, and when it returns to the Thames the Admiralty Condemns her. After that the Owner takes away the Sails and Tackling, and he is ſued in the Admiralty; a Prohibition, lies, which is almoſt our Caſe: For here was a diſtinct wrong. And as to the caſe of Piracy and Sale afterwards at Land, there the Pirate never had Property, and the Sale at Land was dependant on the taking. Here the Proprietor was poſſeſſed antecedent to any Suit, and the Sails not liable till Condemnation; for if the Ship had been ſold at Land before ſuch Suit a Prohibition ſhould have gone, and ſo it hath been on my Motion in Hoar and Clement's Caſe, Hill. 35. and 36 Car. 2. Violet and Plame. And 2 Cro. 514. is expreſs, that a Ship lying at Anchor is not within their Juriſdiction, Meuxin and Penſilvanian the ſame. Leigh and Burling's Caſe, Owen 102. Maſter of a Ship buys Sails and other things, and delivered on board, not within their Juriſdiction: If the Owner ſell her and Furniture, and then runs away, and then Suit is in Admiralty for Sails delivered, a Prohibition lies. If Tackle be bought at Land for a Ship, and Suit in Admiralty for it, a Prohibition lies. Here the Sails are ſevered, and not part of the

Ship

Ship when they are on Shoar. 'Tis but a device to Sue for the Ship, and then to get the Sails as appurtenances: The Suit for Mariners Wages is of their Jurisdiction but by sufferance, and so was it held by Wyndham, 3 Keble 712. 'Tis only by permission for the help of Trade; for they may Sue at Land: Here is property claimed and wrong done (if any) at Land.

Admiralty Court may proceed against the Ship, Sails and Tackle as part of it when on Shoar.

Chief Justice Holt. Mariners Wages are within their Jurisdiction. They may sell the Ship, and the Sails and Tackle are part of it, and remain part of it when they are on Shoar. The Ship it self is at Land when in Harbour, tis infra Corp' Com', and therefore that is no cause for a Prohibition. And as to the Cases of Trespass done infra Com', 'tis true they are out of the Jurisdiction, but here is only a Condempnation of it, as an accessary or Appurtenance. And as to the Property they will and must allow it, if you come in and plead it, if otherwise we will prohibit them.

Then I altered my Suggestion and alledged an offer of Plea claiming Property and refusal of the Plea, and had a Prohibition.

Note, Their course is not to receive a Plea unless we bring the Sails into Court, i. e. into the Custody of the Officer, and then they will admit a Claim and contest of Property, And in truth that was the reason of their refusing any Plea in our Case, but now Affidavit being general, no Notice was taken by the other side of that difference of their Court.

Clayton *versus* Coatsworth.

NArr' en Transgr. de eo quod defendens simul cum. A.B. 30. Martij Anno secundo, &c. Vi & armis quandam navem ipsius Quer. vocat' the William and Deborah, at ——then loaded with divers Goods of the Plaintiffs fregit & intravit, and the Cabin of the same Ship then and there divulsit & diripuit, nec non bona & catalla, *viz.* ducent' librar' Plumbi, &c. did take and carry away, and to their own use did convert and dispose, ac etiam on the Mariners of the said Ship belonging being the Servants of the Plaintiff did then make an Assault, and to the said Mariners tales minas de vita & imprisonament', then and there imposuit, and them with injuries, viz. Assaults and Affrays adtunc & ibidem affecit, that they could not go their Voyage for two Days; and one of the said Mariners, viz. the Master did then and there Imprison and Detain by two Days, per quod the Ship could not proceed in the

Voyage for 17 Weeks, per quod he loſt the profits of his Goods, Et al' Enormia, &c. contra pacem, &c.

The Defendant pleaded Non cul. and Verdict for the Plaintiff and 40 l. Damages.

I moved in Arreſt of Judgment, that here was Caſe and Treſpaſs joined, both Treſpaſs Vi & armis, Trover Converſion, and Special Caſe all jumbled in one Count; Sed non allocat' per Cur', for that 'tis only an Aggravation, and in the Regiſter are abundance of Preſidents of that Nature.

2. Exception, 'tis Repugnant, becauſe he ſays we took and carried the Goods, &c and yet threatned the Seamen ſo that the Ship and Goods could not go, &c. and they cannot be intended different, Goods &c.

Anſwered that the latter was only an Aggravation.

3. Exception, That there was no Venue laid where the Goods were taken away; and this cannot be coupled, for 'tis as a diſtinct Count. The Defendant might have been found guilty of this part and not guilty of the breaking, &c. In Danett againſt Collingden, Mich. 33 Car. 2. in this Court on Mr. Holt's Motion in Arreſt in Treſpaſs for taking Averia querentis, viz. unum Equum, & unam equam, necnon unum Galerum: Held ill, becauſe it lays no property in the Hat. But per Cur' the necnon though it did coupel them yet it could not be called an Averia; but in the preſent Caſe the necnon couples all, and 'tis but one Sentence, ſo that it is well enough after a Verdict, for the necnon is Copulative, &c. and ſo Judgment for the Plaintiff.

Dominus Rex *verſus* Bill & al'.

Return of a Reſcous on a *Fieri fac'*.

The Defendants were preſented in the Crown Office for a Reſcue of a Coach and Harneſs returned upon a Fieri facias, and upon Appearance of the Parties the Return was quaſhed and they diſcharged, becauſe not good on a Fieri facias. Entr. Trin. ult. Rot. 650.

Tamlin

Tamlin *verſus* Hamlin.

CASE for Slander. Narr' that the Plaintiff was a good and faithful Subject of their Majeſties, and as ſuch a good and faithful Subject of their Majeſties, and of the late King James, &c. from his Nativity he had been himſelf free from all Faults, and got Money and Credit by ſuch his Behaviour, the Defendant to Scandelize him, ſaid to his Servant, Your Maſter is a Couzening cheating Knave and a Rogue to boot, and couzened and cheated all the Pariſh, (*quandam Par' de Withicombe innuendo*) and all Perſons he deals with. By colour of which words he is dampnified in his Credit, &c. ad Dampnum, &c. Non cul. pleaded, Verdict for the Plaintiff.

I moved in Arreſt of Judgment, 1. That upon their own ſhewing he was an Infant, for he ſays as a Subject of their Majeſties, and King James, from his Birth, &c. and its well known when his Reign began that he could not be ſeven Years of Age, and yet the Bill is brought by Attorney. 2. That the words are not actionable being ſo general, and not laid that he had ony Office, or was Churchwarden, or had any dealings, and no ſpecial Damage found, or ſo much as laid. That ſuch Words will not bear an Action the Books are clear; for couzening in private dealing will not bear an Action. Co. 4. Rep. 16. 2 Bulſtr. 228. March. pl. 135. Godbol. 284. 2 Cro. 427. Goldsbr. 125. Hob. 76. Owen. 47. 56. Popham 177. Hut. 14. All theſe Books are that couzening and cheating, unleſs ſpoken of an Officer, are not actionable.

Judgment ſtaid becauſe not actionable.

Whiſtler *verſus* Aley.

A Wager on the Government of *Ireland*, being in the Power of the Prince and Princeſs of *Orange*.

NAR' in Caſe, pro eo quod cum the Defendant in conſideration that the Plaintiff had paid him three Guineas he promiſed to pay the Plaintiff 50 l. in Caſe the Government of Ireland were not Surrendred or taken into the Hands or Power of the Prince or Princeſs of Orange, (whether they ſhould have their then preſent or any other Title) or to ſome other Perſon or Perſons Commiſſioned by them or one of them, or to the uſe of them, or one of them, on or before the 30th. day of December then next following: And avers that at the time of making the Promiſe, and always after to the ſaid 30th. of December, William Henry and Lady Mary his Wife

Wife (now King and Queen of England) were Prince and Princess of Orange, and that the Government of Ireland at any time after making of the Promise, and before, or upon the said 30th. of December, was not surrendred or taken into the hands or Power of the Prince or Princess of Orange, or to any Person or Persons commissioned by them or either of them, or to their or either of their use; and lays an Indebitus Assumpsit for 50 l. had to the Plaintiff's use.

We pleaded as to the second Promise that non Assumpsit modo & forma, and Issue joined thereon. And as to the first, Actio non, quia the Government of Ireland was taken into the power of the now King and Queen before the said 30th. of December, viz. the 29th.

The Plaintiff replies that 'twas not taken or surrendred, Et hoc petit quod inquitatur per patr'; and the Defendant Similiter.

On the Trial of this Issue, we justifie for the Debt, that by the acceptance of the Crown the 13th. of Febr. after the Wager laid, they were really & de Facto King and Queen of Ireland; that by Poyning's Act the same was annexed to, and dependant on the Crown of England; that the same Laws governed both; that being Sovereigns of England they were so of Ireland; and though they had not the actual Administration of the Government there then of the whole, yet of London-derry, and some little Parts there adjacent they had, and did appoint Officers thereabouts both Civil and Military; That if it must be intended of the whole Kingdom, then Scotland may as well be said not to be in their Hands, because some of the Highlands are under those who own not the present Authority.

To the first it was answered, that it must be meant the actual Administration, and that was not in their Hands at that time. That the words (whatsoever Title, &c.) shew it was the meaning of the Parties that it should be the actual Administration, and that publick notice told every Man it was under another Administration at that time; and of that Opinion was Chief Justice Holt, and accordingly there was a general Verdict for the Plaintiff. But he gave us leave to move the Court next day and so we did, but all the Court were of the same Opinion with the Plaintiff, and accordingly he had his Judgment.

1 *Siderfin.* Bond for payment of [illegible] *l.* after restauration of King [illegible]

Note, It seemed strange to me, they should countenance such wagers, and permit it to be found by Verdict upon Record, and Judgment accordingly, That the Government of Ireland was not in their Hands. But their Opinion seemed to be grounded

on

on the Caſe of Sid. of the Bond for payment of 50 l. after the Reſtoration of King Charles; The Judges conſtrued it to be meant King Charles I. according to the circumſtances of things at the time of making the Bond.

Fabian *verſus* Plant.

CASE in the Mayor's Court upon an Indebitatus Aſſumpſit generally for 57 l. according to the Cuſtom of the City. Non Aſſumpſit generally pleaded.

Upon Evidence the Debt demanded is for Goods ſold to the Defendant's Wife while living, and thereon is a Special Verdict found to this effect.

That the Defendant was a Free-man and of the Company of Hatbandmakers. That Hannah Plant deceaſed, late Wife of the Defendant, for ſeveral Years paſt in a certain Houſe in the Liberty of the City vita ipſius Hannah, did dwell diſtinct and a part from the Defendant, for which Houſe ſhe paid Rent, and in the ſame Houſe Sola Exercuit, the art of Gimpe Lace making, and the Defendant did no manner of way intermeddle in the Art aforeſaid; and that the Plaintiff did ſell and deliver divers Goods to the ſaid Hannah in order to carry on her Trade aforeſaid, in the whole amounting to 57 l. for which the Plaintiff now declares: That the Defendant for 20 Years paſt hath not exerciſed any Trade, but for all the ſaid time was a Miniſter diſſenting from the Engliſh Church, and to certain Perſons diſſenting from the ſaid Church he did often Preach: That the ſaid Wife of the now Defendant did not keep any Shop, but for the time aforeſaid in her Trade aforeſaid in Cenaculo Domus præd' operabatur. They further found that the Defendant did promiſe to pay the ſaid 57 l. to the Plaintiff, but that the ſaid promiſe was made to the Plaintiff after the death of the ſaid Wife, and not before, & ſi, &c.

Argued by Mr. Darnel, that here was a promiſe which made him chargable; for that was a conſent to her having the Goods, and that if he were not liable, the Creditors would be wronged. Here is no Feme ſole Trader, becauſe 'tis not in any Shop of which notice may be taken, and he did not exerciſe any other Trade; his Wife was liable to be impriſoned, and therefore his promiſe makes him chargable. At Common Law, they are but one Perſon, and a delivery of Goods to her is to his uſe. Beſides, this is prima facie a charge upon him, and then Cuſtom only makes it voidable, as in caſe of Infancy. If an Executor aſſumes

to

to pay after 6 Years elapſed, he is chargable in his own Right, though he might have avoided it. So here, though he might have avoided it, yet having promiſed, he charges himſelf.

I argued è contra, that a promiſe without conſideration is void: That here was none, and therefore this is void. That here was no conſideration, becauſe he was not liable, Barker and Fox's Caſe, 2 Saund. 136. and ſee 1 Saund. 210. both expreſs, that the Promiſe was void, becauſe it did not appear that by the conſideration the Defendant was chargeable with the Debt, Popham 183. March 202. It is not found that theſe Goods were for neceſſaries; that they were uſed in the Plaintiff's Preſence; no Cohabitation, but the contrary found, and ſo the Husband not chargable according to Manby and Scott's Caſe in Siderfin and Mod. Rep.

But here ſhe is plainly a Feme Sole Trader. It need not be in a Shop, for ſome Trades are never exerciſed in Shops, as particularly this, and ſo is Phillips's Reading in Manuſcript in Mr. Lightfoot's Cuſtody upon this Cuſtom, which I have ſeen. Then for the Books, all that I can find, except now and then an aſſertion that there is a Cuſtom in London of a Feme Sole Trader, is the Caſe of Bowett and Langham, Hetley 9, 10. held by Crook, Hutton and Harvey, that if the Husband intermeddles with the Trade of his Wife ſhe is not a Feme Sole, but if he relinquiſh it, or become a Bankrupt, or be over Sea, or be of another Trade, or never intermeddle in it, ſhe is within the Cuſtom, theſe are words of the Book. And by Richardſon, he who ſells, ought to take notice at his Peril, whether a Feme Covert, or Feme Sole Merchant by the Cuſtom: And ſo is Cro. Car. 68. and 'tis there agreed, that if the Husband at the ſame time uſed not the ſame Trade, or medled therewith, ſhe is a Feme Sole Merchant: And in Lit. Rep. 31. are the words of the Cuſtom as returned on an Habeas Corp', and that is the true meaſure of knowing it. Where a Woman exerciſes a Trade in which the Husband intermeddles not, ſhe ſhall have all advantages and be ſued as Sole: Now here 'tis found that he intermedled not; ſhe lived apart, and uſed the Trade alone; the Goods were delivered to her for the carrying on that Trade, ſo that 'tis plain he knew her to be ſuch. This is a Priviledge a Freeman's Wife hath, and its not fit it ſhould be a Burthen to him. By the Cuſtom of the City ſhe may uſe a Trade alone, ſo after his death unleſs ſhe Marries a Freeman, and then ſhe loſes that Freedom; theſe Cuſtoms are Sacred. The Promiſe was not till her death, and then he was not

liable

liable in any manner of wiſe. In her life time he was only nameable for conformity, but he was not to put in any Bail; neither his own Perſon nor his Goods were chargable, only ſhe; now ſhe is dead. If he had intermedled at any time during her life or poſſeſt himſelf of any of the Goods, or the Profits of ſuch her Trade, he had been chargable, becauſe that it would have been an intermedling; but now here this Conſideration was no advantage to the Plaintiff, and conſequently not good: As to the wrong to Creditors, 'tis at their Peril. But no more than in Thouſands of other Caſes; and here the Plaintiff knew her and her Trade: As to void and voidable, I ſay its nothing, becauſe here he was never liable; for as to the Executor's Caſe after ſix Years, there was a new Promiſe, but an old Conſideration continuing, and the Statute was pleadable; ſo of Infancy: Here was no obligation upon him. Adjornat', &c.

Afterwards Rider gave Judgment for the Defendant, and declared Treby to be of the ſame Opinion: Quer. For it deſerves Conſideration, if ſuch a Feme Sole Trader acquires an Eſtate and dies, and the Husband poſſeſſes himſelf of it, if he ſhall not be anſwerable for her Debts.

Term. Hill.

2 Will. & Mar.

Fowles *verſus* Bridges.

Ent. Mich. Ult. 291.

SCIRE facias brought by the Plaintiff on a Judgment removed by him and Mr. Nightingale (ſince dead) againſt Bridges.

The Defendan pleads that the Plaintiff and Nightingale recovered, and the Defendant brought a Writ of Error, which is yet depending. The Plaintiff Demurrs.

For the Plaintiff I urged, that the Writ was abated becauſe of the death of one of the Defendants. But by Chief Juſtice Holt 'tis no Abatement if both die, for a Scire facias may be ſued againſt the Executor and they made Parties; and ſo that was over-ruled.

Then I urged that the Scire facias was of a Judgment on a Suit per Billam in Cur. noſtra, and their Writ of Error was of a Judgment in quadam loquela Coram Jac. 2. nuper Rege, &c. that this was a variance which always quaſht the Writ of Error, as in Dighton and Greenviles's Caſe, this Exception moved, and they dare not depend on it, but have brought a new Writ of Error. So was Strode and Osborn, Trin. 1. W. and M. Ent. Paſch. 4 Jac. 2 Rot. 297. Error on Judgment in Comuni Banco directed to Herbert of a Judgment Coram vobis & Sociis veſtris, and the placita was Coram Bedingfield; then after Iſſue there is an Entry of Bedingfield's death, and a ſuccedit of Herbert, and held ill, though urged that the proceedings till Judgment were placita, for that all refers to placita at firſt though in two Reigns; here it is per billam in Cur. noſtra: The Books are plain in it, Certiorari to remove a Record in Cur. noſtra which was in Cur. predeceſſoris; held ill, Dyer 206. Rolls 1 Abridg. 752. are ſeveral Caſes.

'Its

'Its no objection to ſay, that it may be a Superſedeas tho' no Record be removed, as in Caſe of a Tranſcript out of Ireland. It is not according to March's Rep. 10. That is on a particular reaſon, becauſe of the peril of the Seas, and the Writ there ſhall have the ſame effect as another here. But ſuppoſe a Writ of Error at Ireland on another Judgment, they may proceed below, becauſe no Writ of Error in that Cauſe: If Judgment be by Default, and ſuch Writ as this brought, and a reverſal, no Judgment can here be given upon ſuch reverſal, becauſe not the ſame Cauſe: 'Tis hard to imagin that a Writ which can have no effect ſhould be a Superſedeas. Suppoſe a Writ of Error in the Exchequer-Chamber on an Action here, where it lies not, as in Suit by Original, Appeal of Felony, or the like, that could never be a Superſedeas. 'Its true, allowance of a Writ of Error is a Superſedeas, but it muſt be in the ſame Cauſe.

Then for their Averment of Identity, that cannot help it, becauſe made againſt the Record; and for theſe reaſons we had Judgment for the Plaintiff.

Note, As to Abatement by death, the Law ſeems plain, that death of one Plaintiff in a Writ of Error, abates the Writ, as is Holland and Jackſon's Caſe, Bridgman 78. Earl of Rutland's Caſe, Yelv. 208, 209. In caſe of Error here in Judgment in Communi Banco, death of the Defendant doth not abate the Writ, according to Bromley and Littleton's Caſe, Yelv. 113. Error here on Judgment in Communi Banco in Dower, Defendant in Error dies. Plaintiff ſues 2 Scire facias and 2 nihils returned againſt the Executors, and then proceeds to examin Errors. And held that he might do ſo, and the Executor was thereby made a Party; but to me it ſeems otherwiſe in caſe of Exchequer-Chamber, for there according to March 72. the Record remains here notwithſtanding Error in Camer' Scaccarij, otherwiſe on Error here in Comuni Banco. Beſides, no Record that is removed into this Court is ever remanded. The Exchequer hath no Record there, but only a Tranſcript, there is only an Authority as it were by Commiſſion between thoſe Parties: And ſo is Burnet and Fox, 2 Keble 594. An Affidavit of death of one of the Defendants in Error in Camer. Scaccarij, the Court would do nothing in it; but the Executors ſued a Scire facias, and had Judgment and Execution; and ſo is Cremer and Humbſton, 2 Keble 467. 520. Defendant in Error in Scaccario dies, a Scire facias to Executors was denied as for a delay; and the difference allowed between this Court and the Exchequer; for in one the Record is actually removed, and in

the other there's only a Commiſſion, and that is between the Parties and no others; but in Bowes and Pawlet's Caſe, Moore 701. Pl. 974. Defendant in Erroꝛ in Camer' Scaccar' dies after in nullo eſt Errat' pleaded, and yet they proceeded to reverſal without a new Writ de recordo quod Coram nobis, &c. And in that Caſe, Hill. 27 Car. 2. B. R. 3. Keble 571. Reſtitution was granted upon motion on an Execution ſued after death of Defendant in Erroꝛ, becauſe Per Cur' no Abatement, but Scire Fac' ought and might have been to Executoꝛs.

Kemp *verſus* Andrews.
Entr. Mich. ult. 289.

Trover by Survivor of joint Merchants.

PLaintiff Declares, pro eo quod he and one J. N. and J. P now deceaſed, whom the Plaintiff ſurvived, were in the life time of the ſaid J. N. poſſeſſed as of their proper Goods and Chattels, viz. a Ship called the Streights Merchant with its Apparel and diverſe other Goods, to the value of 20000 l. and being ſo poſſeſſed did loſe them, and they came to the Defendant's hands by finding, and he in the life time of the ſaid, &c. converted them to his own uſe.

Plea in Bar. No Survivorſhip between joint Merchants.

The Defendant venit & defendit vim & injur' quando, &c. Actio non, quia dicit quod the Plaintiff & prædict' J. N. and J. P. long before the times in the Declaration, and the ſaid ſeveral times, &c. were Merchants, and as joint Merchants for their common Profit were poſſeſſed of the ſaid Goods, and that by the Law of Merchants, and the Law within the Kingdom of England uſed and approved, there is not or ever was any right of Survivorſhip between joint Merchants; That J. N. before the exhibiting of the Bills died, and made J. D. his Executor, who proved the Will, and is yet living; That J. D. died alſo, and made R. S. his Executor, who proved his Will, and is yet living, Et hoc parat. eſt verif. unde petit jud. ſi Action', &c.

Plaintiff Demurrs, and ſhews for cauſe, quod placit' attingit ad general' Exit', incert' eſt & caret forma.

Survivorſhip between joint Merchants in point of Remedy, not in point of Intereſt.

I argued that the matter of this Plea is ill; that though in point of Intereſt there is no Survivorſhip, yet in point of Remedy there is; and all that the Books ſay is, that the Executor of the Party deceaſing, ſhall take Account againſt the Survivor per legem Mercator' and ſo is 3 Leon. Caſe 354. 2 Brownl. 99. The Writ in the Regiſter 135. N. B. 117. is only to charge the Survivor with Account, 1 Inſt' 172. And though we are liable to Account, yet that doth not take a-

way

way our Action for the whole, for after a recovery we are ſtill accountable as receptor' denarior', &c. Beſides, there is no inconſiſtency in the Law for to have a Survivorſhip in point of remedy. Further, here it may be, becauſe that the Executor and the Plaintiff cannot join; ſuppoſing them Tenants in Common, yet both ſhould have joined in this perſonal Action, and the Action ſhall ſurvive for the whole, Lit. Sect. 315. Covenant between three having a joint Stock, Survivor alone ſhall have the Action, Eclaſton and Clipſham's Caſe 2 Keble 338, 339. Bro. Joynder 28, 35. But then ſuppoſing it ill, yet no advantage is to be taken of it by Plea in Bar, for we have a Cauſe of Action, and this is only to ſhew us how to bring a better Writ, which is only in Abatement; 'tis no more than Jointenancy in Caſe of Land, or claiming the whole Land when our right is only to a moiety, and therefore this matter ought to have been pleaded in Abatement, for 'tis not to the merits of the Cauſe; for in Hall and Huffam's Caſe Hill. 18 Car. 2. 3 Keble 737. where this is allowed (which is the only Caſe I know of) that was in Abatement, and yet on a new Action in 3 Keble 798. 'twas ſaid, that they and the Executors could not join, but the Executors ſhould come in upon the recovery of their ſhare. Per Cur' This can never be a good Bar, ſo that we do not conſider whether the Executors muſt or can join. Judgment pro Quer'.

Kemp *verſus* Andrews.
Entr. Mich. ult. Rot. 290.

SPecialty, declaring, that the Plaintiff and G. N. and J. P. whom the Plaintiff ſurvived, in the lives of G. N. and J. P. were apud Mecho in partibus tranſmarinis viz. at St. Hellen's in Warda de, &c. poſſeſſed of the Goods and Chattels following, &c. to the value of 15000 l. as of their proper Goods and Chattels, and ſome Goods being at Mecho aforeſaid, being an Infidel Country in Africa, and inhabited by barbarous People, viz. at London aforeſaid, were directed, ordered and appointed to be loaden and tranſported in and upon the Ship of the Plaintiff, and G. N. and J. P. called the Streights Merchant, uſque et ad Port' de London, and that no other proper or poſſible means then, or ever after, could be had for the Tranſport of the ſaid Goods than in and upon the ſaid Ship. That the ſaid Ship was then and there ready and fit to receive and tranſport the ſaid Goods according to the appointment aforeſaid; That the ſaid Goods, by reaſon of ſtay there. Action by Survivor of joint Merchants.

there, were expoſed to manifeſt and undoubted peril of Captures and Spoliations by the barbarous Inhabitants aforeſaid; That the Defendant knowing the Premiſſes and maliciouſly intending to deprive the ſaid Plaintiff and G. N. and J. P. of all means for tranſporting the ſaid Goods and all Profits of the ſame, and the ſame to expoſe to the Rapines and Spoliations aforeſaid, did with Force and Arms take the ſaid Ship, and carry her to Places unknown, &c. by reaſon whereof the Goods neceſſarily remained there, and thereby by reaſon of Captures and Spoliations aforeſaid, the Goods were ſpoiled, dampnified and utterly loſt ad Dampnum of the Plaintiff 10000 l. The ſame Plea as above pleaded, the ſame Demurrer and the ſame Judgment pro Quer.

Dominus Rex *verſus* Tayler.

Indictment of Perjury.

ERROR on a Judgment upon an Indictment of Perjury in Briſtol. The Indictment is for a Perjury before a Commiſſioner for taking Affidavits, concludes contra formam Statut. and doth not ſay voluntarie, and therefore ill, 3 Inſt. 167. Cro. Eliz. 147. 201. and the Indictment is qui nec, &c. And for theſe Errors it was reverſed.

Dominus Rex *verſus* Yates.

THE Defendant was committed to the Priſon of Hull, and I moved to have his Prayer entred, becauſe it was for Treaſon, that he might be tried, &c.

Per. Cur. You cannot make a Prayer here, becauſe 'tis to be for the next Aſſizes for the Place.

I urged, That 'twas in the disjunctive, and we might make our Prayer either the firſt day there, or the firſt week here. But per C. J. Holt. It muſt be taken reſpective, for otherwiſe all the Felons in all the Gaols in England muſt be diſcharged. For if they are committed juſt after the Aſſiſes, and come hither, they muſt be bailed, if not Indicted before the end of the firſt Term; and if not tried the ſecond, muſt be diſcharged; and yet they cannot be Indicted but in the County where the Offence was committed, which can never be thought the intent of that Act.

I ur-

I urged the privilege of this Act, the liberty of the Subject, the inconveniencies on the other side, that then a Secretary of State might send a Man to Hull or Canterbury where Assizes are rare, and he is certainly a Prisoner for a year or two, which spoils the true intent of our Law-makers, for then Slavery would be as rife as before the making of the Act. Then for the Inconvenience objected, that would be remedied by an equitable Construction of the Clause where the King's witnesses cannot be ready. But Per' Cur. no relief for my Client.

Then I urged, that the Treason laid to my Client's charge was done on the Sea, or beyond the Sea, viz. sending Lead to France, and that might be tried any where, wheresoever the King pleased. So at last we got him bailed.

Note, It was resolved by the same Justices, that a Man bailed cannot make his Prayer: In the Earl of Aylesbury's Case.

Barker *versus* Dormer.

Entr. Hill. ult. 635.

Covenant.

PLaintiff declares in Covenant, for that William Barker deceased being seized of certain Lands in the County of Limerick, in the Province of Munster, in the Kingdom of Ireland, made a Lease thereof to Thomas Page, Habend' to him, his Executors, Administrators and Assigns for 31 years, rendring and paying yearly 250 l. in the Insurance Office in London, upon the first day of May every year, by Deed Indented; wherein the said Page for himself, his Executors, Administrators and Assigns, Covenants to and with the said William Barker his Heirs and Assigns, that he the said Page his Executors, Administrators or Assigns would well pay during the said Term, the said Annual Rent of 250 l. at the place aforesaid. That Page entred and enjoyed. That the said William Barker being so seized of the Reversion bargained and sold the same to the Plaintiff for a year, and afterwards the next day Concessit the Reversion of the Reversion aforesaid. That the Estate and Term of Page lawfully came to the Defendant, whereby he entred, and hitherto enjoyed the same. That 250 l. was arrear on 1. May 1688. and not paid that day, according to the Form of the Indenture, Et sic Convention' infregit ad dampnum 300 l.

Defendant

Plea that the cauſe of Action did ariſe in *Ireland.*

Defendant in propria perſona ſua venit & defendit vim & injur' &c. & dicit quod Cur' Domini Regis & Reginæ Regno Hibern' Conuſance of the Plea aforeſaid ought not to have quia dicit that the Lands in the Narr' are and always were ſituate in the Kingdom of Ireland out of England: That there are, and time out of mind there were in the ſaid Kingdom, ſeveral Courts of Record of the King and Queen and their Predeceſſors before Judges of thoſe Courts for the time being for Trial and Determination of all Pleas in all Actions, real, perſonal and mixt, within that Kingdom ariſing; that all Pleas touching the validity and effect of any Grants or Aſſignments of any Lands lying in Ireland, and the Rights, &c. are determinable in Courts there, and that the cauſe of Action in the Declaration ſpecified aroſe in Ireland, abſque hoc that the Eſtate Term and Intereſt of Thomas Page in the Premiſſes, came to the Defendant at London, or elſewhere, out of the Kingdom of Ireland, modo & forma, as by the Declaration is ſuppoſed, Et hoc parat' eſt verificare, unde petit jud. ſi Cur' hic placitum prædict' ulterius cognoſcere velit aut debeat, &c.

Plaintiff Demurrs, and ſhews for cauſe, that the Traverſe is ill, and the Plea uncertain, and wants Form. The Defendant joins, &c.

My Argument Pro Quer' was to the effect following,

The Queſtion is, if here be any matter diſcloſed, to ouſt this Court of its Juriſdiction, which is ancient and general, and preſumed to extend to all perſonal, real and mixt Actions before Magna Charta, and ever ſince to all perſonal ones by Original or Bill.

Juriſdiction. To ouſt this Court they muſt ſhew that your Lordſhip can't determine it, and that another can; they muſt both concur to take away the Jurisdiction of this, and give Juriſdiction to another, and ſo is 2 H. 7. and 17. And that Caſe was obſervable: The Prior of Hungtington brings a Writ on the Statute of Rich. ubi ingreſſus non datur per legem againſt diverſe Men of Huntington, ſuppoſing their Entry into ſeven Acres of Land.

They plead, that 'twas held of the Bailiffs and Commonalty of Godmancheſter, as of their Mannour of C. and alledged a Corporation in them by preſcription, and that the Mannor is of ancient Demeſne of the King, and pray Judgment if the Court could hold Plea. And held none, becauſe no Land was loſt, but only Damages. 2. No Juriſdiction given to another Court. Now if this Plea fails in either of theſe, 'tis with the Plaintiff.

1. As

1. As to the locality of the Action, I conceive there is a great difference between the Rule of Law, that the Law shall draw the Trial to it in an Action of this nature, and the consequence they would infer, that this Court shall be ousted of its Jurisdiction of such locality: But first,

Covenant in its original nature is a transitory Action, and so it is reckoned in Westminster 1. Chap. 35. which restrains inferiour Courts from compelling Men to answer before them of Contracts, Covenants or Trespasses done without their Jurisdiction; and so it is deemed by Coke, 2 Inst. 229, 231. where he reckons Covenant amongst Debt, Detinue and Contracts, which are nullius loci, and therefore at Common Law might be alledged in another place than where made or did arise. Covenant transitory.

'Its meerly personal and sounds only in Damages, the Land is not recoverable in it, nor in question any more than a Title may be in Trespass for taking a Tree, or the like.

I must agree, that Debt (if all here in England) against Assignee, is local, because it results purely from the privity of Estate and arises only from the perception of the Profits; but Covenant is personal, and doth not so much savour of the realty, as Debt, and so it is held in Kitchin and Compton's Case, Trin. 15 Car. 2. Rot. 1256. reported in Siderf. 157. Lease for Years, and Covenant to repair, which is stronger than ours, the Lessor sells the Reversion of part to A. and of another part to B. they may join in Covenant, though moved that they could not, because in the realty; but overruled here; because Littleton's Ten' warrants a Rejoinder in a personal Action, and such is this.

This is not an Action upon a Covenant in Law, but an express one to pay so much Money. I must agree that he is obliged at Common Law because of the Estate, but when obliged it is a personal Obligation and his Executors are chargable with the Money if unpaid. 'Tis true, the Plaintiff may either distrain or bring Debt, and then it savours of the realty; or he may bring Covenant upon the express Covenant, and then 'tis a personal transitory Action, and follows his Person, and may be compared to a personal Annuity which is a transitory Action, and may be brought in one County, and Seizin alledged in another, as is, 21 Edw. 4. 33. Suppose his Assigns had been Party to the Indenture, they agree this Action lies well here: Then in Case of an express Covenant, upon his acceptance of the Estate, the Covenant becomes as much his, as if he were Party to the Indenture: As acceptance of Letters Patents importing a Lease

with Proviſoes in it from the King, the taking of the Land makes him liable to an Action of Covenant even by the Aſſignee of the Reverſion; according to Brett and Cumberland's Caſe, 2 Cro. 521.

An expreſs Covenant imports an expreſs perſonal Contract and Agreement between all the Parties; and Aſſignees being named, whoſoever becoms Aſſignee becomes Party thereto, and is bound thereby as much as the Perſon named; and in truth he is named by deſcription as much as can be.

An expreſs Covenant is always greater in conſideration of Law than an implied one, for that can reſtrain, qualifie and controul the other: So that by the former the Aſſignee becomes Privy to the Contract.

Obj. That by the Statute of 32 H.8. it muſt be agreed that the very Privity of the Contract between Leſſor and Leſſee is transferred to the Grantee of the Reverſion, and ſo is Brett and Chamberlane's Caſe, and Thursby and Plant's Caſe, Sid.401. 1 Saund. 237. Grantee of a Reverſion brings Covenant in London for Rent of Lands in Lancaſhire; and held to lie, though Debt would not; but this is againſt an Aſſignee of a Term, who is bound at Common Law only by the Privity of Eſtate.

Sol. I anſwer, that is not the ſole reaſon of it, for here being an expreſs Covenant, and himſelf named by deſcription, there is a privity of Contract created between them, for he is as liable as the Leſſee, and when he is named he is not a perfect ſtranger to the Contract; and they cannot ſhew any Caſe where Covenant was held local when againſt an Aſſignee, becauſe he is become quaſi a Party: Debt and Covenant by implication are held ſo in abundance of Caſes, as Cudmore and Board's Caſe, Cro. Car. 183. is Debt, Stacy and Bretton, 2 Cro. 446. that was becauſe contradictory in ſaying permiſit apud London' præd. Dom' in Surrey fore in decaſu.

Note, Leſſor hath Election to go either againſt Leſſee or Aſſignee on expreſs Covenant, Batchelor and G. Jones 223. Cro. Car. 188. Norton and Ackland's Caſe, Cro. Car. 508. and the firſt Execution ſhall be a Bar, and the laſt may have an Audit' Querel' thereupon.

Aſſignee when named is not Obliged purely for the ſake of the privity of Eſtate, Iſted's Caſe, 1 Ander. pl. 148. Covenant to renew or make a new Leaſe within or at the end of a Term is held to lie by an Aſſignee of a Term againſt the Grantee of the Reverſion, 'Tis true, there is Judgment on another Point, viz. a fault in the Declaration. But An-

derſon

derſon ſays, that Dyer and the reſt of the Judges were of that Opinion. Now if Aſſignee named were not Party to ſuch Contract, no ſuch Action could lie, for that the privity of the Eſtate was determined by the determination of the Leaſe, and that is apparent, in that no Diſtreſs can be a Day after the Term; A nomine pœnæ is a perſonal forfeiture, and yet an Aſſignee is chargable with it: And ſo is Thyn and Chomley's Caſe, Moore 557. Cro. Eliz. 383. Though it's true, it muſt be a Covenant that runs with the Land, yet it ſhews that his taking the Land makes him bound by all the expreſs Covenants covenanting it. So Aſſignee of a Term ſhall have advantage of a Covenant for further aſſurance. Bailis againſt Highar, Cro. Car. 137. So it lies againſt him for not leaving the Premiſſes repaired ad Finem Termini, tho' the Term be ended before a breach can be, Matuns againſt Weſtwood, Cro. Eliz. 300. A Covenant to build de Novo will charge an Aſſignee if named, as Cockſon againſt Lock, 2 Cro. 215. Aſſignee of a Term ſhall have advantage of a Covenant to with-hold Rent, on being charged with Iſſues, Cro. Car. 137.

Then ſuppoſe him not obliged but only ratione tenuræ, yet the Payment is to be in another place, and the Land not coming in queſtion but only indirectly, the Trial ſhall be where the Writ is brought and the Fact alledged; and of this Opinion was Finchden, 43 Edw. 3. 2. Aſſize of Rent; the Iſſue is whether the Charge were by Deed or not; the Aſſize ſhall not be adjourned, but tried where the Writ is brought. The Land here can come in queſtion only indirectly; and if upon the pleading Iſſue be on non conceſſit, or non dimiſit of a thing that paſſeth by Deed, the Trial ſhall be where the Grant or Demiſe is alledged. Otherwiſe of a Leaſe for Life or Feoffment; and ſo is Sir John Krine and Prythur's Caſe, 2 Cro. 375. And perhaps ſuch Iſſue may be never joined, and then 'tis no Objection. Covenant is quaſi a Tort; 'tis fractio Convention', and in all Torts the Actions ſhall be brought where the wrong began; and ſo is Dyer 40. Here the firſt default is Non-payment in London. Further as to the locality, ſuppoſing it local, yet that will never take away the Juriſdiction of this Court; for if by any means ſuch proceedings may be in this Caſe as that this Court may determin the whole, then this Court hath Juriſdiction; Now the former is proved by Smith and Pieter's Caſe, Noy 142. and 2 Cro. 142. Covenant in London. Breach in not repairing Lands in Hertfordſhire, and Judgment for the Plaintiff per nihil dicit. Writ of Enquiry of Damages ſhall be awarded

to London, though the thing in which the breach was assigned was meerly local, because Damages only are to be recovered. This I urge, to shew that there may be nothing wanting at the Trial in Ireland in this Case.

Where part of the Cause of Action accrued *ultra Mare.*

Obj. There can be no Trial, because the Cause of Action accrued ultra Mare.

To answer that, I agree that if all the matter did arise ultra Mare, both agreement and performance, no Action can lie here for want of a Trial; But if either part here, Trial shall be here by the Common Law; and so is Dowdale's Case express, 6 Rep. 47. and 1 Inst. 261. as on Charter-parties or Obligations made and dated beyond Sea, if to be performed here shall be tried here: Et sic vice versa. Suppose it were a Covenant made and dated in Ireland, that would be as local as this can be pretended, yet if it were to be performed here, it would be triable here.

The Admiralty Jurisdiction is as much allowed by our Law as the Courts in Ireland, if they keep within their Jurisdiction; yet the Common Law Courts shall try all such matters as if performance was, or was to be upon Land, as Charter-parties and the like.

A Jury here may take notice of, and find Assets, and Administer in Ireland; and so is Dowdale's Case, which was, Debt against Executor, and that matter found upon Special Verdict, and Judgment for the Plaintiff. They may find a Warranty and Assets in another County. On the general Issue they are bound to find all local things in another County that are material, so no inconvenience in this Jurisdiction. A Jury here may find Administration in Ireland, Godbolt 33.

Rather than there should be a failure of Justice in England a Trial shall be here of things local in their own nature; as adherence to the King's Enemies beyond Sea, upon 25 Ed. 3. 1 Inst. 261. and 19 Ed. 4. 6. Here may be a failure of Justice. Suppose the Term expired, the Assignee having no concerns in Ireland comes hither, what can such lessor do? To sue there he cannot: Suppose then Ireland is entirely beyond Sea and an Independant separate Kingdom, as the Books say it is, Calvin's Case, 7 Rep. 22. and several Authorities there cited for it, that Irish Men are the same with the Inhabitants of Calice and Gascoigne, and that a Voyage Royal may be made into Ireland, which shews it a distinct Dominion; and by Cook 2 Inst. Magna Charta extended not to Ireland, or any of the Foreign Dominions; but by Poyning's Law in 11 Hen. 7. 'tis made to do so, and if so, then their giving Jurisdiction to Courts there is not sufficent to oust this

Court

Court of their Jurisdiction in a Cauſe which they can determin.

Ireland is beyond Sea, as to the Statute of Limitations, and your Lordſhip hath ruled it ſo.

Ireland beyond Sea as to the Statute of Limitations.

Either it is a divided Kingdom, or elſe it is a Franchize, and then it may be tried there by a Mittimus, or elſe upon an equitable conſtruction of the Statute of 9 Edw. 3. cap. 4. by the next adjoining County, as hath been done in ſome Caſes, I will cite preſently. If either way, there is no colour for this Court to deny its ſelf the Jurisdiction of this Cauſe, for here is a Jurisdiction attatched; if the matter be triable and determinable by any means of this Court, the Defendant is here, he is in Cuſtodia Mariſc'; we have declared againſt him by Bill, and not by Original.

'Its no Argument that this Court ſhall not have Juriſdiction, becauſe the Land ſhall draw the Trial after it upon ſome Iſſues, for it will not do ſo upon all: Here was the payment to be made in London; and that cannot be tried in Ireland, but by a fictitious Venue, and by the ſame reaſon may the Leaſe and Aſſignment be tried here; for non conceſſit is no more a local Iſſue, than payment, or Non-payment.

By Forteſcue in 32 Hen. 6. 25. If a Releaſe dated in Ireland or Wales, or other local matter be pleaded, it ſhall be tried where the Writ is brought; if a Franchize, the Parol may be ſent by Mittimus to be tried there. And ſo is that Book.

A matter ariſing in *Ireland* how tried.

Bro. Jur. 104. Sharde ſaid he had ſeen a precedent of a Feme compelled to anſwer here for an entry into Lands in Ireland. Holding and Keeling's Caſe, 3 Keble 150. Debt for Rent out of Lands in Ireland. The Defendant pleads a Seizin in Fee by the then Duke of York, and an Entry by him, and Evidtion. The Plaintiff replies not ſeized in Fee, Et hoc petit quod inquiratur per patriam. The Defendant Demurrs, becauſe ſuppoſed not to be triable. Judgment for the Plaintiff. And Keeble ſays, That Hales was of Opinion the Trial muſt be in Ireland, and the reſt thought it might be tried here; but all were of Opinion that this Court had a means of trying it, and ſo gave Judgment for the Plaintiff.

Bond with Condition for payment of Money at Dublin, there pleaded, and Judgment for the Plaintiff, becauſe it ought to have been pleaded with a Venue here; Goodier againſt Gardner, Trin. 1 Jac. 1. Rot. 3292. cited. 2 Keble 397. in Jackſon and Criſpe's Caſe about Berwick, and held in 2 Keeble 391. that Covenant to ſettle Land in Berwick, or Barbados may be tried here; and if ſo, the ſame reaſon for it vice verſa; and in that Cauſe the Trial by the next County, viz. York, was held good, Sid. 462.

In

In caſe of neceſſity the Trial ſhall be at Common Law by the next County, as Indictments of a County for not repairing a Bridge, or the like, as in the Caſe of York, Rolls 2 Abr. 579. In the ſame Title are ſeveral Caſes of Trials of matters ariſing in the Cinque Ports by Juries out of the neighbouring Villages, as in Elpin and Hutton's Caſe. Treſpaſs for an Aſſault juſtified by ſervice of a Subpœna in the Cinque Ports, De injur' ſua propria replied. Tried by the next Ville. So upon an Appeal of Murder committed in Feverſham, Watts and Brayne 3 Cro. 694. and in the ſame Abridgment is the Caſe of Barnewell and Rookford, Hill. 36. H. 8. ret' 35. B. R. Error on a Judgment in an Aſſize in B.R. in Ireland. Defendant pleads, that the Plaintiff had made a Feoffment to J. L. Iſſue is joined thereon, and thereon the Defendant ſays that Salop is the next County, and tried there, and a Verdict pro Defendente en Brief d' Error. Rolls 2. Abr. 571. Obligation to pay Money at Dublin, triable here. Whenſoever Part is here, and Part there, 'tis triable here; and whatſoever is triable here by any means they cannot plead it out of the Juriſdiction of this Court, becauſe the Juriſdiction of this Court is general; and tho' in reſpect of Counties in England the Land will draw the Cauſe, yet it does not follow that it will ſo do in Caſe of another Nation.

If Ireland be out of the Realm and in another Kingdom, then according to Dowdale's Caſe, 6 Rep. and the Caſe 7 Rep. 9. part being here, the King's Courts have Juriſdiction.

If Ireland be within the Juriſdiction of the Kingdom of England, then the Court may have Juriſdiction, for the Cauſe ſhall be tried either where the Writ is brought or by Mittimus, or next County; to me it matters nothing which, ſtill this Court hath Juriſdiction.

As to Shaw and Straughton's Caſe 3 Keble 163. there's no Judgment; however, that reaches not our Caſe; 'tis only a Recovery there bars here, and ſo this Court will take notice of judicial Proceedings in the Courts and Methods of Foreign Kingdoms.

Traverſe. Then for the Traverſe, that's ill; 'tis true, generally ſpeaking, in all Places to the Juriſdiction there ought to be a Traverſe that the Cauſe of Action aroſe within the Juriſdiction; but, 1. Here's only the ſuppoſal of the Court traverſed. 2. It's not material at all, for whether the Aſſignments were here or there, it matters not; for if the Action be local by reaſon of Aſſignees being liable upon this privity of Eſtate, its nothing to the purpoſe that the Aſſignment was in

one

one Place or another, for ſtill the Action muſt be local, and therefore this Traverſe is ill. For if we take Iſſue, and it were found for us, 'twill do us no good, for the Law is the ſame be the Aſſignment in one Place or another; upon thoſe Notes I argued for the Plaintiff, that this Court hath Juriſdiction of this Cauſe.

Serjeant Tremaine argu'd for the Defendant from the Caſes that Debt againſt an Aſſignee was local, but could ſhew no Caſe where there was any Judgment upon Covenant on an expreſs Covenant naming Aſſignees.

C. J. Holt. The naming or not naming Aſſignees will not alter the Caſe, for that the Aſſignee is bound only at Common Law; 'tis true, that the privity of Contract between Grantor of Reverſion and the Leſſee is Aſſigne to the Grantee, by the Statute of H. 8. but the Aſſignee of the Leſſee remains as he was at Common Law; however, let us hear another Argument.

Term.

Term. Paſch.

3 Will. & Mar.

Bennet *verſus* Gaudey.

Ejectment. EJectment of a Meſſuage in Cornhill on the Demiſe of Sir John Mordant, Shem Bridges and Thomas Lawfield. Non Cul' pleaded on Trial before Chief Juſtice Holt. Special Verdict is found.

Special Verdict. That Edward Blackwell late Alderman of London in his life time was a Trader, and did exerciſe the Trade of a Goldſmith within the City of London, ſeeking his living thereby by buying and ſelling, and thereby became indebted in diverſe great Sums, and became a Bankrupt within the Statute for that purpoſe. That being a Bankrupt he was afterwards ſeiſed of the Premiſſes in Fee-ſimple. That afterwards 16. Apr. 35. Car. 2. at the Petition of the Creditors of the ſaid Edward, a certain Commiſſion under the Great Seal was made and directed to D. K. and W. B. Arm' W. F. J. C. and J. B. Gent', reciting, that Edward Blackwell had become a Bankrunt above a year then paſt, and thereby deſigned to injure diverſe Creditors therein named, orders them to proceed to the diſtribution of his Eſtate, &c. That the Commiſſioners therein named 17 Apr. the ſame year did meet and deal in the ſaid Commiſſion, according to the tenour thereof. That 4 Jun. 35. a Writ of Superſedeas iſſued directed to the Commiſſioners, reciting an Information that he was a Bankrupt, and a Commiſſion thereon, and a Petition of diverſe Creditors (but not all the ſame) to Sir Francis North Keeper, for to have it Superſeded, who doth command the Commiſſioners to ſtay all further Proceedings, and that they Superſede the ſame. That 9 Jun 1683. Edward Blackwell dies.

That

That 3 Sept. 3 Jac. 2. another Commiſſion iſſued directed to E. F. W. B. C. M. W. F. J. J. J. D. and J. M. reciting the firſt Commiſſion, and that it had been dealt in, and a Deed of Aſſignment of ſome part of Backwell's Eſtate ſealed and delivered, and carried into the Inrolment Office and there left, and a Petition to the Lord Jeffryes, that a Superſedeas had been unduly obtained, and the ſaid Deed of Aſſignment withdrawn out of the Inrolment Office, and that it was ordered by the ſaid Lord Chancellor, that the Order for the Superſedeas, and the ſaid Superſedeas ſhould be Superſeded and diſcharged, and that the Commiſſion being abated by the Demiſe of Car. 2. be renewed, and that E. F. be inſtead of J. K. and J. M. added, and that the granting it did thereby diſcharge the Superſedeas and the Order for it, and ordains thoſe ſeven to be Commiſſioners of and for the ſaid Bankrupt's Eſtate. That 3 Sept. 3 Jac. 2. another Precept called a Superſedeas iſſued, directed to W. K. W. F. J. C. and I. F. and all other Perſons, reciting all the Premiſſes, did diſcharge and ſuperſede the ſaid Superſedeas as unduly obtained, and to the wrong of the Creditors.

They find another Commiſſion 9 Nov. 1 Will. & Mar. directed to E. H. J. C. T. G. F. H. M. H. J. G. S. A. and W. reciting the Bankrupcy and ſeveral Commiſſions, and a Petition to the now Keeper, praying a renewal thereof, and that they hearing all on both ſides, did order and appoint Ed. H. & al' to be Commiſſioners of and for that Eſtate, &c.

That an Aſſignment was made 7 Jan. 1689. by the Commiſſioners to the Leſſors of the Plaintiff, and in due manner executed. That the ſaid Indenture was Inrolled 23 Jan. 1 W. and M. Then they find 19 Jac. 2. Cap. for Expoſition of the Statute of 13 Eliz. that after any Commiſſion of Bankrupts hereafter ſued forth and dealt in by the Commiſſioners, if the Bankrupt happen to dye before the Commiſſioners ſhall diſtribute the Goods, Lands and Debts, that then nevertheleſs the ſaid Commiſſioners ſhall and may in that Caſe proceed in Execution in and upon the ſaid Commiſſion for and concerning the Bankrupt's Eſtate in ſuch ſort as they might have done if the Party were living.

That the Leſſors of the Plaintiff after the making of the Indentures entred and were poſſeſſed prout lex poſtulat, and made the Leaſe to the Plaintiff. That he entred and was poſſeſſed, and the Defendant entred upon him. Si pro Quer' tunc, &c.

Supersedeas to a Commission for distribution of a Bankrupts Estate.

For the Plaintiff I argued, First, As to the Supersedas, 1. I say 'tis void and illegal, for that no such thing could be by Law; The Commission in this Case is not barely a Power or Authority from the Crown, for the General Government of the Realm, but the Creditors have an interest in that Authority; every Creditor hath an interest, though some only prosecute the Commission; for every one may come in before Distribution: 'Its a thing grantable to the Creditors of a Bankrupt Trader ex debito Justitiæ, and cannot be denied by the Keeper of the great Seal any more than a remedial Writ to the Party injured. 'Its not the same with the Custody of Lunaticks or Ideots; for there the King or the Administrator shall have the profits ultra, &c. Here the King hath no Interest but when, and as a Creditor; and then there is care taken for him by express Provisoes in those Statutes.

Till satisfaction the Creditors have a Right: 'Its procured at their Charge; and if it may be superseded without their consent, then these Statutes put them on a Snare, and inflame their Debts, and no certainty of having the Bankrupt's Estate assigned to them or their use; so that this Supersedeas works a plain wrong to the Creditors. And the consent of some cannot bind the rest, for the design of the Statute was to make equal satisfaction to all. Now by this means some may have their Debts paid to procure their Assent, and consequently all the others may be cheated, which is contrary to the express design of all these Laws.

The Commissioners Authority is for the Interest and benefit of each individual Creditor by simple Contract as well as by Judgments, for small Sums as well as great ones.

Suppose a Seizure, and no Distribution, shall the Supersedeas rob these Creditors? The Bankrupt cannot have it again, for he is only to have that which is Surplus after satisfaction: The Creditors they need an Assignment; then what must be the consequence? Here is a trading Debtor becomes a Bankrupt, and found so upon a Commission, and the Estate is seized, and then a Supersedeas before satisfaction.

Suppose a partial satisfaction by a Distribution of the then Estate of the Bankrupt, yet even then a Supersedeas would do a wrong, for if Lands descend afterwards, they may most undoubtedly be sold.

These

Theſe Acts of Parliament are for the advancement of Trade; and ſo according to the Rule in our Books are to be conſtrued in favour thereof: They are remedial Laws, and therefore alſo are to be ſo conſtrued. Beſides, there is an expreſs Proviſo in the Statute that they ſhall be intended in favour of the Creditors, and that ought to extend to the Award of Commiſſioners, as well as to the other Clauſes.

Here being the intereſt of a Subject concerned, the King cannot diſpenſe with ſuch a Law, and a Superſedeas is Tantamount to it. The King cannot prohibit a Suit here before your Lordſhip; A Rege inconſulto lies not, but where he is affected in conſequence and intereſt, and ſo is Blofield and Haver's Caſe, 1 And. 281. pl. 289.

Where a failure of Juſtice enſues, the King's Prerogative is limited, ſo that it ſhall not occaſion it, as many Caſes prove; as if he grants Exemption from ſervice of Juries, 'tis void if there be not ſufficient beſides: He cannot grant Exemptions from the Admiral's Juriſdiction in a certain place, unleſs he grant to ſome in that place the like Juriſdiction, for fear of a failure of Juſtice, Hudſon's Caſe, 2 Rolls Abr. 201. Here is plainly a failure of Juſtice if the Superſedeas were legal and good; for the Creditors not conſenting could never have right, the Eſtate ſeized and the Bankrupt dead: He that is a Bankrupt to one Creditor is a Bankrupt to all, Stiles Reg. 48. once a Bankrupt and ever a Bankrupt, Glyde and Bludwrith's Caſe, 1 Sid.

Such Superſedeas was never granted before, and according to Littleton's Rule, that is a good Argument againſt its legality. Beſides, 2. This Superſedeas doth not diſcharge or annul the Commiſſion, but only commands the Commiſſioners to forbear and ſurceaſe all further proceeding. Then 'tis no more than a Commiſſion dealt in, and the Commiſſioners ſtopt, the Party dies; then a Demiſe of the King; then a new Commiſſion, and there is now no ſuch Superſedeas, for that 'tis vacated and rendred as null. Here is a Superſedeas to that Superſed', quia Erronice & improvide emanavit, which ſets the matter at large, as it was before.

In Turner and Falgate's Caſe, 1658. 1 Sid. 125. Glynne ruled that the vacating of a Judgment made it as null and void; and that an Action lay againſt the Sheriff for levying an Execution in purſuance of ſuch Judgment: Its true, that hath been denied ſince; but yet is ſo far true ſtill, that except as to the juſtifying of Officers who act under it, its

as

as if it never had been. This may be compared to the Caſe in Druries's Caſe, 8 Rep. 143. If two Judgments be, and one depends meerly on the firſt, as in Debt on a Judgment, reverſal of the firſt reverſes the other; à fortiori in caſe of the vacating or ſuperſeding of a Superſedas; 'tis a mandatory Writ, the vacating of that Superſedas vacates all the Conſequences of that Superſedeas, and 'tis now as if it never had been. We are not here arguing to make Treſpaſſers by relation, but to relieve Creditors againſt a Cheat.

Suppoſe I do agree that the firſt Superſedeas did countermand the Authority of the Commiſſioners, but yet what they did before was valid and fulfilled the words of the Statute, their dealing was effectual, becauſe ſo far their power was well executed; and here 'tis found 'twas dealt in, and that taks off the Objection of the Parties death: But further, ſuppoſing the firſt Superſedas did determin the Commiſſion, and it was not utterly null and void, yet it is but a Superſedeas, and a Procedendo revives it; as an Habeas corpus in Common practice to an inferior Court ſtops, becauſe it removes all, yet a Procedendo revives it, 12 Aſſiz. 21. Bro. Tit. Commiſſion 12. A Superſedeas comes to Commiſſioners of Oyer and Terminer by which their Commiſſion is in a manner repealed; yet on a Procedendo they may proceed, and this per adviſament' omnium Juſticiar'. 'Tis but as a Prohibition to Court Chriſtian, which upon a Conſultation may proceed: If a Suit be ſtayed Rege inconſulto, yet on a Procedendo the Court ſhall proceed as before.

3. It may be objected that is a new Commiſſion granted to new Commiſſioners.

I anſwer that well enough, becauſe it recites the former, and is ſtill in purſuance of it: By 34 Hen. 8. Cap. 4. the Chancellor ſhall take order with the Bankrupt's Body, Lands and Goods; and 13 Eliz. cap. 7. doth not take away that power, but enlarge it: That the Chancellor for the time being upon complaint, ſhall appoint ſuch perſons as to him ſhall ſeem good; ſo that plainly he hath the power to name, and the words upon every complaint have been conſtrued to be from time to time, and upon complaint againſt the Commiſſioners as againſt well as the Bankrupt.

As to the words, the ſaid Commiſſioners in 21 Jac. 1. in the Clauſe found in this Verdict, it is not to be intended of the Perſons named in the firſt Commiſſion, but of the Authority of any Perſon named by the Chancellor, as Commiſſioners for the time being. As in Acts of Parliament, the ſaid Chan-

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cellor is to be ſo meant, therefore that Objection is not Concluſive.

The Commiſſioners have no Intereſt, they are only Inſtruments to convey by aſſignment, as a Lord of a Manor in Copyhold Admittances, or a Sheriff in ſale of a Term by a Fieri facias.

If the Commiſſioners die, ſurely they will agree new ones may be made; and yet that would be no more the ſaid Commiſſioners than 'tis here: Suppoſe they all misbehave themſelves, a new one may be granted. 'Tis no Objection to ſay they uſually are of Adjunct; for the Great Seal hath an Indefinite power of nomination, and may do otherwiſe.

Stone's Reading on theſe Laws, Paragr. ult. If after Seizure, and before diſtribution all the Commiſſioners die but one, a new Commiſſion may be granted, and the new ones ſhall call the old to an Account: And pag. 19. if they all die but two, a Commiſſion ſhall be awarded to others and not to them, and they ſhall be called before the new Commiſſioners as Perſons having the Bankrupt's Eſtate in their Hands: The Commiſſioners are no Court in their proceedings; they need no Adjournment; ſo no diſcontinuance upon that account.

The ſaid Commiſſioners are ſuch as ſhall be appointed for that purpoſe; this ſeems natural.

By the demiſe of the King, the Comiſſion abates, then there muſt be a new Commiſſion. Now by their Opinion, if ſtrictly true, no further proceedings could be after a Demiſe of the King, for they are new Commiſſioners though the ſame Men.

I can find nothing in any of the Statutes that gives colour for an Opinion that the firſt named Commiſſioners are unremoveable: By the 34 Hen. 8. the Chancellor himſelf and Judges might make a Sale, for they might take order as to them ſeemed meet. Compare it to Caſes at Common Law, one Attorney removed, a new one may proceed; and after Judgment may pray Execution, even without a Warrant, and may before Judgment proceed with Warrant, Goldsb. 49.

An Attorney General files an Information, and prays Proceſs, a new Attorney may join Iſſue; which ſhews 'tis the Office and Power, not the Perſon which the Law ſo much regards.

A Commiſſioner is meerly a Miniſter and hath no Intereſt, and paſſes nothing by Aſſignment, but the Bankrupt's right; and if one of the Commiſſioners hath right in the Bankrupt's Eſtate, this Aſſignment will not extinguiſh ſuch his right, Godbolt 319. agreed in the Lord Sheffield's and Rivett's Caſe, Moore's Rep. Caſe 1153. A Commiſſion of charitable Uſes ſued out of Fraud to avoid a charitable Uſe, the Commiſſioners make a Decree for Exemption from the Charity, and that Decree confirmed by the Chancellor, yet a new Commiſſion was ſued on the Statute of charitable Uſes, and the Lands charged with the Charity; and yet the Words of 43 Eliz. Cap. 4. are, the ſaid Commiſſioners to make order, &c. Moore Char. 75. There's no difference between this and a Commiſſion of Adjunct, which is a common practice; for if a greater number be added, that major part may act, and it ſhall be good, and if ſo, it's the ſame thing.

As to the Objection, that then ſeveral Commiſſions may be granted at once. Here is no ſuch thing, for that the firſt was determined by the Demiſe of the King. 2. The ſole power of Nomination is lodged in the Chancellor, and a new Commiſſion will be a Determination of the power of the former Perſons, tho' the Authority be ſtill purſued. So I prayed Judgment for the Plaintiff.

The Commiſſioners have their Authority under the Great Seal and by Act of Parliament, and yet what they do if not purſuant is traverſable, becauſe no other remedy, and ſo is Cuts and Delabarr's Caſe cited at the end of Dr. Bonham's Caſe 8 Rep. 121.

A Leaſe by an Aſſignee of a Bankrupt's Eſtate before Inrolment.

Mr. Trevor, è cont. inſiſted only on an Exception to our Narr' in Ejectment, that the Inrolment was 22 Jan. and Leaſe, Entry and Ouſter in the Declaration was laid 19. and nothing paſſing till Inrolment there was no Title in the Leſſor at the time, and that in Perry and Bowyer's Caſe this was the only point, and Judic. pro Defendent.

The which was an Exception that I was not aware of, not having a Copy of the Declaration, but only of the Special Verdict, which made me (as it did ſome others) ſuſpect the truth of our Agent.

Amendment in the time of alledging a Leaſe in an Ejectment.

Thereon we had day given us. Then I argued for an Amendment, that the date of the Leaſe in our Declaration might be amended and made 24 Jan. that ſo the other points might come in queſtion, and that for theſe reaſons, 1. Becauſe 'tis an Ejectment Leaſe, which is ſtill under the power of the Court, and at the Trial other points were inſiſted on, and were accordingly found, and conſequently ſuch an Amendment

cannot

cannot deceive the Party. 2. This Amendment can never deceive the Jury, for they find that by vertue of the Assignment the Lessors of the Plaintiff entred and made the Lease in Narr', which must be therefore after the Inrolment, and consequently such Amendment will be agreeable to their finding. 3. The Issue Roll is of Trinity Term, and the Declaration was delivered to the Tenant in possession in Easter Term, and that was after the Title accrued to the Lessors, viz. after Inrolment, and so neither Party nor Jury can be deceived by such Amendment; for this was not the point in question, as it was the only one in Perry and Bowyer's Case.

As to the Objection that 'tis all entred on Record, and in another Term, that's nothing, for Amendments have been three Terms after, as in Rawlin's Case 4. Rep. 53. tho' that were according to the Notes, yet it is an answer as to the time and entry on Record, the like is Sir Humphry Tufton's Case, 1 Cro. 144. as to time and Record.

This is nothing but the mistake of the Clerk in laying his Fictitions supposed Demise three days before the Title accrued, and so 'tis as much the mistake of the Clerk as the Case of Forger and Sale's, 1. Cro. 147. and Jones 199. which Crooke and Whitlock held amendable, and devisit instead of dimisit, March and Sperry, Hob. 249. and a Venue added to the Commission in Trover 1 Roll. Abr. 209. The date of a Demise in Ejectment was amended after Judgment by Confession, and Writ of Error brought for that very fault in Parr and Cowley's Case upon my motion last Term, on shewing the Warrant of Attorney: In Case for words, Narr' generally of a Term, and the words laid some days in Term, liberty is usually given to make an especial Entry of a day of preferring the Bill, because otherwise the Action would be before the Cause, relation being to the first day of Term; and this is done frequently if the Bail-piece were after the Cause of Action; and this we think like our Case, where the Declaration was delivered after, tho' the Demise be laid after the Title accrued. If Keeble's Reports might be cited for Authority, Amendments have been in Fact as material as this, Countess of Falmouth's Case in Lord Hales time. 3 Keble 117. And Place and Twiford 2 Keble 120. Williams and Moore, 2 Keble 175. But Chief Justice Holt held it not amendable, because no other Lease than what we had laid was confessed, and that 'twas material. Sed Adjornat'. We moved it several times, but could never get over it.

Mr.

Mr. *Crooke's* Caſe.

UPon a Preſentation to the Church of St. Michael Wood-ſtreet, and a Caveat entred againſt the Inſtitution by the preſentee of the preſent King, I being of Councel for Mr. Crooke appeared and argued his Caſe before Dr. Newton; the Caſe was thus. By the Act of Parliament 22 Car. 2. Cap. 11. It is thus Enacted, Sect. 63. Paragr. 26. That the Pariſhes of St. Michael Woodſtreet and St. Mary Staining ſhall be united into one Pariſh; and the Church heretofore belonging to the ſaid Pariſh of St. Michael Woodſtreet, ſhall be the Pariſh Church of the ſaid Pariſhes ſo united. And in Sect. 68. that notwithſtanding ſuch Union as aforeſaid, each and every of the Pariſhes ſo united, as to all Rates, Taxes, Parochial Rights, Charges and Duties, and all other Privileges, Liberties and Duties whatſoever, other than what are herein before mentioned and ſpecified, ſhall continue and remain diſtinct as heretofore; and that the ſeveral and reſpective Patrons of the ſaid Churches ſo united ſhall and may preſent by turns to that Church only which by this Act is to be rebuilded and eſtabliſhed for the Pariſh Church of the Pariſh Churches ſo united as aforeſaid; the firſt Preſentment to be made by the Patron of ſuch of the ſaid Churches, the Endowments whereof are of the greateſt Value. Dr. Martin was Incumbent at the time of the Union, and ſo continued to the time of his Death, which happened very lately, and by his Death the Church is now vacant.

The King is Patron of St. Mary Staining (of far leſſer value both in the King's Book, and the clear yearly value,) and preſents J. S. A common Perſon is Patron of St. Michael Woodſtreet, who preſents Mr. Crooke, and for him I prayed Inſtitution.

The Councel for the Caveat argued for the Prerogative, that in caſe of three Copartners, and one be in Ward, the King ſhall have the firſt turn, and the King not being named, the Act of Parliament ſhall not bind him or his Intereſt.

E cont. I agree, that abundance of Statutes do not bind the King when he is not named, they are moſt of them muſtered together in 11. Rep. 68. Magdalen College Caſe: But yet there Fol. 70, 71. the 13 Eliz. is adjudged to bind the King tho' not named, 1. Becauſe the general letter extends to the King by the words, To any Perſon or Perſons, and the Queen was a Perſon: So here a Patron. Then ſays that Book, If the

the King be exempt, it muſt be by Conſtruction of Law, and ſuch Conſtruction ſhall never be made againſt the expreſs ſenſe or reaſon of the Law makers mentioned in or to be inferred from the Act: And as the King, Lords and Commons had in the Preamble there adjudged long Leaſes to be unreaſonable, and tending to Irreligion, ſo here the King, Lords and Commons have declared the neceſſity of Rebuilding of Churches could be in no other manner, for ſeveral Pariſhes were not able to rebuild; the King is bound by Laws of publick Uſe and Benefit, and where contrary will be a wrong to the Subject all Statutes made to prevent the decay of Religion bind the King, 5 Rep. 14.

He is bound by many Laws where not named; he is bound by the Statute of Marlbridge, Cap. 22. againſt the diſtraining of Tenants to anſwer of their Freehold without Writ; his Bailiff cannot diſtrain; if he does, Attachment lies againſt him, 2 Inſt. 141. 149. He is bound by 32 H. 8. Cap. 28. concerning diſcontinuances tho' not named 2 Inſt. 681, 682. becauſe made to give her that had a right, a more ſpeedy remedy, viz. by entry, when by the Common Law ſhe was forced to a real Action, and many others there are of the like nature. I confeſs the King hath Prerogative in many more inſtances than they have named, but the conſtant Rule is, that he can do no wrong, and here this would be a wrong to our Patron, for he hath the firſt Preſentment; it's a wrong to prevent him of it. Then conſider the nature and effect of an Union; by the Common Law, upon the Conſolidation of two Churches, one becomes extinct in Law, and as Godolphin Abr. Eccl. 169. illud quod alteri unitur, Extinguitur neque amplius perſeverare, ſo the King's Church is gone by that notion. Now of this Union there are three ſeveral ſorts; one of them is when a Church is ſo united to another that that which is united amittit jus ſuum, & eo utitur cui fit unio; and another is when two or more Churches are ſo united together that one is not ſubject to the other, in which caſe quod melius eſt retinetur. I cannot but obſerve the ſeveral Reaſons or Cauſes in the Law for a Conſolidation or Union, or Annexation of Churches for the better Hoſpitality of the Rector; the propinquity of Churches and Places that one may diſcharge the Duty and Cure of both, the want or defect of Pariſhes, or extreme poverty of one Pariſh, theſe are reckoned the cauſes by the Common Law of an Union when made by the conſent of Biſhop, Chapter, Patrons and Incumbents of Livings: Now the ſame Reaſons may be ſuppoſed when made by Act of Parliament; and if ſo, then all the Reaſons which

held in Magdalin College Caſe, as promotion of Hoſpitality, and to prevent the decay of Religion, and conſequently the King bound by this Law; but taking it at Common Law, this Union gives the Preſentment to our Patron, for the more worthy Benefice is never united to the minus dignum, and therefore a parochial Church cannot be united to a Chappel, magis dignum attrahit ad ſe minus by our Law, as Wine the Hogſhead, Deeds the Box, Houſe the Hirelooms, and the like.

Here the King is bound; for if not bound they have no right to a Preſentment to our Church. The King takes a benefit by this Clauſe; it's plain that he is bound, for otherwiſe he could not have any Preſentment to this Church aforeſaid at all; and if he takes he muſt take it under the Modes and Qualifications that the Act gives it him. Suppoſe a private Perſon by Will had Demiſed an Advowſan to the King and a College, declaring, that they ſhould preſent by turns, and that the firſt Preſentation ſhould be by the College, would not the College in that Caſe have the firſt Preſentment; here the ſame Act that appoints the Union, unites their's to our's, and not our's to them, and conſequently gives us the right prime facie, the King conſenting. Then beſides, the ſame Act that directs the King to have any Preſentation to our Church, directs the firſt to us: It is all but one entire Sentence. It is well known that in Acts of Parliament on the Roll, there are no Points, Comma's, Colons, Semicolons, or other notes or ſigns of Diviſion; that's added by the Printer, and as 'tis on the Roll, the whole makes but one Paragraph; the Senſe is to direct the Diviſion, and the ſenſe directs no Diviſion at all between the words that enact a Preſentment by turns, and the firſt Preſentation to us.

Either the King is included in this Act or not; if he be the words plainly give us the firſt Preſentation; if he be not included meant or concerned by this Union, then there's no colour for this Caveat, for then they cannot pretend to a Preſentment to our Church; let them get one to their own; we deſire only a Preſentation to our own Church, that's all for pray at preſent and the right to Tythes out of their's, we'll controvert afterwards; but it ſeems very hard to ſay, That the King is not bound, becauſe not included, becauſe not named, and yet he ſhall be included as to Benefit.

If they have any Right, the King can only have it by this Act of Parliament, and then they muſt have it as this Act of Parliament gives it. That 'tis a benefit to them is plain, becauſe by the Union they have the advantage, ours being the greater. The ſubject to which the Union is, our Church, and that bears the Name and attracts the reſt unleſs it be otherwiſe provided for by expreſs words, and the expreſs words are with us: They agree, the King is bound by that part which excludes him from his ancient Right of preſenting to the Church of St. Mary Staining, and gives him a new right to preſent to ours, and yet will deny him bound by that part which veſts a Right in us, and yet the former is much ſtronger than this, if bound by that, much more reaſon that he ſhould be bound by this: And I do affirm poſitively that an Act of Parliament which gives a right to the King ſhall bind him, as to the manner of enjoying or uſing that right, as well as a Subject.

That the King is bound by this Clauſe, doth appear from Sect. 69. when the King's Prerogative Right is particularized and expreſly taken notice of, for that Section ſaves to him and his Succeſſors, all Tenths and firſt Fruits in the ſame manner as before the Union they ſeverally ſtood charged. I urge this to ſhew that our Law makers, eſteemed the King's Right bound, otherwiſe there would not have been ſuch an expreſs ſaving; and if they had deſigned the King to have had the firſt preſentation, though his Church were of the leſs value, they would have taken care of him in that particular alſo by an expreſs ſaving.

In the Lord Berkley's Caſe, Plowd. 246. the King is bound by the Statute de Doni: Altonwood's Caſe, 1 Rep. 44. he was bound per formam Doni; 'tis there held that if Land had been given to the King and the Heirs of his Body, he before the Stat. of Weſtm. 2. could not have aliened in Fee before Iſſue, for an Alienation by another would be a Tort, and ſo would it be in the King, if it ſhould be adjudged an Alienation in Fee. And this cannot be, for his Prerogative will not be a Warrant for him to do any injury to another, and the Eſtate which the King had would not ſuffer ſuch an Alienation, becauſe not large and ample enough; and his Prerogative will not alter his Eſtate, nor make it greater than the Donor gave it him. And a little after, eodem libro fol. 247. ſuch Alienation is ſaid to be Tortius, becauſe contra voluntatem Donatoris, and therefore ill done; for Men ought to obſerve the intent of other Men in lawful things, and to break it is ill.

Here

Here the Parliament are the Donors; they give the King and my Client a right to present to the Church of St. Michael Woodstret by turns, the King had no such Right before; the mode and form of that Gift is, that the King have the second Presentation and so on; now if the King have the first, that intent is broken and we are injured, and if it were a common Person, and he should first Present, that would be an injury, and so here. 29 Hen. 8. Tit. Remittitur, Bro. 49. It is the Opinion of Englefield Justice, That where a Man takes a Gift by Act of Parliament of any Land (though there were an ancient Right) neither he nor his Heirs shall be remitted; for when Land is expressly given by Act of Parliament which is a Judgment, neither he nor his Heirs shall claim any other Estate or Right than what is given by the Act, and yet Remitter is a Title favoured in the Law. I urge this to shew that the King's ancient Right will not affect this Case, that an Act of Parliament giving a Right which the King hath is new to both the Churches, and then that Right is to be joined in manner and form as the Act directs. So I concluded for Mr. Crooke, and prayed that he might have institution, and he had it accordingly, and enjoy'd it without further trouble as ever I heard: Though there were two instances in London where under colour of this Prerogative, the King's Presentee was first preferred, though his Living were of less value, as was affirmed, viz. Dr. Parry, and Dr. Bridges. But this was done by Jeffreys, and never contested, &c.

Price

Price *verſus* Harſtong.

Error on a Judgment in Banco Regis in Ireland on a Writ of Error there on a Judgment in the Court of the Archbiſhop of Dublin in Debt ſur Obligation, wherein the Plaintiff declared that the Defendant did acknowledge himſelf to be bound in 6000 l. whereof 4400 l. is paid, and the Defendant craves Oyer of the Condition, which is to pay 3500 l. with intereſt 30 days after notice, and pleaded that he paid the 4400 l. in ſatisfaction within 30 days after notice. The Plaintiff replies Non-payment within 30 days, Et hoc petit quod Inquiratur per patriam, Et præd' Tho. ſimiliter, &c. and then the Defendant demurred, and the Plaintiff joins, and Judgment for the Plaintiff, becauſe the Replication was good and ſufficient, and now here the general Error is aſſigned. I argued for the Plaintiff en breve de Error; but the Sollicitor being to argue it afterwards, had my Notes to this effect.

Error on Judgment in *Ireland.*

1. The Stile of the Court is a Court of the Kings held there per Conſuetudinem. Plaint is levied, de placito debiti. The Defendant appears upon Summons in placito præd'. The Plaintiff the ſame day produced quandam Billam ſuam de placito debiti quæ quidem billa ſequitur in hec verba, and doth not ſay ſecun' conſuetud' in plac' præd'.

Stile of a Court held *per Conſuetudinem.*

2. There is Iſſue joined and afterwards a Demurrer, for the laſt ought to have been rejected, becauſe the interpleader between the Parties was at an end, and the matter put in Iſſue, and no Judgment ought to have been till the Iſſue was tried.

Demurrer after Iſſue joined.

3. The Replication is ill, becauſe he did not ſay pay infra 30 days, whereas he ſhould have ſaid, and not before, &c. for a payment on the day will be a payment within the Condition.

4. Condition is to pay 3500 l. with Intereſt. Plea, that he did pay the 4400 l. in ſatisfaction within 30 days after notice, which is within two Years, ſo that there was not ſo much then due. Replication, and Iſſue is tendred upon payment of the 4400 l. and doth not ſay or 3500 l. with intereſt, ſo that the principal Money and intereſt might be paid, though not the 4400 l. and conſequently no good Replication; for though it ſhould be found for us that the Sum was not paid, yet the Debt might, and ſo upon the whole matter there might be no cauſe of Action. Then I urged ſeveral Authorities, that 'tis not enough for the Replication

in this Caſe not to deſtroy, or falſifie the Plaintiffs Cauſe of Action, but it muſt maintain it; there muſt be a good breach aſſigned in the Non-payment of the principal Money mentioned, otherwiſe the Replication cannot be ſaid to be good. And Judgment ought not to be for the Plaintiff. That a breach was neceſſary though our Plea was ill, I cited ſeveral Caſes to prove it, and the difference to be, where ſuch ill Plea admits or ſuppoſes a Non-payment or Non-performance of the Condition, there was no need of breach in the Replication; but if the Plea did not admit the ſame, there though the Plea was ill, yet if no good breach in the Replication, the Plaintiff could not have Judgment; ſundry Books I had to evince and back that difference.

Where neceſſary to aſſign a breach in a Replication though the Plea be ill.

Serj. Levins prayed time to anſwer it, and the next Term moved for a Certiorari to Ireland, which I oppoſed, becauſe here was nothing wanting, and no Diminution could be alledged, for the Errors were rather Surpluſage, and the Replication could be never mended unleſs they returned another Record, which is not allowable in any Caſe: Beſides, Diminution could not be alledged, nor a Certiorari granted after in nullo eſt Erratum pleaded. But per Cur' a Certiorari may be granted at the Prayer of the Defendant in Error ad informandum Curiam at any time, and when returned 'twill appear if the ſame Record or not: The Court inclined to hold the 2 and 4 Exception to be fatal Errors, and Hill. 4. Rule for reverſal.

Certiorari to *Ireland* after in *nullo eſt erratum* pleaded.

Willet *verſus* Tidey.

NArr' in Caſe ſur Indebit' Aſſump' for 20 s. had and received to the Plaintiffs uſe. Cumq; etiam, the Defendant a Collector of the Tax aſſeſſed 1 Wil. and Mar' in Com' Suſſex, had ſeized ſeveral Goods of the Defendants by colour of Non-payment of the Tax, and had ſold them for leſs than he might have procured for them by 20 s. Ad dampnum Querent' 40 l. The Defendant (imprudently enough) pleaded Non Aſſumpſit to the firſt, and Non cul. to the other. A Verdict (coram Rookeſby) generally for the Defendant. The Judge of the Aſſizes certifies on the back of the Poſtea, that the Defendant juſtified by the Act of----- for the Tax, &c. Mr. John Aſhton refuſing to Tax treble Coſts, I moved the Court for treble Coſts on the Clauſe in the Act, that if any Action, &c. for what he and they ſhall do in Purſuance or Execution of this Act, ſuch, &c. may plead the general Iſſue, and upon Iſſue joined

Treble Coſts on Judge's Certificate.

joined may give this Act and the ſpecial matter in Evidence, and in Caſe of Non-ſuit, Diſcontinuance or Verdict againſt the Plaintiff, the Defendant ſhall have treble Coſts.

Mr. Darnell oppoſed upon Stone and Linger's Caſe, 1 Cro. 467. Action againſt the Churchwardens for a falſe Preſentment, where double Coſts are denied on the 7 Jac. 1. chap. 5. becauſe a ſpecial Action of the Caſe for a misbehaviour in their Office, and not Treſpaſs or falſe Impriſonment, whereon liberty was given to plead the general Iſſue, and ſhewed the ſpecial matter in Evidence, and the Caſe of Kentinal againſt Smith, 1 Cro. 285. Jones 305. But I anſwered è contra, that the penning this Act was different; for 'twas upon any Iſſue joined, this was not for a misbehaviour in the Office, but in diſaffirmance of the power by which we were Collectors. We received 20s. by virtue of the Act; the Plaintiff ſays we received it to his uſe, for we had no Power or Authority to receive, and therefore brings an Indebitatus: Now we plead non Aſſumpſit, and upon the Trial we give in Evidence, the Act and the Verdict for us, and the Judge certifies accordingly, and therefore I prayed treble Coſts on that account. With the other I meddle not, and ſo the Rule was for treble Coſts.

Styart *verſus* Rowland.

DEBT for 10 l. pro eo quod cum the Defendant had accounted with the Plaintiff of divers Sums as due, and upon that Account was found in Arrear 8 l. per quod Actio accrevit to have the ſaid 8 l. Cumque etiam the ſaid Defendant had borrowed of the ſaid Plaintiff 10 l. to be paid on requeſt, de quibus quidem ſeperalibus denarior' ſum' this Defendant afterwards ſatisfied 8 l. yet the 10 l. hath not paid. Plea, Nil debet. On the Trial they gave in Evidence only 8 l. which I urged could not be Evidence of the mutuatus—— for that was one entire Contract, and another Contract for 8 l. was not the ſame they had declared upon: And of that Opinion was the Lord Chief Juſtice Holt. Then to prove the inſimul computaſſet they proved that the Defendant and Plaintiff's Wife reckoned that the Defendant had borrowed at one time 40 s. at another time 40 s. and at another time 4 l. and this came to 8 l. and he promiſed to pay it. I urged that this could not maintain an inſimul computaſſet, for that it was only a reckoning on one ſide, for there was neither Payment nor Deduction on the other, and at that rate ſaying

ing one and one was two would make an Account. But C. J. Holt over-ruled me, that it was good Evidence of an Account, and ſo they had a Verdict quoad Comput' pro Quer' & quoad reſid' pro Defend'. Then I moved in Arreſt of Judgment, that no Judgment could be on this for the Plaintiff, becauſe the Verdict was repugnant to, and different from the Declaration, for the Declaration acknowledged part of both the Sums to be received, and conſequently part of the 8 l. to be received, and the Jury had found the contrary, that there was nothing due on the mutuatus, and that the whole 8 l. in the inſimul computaſſet was due, ſo that they have found the Plaintiff's Declaration to be falſe. But per Dolben the exception was too nice. And by Chief Juſtice Holt the 10 l. if received of any of the two Sums, it was received out of the ſeveral Sums, and ſo by the Court the Plaintiff had his Judgment.

Term.

Term. Trin.

3 Will. & Mar.

Dominus Rex *verſus* Oxenden.

Vide Poſtea. Now I argued, that a Mandamus did lie to reſtore a Proctor to the Exerciſe of his Office that was unduly removed, becauſe his Buſineſs concerns the Adminiſtration of publick Juſtice, and tends to the publick Welfare; now a Mandamus lies for all Offices of a publick nature, or relating to the Adminiſtration of Juſtice: This Office is neceſſary, for 'tis morally impoſſible that all manner of Perſons, as Infants, Children, Perſons diſeaſed, who pray relief of Juſtice, can do all their own

Buſineſs there any more than they can without an Attorney; 'tis therefore to be compared to that of an Attorney, he takes an Oath as an Officer of the Court, and this appears by the Return where the Oath is mentioned; nay they are mentioned in Poll Acts as well as Attorneys, nay, he is mentioned in 16 Richard 2. Cap. 15. and therefore may be well preſumed to be time immemorial. The Eccleſiaſtical Court is a Court of Juſtice allowed by and known to the Common Law of England; it is a Court for puniſhment of Offences and Immoralities, as Inceſt, Adultery, Drunkenneſs, &c. a Proctor is an Officer there, and this Court will take notice of him, for you need no Information, as Mr. Attorney ſays, to acquaint you with the nature of his Office, but only for remembrance.

As to the Objection, That there never was a Mandamus granted for to reſtore a Proctor: I anſwer, That there never was one moved for ſuch trivial Cauſes; but there always was a firſt in every Action, and if the ſame Reaſon holds in this as in the other, 'tis as fit to be granted as in thoſe. This Court hath a general Juriſdiction over all the other Courts in England, eſpecially over the inferior Courts and Courts Chriſtian; you will correct what inferior Courts do amiſs, you have granted Attachments for the abuſe of your Proceſs. 'Tis true, you'll not meddle with the Court of Common Pleas about their own Officers or concerns, but that is becauſe the courſe of their Court is the Law, and of that they are Judges, and their's is one of the Superior Courts; but 'tis otherwiſe in Inferior Courts, for there their courſe doth not juſtifie, if contrary to the general Law of the Land: Here's a Man injur'd, there's no relief in the World but Submiſſion to the wrongdoer, unleſs you allow him the aid of this Writ. Beſides, in Common Caſes, if the Eccleſiaſtical Courts proceed otherwiſe than according to the Law of the Land, even in Cauſes belonging to their own Juriſdictions, you grant Prohibitions, as in caſe of refuſal to admit one Witneſs to prove payment of a Legacy. You do take notice of the prejudicial Acts of the Courts Chriſtian as Excommunications, you allow it as a diſability, you write to them to abſolve them by the Writ de Cautione admittenda. Prohibitions are directed to the Proctors as well as to the Judges and Parties, you do e-

very

very day make Rules upon notice to the Proctor; then a Mandamus is a remedial Writ, like to an Habeas Corpus, and this is our livelihood; it supports our Family, and we have no other remedy, for an Assize doth not lie, therefore a Mandamus doth: Action of the Case is but imperfect, that only gives Damages, it works no Restitution, and an Action upon the Case cannot recover Damages to us for the loss of a life's Practise, and therefore must be repeated, which the Law abhors. A Mandamus lay in several Cases, though not so frequent for Officers; in Bagg's Case 11 Rep. 58. the reason given in the first Resolution there, is that which reaches this Case, viz. That to the Court of King's Bench belongs Authority not only to correct Errors in judicial Proceedings, but other Errors and Misdemeanors Extrajudicial tending to the breach of the Peace, or oppression of the Subject, or to the raising of Faction, Controversie, or Debate, or to any manner of Misgovernment, so that no wrong or injury, either publick or private may be done, but that it may be reformed or punished by due course of Law; all this reaches our Case: This Court is the supreme Court of Justice in all Causes whatsoever, and this Court sends Mandamus's to them to command them to grant Administration to inferior Courts to proceed to Judgment, and Execution, to restore an Act of an Inferior Court, as Hurst of Canterbury, Hastings of White-Chappel for a Parish Clerk 1 Keble 286. Pl. 94. To swear a Churh-warden or Constable, who are but annual Officers, nay for an Assistant of a Company, as to one of the Skinner's Company, as I have been informed, which Office is not of great Trust, this concerns himself and Family, and all that think fit to employ him, and since their number is stinted to twenty eight. It concerns every body, for no Man but may have occasion for his help. It concerns the publick, as Court of Arches is a Court of Justice for punishing Offenders, and determining of Ecclesiastical Rights.

But after all, the Court were of Opinion, that no Mandamus lay; that the King hath two Jurisdictions, one Temporal, ar other Ecclesiastical, and they have different Laws and different Processes, and they are Judges of their own Officers; this is no Temporal Office, that they could not take notice

notice of what he is, or what Eſtate he hath, wether for life, or how; that he is a Spiritual Perſon, and they have Juriſdiction of him; they make, and they may unmake him, they cited Jones 187. 13 Rep. 7. 2 Rolls Rep. 107. and 1 Rolls Abr. 536. and ſo no Mandamus by Holt, Eyres and Gregory, Dolben abſent, but he was of the ſame Opinion, &c.

Aiſhcombe

Aiſhcombe *verſus* Hundred del Spelholme entr' Hill. ult. Rot. 901.

Vid. ſupra. Held now per Cur' to be for the Defendant, and that the Servant muſt be Sworn; for 'tis plain within the Intention, as well as Words, and one of the Servants might know the Robbers. 1 Lev. 323. The end of the Stat. of 27 E. was to purge the Party that he was not Confederate with the Parties Robbing. Styles 156. If the Maſter had been preſent, it had been a Robbery of the Maſter. Judic' pro Def. as to the Money in Coxhead's Cuſtody, &c.

Hobbs qui tam, &c. *verſus* Young. Entr' Hill. ult. 19. vel 129.

DEbt on 5 Eliz. Non Cul'. Special Verdict finds the Defendant a Merchant Trading by Exportation to Turkey, never Apprentice to the Cloth-workers; that for his own Merchandize he employed Journey-men in his own Houſe, who had been Apprentices, and ſuch one to Over-look, and gave them all weekly or yearly Wages, &c. Argued pro Quer' that this is uſing the Trade, &c. that by 37 Edw. 3. cap. 6. Artificers are to hold to one Miſtery. The 38 Edw. 3. cap. 2. Repeals that only as to Merchants, and ſo the 37 continued till 5 Eliz. That he, who can't uſe a Miſtery himſelf, cannot imploy others for that purpoſe, and ſo was Maſon and Nightingale's Caſe, 3 Jac. 2. For the Trade of Pin-making, reſolved within the Statute, tho' he employed none but thoſe who had been Apprentices, Pardoe and Couth, the ſame Opinion, and a Verdict pro Quer' Dalton's Juſt. 105. One takes a Miller and imploys him in his Trade, this is a Trading, if not for the private Uſe of his Family. A Merchant cannot Brew for Tranſportation, it is not for the uſe of his own Family here; tho' the poor Men have Wages, yet they have not the benefit of the Trade as if they did it themſelves, E. contra argued, 'tis not found that the Defendant hath uttered any of theſe Commodities in England, but 'tis found quite otherwiſe; That he Exported Engliſh Cloaths to Turkey. At Common Law all Trades are Free, and were ſo till this Statute, and never any conſtruction was made of this by Equity. No Man will ſay a Merchant is within it, if he Buys and Exports a Commodity: The Preamble of the Statute is for

A Merchant trading to *Turkey*, imploys Journey-men, who had ſerved Apprentices, and pay'd them Wages.

313
3: Mod. 312.
610 Sir

Husbandry, and Arts, and Misteries in England: The making of this Cloth is here, but the Merchandizing of it is abroad: This Statute meddles with Merchants only as to taking of Apprentices, not as to the prohibiting Clause of using the Trade, &c. Here the end of the Law is Answered, that the Cloth is wrought and manufactured by those that have been Apprentices; he hath not personally used it, nor is he within the Clause of setting on work those, who have not been Apprentices in the City of London. Coke 8. Rep. I may exercise a Trade for my private Family; I may imploy a Man for that Use; the Defendant hath not done this for the sake of any Trade in England. This Statute hath been always construed strictly, as in Rotheram and Morris's Case at Shrewsbury, a Man is a Mercer, and he sells Hats, and the Party is Apprentice to him as Mercer, he may use the Trade of Hatter, (in the petty Towns 'tis usual) because served to him who did so: A Wife that hath concerned her self in the Trade, may use it when a Widow, if lived with her Husband seven Years; for she shall be construed within the Words, to have served as an Apprentice, tho' never was one; besides, by the Statute, the setting Persons on Work, who have not been Apprentices, is another Offence, and perhaps, that is an Evidence of the use of a Trade; but when 'tis found, that he only set Men on work, that cannot be an using of a Trade. C. J. Holt. Horner is an ancient Trade for the pressing of Horns, and a Comb-maker did press Horns for his own Service in his own Trade, and held he was within the Statute. Vid. Post.

Rousby *versus* Manning. Vide *Supra.*

To submit to an Award *ita quod* it should be ready to be delivered without averring 'twas ready to be delivered.

DEbt Sur' Obl' conditioned to submit to an Award ita quod that it should be ready to be delivered to the Parties, or to such as should desire it ad vel ante: Nul tiel Award pleaded. Replication, Award, and breach, and Demur because doth not say 'twas ready to be delivered. Tremayne cited for Exception, Jenkinson and Allen, Trin. 27. Car. 2. 3 Keb. 513. Roberts and Marriott. 2 Saund' 73. 188. both the same Case, Hungate's Case, 5 Rep. 103. Thompson e cont'. That it ought to have come on their side, that 'twas desired and not ready to be delivered to him. C. J. Holt, It is in writing, and therefore ready to be delivered of necessity, and so well enough, & Judic' pro Quer' Vid. 2 Cro. 577. 1 Cro. 513. Fuller and Lane, 1656. Com' Banc' 3. that 'twas an Exception, but Hale e cont'.

Paine

Paine *verſus* Partich. Ent. Paſch. ult. 43.

Caſe for not keeping a Ferry-boat, which by Cuſtom he ought for all the Inhabitants of ſuch a place, by which he loſt his Paſſage.

CAſe for not keeping a Ferry-boat, which by Cuſtom he ought to keep for all the Inhabitants, by which he loſt his Paſſage. Defendant pleads, that there was a Bridge in Repair. Plaintiff yet makes an idle Replication. Defendant Demurs. Both Bar and Replication agreed ill. Argued if the Declaration was good, and Exception taken to it as not good for Inhabitants by way of Cuſtom, but that there ought to have been a Preſcription, becauſe 'tis not merely an Eaſment, but an Intereſt; a Charge on the Defendant. Now the Inhabitants cannot diſcharge it, nor can any diſcharge be of it; for if all the Inhabitants releaſe it, a new one may claim it. See 2 Roll. Rep. 289. 18 Edw. 4. 10. The Cuſtom is unreaſonable, becauſe not alledged as Neceſſary, that Owner or Servants ſhould attend the Boat, and Damage may come to it, and 'tis not reaſonable it ſhould be out of the Defendant's Poſſeſſion, becauſe he hath no Recompences for it, 1 Leon. 142. 9 Rep. 56. 'Tis unlimited, 'tis ad Libitum, and not limited to their neceſſary Occaſions. E cont' ad Libitum, is no more than Omni tempore anni quolibet Anno, and that hath been agreed good. As to its being an Intereſt, and laying a charge on the Defendant, 'twas anſwered, that it 'twas a pure Eaſment, and there can be no Eaſment to one, but it muſt be a Charge to another, as is a Way over another Man's Ground. A Cuſtom to grind at the Lord's Mill, quit of Toll is the ſame, and yet there the Lord is at the charge to keep the Mill. 18 Ed. 4. 3. Its no new thing to lay a Cuſtom in the Inhabitants for an Eaſment. 1 Cro. Baker and Burman's Caſe. This publick Ferry is for the Publick Good: Suppoſe the King ſhould grant a Ferry with a Toll from Paſſengers, excepting the Inhabitants of ſuch a Hill, this would be good, and ſo this might be the Commencement, and concluded pro Quer'. Chief Juſtice Holt, the greateſt quere is if any Action will lye, it being like a Nuſance publique, ſo many having the Concern in it, and directed the Councel to argue that point. Adjornatur. Vide Poſt.

Kellow *verſus* Rowden. Ent. Trin. 1 Jac. 2. Rot. 796.

Debt againſt one as Son and Heir, on Bond by the Father, who had an Eſtate for Life, the Reverſion to his eldeſt Son in Tail, the Remainder to himſelf in Fee; the Father dies, the eldeſt Son dies, leaving Iſſue, who dies without Iſſue, without taking notice of the eldeſt Son.

DEbt in the Detinet pro Quer' as Executor of Edward Kellow *verſus* Defendant, as Son and Heir of John Rowden, the Elder upon a Bond for 120 l. wherein John Rowden, the Father, bound him and his Heirs.

Defendant pleads Riens per Diſcent from the ſaid John Rowden, his Father: Special Verdict.

The Jury find, That the ſaid John Rowden the Father, was ſeized of Lands in Fee Simple, and had Iſſued John his Eldeſt Son, and Richard the now Defendant his ſecond Son; and ſo ſeized, made a Settlement of the ſaid Lands to the Uſe of himſelf for Life, Remainder to the Uſe of the ſaid John his eldeſt Son in Tayl, and after to the Uſe of his own right Heirs; by Virtue of which, and of the Statute of Uſes, he was ſeized for Life, Remainder to John, his Son in Tayl, the Reverſion to the ſaid John the elder, and his Heirs; that afterwards John, the elder ſo ſeized, dyed, upon whoſe Death the Reverſion diſcended to John his eldeſt Son who entred, and was ſeized in Poſſeſſion of the Eſtate Tayl, and the Reverſion in Fee Simple; John the Son dyed, and upon his Death the ſaid Lands deſcended to John his only Son, who entred and was ſeized in Poſſeſſion of the Eſtate Tail, and Reverſion in Fee Simple, and after dyed without Iſſue, and then the Lands deſcended to the Defendant, who is Heir to John his Father, and John his Nephew: And if the Defendant hath any Lands per Diſcent from John Rowden his Father in Fee Simple, then they find Aſſetts and pro Quer', otherwiſe for the Defendant.

Mr. Gould pro Quer'. I do take it, that the Iſſue is found with the Plaintiff; for the Quere is, Whether the Defendant hath theſe Lands from his Father? And I do take it, that it wholly comes from his Father, and nothing from his Brother, or Nephew. And here I firſt premiſe, That when old John made the Settlement, by which the Eſtate was limited to himſelf for Life, Remainder to his Son John in Tayl, and after to his own right Heirs; That the Eſtate limited to his own right Heirs, creates a Reverſion Expectant upon the Eſtate Tayl, and is the old Eſtate of old John, and when the Father dyed, by which there was a Diſcent on John his Eldeſt Son, the Tenant in Tayl who then had alſo the Reverſion, theſe continued two ſeveral and diſtinct Eſtates, and as if they had been in two ſeveral

ral Perſons: And tho' now both in one Perſon, there will be no difference, whether the ſaid Iſaac was the Tenant in Tayl, and the ſaid J. K. Tenant of the Reverſion. And the ſeizin of the Eſtate Tayl will not give a ſeizin to make a Poſſeſſio Fratris, or to intitle an Heir to the Reverſion, as from him. To explain this, I ſhall only cite Bingham's Caſe, 2 Rep. 91. Robert Bingham Ayle, Robert Pere, and Price Fits, Robert the Grandfather was ſeized of a Mannor in Fee held by Knight's Service, and by Fine ſettled the ſame to the Uſe of himſelf for Life, Remainder to his Son, the Father, in Tayl, and after to the Uſe of his own right Heirs: The Father dyes, the Grandfather dyes, by which the Son within Age had the Eſtate Tayl, and the Reverſion in Fee. The Quere was, If he ſhould be in Ward: Reſolved that Robert the Grandfather had the Eſtate expectant on the ſaid Eſtate Tayl, as a Reverſion, and that the Son ſhould not be in Ward. For that tho' he had the Reverſion in Fee, which was held of the Lord, yet, in regard of the Eſtate Tayl, he ſhall be excuſed; and in that Caſe 'tis held, that the Donee hath two diſtinct Eſtates, the Eſtate Tayl, and the Reverſion in Fee; and the Reverſion in Fee was a Meſnalty between the Lord and the Donee: So that I do infer, that the Reverſion is a diſtinct Eſtate, and no way affected by the Poſſeſſion, or ſeizin of the Eſtate Tayl, but a dry Reverſion in John and his Son, expectant on their Eſtate Tayl: Then, whether this Verdict will maintain this Iſſue, which is, That the Defendant hath theſe Lands by diſcent from his Father? I conceive it will; for the Reverſion being an Eſtate Independant on the Eſtate Tayle, diſtinct from that, there is no poſſeſſion or ſeizin as the Law requires, to intitle the Defendant as Heir to his Brother or Nephew who were only ſeized of the Eſtate Tayl, and intitled to the Reverſion, but he muſt intitle himſelf to it by his Father that was laſt actually ſeized.

In John's Hands 'twas no Aſſetts, but now it comes to the Defendant's Hands under a different Aſpect, 'tis Aſſets; nor could the ſeizin of the Eſtate Tayl make a Poſſeſſio Fratris of the Reverſion: This premiſed,

I do take it, That the Defendant derives his by Diſcent from his Father, and from him only, and not from his Brother or Nephew; and therefore we cannot charge him, but as Heir to his Father: And the general Rule in Law is, that a Man that makes Title by Diſcent, muſt make it as Heir to him that was laſt actually ſeized, or to him in whom the Eſtate was firſt veſted by purchaſe, and this Rule holds in things that lye in Grant, as well as in Livery; and therefore, where Son and Daughter are by one Venter, and Son by the other; the Father dyes ſeized (if

1 Inſt. 11. 239.

(if of Lands) to make a Poſſeſſio Fratris, there muſt be an Entry, or other actual ſeizin in the Brother, elſe the ſecond Brother of the half Blood ſhall have it, as Son and Heir to the Father: If Rent, Advowſon, &c. diſcends, then to make a Poſſeſſio Fratris, there muſt be a Preſentation to the Church, or Rent received: If he dies before he could poſſibly preſent, or receive any Rent, the Brother of the half Blood ſhall have it: In that Caſe is put the Caſe of Reverſion, or Remainder, expectant on an Eſtate for Life, or in Tayl; there, he that claims the Reverſion as Heir, ought to make himſelf Heir to him that made the Gift or Leaſe, or to the Purchaſer of the Reverſion: This I take to be our Caſe at Bar.

Ratcliff's Caſe, 3 Rep. 41, 42.

Agreed in *Reeve* and *Maſter's* Caſe, 1 *Cro.* 410.

The Defendant claims as Heir; who then is Donor but his Father? therefore muſt claim as Heir to him; and if he claims as Heir to him, 'tis a certain Conſequence that we muſt charge him as Heir to him; for if he can claim as Heir to his Father, a fortiori may charge him ſo: Suppoſe John the Father had iſſue a Son and a Daughter by one Venter, and the Defendant had been a Son by the ſecond Venter, had it been neceſſary for him to intitle himſelf by way of the mediate Heirs, he had been gon, for the Eſtate would have eſcheated, for he could not intitle himſelf by the Siſter or Brother of the half Blood; ſo greatly inconvenient would it be.

Upon this Reaſon 'tis; If there be Father and Son, the Son makes a Leaſe for Life, and dyes, and the Reverſion deſcends to the Uncle, and he dyes, the Reverſion ſhall not deſcend to the Father, but ſhall eſcheat, becauſe he muſt make himſelf Heir to the Son, and not to the Uncle, who had the Reverſion caſt upon him. A Man hath Iſſue two Sons, and dyes ſeized, the eldeſt doth not enter, but dyes; the ſecond ſhall have a Mortdanceſtor, and make himſelf Heir only to the Father, and recover Damages from the Death of his Father: In this Caſe, If the eldeſt Son had made a Warranty, theſe Lands ſhould not be recovered in Value, where 'tis brought in by a ſemble that the Heir of an Heir ſhould not be chargeable; the Reaſon is, becauſe he was laſt ſeized, and ſo Heir to him.

1 Inſt. 11. 5 *Edw.* 4. 7.

1 Inſt. 287.

1 Inſt. 239.

Obj. Jenks, 1 Cro. 151. *verſus* Defendant, as Brother and Heir to J. S. Iſſue per diſcent from his Brother, found, that J. S. had Iſſue, and dyed, Iſſue dyed without Iſſue, whereon the Lands diſcended to the Defendant, as Heir to the Son of his Brother: Adjudged for Defendant----. Clearly that ought to be ſo, for there was a Diſcent and Entry; ſo he muſt be named, and no Inconvenience, for there being an Entry, that's Notorious, and the Plaintiff ought to take Notice of it, but of a Pedigree 'tis hard to take Notice.

In

In Buckmere's Caſe, 8 Rep. 86, 'tis ſaid, Firſt, as to a Formedon in Reverter, to name all the Pedigree of the part of the Donor, or elſe to abate. 2. Formedon in Remainder, to make himſelf Son and Heir, or Couſin and Heir to him, that was laſt ſeized; if the Diſcender, to name the Iſſue that ſurvived, if entred, then Son and Heir; if not entred, then only Son. Now it's notable, that in all theſe Caſes the naming is only form; but as to the Point of Diſcent, to derive a Title, muſt be from him that's laſt ſeized, and that's the preſent Caſe, Frank and Burford's Caſe, Hob. 51. If in a Formedon in the Diſcender, makes himſelf Heir to every one, to whom the Eſtate is diſcendable, good, for then he muſt needs be Heir to all ſeized; but muſt not fail, ſaith the Book, to make himſelf Heir to all that were ſeized.

Tremayne e cont'. He ſhould, in this Caſe, have declared as Uncle and Heir of John, who was Son to the Man who ſealed the Bond, and was laſt ſeized; the Reverſion was ſuch an Eſtate as might have been ſold; if he had acknowledged a Judgment or Statute, 'twould have bound the Heir: Now if he had ſuch an Eſtate as he might have barred the Heir from enjoying, then he ought to have ſo alledged it, to ſhew how he was Heir; the Defendant has it by Diſcent, but 'tis not immediate, he hath here pleaded Riens per Diſcent, and he hath nothing by diſcent from him; if the Action had been brought againſt John, he could have pleaded he had only a Reverſion expectant on Eſtate Tail, and no more, and Judgment ought to have been for him; nothing is more Common; he cited a Caſe of Spring and Duke in Roll's and Chappel and Rudge in Com. Banco in Lord North's Time, where Judgment was pro Def. in a Caſe of this Nature, but 'twas imperfectly put, and was agreed, and ſo I took but little of it. Afterwards 'twas argued per Judices & Judicium pro Def. by three to one.

Eyres. He cannot be charged as an immediate Heir, though I agree the Lands are Aſſetts, and he is chargeable. Dyer 306. Plowd. 441. but though the Lands be Aſſetts, he cannot be charged as Heir to the Obligor, without taking Notice of the elder Brother, for he was ſeized of the Reverſion, ſo as to be able to charge it with a Statute, Cro. Car. 412. Jones 361. there held to be a perfect Diſcent; they were ſo ſeized, as the Heir ſhould have been in Ward. Dyer 308. If a Writ of Right had been brought, they muſt have joined the Miſe upon the meer Right, ſo that each of them was Heir. 40 Edw. 3. 10. where any Perſon claims a Reverſion, he muſt make himſelf Heir to him that made the firſt Gift, as 3 Rep. 41. in Ratcliff's Caſe; and in doing ſo, he muſt make himſelf Heir to his Grandfather, &c. N. B. 222. He muſt make mention of the elder Brother to the Father, 8 Rep. 88.

If

If the eldeſt Son do ſurvive the Father, and be omitted, the Writ ſhall abate; as he is to intitle himſelf to the Land, ſo he is to be charged as mediate Heir; for in the ſame manner he is to be charged, that he is to recover by: If the Argument, that the Obligee is a Stranger to the Pedigree, were any thing, 'tis an Argument againſt the ſetting forth a diſcent in Caſe of Lands diſcended in Poſſeſſion, Bro. Titl. Diſcent. 14. 30. I agree to be good Law, but not to affect this; for that Caſe of the half Blood ſtands upon a different Foundation: As ſuppoſe the Fee and Freehold diſcends, the ſecond Son cannot intitle himſelf as Heir to his Father, without taking Notice of his Brother, who ſurvived his Father. The true Reaſon of the difference of the naming, or not naming the Brother of the half Blood, is only upon a particular Maxim of the Common Law, that he muſt make himſelf Heir of the whole Blood, to him that was laſt ſeized. Dyer 48. Hob. 334. Cro. Car. 543. Jones 457. 1 Inſt. 239. Rolls 2. Abr. 400, 402. Dyer 9. 2 Cro. 161. Jones 462. 3 Cro. 24. In the Declaration you muſt ſhew how he was Heir, 9 Rep. 21. Cro. Car. 151. Rolls 2. abr. 709. there 'twas held that an immediate diſcent without ſhewing how, was naught: There's a difference between the Freehold and Inheritance diſcending, and the Reverſion diſcending, as to this purpoſe, and therefore the Defendant ought to have been charged as mediate Heir; and ſo he concluded for the Defendant.

Gregory. The Plaintiff ought to have his Judgment. In Jenk's Caſe, in Cro. Car. the Lands diſcended from the Father to the Son were Aſſets, it cannot be pretended to be ſo here; there the Brother was actually ſeized; here the viſible ſeizin was in John the Son, and that was only of an Eſtate Tail; here the Fee Simple remained in the Father, and ſo he concluded pro Quer'.

Dolbin. If he hath Land as Heir to his Father, then he is well charged; if he hath it, as Heir to his Nephew, 'twere otherwiſe; here his Title is only as Heir to his Father, he claims nothing as Heir to his Nephew. In Jenk's Caſe, there was a Fee Simple executed, and I have ſeen Arguments in that Caſe on both ſides, agreeing this to be as I hold; and ſo he concluded pro Quer'.

C. J. Holt. The Action is well brought: Firſt, This Reverſion in Fee which is now come into Poſſeſſion in the Defendant Richard, he has it as Heir to his Father, and 'twas Aſſets only in him, 'twas not Aſſets in John his Nephew, nor in the Brother; ſo that they were not chargeable: In the Caſe of Jenks, 'twas Aſſets in the eldeſt Son, he was actually ſeized; now here the Eſtate of the Nephew was not chargeable. 2. The Title which

he

he has now, he hath as from the Father as Heir to him; when he is to make his Title, he need only claim as from his Father; and conſequently, a Stranger ſhall do no other: Suppoſe the Defendant had been a Brother of the half Blood, he could not have claimed as Heir to his Brother, and yet he would be Heir to his Father, he claims from the Father that was laſt ſeized: Then as to that of a Daughter; the Anſwer of my Brother Eyres is, You ſhall not mention him in the Pedigree, becauſe it makes againſt you; is that a Reaſon? No, the Reaſon is, becauſe it makes nothing for you in the Matter. Suppoſe a Diſcontinuance, he muſt have brought his Formedon in Reverter, as Son and Heir to his Father, 37 Aſſ. 4. Obj. Brother Eyres ſays, he muſt ſhew his Coſinage; I ſay he muſt, if a Collateral Heir, and what is that? he only ſhews himſelf how Heir, as Son of C. Son of B. &c. he need not ſay Son and Heir of him, but only ſhew his Coſinage; a Son need never ſhew his Coſinage, for he is immediate Heir; beſides, a Stranger is never to ſhew Coſinage, there's no Caſe where 'tis neceſſary; a Man may bring an Action againſt a Couſin and Heir as Couſin and Heir, without ſhewing how. The Title is as Heir only to him that was laſt ſeized; beſides, that is in a Writ; this is by Bill in this Court, which is like a Writ in Com. Banco. As to the Caſe of Reeve and Malſter, the younger Son may intitle himſelf as Heir to his Father, Dyer 371. the younger Brother ſhall not make mention of the Brother, but claim as Heir to the Father, and ſo concluded pro Quer'. & Judic. accordingly given for the Plaintiff.

Buxton *ad verſus* Horne.

ESCape with Conſent of Sheriffs, without Conſent of Plaintiff, no barr to the Plaintiff's Debt on Judgment.

If a Traverſe be ill, ſometimes 'tis helpt by a general Demurrer, as if the Plea be good without it, and the Traverſe is ſurpluſage, there helpt by a general Demurrer, becauſe there the Party may Traverſe the Inducement; but the want of a Traverſe per Holt is not helpt by a general Demurrer.

Smith and Cole, Saund. 206. A Demurrer, becauſe incerta & caret forma, is a general Demurrer. V. Roll's Rep. 264. 2 Bulſt. 326.

There may be an Executor de Son Tort of a Term, Moore 126. Sid. 76.

Term. Hill.

2 W. & M.

Dominus Rex *verſus* Lee, Newton & al'.

A Mandamus does not lye for to reſtore a Proctor at Doctors Commons.

A Mandamus to reſtore the Office of Proctor. They make a Special Return, that at Doctors Commons, &c.

Mr. Darnell took Exceptions to it, that a Mandamus lies for the Office of Proctor, for 'tis of a Publick Concern, the Party admitted to it takes an Oath: A Mandamus lies, becauſe no Aſſiſe lies, and ſo there is no other Remedy, and he has only an Action of the Caſe, and that is but an imperfect Remedy, becauſe 'tis only for Damages to be aſſeſſed by a Jury and no more, there's no Reſtitution: Hurſt's Caſe, Sid. 94. lies for an Attorney. Here's no power of Viſitation ſet forth, for either the Dean of the Arches and the Arch-Biſhop have one and the ſame Power, or if they are different then the Dean of the Arches had no Power to turn us out; 'tis uncertain, for 'tis not ſaid the Arch-Biſhop hath the Power of viſiting ſo as to reſtore; as 'tis ſet forth, 'tis only in Spiritual Matters, here's no preſcription of a Right to reſtore, 11 Rep. 99. The Return ought to be certain; there are no Cauſes ſet forth to juſtifie the turning him out, no manner of Right ſet forth to make a Rate, nor any Rate in particular ſet forth, nor when it was made. They ſhew no Power or Law for to remove a Proctor for non-payment of ten Shillings Tax'd. The Statute ſet forth is void, for no Man that hath an Office for Life, can be turned out without Preſcription or Charter: Now that Statute could only be for the better government of the Proctors. They ſet not forth any time when this Cauſe was received, and then it might be before the General Pardon. They have proceeded againſt him without any warning or hearing of him, Sid. 14. Chief Juſtice Holt. What the Dean of the Arches does, the Arch-Biſhop does, as what the Chancellor does the Biſhop does; Dol-

bin. The Dean of the Arches is the very Arch-Biſhop, 'tis one and the ſame Juriſdiction. Mr. Sollicitor, 'tis true, in point of Cauſes the Dean of the Arches Act is the Act and Sentence of the Arch-Biſhop, but here we have returned that the Arch-Biſhop is Viſitor there, and hath the Government and ſuperintendency of the Proctors and Officers. Steward of a Court Baron denied a Mandamus granted for Treaſurer of the New-River-Water, but never determined; moved for the Clerk of the Works of the City. Cox and Mand. 2 Sid. (Which Book, by Dolbin, is fit to be burned, being taken by him, when a Student and unworthily done by them that printed it.) Chief Juſt. Holt. An Eccleſiaſtical Corporation always hath a Viſitor, and therefore you never heard of a Mandamus moved for an Abbot or Prior. Every private Corporation hath a Viſitor; but this differs from all the other Caſes, for he is a publick Perſon: We do take notice of a Proctor, for our Prohibitions are directed to them; many Acts of Parliament mention Proctors as an Office. I think it lies: And for Cauſes of Removal here are none, but the quære is, whether the Arch-Biſhop can be Viſitor of his own Courts, whether we ſhall not leave the Judges to hear and determine their own Cauſes, and govern their own Officers; its fit to be farther conſidered of. Eyres: The Judge there is more than a Deputy, for the Arch-Biſhop may ſue before the Chancellor for a Penſion, and yet in Arch-Biſhop Sheldon's Caſe Prohibit was granted to ſuit for Library before Dean of Arches. Adjornatur.

Dye *verſus* Wells.

COvenant to permit the Plaintiff to carry away Trees: Breach quod non permiſit, ſed obſtruxit & obſtupavit: Held well upon Demurrer, and Judic' pro Quer.

Dominus

Dominus Rex *verſus* Hill.

MAndamus: **Return that he was not** debito modo Electus & præfectus ad Officium **of the Regiſter** of Arch-Deacon; **moved to be ill, becauſe, not ſaid poſitively,** non fuit Electus, **according to Criſpe and** Maidſtone. **Court: The Writ is** Debito modo electus, **and the Return follows it, and you may bring an Action on this well enough; 'tis a direct anſwer to the Writ.** Return of a Mandamus, not *debito modo electus*.

Per Holt. **The Regiſter comes in by Patent, and I wonder how he comes to lay in this Writ an Eviction; and for a Deputy Regiſter,** no Mandamus **lies, that's only at Will.**

Term.

Term. Paſch.

3 W. & M.

Temple *verſus* Killingworth.

Caſe for Suing one in an inferiour Court, for a Cauſe of Action, not ariſing within their Juriſdiction.

Action ſur le Caſe againſt the Defendant for levying a Plaint in the Sheriffs Court London, and cauſing the Plaintiff to be arreſted thereon, ubi revera, the Cauſe of Action aroſe not within the Juriſdiction, & non cul' pleaded & Verdict pro Quer', and 5 l. Damages aſſeſſed, and moved in arreſt of Judgment, that the Action lies not, for that there was no malice in the Caſe, and 'twas not averred, that he was held to unreaſonable Bail, but barely becauſe it accrewed extra Juriſdiction; and there was cited 1 Roll. Abr' 102. That an Action would lye for a ſecond Arreſt for the ſame Cauſe after a Remover of the firſt Plaint by an Habeas Corpus, but here is no unjuſt Vexation, for he might have pleaded to the Juriſdiction there, and have had his Coſts, and in 3 Cro. 836. Bray and Partridg's Caſe, held no Action lies for Suit, where there's no cauſe of Action, and 'tis hard that an Action ſhould lie becauſe out of the Juriſdiction, when it will not lie, tho' a Vexation be for the Defendant, and no cauſe of Action at all. Waterhouſe *verſus* Bawde, 2 Cro. 133. No Action lies for Suit in Spiritual Court for Tithes of Wood, where the Statute ſays no Tithes ſhall be paid. Argued e contra by Mr. Turner, that this Action doth lie, becauſe here's both Injury and Damage, and there's the Statute of Weſtminſter 1. which prohibits ſuch Suits in Inferiour Courts, he cited 2 Cro. 663. 3 Cro. 628. 836. 1 Sid. 424. 463. 1 Saund. 228. The Action will not lie for a cauſeleſs Suit alone, that is, becauſe of their general Juriſdiction; but here this Action is for an unjuſt Vexation. 4 Rep. 14. The quære here is, if the Proceſs be illegal, and it is ſo, 'tis all Coram non Judice. Perhaps an Action will not lye againſt an Officer, for he is juſtifiable, but here it is againſt the Party. Fitz. lib. Eſtoppel. 18. 17 Hen. 6. 45. The Caſe of Hudſon and Cock. Paſch. 35 Car. 2. C. B. was as this, and Judic' pro Quer. Smith and Fuller.

Fuller. Trin. 27 Car. 2 Rot. 1442. B. R. Prickhouſe and Buttler. And the practice of late hath been frequent to bring Actions of this Nature. Chief Juſt. Holt, Its hard an Action ſhould lye. Of late the Opinions have run with the Action, nay in Ollcitt and Beſſey's Caſe ſome held, falſe Impriſonment to lye againſt the Gaoler; but ſurely 'tis hard an Action ſhould lye for ſuing with Cauſe, becauſe out of the Juriſdiction, and that, becauſe no Cauſe within the Juriſdiction, and an Action will not lye for Suit on a Verdict for the Defendant, when there's no cauſe at all, neither within nor without: Beſides, the Inferiour Court hath Juriſdiction of ſuch a Cauſe as this, and the Law hath put a Plea into his Mouth, and in all Hale's time, no Prohibition was granted without Affidavit of a Plea offered. It is fit to be conſidered by all the Judges, becauſe there hath been difference of Opinion; Let it ſtay quouſq; &c. Dolbin. It was never held to lye till North's time.

Carter *verſus* Davis ent' Hill. ult. Rot. 128.

CAſe ſur aſſumpſit, Defendant pleads in abatement, Plaintiff Demurs, as in Bar, Joinder as in Bar: Upon debate per Cur' held to be a Diſcontinuance, becauſe the Parties have put themſelves upon the Court as to a Plea in Bar, and there's no ſuch, and nothing ſaid to the Plea in Abatement.

Demurrer in Bar or a Plea in abatement diſcontinuance.

Payne *verſus* Partrige. Entr' Paſch. 2 Rot. 43.

ACtion of the Caſe by the Plaintiff as an Inhabitant of a Ville, in which the Defendant, by Cuſtom, was uſed to keep a Ferry-Boat for all the Inhabitants of the ſaid Ville Toll-free, and all other Perſons, &c. That the Defendant did not, &c. by which the Plaintiff could not paſs in and about his neceſſary Affairs, Plea, Repl', Demurrer. Divers Exceptions taken to Bar and Replication; but at laſt by direction of the Court, the Inſufficiency of the Count was argued. Serjant Tremaine. 'Tis not ſaid that he ought, but only uſed to keep; The chief thing was, that the Plaintiff could not maintain this Action, for he ſays, all the King's Subjects have uſed and might paſs thereby over, &c. and here's no particular Damage, and therefore an Indictment only lies; for every Man in the Kingdom might then have this Action, which would be infinite and vexatious: He cited 27 Hen. 8. 27. 1 Inſt. 56. 3 Cro. 664. Fenwick and Hewden. Moore 108. William's. Caſe. 5 Rep. 72. Boulton's Caſe. 5 Rep. 104. Powys e contra, That this is brought as an Inhabitant

Ant.

bitant, he cited, 1 Cro. 266, 267. 2 Cro. 555, 557. That this is not ſuch an Action as every Subject might have; 'tis founded on the uſage of a particular Town, and none but an Inhabitant of an Ancient Meſſuage of that Town can bring ſuch an Action as this, Bro. Title Action Sur' Caſe 6. The Inhabitants were to have a more particular Benefit than others, for they were to pay no Toll: We have ſhewn that we did come and requeſt; this is brought upon the Demand. In Trin' Term following it was argued by the Judges. Eyres: This Cuſtom is well alledged, both as to matter and manner. In all Cuſtoms, there muſt be Uſage and Reaſonableneſs, Gateward's Caſe, 6 Rep. 1. 1 Leon. 142. 1. Inſtit' 114. Shaftoe's Caſe. Sid. 267. Davis 32. Cro. Eliz. 146. 1 Rolls Abr' 560. That may be reaſonable in one place Ratione loci, which is not ſo in another, 12 H. 8. 5. Its a good Cuſtom, that one Man ſhould have the ſole profit of ſuch a Ferry, the Defendant is not charged without a Recompence, and yet if he were, 'tis well enough, as 1 Roll. Abr. 216. 1 Cro. 419. Paſſage is of publick Neceſſity, 'tis well enough alledged for the manner to go ad libitum ſuum, and ſo is Gatewood's Caſe, 3 Eliz. 441, 664. The Defendant's Plea is ill, for 'tis as bad as to juſtifie the ſtopping a way by ſetting out another, and yet, I think, Judgment ought to be for the Defendant, for by the Declaration this is acknowledged to be a Common Paſſage for all the King's Subjects, and ſo is no other than a Common Highway, and if one may bring an Action, another, and every one may, which the Law abhors William's, 5 Rep. 73. 1 Inſtit. 56. 3 Cro. 664. Moore 180. The true difference is, where there is no other Remedy; but here's another by Indictment at the Suit of the King, becauſe 'tis a Common Paſſage as every publick River is, 'tis a publick Street, 13 Rep. 33. 2 Inſtit. 30. 1 Cro. 132. The Defendant is as much indictable for not keeping his Ferry, as he is for not repairing an High-way, To which, he is obliged ratione tenuræ, and therefore Judgment ought to be for the Defendant. Gregory of the ſame Opinion, this is an Eaſment, and therefore the Cuſtom is good, 15 Ed. 4. 29. But the Action lyes not becauſe 'tis common to every one, and the Plaintiff hath laid no particular Prejudice by it to himſelf. Chief Juſt. Holt, the firſt quære is this, Whether this be a good Cuſtom, that the Inhabitants of a Ville be Intituled to paſs in a Ferry without paying of Toll. 2. If the Plea be good, that he hath built a Bridge over, which is more convenient. 3. If the Action lies at all. I am of Opinion that this is a good Cuſtom: It hath been held in the Common Pleas, that 'tis not a good Cuſtom; but that it is good let us conſider, that this Cuſtom doth not conſiſt in charging him with a Ferry: That there was an Ancient

cient Ferry here, is only an Inducement; the keeping of the Boat is not part of the Cuſtom, but 'tis an Incident to the keeping of the Ferry; the Cuſtom doth not conſiſt in having a Right of Paſſage; for there being an Ancient Ferry, all the King's People are intituled to paſs of Common Right. If a Ferry were granted at this Day, he that accepts ſuch Grant, is bound to keep a Boat for the Publick Good: This Cuſtom is barely by way of Diſcharge, for 'tis only to be eaſed of Toll, and ſo is Gatewood's Caſe, 1 Cro. 418. The Inhabitants of a Ville may preſcribe to a Diſcharge, 18 Edw. 4. 3. The true Cuſtom here, is only to paſs without Toll; what they Claim, is only a Diſcharge, a Freedom from Payment of what the reſt of the King's Subjects pay: This is reaſonable, for the Cuſtom doth not charge the Defendant to keep the Boat: Beſides here he has a Recompence, as he receives the Profits from all others, though he hath none from theſe, 3 Cro. 509. This Cuſtom might have a reaſonable beginning by Agreement, as that the Inhabitants of the Town might be at the Charge of procuring the Grant; and in Conſideration thereof, one Man ſhould find the Boat, and enjoy the Toll, but the Inhabitants to pay none: And ſuch Agreement would be good at this Day; 'tis part of his Intereſt, his Intereſt is incumbred with this Diſcharge, 1 Rolls abr. 559. As to the Plea, that he had erected a Bridge croſs the River for common Paſſage, that is an ill Plea; the Erecting of a Bridge is a voluntary Act, and he may pull it down again; it is not in the Power of a Man to diſcharge himſelf by any Act that he can do: If he had petitoned the King for a Patent to deſtroy his Ferry, and in Conſideration thereof, he would Erect a Bridge at his own charge, and repair it, and this found upon an ad quod dampnum to be for the Publick Good; this had been ſomewhat, but he cannot do it of himſelf. 3. As to the Action, it lies not becauſe the Inhabitants have no more Damage than all the King's Subjects; this Right of Paſſage is not veſted in him as an Inhabitant there, but as a Subject; for as an Inhabitant, he is only freed from Toll. Here's another Remedy, 22 Hen. 6. 14. is expreſs, That 'tis a Forfeiture, and he is indictable for it; he that hath a new Ferry by Grant, when he accepts of it, doth charge himſelf with the Repairs, and keeping it. If there had been particular Damage, as if he had come over, and Toll were extorted, he might have had an Action, N. B. 94. So he might, if damnified for want of Repairs, but not by a general Obſtruction, which is a Common Nuiſance, and therefore Judg. for the Defendant.

Holt, the next day, declared Dolbin's Opinion to be the ſame in Omnibus.

Suppoſe A. lays Damage by Loſs of a Market, having a Carriage ready brought to the Place; Quære, if an Action will lye?

Dominus Rex *verſus* Mayor *and* Aldermen Civit. Exon.

Mandamus to reſtore an Alderman.

MAndamus at the Inſtance of William Glyde, to reſtore him to the Office of Alderman, &c. Return, that he departed from the City, and lived at Topſham; That there were ſeveral Courts, and he came not to them though ſummoned; That he was thereupon removed for ſuch his Abſence, and Neglect of his Duty (viz.) ſuch a Day; and further, That he took not the Oaths before the 1ſt of Auguſt, 1689. Mr. Attorney Treby excepted to the Return, that there was no Notice to him, nor Summons to be heard concerning his Abſence; for the ſame might be upon reaſonable Cauſe, and then 'twas no Cauſe of Removal, and he ought to have been ſummoned to anſwer that particular Thing, and a general Summons to meet at the Court, is not ſufficient: Then, as to his not taking the Oaths, it appears by the former part of the Return, that he was amoved by Act of Court; ſo that at this time he was not to take the Oaths, for he was actually out of the Place: The Act doth require, that every Man, having an Office, ſhall take the Oaths. Now the Query is, If Mr. Glyde had, or held this Office at that time; the Word having ſuppoſes Poſſeſſion, as on the Statute of Hen. 8. of Wills; Will by a Diſſeiſee is void; one that is removed by Order of Court (though illegally) till reſtored, is out of the Office, according to the Equity of the Statute of 25 Car. 2. which is the Foundation of this; It ſeems to be the meaning of that Act, that Perſons out of Place, ſhould take it ſo ſoon as the Diſability was removed. As to the Proviſo for Infants, &c. that ſeems to be but a reaſonable Declaration of the Common Law, and would have been ſo, if the Proviſo had not been made.

An Alderman goes & lives out of the City, good Cauſe of Removal.

C. J. Holt ſeemed of Opinion, that an Alderman's going and living out of the City, in another Place, is a good Cauſe of Removal; and that he ceaſing to be an Inhabitant, they might

removed

remove him without Summons; but the reſt inclined, that a Summons was neceſſary. The next Term argued by Pratt, that the Return was ill; firſt, it muſt be admitted that a Mandamus lyes, then here's no Cauſe of Removal: As to Abſence, non Conſtat. that Topſham is extra Libertat. though it be extra Civitat. & Com. ejusdem Civitat. for the Liberties may extend further: Not ſaid how long he abſented himſelf, it might only be for a Week, or the like. 'Tis not ſaid that his Removal was without a reaſonable Cauſe, and it might be for a Publick or Family Sickneſs; the Omiſſions are alledged too general, that he did neglect his Duty, and do not ſhew how, 1 Cro. 579. It appears, there was always a major part preſent, and conſequently his Abſence no Forfeiture, becauſe no want of it, 9 Rep. 50. It does not appear that there was any Buſineſs to be done at any of the Courts, or that any Damage accrewed to the City by his Abſence; It doth not appear that there were no other Courts held, or that theſe were all the Courts, ſo that he might be frequently preſent. Beſides, they have not ſummoned him to anſwer particularly for this Matter. Then, as to the not taking the Oaths, he was not within the Intention of the Act, which was only for Perſons having Offices: It appears that he was removed even before the making of this Act, conſequently he was not a Perſon having an Office; for this was a good Judgment till diſallowed by this Court; that Court had a Juriſdiction; the Removal was not void, but voidable, 8 Aſſiſ. 18. There was no Danger from thoſe that were out of their Offices; the End of the Act was to ſecure the Government from thoſe that were then in Office; beſides, they are to be ſuſpended, and they could not be ſuſpended, unleſs they were in Poſſeſſion, for that ſuppoſes a Poſſeſſion.

Tremayne e cont. cited 1 Inſtit. 232. and urged, that a Removal for Abſence is reaſonable, becauſe 'tis fit the Office ſhould be ſupplyed, and another put into it, leſt there ſhould be a Failure of Juſtice.

Summons is not neceſſary in Caſe of Abſence, becauſe he deſerts, and we know not where to find him.

Then for the Oaths, it muſt be a Forfeiture, otherwiſe here will be an Officer which ſhall never take the Oaths to the preſent Government, for there's no Means to compell him to take them after his Re admiſſion; and therefore, having an Office, doth, and muſt mean a Right to the Poſſeſſion. If a Reſtitution be now awarded, he comes in upon his old Title, there's no Election for it, and he muſt be reſtored, if at all, to his Ancient Right.

C. J. Hol-

C. J. Holt. As to Summons, you take notice where he lives, ſo as to ſummon him to come to Court; by the ſame Notice you might have ſummoned him to anſwer. Then for the other part he is actually out; upon the Reſtitution by the Mandamus, he is admitted de Novo, why ſhould he not take the new Oaths upon that Admiſſion? but Cur. Adviſare vult.

Term. Trin.

3 Will. & Mar.

Dominus Rex *verſus* Lever.

JUdgment on Indictment of Barretry, Error and Reverſal. Held per Cur' on Motion, that no Writ of Reſtitution lyes to a Stranger to the Record, and by C. J. Holt. If it did, it muſt be by Scire fac', and ſo was it in the Caſe of Vaſey *verſus* Harris, 1 Cro. 328.

Judgment on an Indictment of Barretry reverſed, no Reſtitution to a Stranger to the Record.

Dominus Rex *verſus* Oxenden.

MAndamus to reſtore Lee to the Office of Proctor in the Arches. They return, That the Court of Canterbury of the Arches, London, is an Ancient Eccleſiaſtical Court, and the Supreme Conſiſtory of the Archbiſhop's See. That the Archbiſhop for the time being time out of Mind, had, and uſed to have the Government and Regulation of the Judges, Advocates, Proctors, and other Officers and Miniſters of that Court, and from time to time hath made Statutes and Ordinances for their better Government, as often as need required: That every Perſon, admitted to be a Proctor in that Court, takes an Oath before the Judge of that Court, to obſerve the Statutes and Ordinances of that Court. That Lee took that Oath: That an Ordinance was made by Archbiſhop Arundell, that no Proctor ſhould receive any Cauſe without Counſel of ſome Advocate Sub pena Remotionis: That the ſaid Court, and other Courts, are held in quodam Hoſpitio, called Doctors Commons, in which the Judges, and divers Advocates, Proctors, and other Officers attending that Court, do reſide: That the publick Charges and Expences of the ſaid Houſe, are born by the ſaid Perſons, and therefore they have uſually

Mandamus to reſtore a Proctor in *Doctors Commons.*

uſually made Rates for the ſame: That Lee refuſed to pay 10 s. rated upon him: That he, as Proctor, did receive a Cauſe without Advice of an Advocate, and for that Cauſe he was denyed Audience: That the Archbiſhop for the time being, and in vacancy of the See, the Dean and Chapter of the Cathedral Church of Canterbury, Guardians of the Spiritualities, time out of Mind, were Viſitors of the ſaid Court of the Arches, and have heard and determined all Appeals and Complaints of all Proctors, and other Officers of the ſaid Court of the Arches, and the ſame have reformed all Grievances committed by the Judges of the ſaid Court of the Arches, upon the Proctors, or other Officers unduly inflicted: That the Dean and Chapter were at the time of denying Audience to the ſaid Lee, and ever ſince Guardians of the Spiritualities, and have full Power and Authority to hear and determine all ſuch Complaints: That Lee hath neither ſubmitted himſelf to that Court, nor appealed to the ſaid, &c.

Mr. Dolbin argued for Lee, that the Return was inſufficient: That it doth not ſay, that at the time of the Tax, Lee was a Member of the Society, and no juſt Power ſet forth to impoſe ſuch Tax, nor is the Non-payment of ſuch a Sum any Misbehaviour in his Office. As to the Objection, that the Archbiſhop is a Viſitor, it ſeems hard what is meant by a Viſitor of a Court; if they mean of Doctors Commons, that is a Voluntary Society, and of that there can be no Viſitor; it is not like a College, where the Founder appoints a Viſitor: In Voluntary Societies, there is no Founder, but Conſent: If they mean it only as to the Arches, that the Archbiſhop hath Superintendancy of the Judicial Acts of the Court: Can there be a Viſitor of a Court? It muſt be a Court that controuls only, and examines Errors; a Viſitor belongs ad loca pia; if they mean any thing, it muſt be a Superiority of Court; now if the Arches be (as the Return ſays) the Supreme Court of that See, how can the Archbiſhop be ſuperior to it? It is impoſſible it ſhould be as they ſay; for if he have the original Juriſdiction, he cannot have it by way of Appeal. Now by this Return it appears, that the Archbiſhop hath the Government of the Proctors, and conſequently an original and primary Power, and conſequently cannot have it upon Appeal. The very Name and Nature of the Court imports it to be the Archbiſhop's Court, and him to be Judge thereof; for it is to receive and determine Appeals from the Biſhops in their Provinces, 23 Hen. 8. Cap. 9. Which reſtrains Citations out of the Dioceis: By the meaning of that Act, the Dean of the Arches is but the Archbiſhop's Subſtitute, as in Trollop's Caſe, 8 Rep. The Act of the Comiſſary is the Act of the Biſhop; here Lee is removed, by the Archbiſhop himſelf, there was a

Prohibition

Prohibition granted to a ſuit there (at the Inſtance of Archbiſhop Shelden's Executors) for a Legacy given to the Succeſſor, of Books, becauſe the Archbiſhop was Judge himſelf, and might ſit when he pleaſed:

Mr. Attorney Treby e cont'

No Mandamus doth lye. Theſe are not very ancient; I think, Bagg's Caſe is the Foundation of them all, they ſhall iſſue in all Caſes that concern the publick Adminiſtration of Juſtice, but they have deſcended too low, even to Clark's of Pariſhes; but therein the Judges have not generally agreed: The Proctor's Buſineſs is only in the Spiritual Court; you take notice of it ſo far, as to enquire into the Bounds of their Jurisdiction, but you never enquire into what they do amongſt themſelves: It doth not appear judicially to your Lordſhip, whether he hath an Eſtate at Will, or Freehold, or other fix't Eſtate. Then for the Matter of the Return, call the Archbiſhop, Viſitor, or what you will, we have declared his Authority, let his Name be otherwiſe. Here is a Perſon that hath Authority to examine and redreſs upon Appeals. In all times the Proctors have been governed by the Archbiſhops. A Mandamus is an extraordinary Remedy, and not to be granted where there is any other Remedy; and we have ſhown another way for Relief; this Matter is moſt proper to be determined by them in their own Courts: But the Court thought it an idle Return, that 'twas the Archbiſhop's Court, and he no Viſitor; but only doubted, if a Mandamus lay, and therefore ordered another Argument as to that Point.

Dominus Rex *verſus* Mayor *and* Aldermen Civit' London.

MAndamus to reſtore Sir James Smith to the Office of an Alderman of the City of London, to which he had been duly choſen and preferred, according to the Cuſtom of the ſaid City uſed and approved. They return, that Sir James Smith, 13 February, 1688, was one of the Aldermen of the City of London, to that Place and Office, according to the Cuſtom of the ſaid City, before that time duly elected and preferred, and from the ſaid 13 February, 1688. to the 1ſt of Auguſt following, remained one of the Aldermen: That at the time of making the Act, for abrogating the Oaths, &c. and continually afterwards he had and enjoyed the ſaid Office till the 1ſt of Auguſt: That

Mandamus to reſtore an Alderman.

as

at any time before the ſaid firſt of Auguſt 1689, he did not take the Oaths by the ſaid Act preſcribed, but to take them before the ſaid firſt of Auguſt he did altogether neglect; whereby, by virtue of the ſaid Act, the ſaid Office became void, and that the ſaid I. S. at any time after the neglect, was never elected into the Office of one of the Aldermen, and therefore they can't reſtore him.

Sir Robert Sawyer argued againſt the Return, That the Mandamus is not to be reſtored to the place he enjoyed in 1688; but to the Office he enjoyed according to the Cuſtom of the City, before the Judgment in the Quo warranto: The Act for reſtoring the City Franchiſes, is, that he take the Oath the next Term after his Reſtitution; by that Act all Officers are reſtored.

Sir Francis Pemberton, ex eadem parte: There are three things of Conſideration, Firſt, the Act for abrogating the Oaths. 2. The City Act. 3. The Return to this Mandamus. 1. The Act for abrogating the Oaths requires no body to take the Oath, but thoſe that then were in poſſeſſion of their Office, or ſhould be admitted to an Office; one of the Clauſes is in actual poſſeſſion of an Office, the other is ſuch as ſhould be admitted; If a Man had an Office in Poſſeſſion, and another a Right to it in Reverſion, and did not take the Oaths, he only loſt that Office, which he was in Poſſeſſion of: That there was a Judgment in a Quo warranto, 35 Car. 2. Whereby all the Privileges of the City were taken away. Now Sir James Smith was duly Elected when the Corporation was in being: Now this appears by the Return, that he was antetunc Debite Electus according to the Cuſtom of the City, ſo that muſt be before the Judgment, for he could not be duly choſen according to the Cuſtom after the Judgment. By the Judgment in the Quo warranto Sir J. S. ceaſed to be an Alderman, for the Corporation was diſſolved, and a Man cannot be an Alderman of a Corporation that has not a Being: After this Judgment there were new Charters granted, as appears by the City Act; It appears that he was an Alderman by the Charter of King James, for it is ſaid in the Return, that he was an Alderman from 13 Febr. 1688, to the 1 Auguſt 1689. The Reverſal reſtores all the Officers as they were when the Judgment was given; by the Reverſal all the Aldermen were reſtored that were Living: There's a particular time given by this Act of Reverſal for taking the Oaths by thoſe that were reſtored: 13 Paragraph, that all who were reſtored, ſhould take the Oaths the next Term after that Act of Parliament, and that was in Trinity Term that Year. Now having premiſed this,

Sir

Sir J. S. was an Alderman duly Elected before the Judgment, by the Judgment he ceased to be an Alderman: Afterwards upon an Incorporation by Charles the Second he was made an Alderman again, and remained so till the 1st of August. By the Act for abrogating the Oaths, he was obliged under the penalty of the loss of his Office, which he held, to take the Oaths by the 1st of August. Then the City Act of Reversal restores him to the Office, which he had at the time of the Judgment, and there's nothing that hinders him from being restored: The reason which they give in the Return is, That being an Alderman, he did not take the Oaths: This is no reason; for tho' it should be granted that 'tis a forfeiture, 'tis only of that which he then had; 'tis under Forfeiture of such Office, and that must be intended the Office which required him to take the Oaths: You will not extend it further than that which he had in actual Possession; he was not obliged to take the Oaths in respect of his Office, under the first Corporation; he had no such Office, he had neither jus in re nor jus ad rem: Suppose he had stood as he did under that old Corporation, and had no new Office, I think no body will say he was obliged to take the Oaths at all: The Objection, that the eighth paragraph excepts him. I Answer; That Sir I S. is not at all within this Paragraph, and if the first Clause did not extend to him, (for he needed no Confirmation) then the exception doth not extend to him; by the body of the Act he is restored, and he stood in no need of Confirmation: The confirming Clause was designed for those who had bought their Places, and to confirm these present Officers, those that were old ones were restored, and those that were new ones were Confirmed. The Office of Alderman could not be surrendred during the force of the Judgment, for there was no such Office in Being; this Exception can reach only to those that were confirmed, which were those that went from hand to hand. Suppose this Clause be taken to comprehend all, Sir J. S. had nothing whereby to disable himself from being restored, and if he were not disabled, he is restored: In rigour he hath forfeited the Office which he had, but shall the not taking the Oaths disable him from taking a New Office?

Mr Sollicitor, There's a great difference between a Right to the Possession, and a Right in Reversion; the Clause of Confirmation seems to qualifie the force of the first Reversal, Sir J. S. was excepted, and so removed. In truth Mr. Sollicitor was unprepared, and so made little Answer.

Chief Juſtice Holt. I muſt own, that when laſt ſpoke to, I did not underſtand this Caſe, nor what was intended in the Argument; but it now appears to have weight in it. By the Act of Reverſal, we are to take notice, that there was a Judgment, and therefore that they were deprived of all their Liberties by ſuch Judgment: You do not, Mr. Sollicitor, Anſwer the Writ, for that is to be reſtored to a legal Aldermanſhip, choſen by Cuſtom. Now that he could not have the 13 February 1688, he had no right to an Action, the Major, Comonalty, and Citizens had a Right, but Sir J. S. had no Right, he could bring no Action: An Alderman is an Officer within the confirming Clauſe, but that doth not reach this Caſe.

Hobbs qui tam, &c. *verſus* Young.

241.

SEE this Caſe before. The Court now Seriatim delivered their Opinions. ——— Eyres pro Quer' That this is a ſetting up and exerciſing of a Trade within the Statute, which he took to be a Politick Law for the accuſtoming Men to Labour and Induſtry in their Youth. At Common Law every Man might have Exerciſed, what Trade he pleaſed: Whether a private Cuſtom for exerciſing a Trade be taken away by this Statute, hath been a quære; but I confeſs the better Opinion ſeems to be that it is not. 1 Cro. 347. 516. 1 Saund. 312. 2 Bulſtrode 191. Here the Act is negative, and in the General, and reaches to all: The Trade of a Cloth-worker is exerciſed in the Defendant's Houſe, and muſt be exerciſed by ſome Body; and the exerciſe of it by Journey-men, and Maſter-work-men, or Overſeer for Hire, is not an Exerciſe of it by them, but by him that imploys them; he provided them Materials and Tools, and paid them Wages: By Law he is eſteemed the Trader, who is to run the loſs and hazard; the whole Mannagery was to be for his Profit, and the Work-men were to have no Advantage but their Wages. The Widow of a Tradeſman cannot uſe her Husband's Trade unleſs impowered by ſome Cuſtom, or have really ſerved as an Apprentice. Noy 5. Hutton 132. Palmer's Rep. See Rolls and Sholey, all the Arguments; and quære in that Caſe: Suppoſe it that uſing an Apprentice in a Trade, was an Exerciſe of the Trade; I do agree that the private Exerciſe of a Trade for the uſe of a Man's Family is not prohibited, 'tis only a private Service, but if not confined to the uſe of his Family, 'tis within the Statute, 8 Rep. 130. Hob. 211. 11 Rep. 54. As to his Exporting the Cloth, he is not Indicted for the uſe of a Trade of a Merchant, and the Exerciſe of making and working

working Cloth is the Offence, and the Exporting of it afterwards cannot purge that Offence, and so be concluded pro Quer.

Gregory ad idem. The buying of Cloth, and the setting of Workmen at Work in his House, is the Exercise of the Trade, 'twas all for his Advantage; it is the Master driving of a Trade by the Hands of a Servant; the Overseer and Master-workman is as much his Servant as any other. A Man may use a Trade by anothers hands, as in 1 Jac. 1. cap. 22. is implyed, when 'tis said, that if any Man by himself, or by any other, &c. And that shews it was their sense it might be managed by others. In Case of a Goldsmith, tho' he never works at it, yet his Selling makes him an user of that Trade, 2 Bulstrode 187. The Design of this Statute was to Encourage them who had been Apprentices. These Goods are bought by him to Merchandize withal, not for the use of his Family. It is not like the undertaking to build an House, and imploying Tradesmen for that purpose, that's not within the Statute.

Dolbin for the Defendant. He is not within the words of the Statute: The Trade of a Cloth-worker is a manual Occupation for he runs no hazard, he incurs no loss, he neither Buys nor Sells, he is only paid for dressing the Cloth, and so he is here: The Master-workman is the Man that exercises the Trade; If he had imployed these Workmen for the Working and dressing of Cloth for other Men, it might have been somewhat, but these Journeymen here have their Hire for working the Defendant's own Cloth: In the other Case 'tis but an Handicraft, for Hire, and here they have it: He imploys Clothworkers bred Apprentices, and gives them good Wages, and they have no more than if they had work'd in their own Houses. It is the interest of the Clothworkers only to work for Hire, and he is not concerned for any thing else: The Merchant is concerned for the Benefit and Honour of the Commodity, 'tis no damage to private Labouring Persons, and for the Companies Interest. It no ways influences or affects me at all.

Chief Justice Holt, pro Quer'. That he doth Exercise the Trade of a Clothworker; he imploys them only as Journeymen, and not as Principal Workmen in the Trade; the Master workman is imployed only as a Servant: Then the quære is, whether it be Lawful for a Merchant to Manufacture his own Commodity: Now he that uses one Trade cannot use the Trade of another for or about the Commodity used in his own Trade; a Coachmaker cannot make the Wheels for his own Coaches; A Wheel-wright cannot use the Trade of a Smith. Here the Defendant hath the same profit as if he work'd himself, he re-

ceives a Benefit, and Allowance from the Party to whom he ſells the Commodity; he doth receive the Gain belonging to another Trade. Noy 133. Hunton and Moore, there 'twas adjudged for the Defendant, becauſe the Dying was a part of the Felt-maker's Trade, and ſo uſed antiently. A Comb-maker was ſued for Exerciſing the Trade of an Horner: The Proof was, That he preſt Horns to make them fit for Combs; and yet held, that he did Exerciſe the Trade of an Horner. If the Defendant, being a Merchant, had wrought his own Cloth, he would have been within it; and then his imploying Journey-men, is the ſame thing; for the Journey man is not the Trades-man, and therefore he that imploys him, muſt be ſo: He receives the Profit; tho' he be not paid by another in particular for this, yet he receives the Profits, and runs all the Hazard, the Work-men have but their Hire agreed upon. The Words of the Statute are not confined to perſonal Handicrafts; the Words are ſetting up, and that may be by others, without working in it a Mans ſelf. The contrary Opinion would diſcourage many who have great Families; for they could not have that Profit, as if they did the Work themſelves for the common Rates, &c. Suppoſe a Merchant that would tranſport Shoes, and he ſhould buy Leather, and imploy Journey-men to make them; this Man certainly uſes the Trade of a Shoe-maker, tho' the Shoes were never ſold here, but tranſported; the Intendment of Law is, that he hath no Skill, and conſequently the End of the Statute is avoided Judic'. pro Quer'.

Newton *verſus* Trigg.

Inn keeper a Bankrupt.

SEE this Caſe before: Now the Court Seriatim delivered their Opinions.

Eyres pro Quer'. The Quere is, If an Inn-keeper may be a Bankrupt? I am of opinion, that neither of theſe Matters, nor altogether, can make him a Bankrupt; as to the Share in the Ship, that's nothing; though it be found that he had a Stock to Trade with in Potentia; yet if not ſo in Fact, 'twill not make him a Bankrupt, Sid. 411. 1 Cro. 282.

Being a Merchant, and giving over his Trade before the Debts contracted, will exempt him out of the Statute, much more if he had only a Stock, and never did Trade at all: Then for his being an Inn-keeper, and buying all that he vents in his Houſe. Inns are of Neceſſity, the Keeper is chargeable to the Publick, and compellable to lodge all Comers, 2 Rolls Rep. 345, he cannot refuſe whom he pleaſes, Hutt. 200. Rolls 2. Abr. 84.

84. I think good Law. Inn-keepers are compellable by the Conſtable to lodge Strangers; they may detain the Perſon of the Gueſts who eats, or the Horſe which eats, till Payment: They are compellable to keep the Aſſize, and to prevent Tipling, and the Statutes againſt Tipling extend to Inn-keepers; an Inn is but a great Ale-houſe, 1 Bulſtr. 109. They do not deal upon Contracts as others do, they only make Bills, in which they can't ſet Unreaſonable Rates; if they do, they are indictable for Extortion, which other Sellers are not; though he buy by Contract, yet he is no Trader, if he do not ſell by Contract; he buys only for particular Purpoſes, and deals but with particular Perſons. A Suttler to an Army, or a Steward to an Inn of Court, cannot be a Bankrupt, becauſe they buy only for particular Purpoſes: Ever ſince the Statute after ſo long a Tract of Time, which was from 13 Eliz. yet no Inn-keeper was ever endeavoured to be brought within the Statutes, unleſs once in Criſp's Caſe. Theſe Commiſſions are not to be encouraged, though deſigned for Good, yet in Execution are a Grievance: It is the duty of Judges to conſider tempora rerum, and not now to conſtrue Inn-keepers Bankrupts, when under ſuch Hardſhips by Soldiers, and therefore concluded pro Quer'.

Gregory ad idem, that an Inn keeper is no Bankrupt; he that keeps a Boarding School, doth (as much as an Inn keeper) buy Commodities, and vents them in his Houſe, and receives Money for them, and yet he may refuſe whom he pleaſeth; which an Inn-keeper cannot do; yet no Man will ſay he is within the Statutes, and ſo he concluded pro Quer'. Dolbin abſente.

Ch. J. Holt. Of the ſame opinion; an Inn keeper cannot be a Bankrupt; he is not taken notice of in our Law as a Trader for buying and ſelling, but as Hoſpitator, Caley's Caſe, 8 Rep. which deſcribes his Life, and manner of living; he is bound to provide for Travellers, and to protect and ſecure their Goods; he is not paid upon the account of the intrinſick Value of his Proviſions, but for other Reaſons; the Recompence he receives, is for Care and Pains, and for Protection and Security. He doth not buy and ſell, but only for this particular Purpoſe: By the Trade of buying and ſelling in the Statute, it muſt be intended ſomewhat of the ſame Nature with that mentioned before (viz.) Exchange and Barter, 1 Cro. 31. 46. Hutt. 44. Shoemakers and Tanners, they do not ſell the Commodities, but are paid for their Manufacture; they only make the Commodity uſeful, and the buying is with intent to make them fit for Sale; but the End of an Inn-keeper in his buying, is not to ſell, but only a part of the Accommodation he is bound to prepare for his Gueſts. A Farmer is not within the Statute, and yet there's not a Farmer

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in England, but buys and ſells, and that neceſſarily for the managing his Occupation as a Farmer. Where-ever a Man ſells under a particular Reſtraint and Limitation, he is not a Seller within the Statutes. Sir Tho. Littleton, Commiſſioner of the Navy, though he bought and ſold, yet becauſe confined to the Buſineſs of the Navy, he was held not within the Statute. The Caſe of the Gun-Founders in the Exchequer, was held not to be within it, becauſe a particular Undertaking. Suppoſe an Inn-keeper had a Farm, and has his Proviſions out of his Farm. Then in Criſp's Caſe, they all agree him out of the Statute; which is ſtrange, for he ſtill buys Man's Meat, which is all one: A School-maſter that takes Boarders, he buys great Proviſions, and gets great Credit, and yet he was never thought within the Statutes: And, I think, there's as much, or more Reaſon, to bring him within them, for he makes a Contract ad Libitum, which an Inn-keeper cannot; and ſo he concluded pro Quer', declaring Dolbin to be of the ſame opinion.

Dominus Rex *verſus Inhabitants* del *Hornſey*.

Evidence, no Common High-way on not guilty to a preſentment of Juſtice of Peace on view of a Way out of Repair.

PReſentment of a Juſtice of Peace, upon his View, of a certain way in the Pariſh out of Repair: The Defendant traverſes it generally non cul'. Jury finds ſpecial Verdict, that 'twas no common High-way, but that 'twas out of Repair. Mr. Darnel for the Pariſh argued, That this being found to be no High-way, makes it to be a void Preſentment, becauſe it is a limited Juriſdiction, Jones 355. Then ſuppoſing it were an Indictment, yet this might be given in Evidence upon not Guilty; and cited 10 Hen. 6. 16. Treſpaſs for breaking and entring a Warren; no Warren is an ill Plea, becauſe it amounts to the general Iſſue. C. J. Holt. You may traverſe, but that's only by Virtue of a particular Clauſe in the Statute; but the Quere is, if when you plead not Guilty, you do not admit it to be a good Preſentment, and that it was an High way. A Pariſh who is to repair of common Right, cannot plead not Guilty, and give in Evidence, that another ought to repair, but they muſt plead it ſpecially; for on not Guilty, you ſhall not throw it off on another; as was held by Hales, in the Caſe of Leather-Lane; but if a particular Perſon be indicted for not Repairing, where he is bound thereto Ratione tenuræ, there, upon not Guilty, he may give any thing in Evidence: Upon an Indictment of a Pariſh for an High way, if found not an High-way, 'tis not Guilty, as in the Caſe of Hamſtead for Green-lane; but in Caſe of a Preſentment, it goes in Avoidance of the Juſtices Juriſdiction, which this Plea doth

doth admit. Eyres, it is part of his Preſentment, that they ought to Repair, and then ſurely they may give it in Evidence as a Diſcharge. Adjornat.

Hopkins *verſus* Pace.

EJectment. Ancient Demean pleaded, that 'tis parcel of ſuch a Mannor, which is Ancient Demean, &c. Replication, that the Tenements in Narr. are pleadable at Common Law, abſq; hoc, that thoſe Tenements are parcel de Antiquo Dominico. Demurrer to it, & Judic. pro Def. Per Cur. the Traverſe is ill; you ought to have traverſed, that the Mannor was Ancient Demean, and that ſhall be tryed by Doomsday-Book; or elſe you ought to have traverſed, that thoſe Tenements were held of that Mannor.

Antient Demean pleaded. Replication.

Burdon *verſus* Burdon.

ERror on a Judgment in Dower in Durham; where after Imparlance, the Defendant pleaded detinue of Charters, and Demurrer, & Judic' pro Quer' thereon, and that Judgment now affirmed here per Cur'.

Dower, Detainer of Charters after Imparlance.

Edwards

Edwards *verſus* Thompſon.

What given in Evidence, on Aſſumpſit *infra ſex annos.*

ON a Tryal at Niſiprius before C. J. Holt. Held by him. Plea non aſſumpſit infra Sex Annos ante impetrat' brevis Original'. Repl' aſſumpſit infra ſex Annos impetit' brevis pred' (viz.) Such a Day, &c. there in Evidence you need not ſhew the Original; ſo in a plene Adminiſtravit, where the Date is mentioned upon Record, there you need not ſhew it in Evidence, tho' it were only by way of (viz)------

Dominus Rex *verſus* Hayes.

Indictment for forceable Entry.

INdictment for a forceable Entry, and diſ-ſeizing of J. S. of a certain Tenement, adtunc & adhuc Liber' Tenement' ipſius J. S. Exception taken, becauſe not ſaid in mention of the Jurors, to be charged ad &c. pro Corpore Comitatus, and held, it need not in a particular Inquiſition: Then urged to be Repugnant, for it could not be his Freehold after a Diſſeiſin, for then the Diſſeiſor was ſeized, and no Precipe could be brought againſt the Diſſeiſee, Allen 52. pacifice intravit & vi & armis Diſſeiſivit, held void and repugnant. Here per Cur' ill.

Phelps *verſus* Alcock.

DEbt on a Bond of Submiſſion: Award was to give a general Releaſe, &c. held good, though not ſaid of all Actions to the time of the Submiſſion; for per Cur' a Releaſe of all, to the time of the Submiſſion, is a good Performance.

Godfrey

Dominus Rex *verſus* Mayor *de Chicheſter.*

MAndamus pro Reſtitutione *R. F.* in loc' & Officium Unius Commun' Concilii ac Un' Alderman' Civitat' Ciceſter'. **Laſt Term they returned, that** Farrington non fuit Electus, & perfectus in locum & Officium unius Communis Concilii ac un' Alderman' Civitat' Ciceſtr'. **This Term I moved to amend the Return, becauſe they averr ſeveral Offices, and he might be choſen to the one, and not to the other, and therefore prayed to add** vel aliquem eor'; **it being only a Miſtake of the Clerk of the** Crown-Office, **his Inſtructions being general; and it was accordingly amended.**

Term. Mich.

3 Will. & Mar.

Dominus Rex *verſus* Mayor Civit' London.

MAndamus proſecuted againſt the Mayor and Aldermen of London, by Sir James Smith, ſurmiſing that, &c.

Vide le Caſe ſupra 708. Mr. Attorney General Treby; This Act for abrogating the old, and requiring new Oaths, is an Act of the 13th of February, 1688. for it is declared, the Seſſion began then. Sir J. Smith was an Alderman at that time, and ſo ought to have taken the Oaths, Paſch. 9 Jac. C. B. on the Statute of Pluralities. 21 Hen. 8. Any Perſon having a Benefice of 8 l. per Annum, &c. the Incumbent is deprived; then Appeals, then takes another Benefice, then the Deprivation is reverſed; the firſt is void, becauſe, ſays Holt, the Sentence was ſuſpended by Appeal, and conſequently he was in ſtill.

V. Rex & Glyde.

In the Lord Cobham's Caſe, there was an Attainder; and the Act was, That the Lands ſhould, notwithſtanding, diſcend to his Heir; tho' objected, that there could be no Heir, becauſe of the Attainder; yet held, That an Act of Parliament did make an Heir, and an Act of Parliament breaks through all Niceties. Sir James Smith might be choſen Alderman after the Judgment, according to the Cuſtom and Uſages of the City, for the Act takes notice of ſuch a Corporation then in Exerciſe: It takes notice of Officers choſen, and that Choice muſt have been according to the Cuſtom; the Corporation was not altered by the Judgment on the Quo Warranto; the Prayer of the Replication and Surreſoynder, were quod Excludantur, and the Judgment was not according to the Prayer, but only that they ſhould be ſeized in to the King's Hands. There never was ſuch a Judgment before in the World, and the Act of Parliament calls it Illegal and Arbitrary.

bitrary. It is contradictory in it ſelf, becauſe 'tis ſaid to be uſurpt, and yet ſays it ſhall be ſeized, that that which is not, and that which is Illegal, ſhall be ſeized into the King's Hands. The old Corporation could never ſubſiſt in the King's Hands upon a Seizure.

I agree, that the Liberties of the City might be ſeized into the King's Hands, and many Ancient Judgments there are of that kind; but the Senſe of theſe Judgments was only a ſeizing of the governing part, and the putting in of a Mayor or Cuſtos, not thereby deſtroying, but preſerving the Corporation, and they ſtill had the ſame Preſcription as before.

We find Pleas in the Huſtings coram Cuſtode & Aldermannis; the Writs of Reſtitution are obſervable; ſometimes 'tis Libertat' ſum. and ſometimes Majoritat. which ſignifies the ſame thing: Beſides, there never was any Execution of this Judgment: The Judgment is that it ſhall be ſeized, and it never was, there always was a Writ to execute it, 6 Edw. 2. Claus' Membr. 2. 3 Inſtit. 118. Rileys plac' Parliam. 168, 169, 277. There are Writs and Returns of Execution, and nothing was underſtood to be done or altered till the Writ of Execution; and that was one Reaſon why 'twas ſaid in the Act, that the Proceedings were Illegal, becauſe that there was Actual Execution without Writ. The Deſign of the whole Act throughout, was to ratifie all in Peace, and to confirm all that had come in, or been placed there upon Surrender or Removal; and Sir J.S. cannot be meant ever to take the Oaths at all, but as we ſay: For to ſay, that he is to take the Oaths the next Term after his Reſtitution, is very odd; for the Clauſe that appoints all Perſons to be reſtored ſo to take the Oaths, doth not include thoſe that are confirmed.

Serjeant Pemberton. I did not expect to hear any Argument; but ſurely the Act of Parliament Recites a Judgment of Seizure of a Corporation, into the King's Hands as forfeited.

C. J. Holt. There needs no Writ of Execution; for in a Quare Impedit, if Judgment be againſt the Incumbent, the Patron preſents without any more ado; and then if the Judgment did not ſeize the Corporation into the King's Hands, then what need of the Act of Parliament? and therefore I would hear my Brother to that Quere, if the Corporation were gon by this Judgment.

Afterwards Serjeant Pemberton again. The Quere is, Whether by the Judgment in the Quo Warranto, the Corporation was diſſolved? A Corporation is an artificial Body, conſiſting of particular Perſons, as Members conſtituent thereof, and like unto a natural Body to many Purpoſes; that which doth unite them, is the Liberties and Priviledges granted for that purpoſe.

It is but a Franchiſe granted originally to them by King or Parliament. In all Conceſſions of Liberties and Franchiſes, there is a Tacit Condition annexed to them, that they uſe them well; which upon doing otherwiſe determines them: An Abuſer forfeits them all, 20 Edw. 4. 5, 6. 2 Inſtit. 222. The way for the King to take an Advantage of ſuch an Abuſer, is a Quo Warranto, or Information in nature of it, that is the King's Writ of Right; here theſe Abuſers are examined, and then Judgment is either given for Acquittal, or for the King.

There are ſeveral ſorts of Judgments, as Seizure in Nomine Diſtrictionis, and there they remain for ever, unleſs they come and replevie them the ſame Term or Eyre, 2 Edw. 3. 28, 29. If there be a Diſclaimer, then there is a Judgment of Ouſter for ever; If he makes a Title and Judgment be for the King, then 'tis good quod Seiziantur, Yelv. 190. In all theſe Caſes the Party is immediately ouſted of the Liberty: Here it is quod Capiantur in manus Dom. Regis, and quod Capiantur in theſe Judgments is the ſame with, or Tantamount to Capiuntur, as in a Judgment quod recuperet verſus. We mention it, we ſay recuperavit; ſo manus amoveantur, 'tis amoventur, 9 Rep. 90. Raſtall's Entries 540. There it appears by the Award, that the Leet was preſently in the King's Hands; for he prays rehabere, & Conceditur, 9 Rep. 99. Mark Steward's Caſe, Cook's Entr' 538, 559.

Theſe other Words quod ceſſant, &c. are but expreſſio Rerum, &c. and for all the reſt, they are all included in the Words quod Capiantur, 15 Edw. 4. 7. That Book ſhews, that by the Judgment quod Cap' the Franchiſes are extinct. In Sir George Reynold's Caſe, held, that by the very Award of the King, he is out of Poſſeſſion immediately, and the Party is without any Writ: The difference is, where a final Judgment upon a Forfeiture, and where a Diſtreſs only. Bro. Quo Warranto, 6 Edw. 2. makes nothing againſt us; and the Caſe in Riley's Plac' Parliam' 168. that was Nomine Diſtrictionis, and not a final Judgment; that was a Seizure only to give the Biſhop Notice to come in and replevy it, and there ought to have been a Proclamation in every County, and therefore that was reverſed.

I will agree, that ſometimes there are Writs of ſeiſin, where the things taken into the King's Hands are of Profit to him, Cokes Entries 511. And the Writ is ita quod de proficuis reſpondent, which ſhews the Reaſon of it, 9 Rep. 98. But here 'tis otherwiſe, and therefore I conclude, that the Franchiſe which they claim to be a Corporation, was out of them, and in the King as Extinct; for 'tis ſuch a Franchiſe as the King cannot have by way of Uſer, and therefore it muſt be gon, and determined; and if

ſo,

ſo, the Corporation is diſſolved: That which ties them together is their Franchiſe, take away that, and they are ſo many ſingle Perſons: For the Franchize not only unites them, but diſtinguiſhes them, one as a Major and another as an Alderman, and the like; then that being gone, none of them are ſuch: You have the Judgments in the Courts here at Weſtminſter, that the Corporation was diſſolved, for there were ſeveral Tryals at Bar in each Court by Juries of London, which could not otherwiſe be. You have the Judgment of the Parliament in this very Act for Reſtitution; for in the ſecond Paragraph they ſay, that they were deprived of their Liberties, and what are theſe Liberties but what is mentioned in the firſt Sentence to be a Body Politick? Then it ſays they ought to be reſtored; then it ſays, that for ever hereafter they ſhall be a Corporation. All which proves the Corporation gon by the Judgment: Then it makes a Proviſion for the Parties that are to be reſtored, that they are to take their Oaths within convenient time, which ſhews that they were not to take them by th'other Law for abrogating, &c. Mr. Solicitor General Somers.

That a Corporation may not be diſſolved or forfeited, this was never thought of at the time of the Diſſolution of the Abbies; the Majority of the Judges in the Lords Houſe were of this Opinion, that it could not be, and in truth 'tis a Quære too big to be determined or debated in any Court but that one. Sir Robert Sawyer never intended it ſo, and ſo declared himſelf; the reſt of the Judgment quod Major', &c. Capiantur pro fine ſhews it, for they could not be taken for a Fine, when they were actually diſfranchiſed by Operation of Law upon the firſt words. In all thoſe Ancient Seizures the Cuſtos and other Governors were put in to act in the Corporation for the preſervation of the Corporation. Riley 277. There 'tis reddit' civitat' pred' civibus pred. Not one Town Corporate in England hath ever loſt their Preſcriptions by any ſuch Seizure during all the Seizures of the City; the courſe of the City Cuſtoms went on as before, Maynards Ed. 2. 16 Inter. memorand' Scacc'.

The Tryals at Bar mentioned, were not upon that Debate as ſuppoſed. Chief Juſtice Holt, The Court may Award a Tryal at the Bar, and a Venire, but then the Parties ought to claim their Priviledge, and if they do not, a Tryal at Bar may now be, therefore that is not much.

The Act hath declared the Judgment and Proceedings Illegal and Arbitrary, ſuch a thing as had not a legal Form, and therefore void, and Orders the Record to be vacated.

They

They might be deprived of their Liberties by force. The Statute Declares all Charters of Incorporation since the Judgment to be void; now that could not be, but because the Old Corporation was in Force: Those who had places at the time of the Judgment are Confirmed, and nothing can be confirmed that hath not a Being, this seems contrary to the Writ, because that says, he continually behaved himself well in the Office till Removed.

You cannot take notice of the Judgment, any otherwise than as it is recited in the Act for Restitution, and then 'tis against them, or in that part of the Return, and then 'tis void, and the rest well enough; here it sufficiently appears, that he occupied the Office from the 13th of February to the first of August, and that obliged him to take the Oaths which he hath not.

Afterwards the Judges delivered their Opinions severally.

Eyres, The Return is sufficient, and no Peremptory Mandamus ought to go to restore Sir J.S. The difficulty lies upon the Act for restoring the City Privileges: If this Act had not been made, we could not have taken notice of any Judgment against the City or any new Incorporation, for then it would have been only a neglect of taking the Oaths.

There's nothing in the Act that makes the Return frivolous or inconsistent; the Preamble recites the Franchizes seized into the King's Hands as forfeited; the Judgment against the City is not to be taken notice of by us any farther than this Act Recites it; By the Judgment, the Corporation was not dissolved, and it still subsists, and Sir J. S. still continued an Alderman, and we must take it as one intire Proposition, that he was an Alderman before that time Chosen.

Now the Act calls the Judgment Illegal and Arbitrary, and 'tis but a Judgment of seizing into the King's Hands, which is impossible: A Corporation is only a Capacity, and rests only in intendment of Law, and cannot be seized, so as to bring it out of the Members into the Crown; for what the King cannot have, for that a Judgment of Seizure cannot be had, 2 Cro. 260. 15 Edw. 4. 7. Not a Judgment of Seizure for a Court-Baron, but only of Ouster. I do agree there are several Presidents of Judgments, where quo Warranto's are brought against particular Persons for claiming to be Corporations, but then the Judgment is for Ouster quod nullo modo intromittant: There are Judgments of forfeiture of Franchises, for they are distinct, and the Corporation it self cannot be forfeited, Palmers Rep. In the Case of the Corporation of Dublin all the Liberties were Seized, but as to the Corporation it self there was only a Cur' advisare vult; there

there have been ſeveral Seiſures of Franchiſes, which have been Replevyed; now that could not be, unleſs there were a Corporation to Replevy them.

I do agree if the Corporation could be ſeized, 'twould be diſſolved becauſe it can't ſubſiſt in the Crown, for then he could not reſtore it, tho' he might create a new one; there is in conſtruction a Priority of the being of the Corporation, to that of having Franchiſes: Offices and the power of chooſing others may be ſeized into the Kings Hands, tho' he can't exerciſe them, and he may regrant them, for they ſubſiſt to be granted out again, otherwiſe of a Corporation, Nevill's Caſe in Plowden.

Now there may be a Corporation in Actu Signato, tho' not in Actu Exercito, becauſe the power of acting as a Corporation is ſtopt; a Corporation may ſubſiſt, tho' it hath not the power of chooſing Officers, and the King may have that, as 10 Rep. 33. Sutton's Caſe.

The enacting Clauſe here ſays the ſaid Judgment, and that refers to the Preamble, which is only for ſeizure of the Liberty and not ſaid of what, and we cannot take notice what the Liberty was that was ſo ſeized, and then it follows, That Sir J. S. continued an Alderman; nor can we take notice that there was a new Charter of Corporation, for that only makes all ſuch Charters void; for th'other Clauſes they confirm none but ſuch as come in upon the Surrender; now here th'other Clauſe only enlarges the time of taking the Oaths to them who were confirmed or reſtored: No peremptory Mandamus. Gregory of the ſame Opinion; we muſt take the Judgment to be ſuch as it is mentioned in the Act, and the Judgment there is not ſuch a one as diſſolves the Corporation: It is not the liberty of being a Body Politick that is ſaid to be ſeized, but the liberty of them being a Body Politick was ſeized, the Corporation could not be ſeized, but whether could or not, I think no peremptory Mandamus ought to go.

Dolbin dubitans.

I am very doubtful whether the Court can't grant a peremptory Mandamus or no: We muſt take this as a true Return; If this Act had been penned plainly that by the Judgment the Liberty of the Corporation was ſeized into the King's Hands, then 'twere an ill Return. I think a Corporation may be ſeized into the King's Hands, tho' it cannot ſubſiſt there; it is not plainly expreſt, that the Liberty of being a Body Politick ſhould be ſeized into the King's Hands, then the Franchiſe of having Aldermen had been ſeized: The Act of Parliament is the only ground we have to take notice of ſuch a Judgment, and 'tis doubtfully expreſſed whether the Body Politick be ſeized into the King's Hands, and therefore I am not willing that a peremptory Mandamus ſhould go.

Ch. J.

Chief Juſtice Holt. The Return agrees him duly Elected according to the Ancient Cuſtoms of the City, and that he continued ſo, and that he did not take the Oaths. If this Act of Parliament were not in the Caſe, it would be a good Return without all queſtion: The Queſtion is, Whether the Return is not contrary to what is particularly recited in the Act of Parliament, which is now a publick Act? There's no Office as Alderman now, but an Adviſer in a Corporation, and the being of an Alderman depends altogether upon the Being of the Corporation: Whether by this Judgment, as 'tis recited, we cannot conſtrue this Corporation to be diſſolved. I will not give my Opinion concerning the Effect of the true Judgment. I am of opinion, that a Corporation may be forfeited, if the Truſt be broken, and the end of the Inſtitution be perverted; then, whether a Judgment to ſeize a Corporation doth diſſolve it? I agree it not ſo proper a Judgment, for the King cannot have it. There are three ſorts of Liberties; a Liberty granted from the Crown, which doth ſubſiſt in the Crown; a Liberty created de Novo, and doth exiſt notwithſtanding it be forfeited; and another that cannot exiſt but in the perſons to whom it is granted. In the firſt Judgment, to ſeize or ouſt is proper, for then it belongs to the Crown; if the other be forfeited, Judgment is for a Seiſure, and no more; for notwithſtanding the Forfeiture, it exiſts in the Crown: For the latter, Judgment is proper to be given only for Ouſter, and that is the proper Judgment. I do not think that a Judgment for Seiſure, where 'tis a final Judgment, to be ineffectual: And the Judgment for Seiſure quouſq; &c. in caſe of Non-appearance proves it, 15 Ed. 4. 2 Inſt. 270. It is no Argument to ſay, that becauſe the King cannot be the Corporation, he cannot ſeize; for the meaning of Seiſure, is to take it from him that had it: The Reaſon I go upon is this, that there does not appear any Judgment actually given, that the Franchiſe of being a Corporation ſhould be ſeized.

The Liberty of the Mayor, Commonalty, and Citizens of London, is not the Liberty of being Mayor, Commonalty, and Citizens: For in the Dean and Chapter of Norwich's Caſe, 3 Rep. Jones 166. Fitz. Tit. Corporations 58, 78. adjudged, That the Surrender of the Liberty of the Corporation, was no Surrender of the Corporation: No more ſhall a Judgment of ſeizing the Liberties of the Corporation, ſeize the Corporation it ſelf. I muſt agree, that if a Corporation to a particular purpoſe, be diveſted of all its Powers and Liberties, 'tis gone, as in the Caſe of a Charity. But now for another Corporation, they have Power to make By Laws, and govern the Place; tho'

they

they have their Liberties ſeized, yet they ſtill remain a Corporation, and might act as ſuch: And that was the reaſon of the Dean and Chapter of Norwich's Caſe, that they were uſeful ſtill, as aſſiſtant to the Biſhop; 'tis not the privilege of the Corporation to govern and make By-Laws, but 'tis eſſential to its Being, 'tis part of the Conſtitution. The Aldermen are part of the Corporation: The Words of the Act are, the Liberty of the Mayor, Commonalty, and Citizens, being a Corporation, that is improper, but we muſt conſtrue it to be the Liberties of the Mayor, Commonalty, and Citizens, who are a Corporation.

The Quo Warranto ſhould have been brought againſt the Burgeſſes and Inhabitants of the Place; 'tis ſtrange that it ſhould be brought againſt the Corporation; we cannot conſider this Judgment otherwiſe than as the Act doth recite it, no peremptory Mandamus. There is another Clauſe, upon which another Writ doth lye, but we are not to adviſe.

Gumley *verſus* Falkingham.

PRohibition: There was one Mill for Corn, for which a Modus was paid, and the Party adds two new Mill-ſtones; the Parſon ſues for Tythes: Sir Thomas Powis argued, That Tythes are payable for Corn Mills cont' 2 Inſt. 621. and cited 1 Rolls Abr. 641, 642, 652, 656. 1 Rolls Rep. 405. 3 Bulſtr. 212. N. B. 51. 2 Inſtit. 652. Littleton's Rep. The Tythes of the Toll is another Profit ariſing out of the thing, not to the Owner, but to the Miller; 'tis a new Increaſe in the Hands of another Perſon. Be it predial, perſonal, or mixt, the Court-Chriſtian hath Juriſdiction, 2 Inſtit. 490. Now here the Profit is increaſed, the Modus ſhall not extend to the new Profit, 2 Cro. 429. Right of Eſtovers ſhall not go to new Rooms or Chambers newly erected, 1 Rolls 641. Num. 1. 652. Num. 1, 2, 3. 1 Brownlow 31.

Modus for a Corn mill, and two new Mill ſtones added.

Mr. Wright e cont'. 'Tis but perſonal, the fulling Mills are yielding only of a perſonal Tythe; and the Reaſon is the ſame for this, that there ought not to be a double Tythe, 2 Inſtit. 621. 657. Before the Statute of Articuli Cleri, no Tythes were payable for ancient Mills, 12 Rep. 26.

C. J. Holt. The Tenth Toll-diſh is the Tythe; it is not the Owner of the Mill, nor the Owner of the Grain, that hath the Profit, but the Miller; this is a predial Tythe, becauſe payable

Tythes for a Corn-Mill predial and payable by the Miller.

Rectori Loci, i. e. where the Will is, not meerly where the Party lives. It ſeems reaſonable, the Parſon ſhould have the tenth Toll-diſh, Adjornatur.

Dominus Rex *verſus* Evans.

Mandamus to reſtore one to Clerk of the Peace.

MAndamus to reſtore him to the Office of Clerk of the Peace, for the County of Denbigh. Returned, that he was made Clerk of the Peace by A. B. Cuſtos; that he was removed; that a new Cuſtos was conſtituted; that he refuſed to deliver the Rolls to the ſaid Cuſtos; that Articles were exhibited againſt him in Seſſions; that he there alſo refuſed; that thereon he was removed by order of the Juſtices, according to the Statute of Will. & Mary.

Juſtices cannot diſcharge the Clerk of the Peace for a Fault, without Articles in Writing.

Sir Will. Williams moved divers Exceptions: That the firſt Refuſal the 2d of May, was pardoned, and for that he could not be removed: That for the laſt, nay for neither of them, was there any Articles, or Complaint in writing, according to the Tenor of the ſaid Act. Serjeant Pemberton anſwered nothing as to the Pardon, but urged that the Word Articles did ex vi termini import a Writing: But the Court e cont. Nothing is to be intended in a Return to a Mandamus: And C. J. Holt declared, that the Juſtices can diſcharge no Clerk of the Peace for a Fault appearing in Court without Articles in Writing; and afterwards for want of Writing, a peremptory Mandamus was granted.

Haynes *verſus* Rogers.

CAſe, for that the Defendant tali die & loco Falſo & Malitioſe ei crimen feloniæ impoſuit: Moved, that it was too general and uncertain, and per Cur' no other Act held neceſſary to be alledged; but yet Words importing a Charge of Felony, will not be Proof of it; there muſt be Proof of ſome Act. Judic. pro Quer.

Dominus

Dominus Rex *verſus* Parſons.

DEfendant was outlaw'd for Murder of one Wade in Eſſex, for which he had fled and continued in Holland till the Revolution; and then appearing publickly at White-hall, he was at laſt by ſome of that County complained of to the C. J. and by him committed to the Marſhal, and reverſed his Outlawry, and was tryed and convicted of Murder, and condemned: Then he pleads a Pardon, reciting the Indictment and Attainder, the King pardons it by the Words murdrum & felonicam interfectionem, for the which he had procured a Writ of Allowance, and that per Holt is neceſſary, for the Pardon of Murder is conditional, viz. the finding Sureties, and there muſt be a Writ of Allowance, ſignifying the Performance of that Condition, and 'tis not merely at the Peril of the Party; for we ought not to give a final Judgment upon Ignorance of its Performance. Now no Non Obſtantes are uſed, which always formerly were held ſufficient, for the Statute that requires it.

Writ of Allowance on Pardon of Murder.

However, Sir Francis Winnington oppoſed the Allowance of the Pardon; for that in this Pardon the King ſeems to be informed of nothing but the juſt Proceedings of this Court in the Attainder, and then comes immediately Sciatis nos, &c. Here's no reaſon for Mercy ſo much as furniſhed, 3 Inſt. 235. Coke ſaith, that he never ſaw any Pardon of Murder by expreſs Name. When Abel was ſlain by Cain, 'tis ſaid according to ſome Readings, that his Offence was too great to be forgiven: And Selden ſaith; the Command, That by whom Man's Blood is ſhed, by Man ſhall his Blood be ſhed, extends not only to the Jews, but to all the World, Vide Barlow's Caſe of pardoning Murder e contra'.

Since Chriſtianity was planted in England, Murder was always a Crime beyond Mercy. In the Regiſter, where are the Writs for Allowance of Pardons, there are Forms for ſuch Caſes where is no Malitia præcogitata, but there's no ſuch Writ of Allowance for Murder; King Alfred's Letter is to the ſame purpoſe.

The ancient Book of Oaths hath the King's Coronation Oath in it, which is to ſhew Mercy where Mercy, &c. but here is nothing alledged in the Patent to found Mercy, no Certificate of the Juſtices, no Report of Hardſhip, nothing but only a Recital of a wilful malicious Murder, and a juſt, legal Attainder thereof: In Rickabie's Caſe 'tis a Quære, if the Word Homicide could pardon Murder; but Murder is not inſerted, nor ever was, 1 Edw. 3. 24.

Statute of Glouceſtr. Fleta lib. 1. cap. de homicid. Statute of 4 Edw. 3. 10 Edw. 3. 23. Cotton's Records, 17, 18. 14 Edw. 3. 15. 27 Edw. 3. cap. 2. 13 Rich. 2 cap. 1. Styles 325. Stamford 101. They all do take it, that there muſt be a Non Obſtante for it; now by the Bill of Rights, no Diſpenſation is to be allowed to any Statute, 2 Hen. 7. 6. Without a Clauſe of Non Obſtante 'tis void, vide Raſtall's Entries, 455, 456. and Stamford 101, 102. There muſt be a Non Obſtante to get off theſe Statutes; 'twas never pretended to be good without one, Vide Dudley's Caſe, 20 Car. 2. Sid. 366. Here's neither Suggeſtion nor Report, nor non obſtante, and the King could not pardon Murder at Common Law; the King is but a Truſtee, and all the people have an Intereſt in the Juſtice of the Realm.

Murder par-don'd.

C. J. Holt. The Power of pardoning all Offences is an inſeperable incident to the Crown and its Royal Power; 'tis as much for the good of the people, that the King ſhould pardon, as that he ſhould puniſh. If the Statute of Edw. 3. takes away the power of pardoning Murders, it takes away his power even in Treſpaſſes: He is the beſt Judge of his own Mercy: The Statute of 13 Rich. 2. is, That he ſhall not pardon by general Words; but here is a Recital of the Fact; the 16 Rich. 2. is a Repeal of part of the 13. as a Grievance to the people; and for your Doctrine about Cain, he was pardoned for his Life. Dolbin, The King at Common Law had power to pardon all Offences; and if Murder be named, there needs no Non obſtante. Eyres. Homicid. & felonic' interfection. with a Non obſtante, was always held good, and now with the Fact recited; and the Word Murdrum is good without it; and ſo the Pardon was allowed per Cur.

Glover *verſus* Cope. Entr. Paſc. ult. Rot. 267.

A Copy-holder makes a Leaſe, the Leſſee Covenants to repair, the Copy-holder ſurrenders to the uſe of *A.*

COvenant: The Caſe was, A Copy-holder in Fee makes a Leaſe for Years, with Covenants for Repairs; the Copy-holder ſurrenders to the uſe of the Plaintiff, the Plaintiff is admitted; and then brings an Action of Covenant againſt the Leſſee; he pleads an Aſſignment of his Term to J. S. The Plaintiff demurs.

Pl.

Mr. Northey pro Quer'. If this were a Free-hold, 'twould be agreed to me, that the Action lies at Common Law, according to Brett and Cumberland's Case, 2 Cro. And there's no difference between this and that, Hob. 177. A Copy-hold Rent is incident to the Reversion, and passes by a Surrender of it, 3 Cro. 361. 4 Rep. 27. b 21. b. When a Copy-holder in Fee surrenders, the Lord is but an Instrument, and the Estate of the Surrenderor remains in himself, and the Surrenderee is an Assignee of the Estate which he had: 'Tis true, if a Copy-holder for Life surrenders, that is drowned, and the new Estate comes out of the Estate of the Lord, but if in Fee 'tis otherwise. By the Common Law, an Assignee of the Reversion might bring Covenant, because it runs with the Land, Spencer's Case, 5 Rep. 1 Rolls 360, 362. Fitzh. Tit. Coven. 7, 13. Bro. Tit. Covenant 32, 39. 1 Cro. 221, 222. Owen 152. 2 Bulstr. 281. 1 Saund. 240. Here the Action is brought against the Lessee after Assignment; and therefore, though he be chargeable, neither upon the Estate, nor Contract, yet upon his express Undertaking, Bro. Tit. Coven. 32. Then he is within 32 H. 8. 34. A Copy hold is within the Mischief of the Act, as well as the other Case of a Free-hold; this is a Remedial Law: There is the same reason why Copy-holders should be within the Statute, as within those of Champertie, 4 Rep. 21. 3 Rep. 8, 9. This Construction alters not the Service or Term, or Customs of the Mannor, 1 Instit. 33. And there is no Authority against it: The Case of Platt and Plummer, 1 Cro. 24. is a Quære, but no Judgment in the Case; though 1 Cro. 44. it be said to be not within the Statute, yet no Authority for it: Then for the Case of Beale and Brasier, 2 Cro. 205. Yelv. 222. That a Copy-holder cannot enter for a Condition within that Statute; that was a Case without Argument or Debate; though it may not extend to Conditions and Entries for the Breach of them, because of changing the Possession to the Prejudice of the Lord, yet it may extend to Covenants.

When it is admitted, the Lessee assigns his Term. A. may bring Covenant against the Assignee for not repairing

Mr. Cooper e cont'. The Action doth not lye at Common Law, for 'tis brought by a Surrendree of Copy-hold Land against a Lessee after Assignment. The Free-hold is still the Lords, and the Lands continue still the Demean of the Lord: For if a Copy-holder in Fee takes a Lease, though but for 3 Years, yet the Copy-hold is drowned, 3 Rep. 8.

Then

Then for the Statute, in Plowd. 174. It admitted a Debate, Whether any but the Grantees of Reversions from the Crown were within it? So far were they from thinking the Statute did include Copy-holds This is no Reversion; for the Party comes in from the Lord; and like the Case of Chaworth and Phillips, Moore 876. Lessee for 20 years, makes a Lease for 10 years, upon Condition: Then the Lessee for 20 years, surrenders to him in Reversion; he in the Reversion shall not take Benefit of the Condition, because he is in of an Estate paramount. Then it appears by the same Case, that this Stat. is not further extended than the Purview; for if Condition be to be void, if 10 l. be not paid at a certain day, the Grantee of the Reversion cannot enter for the Condition broken, because 'tis Collateral, ibid. v. 4 Rep. 29.

Nor is there any Answer given to the Cases of Entry for Condition, for a Covenant is more Collateral than a Condition; for a Condition is annexed to the Estate, but Covenants are foreign; and therefore if it doth not extend to Conditions, much less will it to Covenants.

C. J. Holt As to the Common Law, I doubt it lyes not; but as to the Statute, it seems within it; however, let's hear another Argument, v. Rolls Rep. 360.

Afterwards Serjeant Levins pro Quer. This Covenant is maintainable at Common Law, 42 Edw. 3. 3. 9 Hen. 6. 6. 5 Hen. 7. 19. and Mich. 25. Car. 2. in Scacc' Lower and Williams. A. seized in Fee makes a long Lease for years, and Covenants with the Lessor and his Executors to repair; yet held, the Heir might bring Covenant, upon the reason of Sacheverell and Frogate's Case, because 'twas plainly intended, that the Term was to last longer than his Life, and consequently the Covenant shall go with the Land on both sides, 5 Rep. 35. The Covenant shall bind and follow the Land, 1 Cro. 137. Baylie against Hughes. The Assignee of a Term shall have Benefit of a Covenant, to deduct Rent upon Disturbance in perception of the Profits, because it goes with the Land: But you say, if it goes with the Land, the Assignee is chargeable, and not the Lessee: For that I answer, That if the Covenant goes with the Reversion, then let the Assignee do what he will, tye Lessee is bound by his own Covenant notwithstanding his Assignment; and so are the Cases of Batchellor, and of Norton and Ackland, 1 Cro.

But then they say, these Actions are brought by the Lessor himself upon the Account of Privity of Contract: Now, I say, that if it be Incident to the Reversion, the Lessee is still bound, according to Brett and Cumberland's Case, 2 Cro. 2. If not at Common Law, yet we are within the Statute of 32 Hen. 8. Beale and

Brasiers

Braſier's Caſe, 2 Cro. is adjudged againſt me, but that was without the due Conſideration it deſerves; the ſame in Rowden and Maiſter, 1 Cro. 44. was only ſaid by ſome arguendo, but that Caſe hath not ſtood; and contrary thereto, it hath been held, that a Copy-hold may be intail'd, and ſo held in the Caſe of Sir William Wentworth. In Platt and Plummer's Caſe 'twas found on a ſpecial Verdict, and no Judgment in it: The Tenant-Right Eſtates in the North, which are not Free-holds, will be within the ſame Conſideration as Copy holds. It has been a Queſtion; Whether the Grantee of a Reverſion upon a Leaſe for years, were within the Statute, but that hath been held to be ſo, Littl. Sect. 77. Kelway 77. Copy-holds were not of that uſual regard at the time of making this Statute of Hen. 8. for before that, 12 Edw. 4. 7. A Copy-holder ſhall have Aid of his Lord; ſo that they were of value then, and are ſo ſtill, ſince the Statute, Owen 73. 1 Inſt. 59. 4 Rep. 23. 22. The Laws which are for general Repoſe and Relief, ſhall extend to them, Moore pl. 276. Within the Statute of Limitation, 3 Rep. 9. Haydon's Caſe: This Statute of Hen. 8. ſpeaks of all Grantees of Reverſions, which is general, and includes all: Whereas theſe Statutes that have been conſtrued not to extend to Copy-hold Lands, make mention only of Lands, Tenements, and Hereditaments, which rather ſhould be reſtrained to Common-Law Lands, 4 Rep. 26. held within the Statute of Pretended Rights, &c. And that was an Act made at the ſame Seſſion of Parliament with this in Mary Podger's Caſe, 9 Rep. within the Statute of Fines, 6 Rep 37. Dean and Chapter of Worceſter's Caſe adjudged within the Stat. of 13 Eliz. for Reſtraint of Eccleſiaſt. &c.

Mr. Rowe cont'. At Common Law there can be no great doubt, but that this Action doth not lye, and 'tis not within the Statute; for notwithſtanding all the favourable Opinions which have been given for Copy-holds, 'tis but an Eſtate at Will, and can paſs only by Surrender to the Lord, and he to regrant it; and the Surrendree is in in the Poſt, 22 Aſſiz. 27, 37. 3 Cro. 666, 606, 622. 1 Rolls abr. 509, 511. This Term is forfeitable to the Lord of the Manor; the Copy-holder, though he hath a Fee, yet he is in nature of a particular Tenant. V. Moore 876, and 159. Spencer's Caſe reported there by the Name of

and upon the Statute only of Hen. 8. Thoſe Statutes which concern or affect the State of the Land, have been conſtrued not to extend to Copy-holds; as the Statute which gave an Elegit; Acton Burnell did not. 1 Sid. 11. 'Tis true, Statutes which regard criminal Matters, have been adjudged to reach it; he cited 1 Leon. 97. Owen 37. The Caſe of Braſier, 2 Cro. is ex-

preſs,

preſs, and that of 1 Cro. 24, 25. Tho' there's no Judgment in it, yet it ſhews the Plaintiff could not ſpeed in it, and conſequently the Opinion of the Court was againſt him.

C. J. Holt. This is within the Statute as much as any thing can be within the Equity of a Statute. Dolbin, The true Reaſon why at any time Copy-holds are adjudged out of ſuch Statutes, is for the Damage to the Lord, and there can be none here; now an Eſtate Tayl may be of it, and by Cuſtom dock't by a Surrender; and ſo without ſolemn Argument at Bench, Judgment was given pro Quer'.

Dominus Rex *verſus* Mayor & *al'* Civitat' Briſtol.

One outlaw'd can't bring a Mandamus.

A Mandamus generally to reſtore Rowe to the Office of Sword-Bearer to the Mayor of Briſtol, and Weigher, &c. Return of Removal for Abſence and Non-Attendance on the Mayor in diverſis progreſſibus ſuis per tale tempus, &c. and an Outlawry of him ſuch a Term, &c. Per Cur'. The Abſence is no Forfeiture of his Place, becauſe not ſaid to be in his Progreſſes as Mayor, and Abſence in his Perſon is no Forfeiture: But however he cannot be reſtored, becauſe of the Outlawry, for that is a Diſability, and he muſt ſue out a new Writ reciting the Outlawry and its Reverſal, for we cannot otherwiſe take notice of the Reverſal ſince; tho' it did not forfeit his Office, yet 'tis a Diſability: A Parker outlaw'd could not bring a Writ of Aſſize, and afterwards he brought ſuch a ſpecial Writ, and we amended the Return, &c.

Jones *verſus* Bean. V. le Record.

A Grant of the Office of Official to two, and the longer Liver.

The Caſe upon a ſpecial Verdict was, That before the Statute of primo Eliz. the Biſhop of in Wales, uſed to grant the Office of the Official or Chancellorſhip to two Perſons, and the longer Liver of them: That the late Biſhop made ſuch a Grant to J. S. and the Plaintiff conjunctim & diviſim, and to the longer Liver of them: That 'twas confirmed by the Dean and Chapter: That J. S. dyed; that the preſent Biſhop made a new Grant to the Defendant, and he receiv'd 20 l. of the Fees, &c. Thompſon; This Grant is void at Common Law, for that 'tis a Judicial Office, and cannot be granted to two:

And

And ſo is Auditor Curle's Caſe, 11 Rep. For how can two Perſons be one Officer? Suppoſe one doth abſolve, and another doth excommunicate. If it were a good Grant before the Statute, then I muſt agree it not reſtrained; But in Walker and Lamb's Caſe, 1 Cro. 258. ſuch Office is not grantable in Reverſion. Per Cur' here in this Court were two Prothonotaries, Henley and Whitaker; 'tis true, the Common Pleas Cuſtom will not warrant two Perſons to make one chief Prothonotary, the Uſage doth it: Here are two Perſons make one Cuſtos Brevium, Goodwin and Foulkes; there was an Uſage for this in ſeveral Places, and then good within 1 Eliz. As to the Sheriffs of London, when one dyes, the other cannot act; he is no Sheriff; he muſt wait till another be made; Uſage makes that. The Inconvenience here is not ſo great, and the Uſage having been ſo, I know not why it ſhould be otherwiſe than good: The only Reaſon why there cannot be two chief Prothonotaries is, becauſe of the Uſage. The Ordinary may come and judge when he pleaſes, and therefore difference in Opinion here is no Inconvenience: The Chancellorſhip of the Arch Deaconry of Rippon is ſo as this, and ſo is that of Lincoln. Judic. pro Quer'.

Biſhop may grant the Office of Official to two.

Beake *verſus* Kent. Entr. Trin. ult. Rot. 377.

INdebitatus aſſumpſit for Wares ſold, againſt Defendant as Executor of &c. Defendant pleads three Judgments, and no aſſets ultra. Plaintiff replies, that there is ſo much due on each Judgment, and no more, and that he hath Aſſets ultra theſe Sums, & ſic continuat per fraudem. Defendant rejoins, that they are all for juſt Debts, abſq; hoc that he permits them, or any of them, to be kept on foot by Fraud. Plaintiff demurs, becauſe the Traverſe is to all, or any; whereas it ſhould have been ſeveral to each Judgment. Tremayne. This is an ill Rejoinder, and ſo was the Caſe of Wakehouſe and Symonds.

Five Judgments pleaded. Repl. that ſuch a one was paid ſo much of his Debt, and ſo ſeveral Replications to each; and that they were ſeverally continued by Fraud. Rejoynder, that the Judgments aforeſaid are unſatisfied, and does not ſay ſeverally, that they were not kept on foot by Fraud: He cites 1 Rolls abr. 802. where ſeverally anſwered, and Sams and Mercer's Caſe, 2 Cro. 625. Several Judgments pleaded, and concludes prout patet per Recorda pred. and ill, for he ought to have concluded ſo to each. Mr. Dee e cont'. If this Pleading be faulty, the Replication commits the firſt Fault; for they might have

replied Fraud to any one in particular, and that would have done their Buſineſs. Hancock againſt Proud, 2 Saund. This is well enough, Sid 39. 15 Hen. 7. 10. Dyer 181. and our Rejoynder is well enough, for we traverſe abſq; hoc, that he kept them vel aliqu. eorum, &c.

Action againſt an Executor who pleads ſeveral Judgments, the Plaintiff may reply to them ſeverally, or generally, they were kept on foot by fraud

C. J. Holt. The Plaintiff hath Liberty of replying to them all ſeverally, as is Treſham's Caſe, 9 Rep. But you need not averr Fraud to every one; if to any, it's enough to avoid their Bar: Or you might generally have ſaid Judic. ſeparalia pred. were kept on foot by Fraud. The Cauſe of the Exception in Wakehouſe and Symond's Caſe, was, Becauſe he did not ſay nec eor. aliqu. And I thought that hard enough; for in a general Iſſue, you muſt ſay nec eor. aliqu. but in a ſpecial Bar you need not; for if falſe in part, 'tis ſo in the whole. The Caſe of Waſte Dyer 115. for cutting 20 Oaks. You muſt plead you did not cut them, or any of them, but in Debt on Bond, if Breach be that he did cut 20 Oaks, it's enough to ſay he did not cut them modo & forma, Robſert againſt Andrews, 3 Cro. 83, 84. Adjornat.

Lewis *verſus* Preſton.

Plea, that Letters Patents became void.

DEbt on a Bond, Condition to pay ſo much Mony yearly, while ſuch Letters Patents are in force. Plea, that from ſuch a time, till ſuch a time, he did pay, and that then the Letters Patents became void, and of no Force. The Plaintiff replies, that they were in Force, Et hoc petit quod Inquiratur per patriam. Defendant demurs; and per Cur' the Plea is ill, becauſe it doth not ſhew how the Letters Patents became void.

Hannam *verſus* Stephens.

Lands after Ejectment, and *Liberate* returned, and before Entry, not aſſignable.

EJectment on a ſpecial Verdict, the Quere was; A Statute was extended, and a Liberate returned, but no Poſſeſſion, the Conuſor ſtill enjoys the Land; if this is aſſignable? Argued pro Quer', that there is no turning any Eſtate to a Right to an Intereſt whereon an Ejectment may be brought, and the Poſſeſſor removed, the Conuſor is not a Diſſeiſor but at my Election Pewſey againſt Blackman, 2 Cro. I have ſtill all the Poſſeſſion as ever I had, and that is what the Law gives me upon the Liberate: Upon the Return of the Liberate, the Conuſee is then ſaid to become Tenant per Statute Staple, and then there

is

is an Intereſt in him by Agreement of the Party upon the Conceſſit: It is at leaſt in Nature of an Intereſſe Termini, 'tis not a meer Right, but like Bracebridge's Caſe, Plowd. 423. in 1 Inſt. 270. Leſſee for Years before Entry, is ſaid to be the ſame with Tenant by Statute Staple, and therefore the one is aſſignable as well as the other.

C. J. Holt. The Books ſay, when the Liberate is awarded, the Party may enter, and then from the Execution of the Writ, the Party is in Poſſeſſion; and then when the Party goes away, this is an Actual Ouſter, and this turns it to a Right: And I have known this before Juſtice Ellis in the Circuit, and held not aſſignable for want of an actual Entry and Poſſeſſion. Dolbin, Upon a Leaſe for Years, it has oftentimes been doubted. Eyres, I was of that opinion always, and have adviſed Adminiſtrations to be ſued out to the Conuſee upon that account, and I believe in this very Caſe.

Herne *verſus* Jennings.

ACtion of the Caſe for Slander, viz. theſe Words, He is in Newgate for an High-way-man. Verdict pro Quer' on non Cul. pleaded. Mr. Darnell moved in Arreſt of Judgment, that the Words are not Actionable, and cited Hob. 177. and 2 Cro. 687. 3 Cro. 302. Mr. Northey e cont. cited 2 Cro. 154, 247, 536. 1 Cro. 268 Jones 299. and ordered by the Court to ſtay quouſq; &c.

Dominus Rex *verſus* Inhabitants *del* Hornſey.

THe Caſe, Vide Supra, moved now again. Holt. The Being of an High way is Matter of ſuppoſal, and muſt be denyed in pleading, and ſo held in the Caſe of Leather-Lane. Eyres, You may give it in Evidence, for 'tis the ſame with no Park, or no Warren. In Treſpaſs 'tis not Guilty; the Preſentment is but in Nature of an Indictment. Per Cur' ordered to ſtay.

Dominus Rex *verſus*

INdictment for Foreſtalling, by buying at Billinſgate of Fiſh, and held by Holt on Tryal at niſi prius, that the Party was not guilty; for Billingſgate was a Market time out of Mind, and ſo the Party was acquitted: And by him, were it otherwiſe, all the Fiſh-mongers were lyable to Proſecutions: Note, This was at the Inſtance of that Company againſt a poor Woman that cryed Fiſh.

Term.

Term. Trin.

3 Will. & Mar.

Hill *verſus* Mills *& al'.*

HEnry Hills, Citizen and Stationer of London, made his Will; and conſtituted Elizabeth his Wife, and Adiel Mills Executors; and gave the Reſidue of his own third part equally to be divided between Gillam, his Son by his firſt Wife; James and George Hills, his Sons by his ſecond Wife; his two other Children having been advanced by him in his Life-time; with a Clauſe, that if either of his Sons ſhould conteſt or ſue for any thing contrary to, or to invalidate his Will, ſuch his Legacy ſhould be void.

Prohibition to the ſpiritual Court to Suit for revoking the *Probate* of a Will.

Probate of the Will was granted to Adiel Mills, one of the Executors, and denied to the Widow, ſhe being a Papiſt Convict, the Conviction being exhited into Court, and there remains with the Regiſtry. Gillam Hills, one of the Children, and reſiduary Legatees, cites Adiel Mills to ſhew cauſe why the Probat granted to him, ſhould not be revok'd, and Adminiſtration granted to him the ſaid Gillam, with the Will annexed. In the Citation, no Cauſe was expreſſed, but upon Mr. Mill's Appearance, the Judge of the Prerogative examins him, if any Commiſſion was ſued out againſt him. He owns it, and that it was not ſuperſeded; and then he urges, that his Creditors had given him 1000 l. The Judge likewiſe examins ſome Witneſſes about a Mortgage of part of the Eſtate of Hills, which was thus: Hill in his Life-time, had made a Mortgage to Mills for 1000 l. which Mills aſſigned after Hill's Death, &c. and then Sir Thomas Pinfold argued to this effect:

That

That Mr. Mills is but a Nude Executor, and he hath no intereſt in the Teſtator's Eſtate; and now, by becoming a Bankrupt, he is unfit and diſabled to manage another's Eſtate, that wants Honeſty or Conduct in his own; that the Ordinary is Judge of all this Matter; that a Probate may be revoked, and the Judge hath power to revoke; if the Teſtator ſays that he will not have his Executors to give an account, yet the Judge, upon conſideration of the Circumſtances, &c. may call him to an account, for the Judge may order that which the Teſtator would have done upon knowledge of thoſe Circumſtances. ---- Linwood de Teſtament. Religion. verbo rationem; that in the ſame Book niſi talibus, that an Ordinary may remove an Executor deputed by the Teſtator when he ſees juſt Cauſe for doing it, where there is a ſufficient Preſumption of Fraud; though Poverty if accompanied with Diligence, be not ſo; and in the Inſtitutes de ſuſpectis tutoribus, if ſuſpectus de Moribus, he may be removed.

Linwood 168, 177.

Mr. Ward, of the ſame ſide, That he was but a Truſtee, he had no intereſt; and in Chancery upon any Misdemeanor, they do often transfer the Truſt, there the Ordinary is the Judge.

E contra. I argued that this Probate was not revokable by our Law; the Ordinary here is compellable to give Probate to an Executor, that the revoking it is an altering of the Will of the Teſtator, and making a new one for him; that the Intention of the Party, the mens teſtandi is as ſtrong for the conſtituting of him Executor, as for the giving the Sons their Legacies; that 'twas plainly the expreſs Will of the Teſtator, that his Sons ſhould not have the Conduct of his Eſtate; he gives it to them ſub alio modo, viz. under the Managery of ſuch a one his Executor; then as to the Bankrupcy, that is no Diſability or Breach of Truſt quoad his Executorſhip, for what he has as Executor, the Law protects from all Forfeiture, for an Outlawry affects it not: Nay, if he be reſolved into a State of Damnation by Excommunication, that is no Diſability upon him in that reſpect; an Attainder of Treaſon or Felony will not any ways forfeit it; the Law calls it not his, becauſe in another's Right; if he grant omnia bona ſua, the Goods which he hath as Executor will not paſs; if he releaſes all Debts due to him, 'twill not bar a Suit as Executor; the Commiſſioners of Bankrupcy cannot aſſign any thing but his own Eſtate, ſo there's no Danger to the Teſtator concerned by this Bankrupcy: Then as to his fitneſs to be truſted, the Teſtator knew him, and judged him fit, and made him Executor, he is compleatly and entirely ſo, without any Act of the Court Chriſtian; the Probate is only to capacitate him to ſue, he may pay Debts, and releaſe Debts before and without

out Probate; he may do any Act of Adminiſtration even without Exception. Now no Man or Court can determine Executorſhip without his own Renunciation; he muſt ſtill ſue, I ſay he muſt; this Adminiſtrator can never bring an Action, but if he do, the Defendant may plead an Executor made and living, he is undoubtedly ſtill liable for all Debts: Adminiſtrator is an Executor appointed by the Judge, and therefore no Argument from thence can affect this Caſe; 'tis true, an Adminiſtration to Forth was revoked, becauſe of his Bankrupcy; but here's an Executor made by the Party, which the Law entitles to have a Probate of his Teſtator's Will: Surely there never was a Citation for this purpoſe, or any Revocation of a Probate granted to an Executor, ever ſince the original of Eccleſiaſtical, or any Courts in England, &c.

Sir Richard Raines, the Judge, made a great difference between an Executor and an Adminiſtrator; ſo for an Executor, between a Nude Executor, who is only Truſtee, and one that hath intereſt by the Will; that the Ordinary is to take care that the Will be performed; the Teſtator made Mills Executor, on ſuppoſal of him to be able: Now he is a Bankrupt; this, if known to the Teſtator, had prevented his being Executor; the Ordinary is to ſee his expreſs Will performed; if Circumſtances alter, then his preſumed Will muſt be obſerved, in ſuch manner as he would have done it, digeſt' de Adminiſtratione & periculo tutor', lib. 3. artic. 3. The Judge ſhall ſometimes ſwerve from the Teſtator's Appointments, as if that a man were Improvidens or of ill Manners, &c. and therefore as Judge, did revoke the Probate, and granted Adminiſtration with the Will annexed to Gillam Hill, the other Children being beyond Sea.

Afterwards Raines told me, that the Canon Law looks upon an Executor in general, as one that hath no Intereſt, whoſe Province is only to execute the Will; that by the ſame Law in caſe of a Will to pious Uſes (and for Cauſe of Nurture was the ſame) an Executor was removable for Negligence, if nothing were done for the ſpace of one Year.

Note, The Novelty and Profit of this Caſe engaged all the Doctor's Zeal for it, &c. ſed mihi videtur fore diſſonum Legi Comm'. And the firſt day of Mich. Term, upon my motion on a Suggeſtion of this Matter, we had a Prohibition.

Term.

Term. Mich.

3 W. & M.

Leach & al' *verſus* Thompſon. *Entr. Paſch. ult.* Rot. 221.

Ejectment. ERror in B. R. ſur Judgment in C. B. pro quer' en Ejectment, there brought by Thomas Thompſon againſt Sir Simon Leach & al' Defendants, upon the Demiſe of Ch. Leach, of the Manor of Bulkworthy. Wherein upon non culp. pleaded, the Jury find a ſpecial Verdict, That Nich. Leach was ſeized in Fee of the Manor and Lands in the Declaration, and by his laſt Will in Writing, bearing Date December 9. 19 Car. 2. Demiſed the Premiſſes to his Brother Simon Leach for Life, Remainder to the firſt Son of the Body of the ſaid Simon, and the Heirs Males of the Body of ſuch firſt Son; and in like manner to the ſecond and third Son, &c. and for want of ſuch Iſſue of the ſaid Simon Leach, the Remainder to Sir Simon Leach, and the Heirs Males of his Body; and for want of ſuch Iſſue, to the right Heirs of Nicholas the Teſtator for ever; and that the ſaid Nicholas died ſeized of the Premiſſes, and after his Deceaſe the ſaid Simon entred, and became ſeized for Life, with Remainder over as aforeſaid; and being ſo ſeized, made a Deed bearing Date 23 Auguſt 25 Car. 2. Sealed and Delivered to the uſe of Sir Simon Leach (but he was not preſent) which Deed the Verdict ſets forth in hæc verba, and by it he granted and ſurrendred unto the ſaid Sir Simon Leach, and his Heirs and Aſſigns, the ſaid Manor and Lands, and Reverſion and Reverſions Remainder and Remainders of the ſame; To have and to hold the ſame to the ſaid Sir Simon Leach and his Heirs, to the uſe of him and his Heirs: And further, That the ſaid Ch. Leach (the leſſor of the Plaintiff) the firſt Son of the ſaid Simon Leach, was born

the

the firſt of November, 25 Car. 2. and not before; and that Simon Leach, from the time of ſealing the Deed, to the 25th of May, 30 Car. 2. did continue poſſeſs'd of the Premiſes; and that then, and not before, Sir Simon Leach accepted and agreed to the ſaid Surrender, and entred into the Premiſſes; and that afterwards the ſaid Simon Leach, Brother of the ſaid Nich. the Teſtator, dyed, and the ſaid Ch. Leach, the Son after his Deceaſe, entred and made the Leaſe in Narr. to the Plaintiff; who by Virtue thereof entred, and was poſſeſſed, and ſo continued till the Defendant (Sir Simon Leach & al') ejected him. But whether, upon the whole Matter, the ſaid Simon Leach did ſurrender the ſaid Manor and Premiſſes to the ſaid Sir Simon Leach, before the ſaid Charles was born, they doubt; and if he did not ſurrender the ſaid Manor and Premiſſes to the ſaid Sir Simon Leach before the Birth of Charles, then they find the Defendants guilty; and if he did ſurrender before the Birth, then they find pro Def.

The Chief Juſtice, Powell and Rooksby, after four Arguments at the Bar pro Quer. Held, That it was no Surrender, till ſuch time as Sir Simon Leach had notice of the Deed of Surrender, and agreed to it, and ſo the Remainder was veſted in Charles the Son, and not defeated by the Agreement of Sir Simon after the Birth: And Judgment there pro Quer', contra Opin. Ventris.

Pro Quer' En breve D' Err. I argued.

The Caſe in ſhort was, Simon Leach, Tenant for Life, Remainder to his firſt Son, Remainder in Tayl to Sir Simon; the Tenant for Life before the Birth of that Son, by Deed, ſealed and delivered by him to the uſe of Sir Simon, (but in his Abſence, and without his Notice) ſurrenders his Eſtate to Sir Simon, he continues in Poſſeſſion till after the Son is born; then Sir Simon agrees to the Surrender, and then entred.

The Queſtions are two. 1. Whether by the ſealing of the Deed to the uſe of Sir Simon in his Abſence, the Eſtate immediately paſſed; if ſo, then the contingent Remainder to the Leſſor of the Plaintiff in the Original Action, could never veſt, becauſe the particular Eſtate upon which it depended, was gon and determined; the Conſequence cannot be denied, for that the Law is plain, if Simon Leachs's Eſtate for Life was determin'd before the Death of Charles, 'tis with my Client. Then another Queſtion is, Whether the Agreement afterwards ſhall not re-

Tenant for Life ſurrenders to one in Reverſion, without his Conſent or Knowledge.

late, as to make the Land pass ab initio; but the first is that which I rely on, and in truth I doubted the other, for that no Relation to a precedent Act could work so strong as to divest an Estate vested, which was created by Conveyanc antecedent to the Deed to which the Relation must be; and therefore I pretended not to argue that, but only the other first Qu. viz.

That the Free-hold and Estate of Simon, Tenant for Life, did immediately by the Deed, vest in Sir Simon before he had any notice, or gave any express Assent to it; and so 'twas a Surrender before Charles was born; that a Surrender passes the Estate immediately, even without any express Assent, because 'tis a Conveyance at the Common Law that needs no Agreement, 1 Inst. 50. Coke enumerates the Conveyances that work without Livery, or other Ceremony, he puts the Cases of Lease and Release, Confirmation, Demise and Surrender, amongst the rest: Whereas, if the Explicit Agreement of the Remainder-man or Reversioner were a Circumstance requisite to make it effectual, he would have mentioned it, and not have numbred it with those that need no other Requisite than a bare Deed that require no such Assent.

Then, if I can make it out to your Lordship, that such Common Law Conveyances need no expresser Assents, to pass the Estate out of the Grantor, and that the Reasons of the immediate passing of the Estate in such Cases, holds in Surrenders, as well as other Conveyances, then the Inference will be easie. Conveyances at Common Law do immediately (on the Execution of them upon the Grantor's part) divest the Estate out of him who makes the Conveyance, and vests it in him to whom the Conveyance is made.

In case of Conveyances, requiring a further Act besides a Deed, when all is done on the Grantor's part, the Estate passes immediately even without assent or notice: As in case of Feoffments made to diverse Persons, and Livery made to one Feoffee in the absence of the rest; the Estate vests in them all till Disagreement: And so is the 18 Edw. 4. 12. expressly; and the same is cited and agreed for Law in Mutton's Case, 2 Leon. 223, That the Free-hold shall be adjudged in them all till they have disagreed: So an Estate by Livery to a Feme Covert vests in her presently before Agreement of her Husband, though the taking by Livery could import no Consent from her, for she was not able to give her assent by reason of her Coverture, yet good till she disagree, 1 Inst. 3. 356. So 'tis in case of the Grant of a Reversion with Attornment, the Free-hold passeth immediately by the Deed, 1 Inst. 49. And the Reason seems to be, because the Grantor hath done all on his part.

In

In caſe of a Leaſe for Years, the Intereſt is veſted before Entry, and if either Leſſor or Leſſee, or both die before Entry, the Executors of the Leſſee ſhall hold it, 1 Inſt. 46. b. 51. b. And if made to two, and one die before Entry, the Intereſt ſhall ſurvive, and yet till Entry no Agreement may be had of the Leſſee.

The Reaſons why any Conveyance doth diveſt the Eſtate upon the Execution of all required on the Grantor's part, do all of them hold in caſe of a Surrender, as well as any other Conveyance: They ſeem to be three.

1. 'Tis an Abſurdity and apparent Incongruity, that when a Conveyance is compleatly executed on the Donor's part, that notwithſtanding the Eſtate ſhould continue in him, when he hath done all he can to diveſt himſelf of it; as Coke in 1 Inſt. 217. ſays in caſe of Livery, That it cannot ſtand with any Reaſon, that againſt a Man's own Livery and Seizin, the Free-hold ſhould remain in himſelf, when there is a Perſon capable to take. Now it is to the full as unreaſonable, that the Eſtate ſhould remain in Simon Leach againſt his own Deed of Surrender, when he hath done all he can to part with it, and nothing further is required on his Behalf; for in caſe of a Surrender by Deed, and ſometimes Words are as effectual without Deed, as Livery in caſe of Feoffments, I can ſee no reaſon for a difference. In the caſe of a Releaſe to the Tenant in Poſſeſſion, the Eſtate veſts by Deed immediately.

Then there is a Preſumption in Law, that 'tis for a Man's advantage to take an Eſtate, and ſo is it to have his Reverſion attacht in Poſſeſſion: Now no Man can be ſuppoſed unwilling to that which is for his advantage; where an Act is done for a man's Benefit, an Agreement is implied till there be a Diſſent. Small-man and Agborrow's Caſe, 1 Rolls Rep. 441. J. S. and a Feme ſole are Joyntenants for Life, they intermarry and make a Leaſe of the Wife's Moity rendring Rent, the Feme dies; held, that the Leaſe binds the Survivor, becauſe it being with a render of Rent, 'tis intended to be for her Benefit, and ſo good till expreſs Diſagreement. Held alſo e cont. That if a Feme Covert grant a Rent, the Grant is abſolutely void, becauſe it cannot be for her Benefit; ſo of an Obligation: So if an Infant Leaſe Land rendring Rent, 'tis good till Diſagreement, but if without Render 'tis void. A Leaſe made to Baron and Feme for Years, the Feme ſhall have it, if ſhe ſurvive, becauſe intended for her Benefit, and conſequently good till ſhe diſagreed, and no need of an expreſs Agreement to make it good. An Aſſumpſit to my Servant or Agent in my abſence, is good to me till Diſagreement, Hetley 176. Godb. 261. This Rule holds even in the Gift of Goods, as is reſolved in Butler and Baker's Caſe,

3 Rep. 26. A Grant of Goods and Chattels veſts the property in the Grantee before notice. A Bond is ſealed and delivered to a Man's uſe, who dies before notice, his Executors may bring an Action upon it, Dyer 167. Which ſhews the general Reaſon and Intendment of the Law, that what is for a Man's Benefit, 'tis ſuppoſed every Man is for it; and I may be very confident, that Sir Simon Leach was always willing to have this Eſtate: And as I ſaid before, an Eſtate made to a Feme Covert, veſts in her immediately till her Husband diſagrees; and yet ſhe cannot agree to bind her ſelf: So is Hob. 204. And in pleading 'tis not neceſſary to avert his Aſſent, for it veſts till he diſagrees; Swayne and Holman's Caſe, Hutt. 7, 8. Now, my Lord, is there not the ſame preſumption and appearance of Benefit to him in Reverſion in the Caſe of Surrender? Is it not a palpable advantage to him to determine the particular Eſtate, and to reduce his own into poſſeſſion? and therefore there can be no reaſon why an Aſſent ſhould not be implied in Surrenders, as well as other Conveyances.

Then further; The Law will not allow or ſuffer the Operation of a Conveyance to be in ſuſpence, and to expect the Agreement of the Party to whom it is made, becauſe the Care of the Law is to prevent an Uncertainty of the Free-hold: This ſeems the great Reaſon, why a Free-hold cannot be granted in futuro, becauſe it would be hard and inconvenient, that a Man ſhould be driven to bring his Precipe or real Action firſt againſt a Grantor; and after he had proceeded in it a great while, it ſhould abate by a Tranſlation of the Free-hold to a Stranger, by reaſon of his Agreement afterwards to ſome Conveyance made before the Writ brought: For, my Lord, this muſt be the Reaſon, or there's none at all, for there's nothing in the Nature of the thing which can be called a Reaſon againſt paſſing of a Free-hold in futuro, for a Rent de Novo may be granted to commence in futuro, becauſe that being newly created, there can be no precedent Right to bring any real Action for it, Palmer's Rep. 29, 30. Now all the Uncertainty, which the Law abhors of a Free-hold, muſt follow in this Caſe of a Surrender, if nothing paſs till an Agreement.

Beſides, Pray do but conſider the Convenience and Inconvenience of each Opinion, and 'twill be apparently manifeſt, that the ballance is on our ſide, notwithſtanding the Objection which I expect to hear from the other ſide. Suppoſe in this Caſe, a Precipe had been brought againſt Simon Leach the Tenant, this ſhould have proceeded according to their Opinion, and he could not have pleaded in abatement till Sir Simon had agreed; and after a long Progreſs in the Suit, he might have pleaded an

Agreement

Agreement of Sir Simon's puis darreine continuance, and defeated all; and I see no reason why any such Plea should not be admitted; so that the same Inconvenience, as to the bringing of real Actions, holds in Case of Surrenders, as of other Conveyances.

Now, on the other side, you say, That if a Precipe had been brought against Sir Simon Leach, he might have pleaded his Disagreement, and so have abated the Writ by non-tenure.

Sol. That must be agreed; but it is no greater Inconvenience, than the Plea of Non-tenure is in all other Cases whatsoever; besides, it must have abated the Writ immediately, for he could not have abated the Writ by any Disagreement after he had answered to it; when as in the other Cases it might be pleaded puis darreine continuance, and consequently after a long Progress in the Suit; besides, it's more improbable that he should disagree, than the other; for an Assent to take, is the likeliest thing in the World, so that the Mischief to a Demandant is neither so great, nor so probable as in their Case.

As to the inconvenience of making a Deed of Surrender, and continuing in Possession, and thereby destroying and defeating of Recovery, Settlement and Charges.

Sol. This holds too frequently in other Conveyances, and yet in these the Free-hold vests immediately, though a Disagreement doth afterwards divest it. Besides, they must agree, that an express Assent will make a Surrender effectual, though the Surrendree do not enter, and consequently tho' the Assent may be as great a Secret as the Deed, yet it vests the Estate in him; so that the Objection as to Strangers, by continuing in Possession, holds as well in their Opinion, as in that which I contend for; for the Estate vests before Entry, tho' it cannot maintain Trespass before Entry, and that Assent of theirs might be kept as private, and consequently all the Mischiefs pretended would follow, as much as if no express Assent were requisite: That he is become Tenant before Entry, and must be so sued in a Precipe, are full Authorities, Bro. Tit. Surrender, 50 Hutt. 95.

Object. That in Case of a Surrender, an actual Assent is necessary, as Attornment is to the Grant of a Reversion, or Livery to a Feoffment, or Execution by Entry in Exchange.

Sol. That Assent is necessary as a Circumstance, I deny, but do, and must agree it an Essential to all Conveyances; for every Conveyance supposes, that there are two Persons, and both assent; and if that Assent be denied, it annuls the Conveyance: But that which I do affirm is, That 'tis not required as a Circumstance, as Livery and Attornment are, to perfect the Conveyance;

ance; for an Aſſent in all Conveyances is implied in him that takes, and this by Intendment of Law which is as ſtrong as the Expreſſion of the Party, till the contrary do appear, and there's no Conveyance at Common Law that doth not work immediately when the Grantor hath done all on his part: But perhaps they'll

Object, That Exchanges do not work immediately.

Sol. That ſtands upon a particular Reaſon; there muſt be an expreſs, mutual Aſſent, becauſe there muſt be a mutual reciprocal Grant, as appears by Litt. Sect. 13. Finches Ley. 27. But in caſe of a Surrender, there's nothing to be done on the Reverſioner's part, but to take, and that the Law intends a Man willing to do till Diſagreement appears.

Obj. That in Copy-hold Surrenders the Eſtate ſtill remains in the Surrenderor, Forſch againſt Walch, 2 Cro. 403.

Sol. That's founded upon the particular Cuſtom, and cannot be urged as a Reaſon in this Caſe; beſides, the Reaſon is plain there, that the Lord may have a Tenant for his Services, and if it ſhould not be in him, it could be in no Body; the Cuſtom will not admit it in the Ceſtuy que Uſe of the Surrender, becauſe not ſo much as a Preſentment, and the Lord is not capable of having it, becauſe the Surrender is quaſi conditional to him, and not to his Uſe.

Obj. That this is like to the Reſignation of a Benefice, which cannot be pleaded as good till acceptance by the Biſhop, as Bro. tit. Barr. 81. & Noy. 147. & 2 Cro. 197. 7 Edw. 4. 16. 9 Ed. 4. 49.

Sol. That is no way to be compared to this Caſe; for that's an Eccleſiaſtical Matter, and founded rather upon an Eccleſiaſtical Reaſon; the Reſignation is of the Cure, rather than the Benefice, though the one follows the other; the Reſignation is not to a Man intereſted; the Biſhop acquires no Intereſt therein by ſuch a Reſignation, 'tis made to him as a ſpiritual Judge and Father, who (by reaſon of his own Juriſdiction, and the Prieſt's Obedience) hath Power to judge if convenient for the Church, and no Formedon lies of a Rectory, for there's neither Remainder, Reverter or Deſcender of that; perhaps by the Canon Law the Ordinary may refuſe or cenſure him, if he reſigns a Cure he is beſt qualified for; and yet the Reſignation of a Donation to one of two Founders enures to both. Fairchild and Gaire, 2 Cro 63. Whereas a Surrender is quaſi a dereliction or quitting of the Land, or his Eſtate in it, and thereby the Reverſion or Remainder takes Poſſeſſion immediately, the Free-hold is

transferred

transferred immediately for fear of a ſuſpence of that Free-hold; there's no ſuch Fear or Care in caſe of Parſonages, becauſe they have their Proviſion. In a Vacancy the Ordinary is to take care for the ſupply of the Cure, and may apply the Profits thereof for a Reward to him that ſhall actually officiate therein.

A Surrender is quaſi, a Grant of the Term or particular Eſtate; and ſo is it held in Pieto and Pemberton's Caſe, 1 Cro. 101. And being a Grant, no Man can queſtion but what paſſes by Grant, doth veſt immediately, and ſo continues till Diſagreement.

A Surrender or Surſum redditio doth not ex vi termini, import or require any expreſs agreement of the Reverſioner, only a derelliction of his own Eſtate and his Aſſent, that the other ſhall take and enjoy it; this is all that the Word can import.

Obj. That there is found in the Verdict an Acceptance and Entry, ſuch a Day, and not before, and no agreement can be intended contrary to what the Jury find.

Sol. I confeſs there are ſome ſuch unkind Words inſerted in the Verdict, but that will not alter the Caſe; for if the Law doth not require an expreſs Agreement, no more than it doth an Aſſent on the Leſſee's part, in caſe of a Leaſe and Releaſe, then upon the Execution of all on the Grantor's part the Free hold paſſed, and that immediately; and then this finding no way alters the Caſe: For if the Eſtate paſſed before the expreſs Aſſent, if upon the Act of the Grantor, that Act being for the Reverſioner's advantage, the Law implied an Aſſent till the contrary appeared. Then the finding of the Agreement doth no ways alter the Caſe, and the Words (and not before) are repugnant, and therefore void, becauſe the Law implied an Aſſent at firſt, and no Diſagreement found, 'tis a good Conſequence of the Free hold immediately.

Obj. That in pleading of a Surrender, it's generally ſaid ad quod---- agreeavit, and that the Forms of pleading do ſhew what the Law is in that Caſe, as Raſt. Entr. 176, 177. Fitz tit. Bar. 262.

Sol. 1. Theſe are all in Actions which are brought in a Diſaffirmance of the Surrender, and do import a Diſagreement, and therefore the Defendant hath no means to bar, or avoid ſuch Agreement, but by ſhewing an expreſs Agreement before: As in Debt for Rent, Defendant pleads a Surrender before the Rent became due; the bringing the Action was a Diſagreement, and therefore an expreſs Agreement before was pleaded: So in Waſte. Of the ſame nature, is Pieto and Pemberton's Caſe, 2 Cro. 191. in Replevin, the Avowry was for a Rent-Charge: 'Tis pleaded in bar of the Avowry, that the Plaintiff demiſed the Land

that

out of which the Rent iſſued to the Avowant: The Avowant replies, that he ſurrendred dimiſion. pred. To which the Plaintiff agreed; this is of the ſame nature with pleading it in bar to an Action of Debt for Rent; but when the Action is in purſuance of the Surrender, then 'tis not pleaded; ſo is Raſtall Ent. 136. in Covenant for ejecting him, and the Defendant pleads a Surrender in Bar without any acceptance.

2. It is not univerſally ſo, for in Fitz. tit. Debt. 149. Debt for Rent; Defendant pleads in Bar, that he ſurrendred, by force of which he became ſeized; there's no mention of pleading any Agreement, tho' that Action was in diſaffirmance of the Surrender.

3. If an Agreement be neceſſary to be pleaded, that's fulfilled by an implied, as well as by an expreſs Aſſent: Suppoſe Leſſee for Life ſhould make a Leaſe for Years reſerving Rent, and in Debt for the Rent, the Leſſee ſhould plead, that the Plaintiff, before the Rent grew due, did ſurrender to him in Reverſion, and he accepted, and Iſſue taken upon the acceptance; and at the Trial it be proved, that the Plaintiff had executed a Deed of Surrender (as 'tis here) to him in Reverſion in his abſence; would not this turn the Onus probandi upon the Plaintiff, that he diſagreed to the Surrender? Surely his Agreement prima facie would be preſumed, and then the Rule is ſtabit præſumptio donec probetur in contrarium. It is not always pleaded; and when pleaded, 'tis upon a ſpecial Reaſon, to conclude the Party from diſagreeing.

4. No Argument can be had from this pleading, to make any forceable Concluſion in the Point; for admit an expreſs Aſſent neceſſary, it cannot be needful to be pleaded; for if it be a neceſſary Circumſtance to the Conveyance, as Livery, then ſurſum reddidit implies it, becauſe it cannot be a Surrender without it; as Feoffment implies Livery, becauſe no Feoffment without it, 1 Cro. 162. and 181. Now it's an odd way of arguing, to infer, that the Law is ſo in a Point, becauſe the pleading is ſo; whereas, if the Law be as they ſay, the pleading need not be ſo.

Obj. The Deſcription of a Surrender in the Books is with an Aſſent, 1 Inſt. 337. That the ſurrendring is the yielding up an Eſtate which grows by mutual Agreements between them, Perkins, cap. Surrender, Sect. 608, 609.

Sol. To this I give two Anſwers, 1. That every Conveyance requires the Conſent of both Parties, and an Agreement is neceſſary; but the Query is, Whether an Agreement is not intended where a Deed of Surrender is made in the abſence of him in Reverſion? Whether the Law will not ſuppoſe an Aſſent, till a Diſ-

a Diſagreement appeared? If the Reverſioner were preſent, he muſt agree, or diſagree immediately; and ſo 'tis in all other Conveyances; and ſo are all the Caſes put by Perkins of Surrenders made to the Leſſor in Perſon; the Words of the Book are, The Leſſee comes to the Leſſor, and ſaith I ſurrender. Perkins ſaith, If the Leſſor doth not agree 'tis void, for a Surrender cannot be againſt his Will: This may be all true, and yet what we contend for, may be Law too; for by no Conveyance can a Man have an Eſtate put into him againſt his Will and by Force: But 'twill be hard to ſhew a Book-Caſe adjudged, where a Deed of Surrender is executed in the Abſence of the Reverſioner, and that nothing paſs till he conſents.

I do agree, that a Diſagreement will null it, and ſo 'twill in a Caſe of a Leaſe for Years made in Abſence, Fine, Feoffment, grant with Attornment, Bargain and Sale, yet then the Term veſts before Agreement or Notice.

The Inconveniencies would be infinite, if a Surrender could not operate till an expreſs Aſſent of the Surrendree, for then no Surrender could be to an Infant, at leaſt when under the Years of Diſcretion; for if it be a neceſſary Circumſtance, it cannot be omitted in any Caſe, no more than Livery or Attornment; ſo although an Infant of a Month old is by Law capable to take an Eſtate, becauſe 'tis for his advantage, yet he muſt not take a particular Eſtate upon which he hath a Reverſion expectant, becauſe it muſt enure by way of Surrender: And yet an Infant by our Law, is capable of being a Surrendree, as well as a Grantee; for whoſoever is capable of a Surrender, is capable of a Grant.

Tenant for Life, and he in Reverſion for Life, may ſurrender without Deed, and the Eſtate of him in Reverſion ſhall be ſurrendred by it; for it ſeems this ſhall enure, as a Surrender of the firſt Eſtate for Life to the next, and ſo 'tis a Surrender of an Eſtate in Poſſeſſion, 27 Aſſ 46. 2 Rolls Abr. 498. Now here the Reverſioner for Life never agreed to take any Eſtate from the firſt Leſſee.

1 Inſt. 192. 214. If there be two Joyntenants in Reverſion, a Surrender to one enures to both; by which it is plain, that as to one Moiety the Deed of Surrender operated without Aſſent, or Notice, Bro. Sur. 39.

Suppoſe Tenant for Life ſhould make Livery upon a Grant of his Eſtate to him in Reverſion, and two others, and the Livery be made to the others in the Abſence, and without the Notice of the Reverſioner, this Livery ſurely ſhall work immediately, even as to the whole Eſtate; and if it doth, it muſt enure as a Surrender for a third part; ſo is Bro Tit. Surr. 11.

Suppoſe Tenant for Life of Black-Acre, ſhould by Leaſe and Releaſe, convey Black-Acre and White-Acre to him in the Reverſion, who hath no notice, muſt not Black-Acre paſs till Notice and Aſſent, and White-Acre paſs immediately? for Black-Acre muſt paſs by way of Surrender, and in pleading you muſt ſay ſurſum reddidit.

Obj Perryn and Aller's Caſe, in Owen's Rep. 47. 'Tis there ſaid, That to make a good Surrender, there muſt be an immediate Reverſion in the Surrendree, Poſſeſſion in the Surrenderor, and an Agreement of the Parties.

Sol. That Caſe can be of no Authority in this Point, for that was Tenant for Years, the Reverſioner for Years Covenants and agrees with J. S. That the Tenant ſhould enjoy the Land for a longer Term; and the Quære was, If that were a Surrender? And held not, and with good Reaſon; for undoubtedly the Conſent of the Tenant is neceſſary, and there could be none intended, and the Tenant was no Party to the Deed, but a perfect Stranger; and the Intent and Agreement of the Parties to the Articles, was undoubtedly that it ſhould not extinguiſh the other Term, and 'twas intended a Surrender by no Body; beſides, there's a better Reaſon than all this given, viz. Becauſe a leſſer Term could not merge in a greater, the Reverſioner being but for Years. And Anderſon, and the reſt, go upon another Notion, That a Covenant between two, that a third Man ſhall enjoy Land, is no Leaſe: Further, The Report can carry no great Authority with it, the Caſe is oddly put; A Man ſeized of Land by Leaſe for 30 years makes &c.

A Grant of a Reverſion may be with Attornment without Aſſent or Notice, for Attornment may be in the abſence of the Grantee, by an Aſſent declared on hearing the Deed, which was only ſealed and delivered to the uſe of J. S. 1 Inſt. 310. Bro. Tit. Attor. 40. Tooker's Caſe, 2 Rep. 68.

Then we are here in a Caſe where is only a contingent Remainder, which is but a kind of Scintilla Juris, and not much favoured in Law. Upon this Surrender hath been a long and quiet Poſſeſſion, and two Marriage-Settlements; and therefore I prayed a Reverſal of the Judgment in the Common Pleas.----

Note, I did not argue the Point of Relation, for that I doubted 'twas hard to maintain ſo ſtrong a Relation, the Remainder being by Title antecedent to the Surrender, it being veſted in Charles by Vertue of the Will, and ſo paramount the Surrender: To which the Aſſent muſt relate, and conſequently no Relation to that Deed of Surrender ſhall diveſt an Eſtate inveſted by Vertue or Force of a Will or Conveyance executed before:

That

That if an Estate ariseth to one upon a Contingence, by a Power reserved upon a Fine or Feoffment to Uses, when once raised or vested, it relates to the Fine or Feoffment, as if immediately limited thereupon, 1 Rep. 133, 156. If the Husband discontinue the Wife's Estate, and then the Discontinuee conveys back the Estate to the Wife in the absence of the Husband, who, so soon as he knows of it, disagrees to it; this shall not take away the Remitter which the Law wrought upon her first taking the Estate from the Discontinuee, 1 Inst. 356. Jones 78. Because she is in of a Title paramount to the Conveyance, to which the Disagreement relates; and the same Rule holds for Agreement; and of this opinion was all the Court of Common Pleas, and therefore I stir'd not this Point.

Mr. Row argued e. contra, That in a Surrender the mutual Assent of the Parties is necessary, that a particular Tenant cannot throw up his Estate, nolens volens to the Reversioner; that a Surrender pleaded without Assent, is ill; that a Surrender is like a Resignation; that an Assent cannot be presumed when 'tis found that he did not agree till five years after. He cited Winchs Ent. 477. Palm 344. Dyer 110. 9 Edw. 3. 76. 2 Cro. 197. Sid. 75. 3 Cro. 487. 31 Ass. pl. 25. Bro. tit. Debt 93, 94. Kelw. 194, 195. Dyer 258. 2 Leon. 192.

The next Term, Mr. Serjeant Levins argued pro Quer. en Breve d' Err. That the Estate passes generally by the Act of the Grantor, 1 Inst. 110. Even in the Grant of a Reversion it passes between the Parties immediately. In Releases no Consent is necessary: He cited Rast. Ent. in Debt Release 1. 136. Cokes Ent. 188. Dyer 167. 1 Inst. 266. 2 Inst. 674. If a Lease be made for Years with Condition of Accruer, the Estate passes presently. That Exchanges stand upon another Reason, for there must be mutual Acts: That a Grant may be pleaded without Assent; and this is found as a Release and Grant. 'Tis true, the Grant turns by Operation of Law into a Surrender, but still 'tis a Grant; here 'tis a good Grant: Now there's no Body's Consent required to that, but his own: Here it first works as a Grant: Then if the Estate were out of Simon Leach, it matters not where, the Contingency is destroyed.

Gold e contra. That the Jury make a special Conclusion, if the said Simon Leach surrendred or not, which destroys the Motion of passing as a Grant: Then, that no Estate passes at Common Law without Livery, Entry, or Agreement, unless in Case of an Estoppel: That whosoever comes to an Estate by any Conveyance, is called a Purchaser: Now 1 Inst. 3. Purchase is where a Man comes to Land per son Fait on Agreement: That even in Surrenders in Law it is the Acceptance or Agreement of

the Parties that makes them good: He cited 2 Rolls Abr. 787. 12 Edw. 4. 2. Perkins tit. Grant Sect. 1. 13 H. 7. 26, 27. Plowd. 87. B. 21 H. 7. 6. And therefore concluded, That no Aſſent being had to the Surrender, till after the Birth of Charles, 'twas a void Surrender.

A Surrender of a Tenant for Life to him in Reverſion not good, till his Agreement thereto.

Ch. Juſt. Holt. As to the Words Releaſe and Grant in the Deed, they ſignifie nothing; for a Grant in this Caſe could be of no avail without Livery; though the Words of the Deed be Grant, yet it muſt be pleaded as a Surrender, and not otherwiſe: That a Surrender is a particular ſort of Conveyance, and Agreement is neceſſary to perfect it; and ſo Judgment was affirmed. And afterwards that Judgment reverſed in the Houſe of Lords; Omnibus Baronibus pur mon Clyent.

Bird *verſus* Geary. *Ent. Hill.* ult. 433.

ACtion on the Caſe pro eo quod cum the Plaintiff Paſch Anno in B. R. had recovered againſt one T. G. tam quod. dam debit. 600 l. quam 50 s. pro miſis, and had ſued a Fieri Facias to the Sheriff of M. directed, and diverſe Goods to the value of 400 l. were ſeized, and in Execution detained by vertue of the Fier. fac. and the ſaid T. G. had paid and ſatisfied all the Monies due on the ſaid Judgment, except 200 l. for Principal, and 38 l. 5 s. for Intereſt and Coſts in obtaining the ſaid Judgment, and levying Execution aforeſaid; and that 100 l. of the ſaid 200 l. was in Truſt for one J. F. And whereas the Goods and Chattels aforeſaid in Execution aforeſaid, and in Poſſeſſion of the Baliff, being a certain Agreement was had between the ſaid Plaintiff and Defendant, and the ſaid T. G. viz. That the ſaid Defendant ſhould give to the Plaintiff a Bond for Payment of 100 l. of the ſaid 200 l. and another Bond for the other 100 l. to the ſaid J. F. and that the Plaintiff ſhould aſſign and transfer to the ſaid Defendant, all the Benefit of the ſaid Judgment and Execution to his own proper Uſe without any Account to be render'd to the ſaid Plaintiff; and ſhould permit, and do and execute all things neceſſary thereunto; and that the Goods aforeſaid ſhould be ſold, aſſign'd, and delivered to the Defendant De & ex bonis & Catallis pred. ac monet. proinde fact' ſhould on Requeſt pay the Plaintiff all his Intereſt and Coſts: That the Defendant (in Conſideration of the Plaintiff's Promiſe to perform his part) averrs, that Bonds were given in purſuance of the ſaid Agreements; and that the Plaintiff (by Writing under his Hand and Seal) did aſſign to the Defendant the Judgment and

Debt

Debt, and Damages aforeſaid, and all the Benefit thereof nec non Execut. pred. and made him his Attorny without Account, to receive to his own Uſe; that the Defendant abinde hucuſq; tot' Benefic' pred' nec non Execut. pred ad uſu' ſuu' propr. ſine aliquo computo inde querenti fact. habuit & recepit; that the Intereſt and Coſts amounted to 38 l. 5 s. and were demanded, and not paid. Non aſſumpſit, and Verdict pro Quer'.

I moved in Arreſt of Judgment, that our Promiſe was ſpecial and conditional to pay out of the Goods and Chattels, and the Money thereby made; ſo that by the Agreement we were to pay nothing till the Goods were diſpoſed of by us: Now, for any thing that appears by the Declaration, the Goods do remain in our Hands, and then we were not to pay; for their very Averment ſuppoſes it, viz. That from ſuch a time hitherto, we had the Benefit of the Judgment and the Execution, which ſuppoſes a Continuance of the Goods in our Hands, and no Money raiſed out of the Goods: And the raiſing of the Monies out of the Goods, was the Conſideration, and that being executory, muſt be preciſely alledged to be performed: But per Cur. Non allocatur, becauſe after a Verdict. And Eyres ſaid, 2 Cro. 7. was much a ſtronger Caſe than this; and yet held, that the thing averred, being the ſame in Subſtance with the Matter of the Agreement, 'twas well enough. Jud. pro Quer'.

Conſideration executory averred.

Dominus Rex *verſus* Dominam Oneby, *alias* Truder.

INdictment for not coming to any Church or Chappel for the ſpace of a Month, Contra form' Statut', and for want of Appearance, Proceſs of Outlawry iſſues, and an Exigent is returned thereupon. She brings a Writ of Error to reverſe the Outlawry, and the Error which I aſſigned Ore tenus was the uſual Fault, in not ſaying the County Court was held pro Comitat.

An Outlawry for not coming to Church, reverſed for a Defect.

Obj per Cur. the 3 Jac. 1. Cap. 4. Sect. 16. That no Indictment, &c nor any Proclamation, Utlawry, or other Proceeding thereupon ſhall be avoided, diſcharged, or revers'd, by reaſon of any Default in Form, or lack of Form, or other Defect whatſoever (other than by direct traverſe to the Point, of not coming to Church) whereof ſuch Perſon or Perſons ſhall be indicted, but the ſame Indictment ſhall ſtand, and be in Force, and be proceeded upon, any ſuch Default of Form, or other Defect whatſoever notwithſtanding. To the which I anſwered at another day, that 'tis true, the Statute includes Utlawry and Proclamation,

and

and ſays, None of them ſhall be annull'd for any lack of Form; but if that Conſtruction be made of it, then 'twill be inconſiſtent and contradictory in it ſelf.

Now this is all but one entire Sentence, and the whole muſt be taken together; the latter Words muſt explain or controul the former, elſe no Outlawry can be reverſed at all, but upon Conformity; whereas the Statute ſays, other than by direct Traverſe to the Point of not coming to Church, and that the Indictment ſhall ſtand good, which admits it may be reverſed; but then the Party muſt plead not Guilty to the Indictment. Several Outlawries were reverſed in the Lord Scrogg's Time. I confeſs I can't remember that Notice was taken of this Objection, but at laſt the Outlawry was reverſed, and ſhe pleaded non Cul. and this per tot. Cur.

Cudlip *verſus* Rundli. Ent. Trin. 2 W. & M. Rot. 646.

Caſe for negligently keeping Fire, by which his Houſe was burnt.

Caſe. Narr. pro eo quod the Plaintiff 25. Martij 36. Car. 2. was poſſeſt of an Houſe with the Appurtenances for a Term of Years, then, and yet to come; and being ſo poſſeſt, did by Indenture, demiſe the Premiſes to the Defendant for ſeven years then next enſuing; by Vertue whereof the Defendant entred, and was thereof poſſeſt; and ſo being poſſeſt, and the Plaintiff poſſeſt of the Reverſion thereof, the Defendant afterwards, the 8 Nov. An. &c. ignem ſuum in domo pred. tam negligenter Cuſtodivit, that the Houſe was burnt, to his Damage of 300 l.

Defendant pleads Non dimiſit modo & forma prout querens narr. Iſſue thereupon.

The Jury find, that the Plaintiff 25 Martij was poſſeſt of the Premiſes for a certain Term of years, then and yet to come; and being ſo poſſeſſed by Indenture then made, in Conſideration of the Rent and Covenants therein after mentioned, he did demiſe, grant, and to Farm let for Herbage Paſture and Tillage to the ſaid Defendant his Executors and Aſſigns, all that one Meſſuage or Tenement with the Appurtenances commonly known by the Name of Ugbeare ſcituate in Taviſtock, and then in the Tenure of the ſaid Cudlip or Aſſigns, together with all Houſes, Out-houſes, Structures, Ways, Waters, Water courſes, Profits and Commodities thereunto belonging, or in any wiſe appertaining, excepting, and always reſerving out of the ſaid Demiſe and Leaſe, to the Plaintiff his Executors and Adminiſtrators, the

the House commonly called the New House, new built upon the Premises, for the Use only of the Father of the said Plaintiff and himself, and their Wives and Family to live in, if they please, but not to be lett to any Person or Persons whatsoever, and at all other times when they shall not dwell there to be used by the Defendant, his Executors and Assigns; and also except one Nursery, with the Trees therein growing, to the Plaintiff, his Executors and Assigns, during the Term after mentioned. To hold the Premisses (except before excepted) to the Defendant his Executors and Assigns for seven Years, &c. That at the time of the Lease made, there were two Houses upon the Premisses, one old one, and one new built; that the new built House only was burnt; that at the time of the Fire, the Defendant was in Possession of the new built House (except one Room which the Plaintiff had) and that the new built House was burnt by Fire made, and negligently kept by the Defendant in that part of the House then in his Possession, Et si, &c. ad dampn. ad 100 l. Et si pro Defend. pro Defend.

Pro Quer'.

There have been many Queries started in this Case at the Bar, and by your Lordships.

1. If this Action lies against an under Lessee.
2. If there be any Reversion in the Plaintiff to found this Action.

1. If this be such a Demise as we have declared on, supposing it a Tenancy at Will, if that so found maintains our Declaration; nay, if here be any Demise for years; and this last I shall endeavour to maintain.

That if this new House did pass, or was excepted. And with Submission, my Lord, It is not excepted, because as the Exception is qualify'd, we are here in the Case of a Lease, where every Word is to be so construed, as to have a due and full sense if the Rules of Law will permit it; and no such Construction is to be made or allowed, as shall reject or make void any part or Clause of the Deed, if by any other Construction consistent with the Rules of Law, they may be made to have a sense. And this is a Rule in all Laws, and in our's especially, as I might cite many Cases.

Pau

Subſequent Words may reſtrain and explain the Senſe of Antecedent.

Now theſe Words for the uſe of &c. muſt be void if their Conſtruction hold, for then they are of no Service; whereas, I ſay, theſe Words ſhall qualifie the Senſe of the general Words Excepting, and then the Term and Intereſt paſſes; but a Liberty or Uſage is reſerved to the Leſſor. It is true, the firſt Words are ſtrong; but then the Subſequent ones explain their Senſe; the Intent is to be gathered from the whole Conterture: The Words Subſequent explain their meaning, and at all other times the Leſſee his Executors and Aſſigns are to have it, that plainly denotes an Intereſt veſted to be their Intent, which ſhould go in Succeſſion to the Parties Repreſentative; whereas the Benefit of the Uſe to the Leſſor was only perſonal, and extended no further than him and his Father: No Words of Intereſt uſed, nor ſo much as Executors are there named.

Then the next Exception ſhews their different Meaning, viz. Except during the Term. There was a total Exception deſigned of the Nurſery, here's only a perſonal Occupation reſerved, which only doth amount to a Covenant; and the different Form of penning, ſhews the different intent of the Parties in the ſeveral Exceptions; ſo that the Intereſt of the thing was never deſigned to be excepted in the firſt; for if ſo, then they would have uſed the ſame Word as in the laſt; and this anſwers the Objection of the Exception before excepted in the habend', for that is ſufficiently fulfilled by the Exception of the Nurſery, which is total and compleat, and during the whole Term.

That this Exception ought to be conſtrued according to the Senſe I would put upon it, there's the Reaſon of the Law for it: Be agreed, that theſe Words uſed in a Will, may give an Intereſt, and paſs the Thing to be uſed, and ſo is Matthew Manning's Caſe, 8 Rep. 94. becauſe of the Intent, but that implies it ſhould be otherwiſe in a Deed; nay, though it ſhould paſs the Thing it ſelf in the Caſe of a Grant, yet 'twill not reſerve it in an Exception, for that the Words of an Exception are the Words of the Leſſor, and to be conſtrued moſt ſtrongly contra proferentem, and ſo is Bro. Tit. Except. pl. 2. 4 H. 8. 1. Tho. Ive and Sam's Caſe, 3 Cro. 522. does contradict as to the Exception of Woods, that that excepts the Soil. Yet it muſt be agreed ſtill, that an Exception is to be conſtrued moſt ſtrongly againſt the Exceptor, becauſe his Words, Plowd. 103, 171.

In Wills, Covenants, and all Agreements, (and a Leaſe is but an Agreement) the latter part ſhall explain, qualifie, reſtrain, or enlarge the general Word's precedent, eſpecially if in one Sentence. The Books are plentiful in this Matter, whether the reſtrictive Words are Precedent or Subſequent, as in Dyer 240.

Termor

Termor for years assigns his Term and Covenants, that he hath not made any former Grant, or done any thing, whereby the said Assignment should be impaired or frustrate, but that the Assignees might quietly enjoy without the Disturbance of any Person: Held, that the general Words shall be restrained and limited by the Exposition of the particular ones. So Dyer 255. Condition to suffer the Obligee quietly to hold the Lands during the Term, and that without the Trouble of any Person: Held, that the general Words shall be restrained by the Particular. Nor is there one Case to the contrary: Sir Geo. Trenchard's Case, Winch. 91, 92. and Litt. Rep. 92, 95. Covenant, that he was seized in Fee, and that he had Power to sell, and that no Reversion was in the Crown notwithstanding any Act done by the Covenantor; the last Words, notwithstanding any Act, do restrain the general Sense of both the former Covenants.

And in all the Cases on this Topick 'tis agreed, That the general shall be restrained by the particular, if they are but one entire Sentence: Here they are undoubtedly but one. The Case of Gainsford and Griffith, 1 Saund. 60. agrees that Point. In that Case of Sir George Trenchard as reported by Litt. there are many Cases quoted which deserve not a Repetition before your Lordship.

Then this Exception seems repugnant, and therefore void, as if I grant totam partem pischar' mei salvo mihi pischario meo; this is a void Exception, because repugnant and contrariant to the first Grant, Bro. Tit. Reservat. 23. Grant of 20 Acres, reserving or excepting one, are void because repugnant, 1 Inst. 47. Lease of a Mannor except the Courts and Profits, Exception void. Moore 870. Dyer 96, 97.

Express Authority is Dyer 264. Lease of an House in Fleet-street, with all Chambers, Cellars, and Shops thereunto belonging, except the Shops for his Use; and held a void Exception, and that for 2 Reasons, both which hold in our Case, viz. The first per Dyer, the Exception was but special and temporary (viz.) during the Occupation and Use of the Lessor himself, and the Premisses were leased generally. Then, 2. The Shops were by express Words demised; 'twas expressly said all Shops, and the Exception being contrary to the express Words of the Grant is void; and this was Dyer's Opinion contra Weston. And then at last is added, Et sic fuit opinio aliorum Justicariorum tandem. This is direct: But I confess, that Mr. Row did cite 1 And. 52. And there the Case (by the Name of Homeby and Clifton) is otherwise reported; but my Lord Dyer says, that such at length was the Opinion of the other Justices; so that on first Argument, the Opinion might be as Anderson puts it. Besides, his

Reports are imperfect; they takes notice only of the Reason of its being ſpecial and temporary, as idle and void. Beſides, there was a total Uſe reſerved; here 'tis at other times for the Defendant and his Aſſigns, and he takes no notice of the Argument from the Repugnancy, which is the ſtronger Reaſon of the two: It's true, the Report of Novel Bendlowes 181. is agreeable to Anderſon; but that is plainly miſtaken, for it refers to Dyer, which ſee accordingly, whereas 'tis plainly with us: But to ſupport the Authority of Dyer, there's the opinion of my Lord Hobert exactly concurring. And he quoted this Caſe out of my Lord Dyer as good Authority, in his Argument inter Stukeley and Butler, which was Hill. 12 Jac. 1. it's fol. 170. and ſeveral others, Keinſham and Reading, 3 Cro. 344. Moore 280. where ſpecially expreſſed before the Exception made, as in that Caſe of Underwood's Reſervations and Exceptions ſhall be void, rather than the Intent of the Grant ſhall be fruſtrated, as 3 Cro. 6. Arden & Dennis's Caſe, Lanes Rep. 68, 69. 7 Hen. 6. 43. Out of a general, a part may be excepted, but not a part out of a Certainty, Dyer 97. And the true Reaſon is, becauſe the Intent, where apparent, ſhall never be falſified; where 'tis not particular, an Exception may explain it.

Then if here be any Reverſion in the Plaintiff, that appears well enough, for 'tis ſaid that the Plaintiff (being poſſeſs'd of a certain Term of years) that he made him a Leaſe for 7 years: That by Vertue thereof he entred, and was poſſeſt. That the Plaintiff being poſſeſt of the Reverſion thereof for a certain Term of years, which could not be, if he had aſſigned the whole Term. Further, the Jury find us poſſeſt of the Reverſion for a Term, then, and yet to come, which was at the time of the finding. There's no Words of Aſſignment of &c. but only of a Grant and Demiſe. It muſt now be intended ſo, ſince the Jury have found a particular Matter, and referred it to the Court, every thing elſe ought to be intended, according to Goodale's Caſe, 5 Rep. 96, 97. The Court on a ſpecial Verdict ſhall never doubt of any thing, but that which the Jury doubt of, and have referr'd to their Conſideration, and all other Matters ſhall be ſupplied and intended. Here the Iſſue is non dimiſit, and the Jury have found a Deed of Demiſe in Conſideration of a Rent reſerved, and that could not be, if his Term were no longer than 7 years: And they find, that upon the demiſed Premiſes, there were two Houſes, and their Concluſion is ſpecial: If by this Indenture the Houſe paſſed, then pro Quer': If otherwiſe, pro Def. Therefore all other things ſhall be intended, as Caſtle and Hobb's Caſe, 1 Cro. 21, 22. and Saund. and Rich. Styles 278, 279. Special Verdict on a Will, the dying ſeized of the Deviſor, ſhall

be

be intended: But of this Point the Court made no doubt, tho' the Ch. J. at first objected it.

Then, that this Action lies, was agreed by Row, and must be so if the House passed by the Lease; for the Reason of the Countess of Salop's Case, 5 Rep. 13. and 3 Cro. 777, 784. was, because Tenant at Will was not lyable for permissive Waste, either by Common Law, or by Statute; and the Lessor was seized in Fee, and not liable over for any wast done: But here's a Lessee for years under us; if he were Assignee of the whole Term, no Wast lies against us, but only against the Assignee for Wast done after the Assignment, 1 Inst. 54. 2 Inst. 302. because he is the holder. But we are in the Case of an under Lease, and it must be agreed that Wast lies against us, Lewkner against Ford, 1 Leon. 48, 49. Swetton and Cashe's Case, Yelv. 36, 37. There expressly held, that it lies not against an under Lessee for a lesser Term, and that because there wants an immediate Privity, and consequently it must be against us: The very Form of Declaring in the Case, is in Hern's Plead. [illegible] and so adjudged, West and Trude, 1 Cro. 187. Jones 22[illegible] 3 Cro. 461. Nor can I see any Reason, why it should not lye against a Tenant at Will, for we are liable over in that Case, which is the true Reason the Books go upon. But supposing the House excepted, and then the Defendant but Tenant at Will; If this Finding maintains our Declaration? This I waved, because I was of opinion, that 'twas a material Variance; though Mr. Gold argued, that if at Will, the Verdict is for the Plaintiff, and the Lease only an Inducement, and not of the Substance, and the modo & forma is not material in this Case; and cited Clare and Pepis's Case, 3 Cro. 40. 1 Leon. 68. Kaire and Deucart, Owen 91. 1 Inst. 281, 282. and Hyden's Case, 2 Cro. 328. To which Mr. Row e contra insisted, that modo & forma in this Case were of the Substance of the Issue, and that this was another Demise; and that Tenancy at Will, and for years, were quite different, and cited Dyer 260, and 2 Rolls 709. And the Court was of this opinion, and that the Cases in the 2 Rolls Abr. 707. num 44. num. 58. were stronger than this, and Hob. 72. And in this Case they ought to prove a Demise for 7 years: though it must be owned, that if a Man entred by agreement, he becomes Tenant at Will, and Cestuy que trust is such.

Serjeant Tremaine argued on the other side on the Point of Exception, only as I did, viz. that as to Repugnancy there was none, because it is general, all the Houses and Structures, and then the Exception of one is well enough. Then 'tis excep-

ed to the Plaintiff and his Executors to be used by him, which intends the Interest, and not barely the Use: Then these Words not to be let or set, import an Interest; for if only the Use were intended, then the Words not to be let would be idle.

A Grant of a Messuage excepting the House call. led the New-House, for the use only of himself & Family to live in when they please, but not to lett, a good excepting of the New House.

Afterwards the Court gave their Opinion severally.

Eyres. That 'tis no Demise of the New House for 7 years: The New House is plainly excepted out of the Demise, tho' there seem to be a Qualification of the Exception, and there may be a saving out of the same, Owen 20. This Qualification only amounts to give a Tenancy at Will to the Defendant. 'Tis at the pleasure of the Lessor, whether the Lessee shall enjoy it for the Term, or any part thereof: And therefore 'tis only declarative, how the Lessor agreed to use that House. But no Term passes to the Defendant by it, and therefore the Defendant must have Judgment for him, though I think the Plaintiff might have declared right.

Gregory was of the same opinion. I think the Action lies; for the thing speaks it self; for the Plaintiff had a longer Term in it, and that is lost. Jones 224. But, I think, the Exception good, and no ways repugnant to the Deed. If the thing did not pass by the general Words of the Grant, the Exception would be useless. And Dyer reports not the Case so well as Anderson and Bendlowes.

Dolben ad idem. I think it an Exception, and therefore not a Demise for 7 years.

C. J. Holt. I think this New House absolutely excepted out of the Demise. The Words are as full an Exception as can be. The Words afterwards are no manner of Qualification of the Words of the Exception, but only declarative of what purposes 'twas for. An Exception may be qualified, as it may be for part of the Term; but if a Lease or Assignment be for years, with an Exception of the new House for Life, this Exception is void. 1 And. 52. is our Case in Point, and good Law, and there held a good Exception, and qualify'd; in Dyer 'twas held a void Exception, but for another Reason, because repugnant. Now 'tis true, you cannot except that which was particularly and expressly granted, but then the Grant is only in general; the Case of Pitt and Marshall, Dyer 264. in the Margin, I take to be good Law. Judic. pro Def.

Mogadara

Mogadara *verſus* Holt. Ent. Trin. 3 W & M. *Rot.* 197.

NArr. en Caſe ſur Bill del Exchange, and ſets forth, that the City of London here, and the Town of Rotterdam abroad in foreign parts, are, and time out of Mind, have been ancient Vills, and that 2 Uſances and half in any Bill of Exchange directed by any Merchant in London, to any in Rotterdam, was, and time out of Mind uſed to be 2 Months and a half, from the Date of ſuch Bill. That there is a Cuſtom, that if any Merchant in London draw his Bill or Bills on any Merchant in Rotterdam, payable to any Merchant, or order; and if the Merchant there accept any ſuch Bill, and before acceptance, or after, the Merchant to whoſe Order the Money is directed to be paid, doth endorſe it to any other Merchant, and that other Merchant endorſe it to ſome other, and the Merchant to whom the Bill is directed, accept it after ſuch Endorſement, and fails in Payment to the Merchant to whom indorſed at the time limited for Payment, whereby the Bill becomes proteſted, and Notice given thereof to the Drawer, that in ſuch Caſe the Drawer becomes liable to pay the ſame with Damage to the Indorſee.

That the Defendant 9 Nov. 1688. drew two Bills of Exchange of the ſame Date, and for the ſame Sums on Edward Williams, payable to the Order of Hartopp for 300 l. value of himſelf: That Hartopp, the ſame day, endorſeth it to Marques, Marques the ſame day, indorſeth it to the Plaintiff; that the Plaintiff afterwards, viz. 8 Feb. 1689. Stylo Novo gave Notice to Williams, and he then accepted it; that Williams failed to pay it; that by reaſon thereof afterwards, viz. the ſaid 8 Febr. the Bill was proteſted, of which Proteſt the Defendant had Notice the 28th of April, 1689. and did not pay it, ad dampn'.

Caſe on a Bill of Exchange, and ſets forth the Cuſtom of Merchants, and doth not bring his Caſe within it: If by the Law of Merchants, he has a right to his Action, the ſetting forth the Cuſtom ſhall be re- [illegible] privilege.

The Defendant demurs generally.

For the Defendant I argued, that the Declaration was ill, becauſe they had declared upon a Cuſtom, which was, If the Bill drawn at 2 Uſance and a half, and accepted, and not paid at the time, then the Drawer was liable. Now their Fact alledged, was a Bill ſo drawn, accepted and proteſted after the day of Payment was expired, and therefore not within their Cuſtom: That the Proteſt ſhould have been for Non-acceptance within the time, and then the Party ought to have the Bill tendred unto him with

in the time: That here they had not any Acceptance at all within their Custom: That the Custom was for an Acceptance within the time, and failure of Payment at the time, and there could be no failure of Payment by that Custom, but upon Acceptance before: That here the Custom was part of the Case; that they had set it forth specially; that they had declared of all the Facts, Secund' Consuetund' pred. and that virtute Consuetud' pred. the Defendant became chargeable, and in consideration thereof assumpsit: That though the Custom of Merchants should allow of a Protest after the time, yet here they fail, because they have declared of a Custom to which they apply all their Facts, which does not quadrare. That if a Man do declare upon an Act of Parliament, and set it forth otherwise than 'tis, yet if his Case, and that Act he sets forth, do not agree, it's ill. Now here the Usances and half were expired in January, and the days of Grace allowed in such Cases were but three, and therefore the Judgment ought to be pro Def.

The Chief Justice doubted, because he said the Law of Merchants made him liable, who was the Drawer, though the Acceptance were after the Day; and then doubted, if they were not bound to take Notice thereof as part of the Law of the Land; the which I thought new and strange, because many Judgments had been arrested after Verdict for Variances between the Custom and Fact alledged, but never doubted upon a Demurrer but 'twas ill. And though in the Case of Carter and Devenish, which he quoted to me, it had been adjudged, that the Custom need not be alledged, yet in a Declaration 'twas always usual to set forth the Custom; and when they had done it, 'twas part of their Case. But afterwards they severally gave their opinions pro Quer'.

Eyres pro Quer'. Though the Plaintiff hath alledged a Custom contrary to his Fact, yet that is but Surplusage; for 'tis no more than the Law of Merchants, and that is jus gentium, and we are to take notice of it, and cited 2 Rolls Rep. 113. Palmers Rep. Rex against Cosack, 1 Inst. 183. Yelv. 136. Now if there be no Accident happening or intervening, by the Parties breaking, or the like, the Drawer is chargeable, though the presenting of the Bill and Protest were after the day; for by the Law of Merchants it need not be tendred within the time.

Gregory and Dolben of the same opinion, that the Judges are bound to take notice of it, and he needed not to have alledged a Custom.

Ch. J.

Ch. J. Holt. The time is well enough by the Law of Merchants, and that is the ſame with our Law: Now by that the Drawer is chargeable by the Value received; for though it were not paid, or the Bill preſented within the time, yet it ought ſtill to be paid; but if he do not tender and proteſt at the day, and there be a Break in the mean time, the Party loſeth his Money; otherwiſe if no particular Damage. Jud. pro Quer'.

Drawer of a Bill of Exchange liable tho' the Bill not preſented in time.

Phyler *verſus* Boſon. Entr. Mich. 2 Rot. 250.

NOW a new Writ of Error was brought directed Ballivis Civitat' noſtræ Exon. et eorum Cuiliber. Quia in Record' & coram Ballivis, &c. And ſo right returned: The Writ was to reverſe a Judgment in Trover after a Verdict in the Sheriff's Court in Exeter. The Exceptions taken by Mr. Carthew were, That the Plaint is entred 15 Dec. 1688. in Cur' Dom. Regis Jac. 2d. And ſo all one as in Cur' pred', which is ill, becauſe of the Abdication. To which I anſwered, that by the Act of Continuance of Pleas and the Term, &c. All Bills, Plaints, Judgments, and Proceedings in Courts of Cities or Towns Corporate, or any other inferiour Courts, and all other Executions thereupon had ſince 11 Dec. and before the 13th of February, ſhall be good and effectual in the Law, as if the ſaid late King had remained in the Exerciſe of his Regal Power; ſo by that 'tis well enough for the Style of the Court. The 2. that there's a Diſcontinuance. 1. Becauſe that the dies Datus's are ad prox. Cur. tenend' tali die, and do not ſay coram whom the Court is to be held; and for it cited Raſtal's and Cook's Entries. To which I anſwered, 'tis true, it muſt be ſaid before whom the Court is held, but it need not be in the dies Datus; it's well enough if it be in the ad quam quidem predict' Cur. and ſo 'tis here, and ſo are the Precedents in thoſe Books. 2. That there's a Diſcontinuance for want of an ei Conceditur upon the Imparlance prayed from the 9th to 15th of February. there being only a Petit licent' interloquendi; and that ad quam the Parties appear, but no dies datus or conceditur. To which I anſwer'd, that that's helpt by Appearance afterwards, or at leaſt by the Verdict. By Swift and Nott's Caſe, Sid. 173. Diſcontinuance of Proceſs helpt by Appearance, and Marſham and Anderſon, Paſch. 18 Car. 2. Keble 34. want of dies datus helpt by the Verdict; and Rawlins and Higgins, 2 Keb. 715. held Error in Judgment pro Def. otherwiſe not: And Green againſt Cubet, 2 Keb. 626. Diſcontinuance

Statute of *Jeofails* extend to inferiour Courts

nuance aided by Verdict in inferiour Courts, and Mollineuxs's Caſe, 2 Cro. 236. But an expreſs Authority is Cole and Green, 2 Saund. 257. by the Judges in the Houſe of Lords; that the Statutes of Jeofails do extend to inferiour Courts: That they are helpt by 21 Jac. 1. Cap. 13. And of this opinion was all the Court, and the Judgment was affirmed, for that the Diſcontinuance of Proceſs is helpt at Common Law by appearance, and a Diſcontinuance of Court is helpt after Verdict by the Statute of Jeofails, and ſo they held in another Caſe, this Term Int. Walwin and Smith, 1 Cro. 254. 1 Rolls abr. 486, 779.

Jefferyes *verſus* Legendra. Ent. Hill. ult. 659.

Caſe on a Policy of Aſſurance.

NArr. en Caſe, upon a Policy of Aſſurance on a Ship called the Olive Branch from London to Naples; and ſets forth the Policy in hæc verba, by which the Ship was warranted to depart with Convoy; and avers, that being loaden, departed from London towards Naples cum et ſub præſidio navis guerrinæ. That afterwards ſhe was taken at Sea, and loſt. Non-aſſumpſit pleaded.

Jury find, That the Defendant ſigned the Policy prout; That the Ship departed with Convoy; That the Ship was ſeparated from the Convoy by Streſs of Weather in the Downs; That ſhe was driven into Foy; That ſhe (waiting for Convoy) did afterwards go out expecting to meet the Convoy, ſuppoſed to be coming from Torbay; That the Wind was fair, that the Convoy was not come up; That ſhe could not return, that ſhe ſailed on; That afterwards 10 Leagues off ſhe was taken by a French Man of War.

Serjeant Tremayne pro Quer'. That here the Adventure is to begin at the loading of the Goods, which is before the Departure; That theſe are mutual Agreements; That they ought to bring their Action according to the opinion of Hind and Knightley's Caſe, upon the Policy, where the Ship was warranted to be in the Downs; that here the Warranty was performed, i. e. a departure from London: What the Maſter hath done, is conſiſtent with his Duty, and 'tis found he uſed his utmoſt Endeavour, and that there was no Default in him: That ſuppoſing it a Condition precedent, yet 'tis expreſly found, that it departed with Convoy; That the firſt Separation was by the Perils of the Sea; That the Convoy is the King's Ship, and not at the Plaintiff's Command. E cont. in the Arguments in this Caſe I made a Quer 1. What is the meaning of theſe Words, depart with

with Convoy, whether going out with Convoy, or going the Voyage with Convoy?

2. Whether that be a Conditional part of the Agreement, ſo as that the Inſurance obliges not, unleſs it be performed, or if they are mutual Aſſumpſits?

3. Whether ſuppoſing it a Condition, or part of the Agreement, it be here found to be here performed?

As to the firſt, this Policy is but a Parol Contract, and that between Merchants and Traders, and in ſuch Caſes the Words are to have a reaſonable Intendment: It is to be conſtrued according to the Mind of the Parties expreſt by theſe Words, and thoſe Words are to be interpreted according to the Nature of the thing and the ſubject Matter about which ſuch words are uſed. Now the ſubject Matter here, is a Voyage from London to Naples, the Undertaking is an Inſurance, or Promiſe, to anſwer, or ſatisfy for ſuch Loſſes as ſhall happen in this Voyage; Theſe Additional words warranted to depart with Convoy, (if of any uſe) they are to leſſen and diminiſh that Adventure which the Inſurer undertakes. Now this is a reſtrictive Clauſe, and qualifies the Force of theſe general words which are in the Body of the Policy, viz. all Perils: And if any other Conſtruction be had for it, it muſt be immaterial: And it is a Rule in all Conſtructions of Deviſes, Awards, and Contracts or Agreements, that every word is to have a meaning, if poſſible, and ſuch Senſe is to be made thereof, that every Clauſe ſhall have its due Force, and that according to the Intention of the Parties: I need cite no Authorities for theſe plain Rules. Now if the ſtrict literal Senſe of the word depart, be taken in this Caſe, then that Clauſe is uſeleſs; for to depart from London, there's no need of Convoy; for in our own Harbours (Gratias Deo) we are ſafe enough; and to depart in the ſtrict Senſe, is to break Anchor, ſet Sail, and leave the Port of London: May take it in the moſt ſtrict Senſe, and conſtrue it without any Latitude, and 'tis only to leave the City of London; for London only ſignifies the City, unleſs you intend it according to the ſubject Matter, and then the Port is meant, which reacht no further than the Hope, or thereabouts. It muſt therefore be meant, go with Convoy, as depart in Peace, ſignifies Peace attend you.

Decedere muſt have terminus a quo, et terminus ad quem both, eſpecially in this Caſe, for otherwiſe 'twould be to depart indefinitely, and then departure upon another Voyage with Convoy, would fulfill the words, which was never intended: Now there muſt be an Intendment for the Port of London a quo, why not for the locus ad quem, the Voyage is deſigned? And there's all the Reaſon in the World from the nature of the thing for

the ſame Intendment in both. Reaſon ſays, it muſt be in a Voyage, and in this Voyage, and this Voyage is from London to Naples, Ergo the ſame Reaſon holds for the one as well as for the other. The Method in the Civil Law, for diſcerning the true Senſe of Agreements, is by Interrogation: Now here, ſuppoſe it queried, What if the Ship go alone? No, it ſhall depart with Convoy. What if the Convoy leave her at the River's Mouth? The anſwer would be without peradventure, ſhe is to have, and go with Convoy.

All Contracts are to be conſtrued by our Law according to the Intent of the Parties, as near as the Rules of Law will admit. Now in our Caſe there is no Rule of Law, nor particular Reaſon againſt this Conſtruction which I am now contending for.

My Lord, there are infinite Numbers of Caſes that words are to be conſtrued according to the nature of the thing, and the ſubject Matter, and upon that account even different from their literal (or otherwiſe natural) Senſe: as and for or, and or for and, according to the ſubject Matter, Plowd. 289. a Conjunction for a Diſjunction, et e contra, Owen 52, 53. Nay, contrary to the very words, if the Intent be pregnant and ſtrongly manifeſt, as, the Condition of this Obligation to be void. Maleverer againſt Hawxby Sid. 456. 2 Saund. 78. Mod. rep. 35. Words are oftentimes rejected, if contrary to the apparent Senſe of the Parties: The Intent is to be performed, and not the Words. See Barry and Smith's Caſe, Dyer 219.

Pickering and Berkley's Caſe, Paſch. 24. Car. 1. Rot. 154. 'tis in 2 Rolls abr. 248. and Styles 132. Covenant on a Charter-Party, that the Defendant in Conſideration of a Sum agreed on for Freight, ſhould make ſuch a Voyage, and bear all Loſs and Damage which ſhould befall the Ship or her Lading, except only Perils of the Sea. Defendant pleads, That in making that Voyage, the Ship was taken by a Man of War unknown, whereby he was hindred in making his Voyage. Demurrer to it, the Query was, If the Capture by unknown Men of War, was a Peril of the Sea, or not, according to the meaning of Merchants? And argued ſtrongly that it was not. But upon a Certificate of Merchants read in Court, that 'twas ſo eſteemed, the Court enclined thereto: Yet the Court deſired Crawly, the Maſter of the Trinity-houſe, and other ſufficient Merchants to be brought into Court to ſatisfy them Viva voce, and 'twas ſo done accordingly, and Judgment pro Def.

I urge this to ſhew, that the meaning of Words, according to their Uſe amongſt Merchants, may be even contrary to their natural Senſe: For in ſtrictneſs, Perils of the Sea importeth only Tempeſts, and Dangers by Rocks, Winds, or Waves. The Judges have been governed by Grammarians about the meaning of Words amongſt them, as modo, &c. Now there is the Form of Expreſſion uſed in Policies to diſtinguiſh when a Ship is to go with Convoy, and they have no other different way of expreſſing it, and therefore cannot be taken to be for a particular Agreement, only to have a preciſe departure with Convoy, which might be more colourable, if they had diverſe Forms in this Caſe. Beſides, this Clauſe is added in ſhort at the end of the Policy; which ſhews, that the paucity and ſcantineſs of the words was only for brevity, and not upon any Reſtriction or Particularity in their Agreement, that it ſhould mean no more, and therefore I conclude this Quere, that depart here, muſt mean going the Voyage with Convoy.

2dly. We are not enforced to another Action, as in mutual Covenants or Aſſumpſits: Firſt, I obſerve, that the Law abhors Circuity of Action, if by any means or Conſtruction it can be prevented. I need not quote Caſes to prove it. Kelway 34. 7 Rep. 38. Plowd. 34. The Law will never put a Man bound, unleſs on an abſolute Neceſſity; this is all a Parol Agreement; and Hind and Knightly's Caſe, though ſo ruled at firſt, yet the then and after opinion of all ſave one or two Judges was with me. For there, though there was a Recovery, notwithſtanding the Breach of the Warranty for the Ships being in the Downs, yet I well remember, that all the Opinions were againſt that; and My. Juſtice Jones declared himſelf ſo afterwards upon the Tryal of the Inſurer's Action for Deceit in that Warranty, for that it made all but one Contract, and a Parol Averrment might be againſt it.

This is part of the Agreement; 'tis the mode of the Voyage, upon which we inſure; It is as it were a Condition precedent; and in a perſonal Contract there needs no preciſe words to make a Condition, as ſi, proviſo, ſub Conditione, or the like. Ea intentione, or ad Suppoſitum will in many Caſes make a Condition in a Will; ſlight words do it there, and the ſame Reaſon holds in Contracts and Agreements.

We are not here arguing for a Condition to veſt or divert, create or deſtroy an Eſtate of Free-hold or Inheritance: Any words that amount to a Signification of the Parties Senſe, that a particular thing is to be done, or otherwiſe the reſt is to fail, if it appears that ſuch is their intent, 'tis ſufficient; and then if that be not obſerved, the other fails; and it muſt be ſo intended; and

were it intended otherwiſe, it would have been added (as Grotius in his Right of War and Peace, lib. 3. cap. 19. Sect. 14. ſays, is uſually done in ſuch Caſes) that if either Party do tranſgreſs in this, or that Particular, yet the reſt ſhall remain firm and immoveable.

Here this is a part of their Policy, and ſo is it in their Count, tenor cujus ſequitur, and yet that we were content to become Aſſurers, ſecund' tenorem ejusdem ſcripti.

Beſides, conſider the nature of the Policy; 'tis a Negotiation amongſt Merchants; and there ſays Straacha de Mercator' 804. The Intent is chiefly to be regarded; and if it be not ſo, yet 'tis falſa demonſtratio quæ vitiat Aſſeverationem, as if the Party have no Goods on Board, or if that there be no ſuch Ship, or no ſuch Voyage had; for then ſay thoſe Deciſions, there's no Hazard run, and conſequently the Præmium to be returned. Policies are to have a reaſonable Intendment: So if the Ship or Goods were loſt before the Policy was made, and the Party inſured had Notice; though the words loſt, or not loſt, be inſerted, yet the Policy is void. If general without theſe words; yet if loſt before Policy made, 'tis void, becauſe of the Improbability ſuppoſed that any Man would engage againſt that which is already happen'd, Straacha 143. 222. I urge this to ſhew, that ſuch reaſonable Intendment is to be made here, that this was part of the Agreement, for that in time of War (of which you'll take notice) Men would not readily enſure Ships going without Convoy. Beſides there's another Rule, That in Conſtruction of the nature and extent of the Enſurance, a regard is to be had to the quantity of the Præmium, and that helps in many Caſes. It is to be intended of the firſt Voyage, Straacha 173. of one Voyage only. So to refit a Ship, 'tis only pro prima vice, Straacha 806. Then there's another Rule that holds inviolably, that the change of the Voyage doth diſſolve the Contract, Straacha 154. which brings me to the laſt and 3d Quære. If the Inſurance made of this Voyage were ſo obſerved, that we are bound by our Policy. Now, my Lord, upon what I have already offer'd, it appears that an Inſurance is a Conditional Contract; now if ſuch Condition by any Collateral Impediment, be prevented from ever happening in the manner it is agreed upon, neither Party are bound; and if it happen by the Default of the inſured, we are diſcharged, and yet the Præmium is ours: But if by neither of their Faults, then neither are bound, and ſo is my aforeſaid Author 804.

We

We undertook only to pay the Loſs, in caſe the Ship, going in ſuch a manner, be loſt; and it matters not to me whether the Hazard be prevented by their Default or not, if by their Default, they loſe the Præmium; but if otherwiſe, it however vacates the Contract.

That Matters happening afterwards, though not by the Default of the Inſured, may vacate an Inſurance is plain. I mean ſuch as prevents or alters the mode of the Voyage; As ſuppoſe by the Default of the Maſter, who is here a third Perſon, a meer Stranger to this Contract: If an Inſurance be upon Goods in a certain Ship by Name, and afterwards they are put on Board another Ship; It's plain the Inſurers are not liable; nay, the Civilians go further; though there were a Clauſe of Power to tranſmit from one Ship to another, yet if the Goods are taken on Shoar and lodged there, and afterwards put on Board another Ship, the Inſurers are not liable, Straacha 806.

We are not within the Law or Rules of Impoſſibilities happening by the Act of God to ſave from Penalties; Ours is no more than the Common Caſe of a Conditional Aſſumpſit, an Executory promiſe upon an Act done, and to be done to, or by a Stranger: And in ſuch Caſe it's not enough to ſay, that 'twas endeavoured, or that the Circumſtance was rendred impoſſible to be obſerved by the Act of God; for if it be ſo, I am however diſcharged from my Promiſe, See 7 Rep. 38. Styles 280. 3 Cro. 833. 1 Rolls Abr. 450.

The full intent is to be performed, and not the bare words: Then here the intent was, that the Voyage ſhould be had with a Convoy, or at leaſt till paſt Danger; now here's no ſuch matter found, nay the contrary is found; the Loſs is not by Storms or Tempeſts, by Rocks, Winds or Waves, but for the want of Convoy; it's found the Convoy was 90 Leagues behind, and the Maſter knew it. His going out ea intentione to meet her, will not help it; the Plaintiff was to proceed and keep with the Convoy; the Agreement for it is on his part; he was not bound to go with this or that particular Man of War, but with Convoy in general; he ought to have waited for that or another: Beſides, it's of no regard to us, whether he were blame-worthy or not. Suppoſe his deſigned Convoy had left him at the River's Mouth, and refuſed to go with him, and a Loſs happens for want of him, we are not bound to anſwer the Loſs, for we never undertook to aſſure under ſuch Circumſtances, or upon ſuch Terms. Here the Plaintiff undertook for the Act of a Stranger, and this Stranger doth not that Act; 'tis not found he ever came out of Torbay. Upon the whole I pray Judgment pro Def. for that to depart without Convoy, muſt be conſtrued according to the ſubject Matter,

ter, i. e. to go the Voyage; then this being part of the Agreement, and not obſerved, though without the Plaintiff's Default, we are diſcharged of our Promiſe, which was to be an Inſurer ſecundum tenorem ſcripti præd. and that was in a Voyage with Convoy.

Afterwards Serjeant Thompſon argued pro Quer', and Serjeant Levins pro Def. And Serjeant Levins argued on another Topick, and agreed what I laboured to deny, that if the Maſter had done his utmoſt, then the Cauſe was againſt him; but laboured to ſhew a Default in the Convoy and Maſter in not meeting after the Separation, which was ſufficiently difficult, as the Fact was found: That he might have ſent to Torbay to have enquired for the Convoy; that the Convoy might have come up, but was negligent and ſtaid behind when the Wind was fair; that the Convoy being to be provided by them, if any Default in him, 'twas againſt the Plaintiff.

Warranted to depart with Convoy, if the Ship goes out with Convoy and ſeparated by Streſs of Weather, and return home and is taken in going out in ſearch of the Convoy, the Inſurer's liable.

C. J. Holt denied the Caſe of Hind and Knightley to be Law, and that the current Opinion was againſt it. That 'twas part of the Agreement, and if not fulfilled did vitiate the Policy. But he ſaid that Deceſſit only ſignifies a departure from London in that Voyage: And ſuppoſe he does depart, and is at Sea, the Voyage is begun: If the Separation had been by Fraud 'twere ſomewhat; but here the Separation is by ſtreſs of Weather. Suppoſe the Maſter had committed Barretry, the Inſurers are liable; If you intend he ſhould go the Voyage with Convoy, you muſt make the Agreement ſo.

Gregory. There is no manner of Fault in the Plaintiff: When the Veſſel was once gon to Sea with Convoy, 'twas not in the Plaintiff's Power to do more.

Eyres. I take it, the meaning is, That he ſhould go out with Convoy, and ſo continue with him to the end of the Voyage, without any Default in him; and the ſpecial Verdict hath found no Default in him. Judgment pro Quer'. Dolben Abſente ſic conſentiente.

Dominus

Dominus Rex *verſus* Warrington.

INformation here in B. R. againſt Warrington & al' for a Riot committed in Cheſter, and Iſſue joyned upon Non Cul' thereon, by Writ of Mittimus the Tenor of the Record is ſenc Camerario noſtro Com' Palatin' in Ceſtr. Sive ejus locum ibid. tenent' commanding quod inſpecto tenore præd. per breve noſtrum ſub Sigillo Com' Palatin' præd. debit' conficiend' mandari fac' Recordum præd. Majori Civitat' Ceſtr. præd. dand. in mandat' eidem Majori quod quoad triand' Exitum in Recordo præd. junctum idem Major Mandari faciat *Roberto Kentiſh* un' Mercat. Civitat' præd. quod venire fac. coram Majore præd. ad certos diem & locum per ipſum Majorem limitand' poſtquam Record. præd. ſibi liberatum fuit duodecim liberos et legales hom' de viſn' Civit' Ceſtr. præd. quorum quilibet habeat quatuor libras terræ tenementor' vel redditus per ann. ad minus per quos rei veritas melius ſciri poterit. Et qui præd. *W. &c.* nulla affinitate attingunt ad Recognit'---- Si *&c.* Et ulterius taliter proceſs' verſus Jur' inter nos et præd. Impanell' fac' qualis ſecund' legem & Conſuetud. Civitat' præd. in hujuſmodi Caſu fieri conſuet' fuerit quouſq; Exitus præd. plenarie trietur: Et cum præd. Exitus et verificatio ibid. fact' & triat' fuerit quod tunc pred. Major Record' præd. cum toto eo quod inde in Cur. noſtra ibid. fact' vobis mittat ita quod ea omnia vos nobis in Cur. noſtra coram Nobis apud Weſtm. remittatis ad certum diem per nos præd. partibus præfigend' ad audiend' inde judicium, et habeatis ibi tunc hoc breve, *&c.*

Reſponſ' prenobilis *Willielmi* Comitis *Derbye* Camerarij Com' Palatin. Ceſtr. infraſcript' Virtute iſtius brevis mihi direct' dedi in mandat' per aliud breve direct. Majori Civitat' Ceſtr. Infraſcript prout interius mihi præcipitur, qui quidam Major, *viz. N. W.* Arm. dedit mihi in reſponſ' quod Executio illius brevis patet indorſ' in Record' huic brevi annexat' et ſupra hoc prefix' partibus infraſcript' tres *Michael'* prox' futur' ad eſſend' coram Dom. Rege & Domina Regin' ad audiend' inde Judic' ſuum, *&c.* Indorſed the Record thus.

Placit. Coram Domino Rege & Domina Regin' apud *Weſtminſter* de Termino Sanctæ Trin' Anno Regni Dom. *WIll.* & Dom. *Mar.* nunc Regis. & Reginæ Angl', *&c.* tertio.

Inter

Inter Placit' Regis & Reginæ Rot.

Civitat' Ceſtr. & Comitat' ejuſdem Civitat' ſſ. Memorandum quod Samuel Aſtry, &c. Defendants appear, and plead Non cul'. Mr. Saund. ſays, That the Iſſue above joyned is per homines Com' Civitat' Ceſtr. præd. ubi breve Domini Regis et Reg' non currit & non alibi triari debet ac homines de eod' Comit. Civitat. illius extra eund' Com. Civitat. illius ad aliquam jurat faciend' venire non debent nec ſolent; and that the ſaid Warrington and one Robert Kentiſh are Sheriffs Com' pred. Civitat' Ceſtr. ac pro eo quod idem *Johannes VVarrington* unus Vicecom. Com' ejuſdem Civitat'; he prays proces de Venire fac. ad triand' Exit' pred. ſuperius junct præd. *Roberto K.* alteri Vicecom' Civit' præd. tant' derigend &c. and becauſe the ſaid Defendants deny it not; Ideo Mandetur Camerar. &c. Et poſtea Scil' ad Cur. &c. The Iſſue is tried by a Jury returned by the other Sheriff, and the Jury find them Guilty.

And Mr. Cheſhire moved here in Arreſt of Judgment, that the Venire is miſ-awarded, for it ought to have been directed to the Coroners; for that both the Sheriffs are but one Officer, and the Reſolution in the Caſe of Auditor Curle, 11 Rep. is expreſs, that the one can do no Act of himſelf; if one dyes, the other cannot act. Suppoſe one dies, the Award muſt be to the Coroner: Suppoſe Execution againſt one of them, ſhall the other Sheriff have the Cuſtody of him? That would be a Commitment to himſelf, 2 Hen. 4. 4. Suppoſe Conuzance of Pleas granted to be held before 2 Bailiffs, and an Action is againſt one of them, there the Court ſhall be ouſted of Conuzance, for that one only cannot hold Plea, 1 Rolls abr. 492. 1 Cro 138. Goff and Carne, Styles 342. Award to the Coroners in ſuch caſe held well, 36 Hen. 6. 1. They are but one Officer, though three Perſons; and if one doth not take the Oath, the others are not qualified. Upon 1 Edw. 6. cap. 10. if they were ſeveral Officers, they muſt have ſeveral Deputies, whereas the Coroners are ſeveral Officers, and each comes in upon a diſtinct Election.

E cont. I urged that the Venire fac. was well awarded; for though they are but one Officer to moſt Purpoſes, yet in caſe one be challeng'd off, the other may execute; ſo is it in the Caſe of Coroners, 31 Aſſ. pl. 20. A Venire may be awarded to one Coroner upon a Challenge of the other, Ita quod the other do not intermeddle, &c.

And

And this is for Neceſſity in Caſe of a Challenge, becauſe the reaſon of the Challenge goes but to one. The Law requires Hundredors, yet there need none, where either Party is Lord of the Hundred; it may be out of the next adjacent Hundred. This was reſolved Hill. 34 and 35 Car. 2. and upon debate Paſch. following between Sir Peter Rich and Sir Thomas Player; and the Venire was awarded as here, and a Challenge to the Array for this Cauſe, and that Challenge ſaved by the Allowance of a Bill of Exceptions, and afterwards moved in Arreſt of Judgment by Sir William Williams, that they were but one Officer as 'tis now objected; and Judgment pro Quer'. I remember there were cited for Precedents, in Norwich, Hill. 8. Hen. 8. in Banco Rot. 303. and in Lond. Trin. 18 Eliz. in Banco Rot. 511. The Caſe of Sheriff Bethel againſt Harvey here in this Court when he was Sheriff, was the ſame. In Brownl. Declar. 2 Edit. print. 1653. fol. 44. is an Action brought by a Coroner, and a Challenge, becauſe of his Relation to the Sheriff, and then he ſuggeſts that he is one of the Coroners, and prays a Writ to the other, and has it; fol. 45. is another of the ſame; This very Writ in caſe of a Sheriff, is in Brownl. Brevia judicilia, the fol. 396. in Lond. the very ſame Suggeſtion as here, and awarded accordingly alteri Vicecom'. As to the Caſe in Styles, it's no Authority, for 'tis a Nonſenſical Caſe as put there, and no Authority: It's true, if there be no Sheriff, that makes the Award neceſſary to the Coroner; now if one be dead, then there's none; but otherwiſe where there's a Challenge.

Ch. J. Holt. If the Archbiſhop of Canterbury be Plaintiff in a Quare Impedit, the Writ muſt be awarded to the other Archbiſhop: And afterwards he delivered the Opinion of the whole Court.

That the Ven. fac. is well directed, that the Precedents are in Brownlow as they were cited; that this was ſettled in the Caſe of Rich and Player. The Objection is, that they are but one Officer, and have the Shirivalty joyntly in them; but 'tis otherwiſe in caſe of a Challenge. The Coroner is only to execute the Writ, when there is no proper Officer; for if no ſuch Officer at all, as if the Sheriff dye, the Coroner cannot execute it, 22 Hen. 6. 51. Then 'tis the Challenge to the Sheriff as improper, that makes the Coroner a proper Officer; and then why cannot the Challenge to one Sheriff, make the other a proper Officer? Suppoſe one Coroner be challenged, the other may execute it, that's plain. Now where is the difference? For all the Coroners are but ſuch one Officer as the two Sheriffs are: It's true, if there be two Sheriffs, their Authority is joynt, but the act of one is the act of both, Mod. Rep. 198. Suppoſe a Quare Impedit be brought againſt

Where two Sheriffs and one challenged, the *Venire* ſhall be directed to the other Sheriff.

the Archbiſhop of York as a Diſturber, the Writ ſhall be directed to the Archbiſhop of Canterbury, and yet he hath no Superiority, Dyer 328. Judic' pro Rege.

Carivil Executrix *of* Dodſworth *verſus* Edwards. Entr. Trin. 3 *W. & M.* Rot. 394.

NAtr. en Debt ſur Judgment ſur Obligation fait al Teſtator, and ſets forth the Bond and Recoverie by the Teſtator in his Life-time.

Defendant pleads, That the Plaintiff ought not to have her Action, becauſe he ſaith, that the Teſtator, in his Life-time, after the making the Obligation, and recovering the Judgment aforeſaid, viz. 6 February 1681. apud Paroch' pred. in Com' pred. by certain Articles of Agreement, indented, made, granted, and agreed between the ſaid Defendant per nomen, &c. and the ſaid Teſtator in his Life-time and J. B. and H. K. principal Creditors of the ſaid Defendant on the Behalf of themſelves, and the ſeveral Creditors of the ſaid Defendant in a Schedule to the ſaid Articles annexed, named by, and with their Conſent teſtified by the Subſcription of their Names, and ſetting to their Seals, and delivering the ſame as their Act and Deed, &c. the which Articles Sigillo teſtatoris hic in Cur' profert, reciting the Defendant indebted, and not able to pay them without their compliance, in accepting ſuch Satisfaction as he could give, being an Equity of Redemption in certain Houſes, &c. It was covenanted, concluded, and agreed by and between the ſaid Defendant, for himſelf, his Executors and Adminiſtrators, to, and with the ſaid Teſtator, and the ſaid J. B. and H. K. joyntly and ſeverally, and with their ſeveral Executors, Adminiſtrators and Aſſigns, by the ſaid Articles, as in the ſame is mentioned.

Imprimis, the Defendant licenſes and authorizes the ſaid Teſtator and J. B. and H. K. to diſpoſe and ſell the Right aforeſaid, &c. and that upon the Sale thereof, he to ſeal Deeds as they ſhould adviſe; and after the Mortgage-money and Intereſt paid, and the Expences about ſuch Sale, &c. the Reſidue of the Proceed thereof to go to ſatisfie the ſeveral Creditors, as the ſame could ſuffice proportionably; and that every Creditor upon Receipt of his Proportion, as aforeſaid, ſhould make, ſeal and deliver to the Defendant a general Releaſe. And further agreed by, and between the Parties to the ſaid Articles, quod interim & quouſq; premiſſa vendit' forent ut pred. eſt et extunc poſtea pred. Willielmus Edwards (the Defendant) non ſectat' vel proſecut' foret ad legem vel perſon' ſive bon' per aliquos dictor' Creditor' antea

in

in eiſdem articulis mentionat' vel aliquem reſiduor' ſubſcribent' adinde pro aliqua re præterita ſub penalitate reliction' & exoneration' debiti vel debitor' tal' perſonæ ſive perſonar' Creditor' ſive Creditor' qual' ſic ſectaret & proſequeretur ſectarent & proſequerentur ut predict' eſt prout per Articulos pred. plenius liquet & apparet: Et ſic the Defendant ſaith, that the Plaintiff per proſecution' & Exhibition bille ſuæ præd. verſus him the Defendant afozeſaid, and upon the Obligation and Judgment afozeſaid hath fozfeited to the ſaid Defendant the ſaid Debt, accozding to the true Intention of the Articles afozeſaid, Et hoc paratus eſt verificar' unde petit Jud. Upon this there's a Demurrer joyned.

I argued foz the Plaintiff, That the Plea in Bar was ill. This is only a Covenant, and not a Releaſe; he may bring his Action on the Covenant, and recover the value of the Debt. Here are no Wozds of Releaſe as are mentioned in the 1 Inſt. 264. 'Tis only ſaid, he would not ſue under pain of fozfeiting his Debt, i. e. the Sum: This is not as it was in the Caſe of Macbeth and Cobb, Mich. 1 Jac. 2. that the Debtoz ſhould be acquitted; and as ſome Letters of Licenſe are penned, that the ſame ſhould be taken and accepted as a Releaſe. Letter of Licenſe not to ſue under pain of fozfeiting the Debt, no Releaſe.

I'le not controvert, but that a Releaſe may be upon Condition; but this is not ſuch. A Deed may be defeaſanced, and ſo may a Judgment be, but this ſounds meerly in Covenant; foz there 'tis agreed, that expzeſs Releaſes ſhould be given when they receive their Money out of the Sale of the Equity of Redemption.

This is not like the Caſe of Hickmott, 9 Rep. 52. Where by Indenture he acknowledgeth himſelf fully ſatisfied and diſcharged of all Bonds, except one ſuch. Replied, That the Bond in Suit was excepted; and held a Releaſe of theſe not excepted, becauſe acknowledgment of Satisfaction; here's no ſuch Declaration, only a Covenant not to ſue. There's the Caſe of Butler and Monnings, Noy 5. per Anderſon. A. ſeized of 3 Acres grants a Rent-charge out of them to B. and then enfeoffs C. B. covenants and grants to and with C. that he would not charge the ſaid 2 Acres granted to C. with any Diſtreſſes foz the ſaid Rent afterwards, and the Quære was, if it were a Releaſe. And by Anderſon, held that it was not, tho' Glanville thought it one.

2. This Action is brought by my Client who is Executoz, and therefoze this Suit is no Bzeach of the Condition; foz that is by the Parties ſubſcribing to the Articles; now we are none of thoſe, a Suit by us is no Suit by our Teſtatoz; and ſo it is expzeſly reſolved in the Caſe of the Pzioz of St. John of Jeruſalem, 27 Hen. 8. 16. Where 'tis agreed by Fitzherbert, and de-

nied by none; that if I am obliged to you that I will not ſue J. S. my Executor may ſue J. S. and it ſhall not be any Forfeiture of the Obligation; for this Condition is a Collateral thing, and ſhall be conſtrued according to the Words: Which extend to the Perſon only, and not to the Heir or Executor.

It's true, the Executor repreſents the Perſon of the Teſtator as to Obligations and Liens, but not in Conditions; in Collateral Clauſes, the Executor is bound, and ſhall anſwer a Breach of this Covenant, becauſe included in the Covenant, tho' he were not named; but ſince the Covenant is, that A. ſhall not do ſuch an Act, A's Executor is not included in the Name or Perſon of A. becauſe that is Collateral: Suppoſe A. be bound, that he will not go to York in 7 Years, no Man will ſay that the Executors going thither within the 7 years, is a Breach, though the Executors were bound if the Teſtator went, Wentworth 145.

Beſides, it is the Party's ſubſcribing. Now we never ſubſcribed, and that explains their intent and meaning to be clear, that the Parties themſelves were only intended, and not their Repreſentatives, as in Sir Fra. Engleſield's Caſe is agreed: If a Man make a Settlement with a Power of Revocation by writing under his Hand, and the Party being beyond Sea, refuſe to return, whereupon his Lands are to be ſeized, the King cannot make a Revocation, becauſe the Act is reſtrained to his Perſon, to a Writing under his own hand, though it is adjudged that the King comes in his place and ſtead, and may make a tender of a Gold Ring, or piece of Money, or the like; but the former is held to be meerly and ſtrictly perſonal.

In that very Caſe of the Prior's, the Fact was thus; A Leaſe was made, with a Proviſo, That if the ſaid Prior, or any of his Brethren Commanders, would inhabit upon the ſame, and keep it for their own uſe, then upon Notice the Leſſee and his Aſſigns to remove: The Leſſor dies, and the Succeſſor gives Notice to remove, and then enters. There were divers Queries in the Caſe; As if it were a Condition, &c. But one great Quere was, If the Succeſſor were included. And held by all, That he was not; for a Succeſſor may take, or be bound by the Act of his Predeceſſor, and yet in Conditions Collateral a Succeſſor is not included, unleſs named, 27 Hen. 8. 28. An Executor doth in truth repreſent the Perſon of the Teſtator; but that is chiefly as to beneficial, not to penal Points: For in the latter they are different Perſons, and in Suits it is ſo reckoned, though in things for their Benefit, Noy, Bro. tit. Stat. Merch. 43. If the Conuſor in a Statute be returned dead by the Sheriff upon an Extent, a Scire fac. muſt go againſt the Executors, &c. So on a Judgment

Scire

Scire fac. is necessary on Death of either Party to have Execution. The Reason is, because they are esteemed different Persons in our Law. The reason of abating Suits by Death proves this sufficiently.

Pray, my Lord, Consider the Reason why an Executor shall not pay Costs by Force of 23 Hen. 8. cap. 15. which gives Costs to a Defendant against a Plaintiff suing for a Wrong or Breach of Promise, or the like done to the Plaintiff, against whom it passeth by Verdict or Non suit; the Law is ruled to be, that an Executor suing upon such Wrong or Breach of Contract made to his Testator shall not pay Costs, because he is another Person than the Testator, to whom the Wrong or Injury is supposed done, and therefore not done to the Plaintiff within the Words of that Statute; and if this be not the Reason, I know of no Reason at all for it.

It's no answer in our Case to say that the Chancery will compell an Execution of, and Compliance with these Articles, for their Rules rather prove the Common Law, viz. by Contraries.

This is to be taken strictly, because 'tis quasi a Condition, and because 'tis to defeat a just Debt without Payment or Satisfaction. Suppose a Condition were annexed to a Term for Years, that the Lessee by Name do not alien, and the Lessee dyes, and his Executor aliens; this is held no Breach, Dyer 65. pl. 8. 3 Edw. 6. And this is agreed for Law, 1 Rolls Rep. 68. Now this is, because the Intent ought to be only to restrain the Person of the Lessee. Condition not to alien, but to one of his Brothers, he aliens to one of them who aliens to another, held no Breach, Whitchcott against Fox, 2 Cro. 398. Dyer 152. And as the Case is, 1 Rolls Rep. 68. held, That Covenants or Conditions that are penal, shall not extend further than the Person named.

So it is likely to have been the meaning of the Parties here, and the true design of these Articles might be to reach only to their own Acts. My Clyent's Testator might be willing to oblige himself not to sue under pain of forfeiting his Debt; because he needed it not, as having an Annuity or Pension, or Office, or Profession, or Trade, for his Life, but he would not oblige himself, that his Executors should not sue; for his Children or next of Kin might have more need, and so not be in a condition to be so charitable; so that perhaps if the Clause had in Words extended to Executors, he and many more would not have signed the Articles; and therefore the Words being only to personal Acts, and the thing admitting of such an intent, I conceive our Suit no Breach of the Agreement, and therefore pray Judgment pro Quer'.

Ny.

Mr. Hall e contra argued, That this is a ſufficient Releaſe, and cited for it 21 Hen. 7. 23. & 30. 2 Bulſtr. 95. Bridgman 117. 1 And. 307. 3 Cro. 352. 1 Inſt. 204. 2 Bulſtr. 290. 1 Inſt. 236. 43 Edw. 3. Fitz. Damages 37. 2 Saund. 148. But he ſaid nothing to the other Point being unprovided.

C. J. Holt. This is no Releaſe, but a Defeaſance, and ſuch a one there may be by another Deed, Moore 811. And the Quere is, if here be an Acknowledgment of Satisfaction. Adjornatur.

Wynne *verſus* Fellowes. Entr. Termino Rot.

Covenant.

NArr. en dett' ſur Charter Partie, by the Plaintiff as Executor of Wynne the Maſter, in which the Defendant and other Fraightors Covenant, that the Ship ſhould go and retorn home within twelve Months, periculis marium Exceptis, and the Maſter warrants, that the Ship at her departure, ſhould be ſtrong, well, and ſufficiently furniſhed with a Boat and Neceſſaries, and mann'd with himſelf and 8 Men and a Boy, which, or as many as ſhould be neceſſary, ſhould at all times convenient, be ready to ſerve with the Boat during the Voyage: And the Plaintiff and the Defendant, each bind themſelves in 1000 l. to the other for performance.

The Maſter of a Ship covenants, that the Ship ſhall be well furniſhed with Men, and the Fraitors covenant the Ship ſhall return in 12 Months. In Covenant for the Ship's not returning in due time, a good Plea that the Ship was not ſufficiently provided with Men, &c

The Plaintiff aſſigns for Breach, that the Ship departed from Thames, &c. That the Maſter died in the Voyage at 6 Months end, and that it did not retorn within the 12 Months, tho' the Dangers of the Seas did not hinder, &c.

The Defendant pleads, that the Ship was at her departure, mann'd with the Maſter, 7 Men, and a Boy, and that the Ship ſailed to Madera, the Canaries and Jamaica, and ſhe being there, 6 of the Seamen in the ſame Veſſel at her departure, left the Service of the ſaid Ship, and that the Maſter did not provide other Seamen to ſerve in the ſaid Veſſel and Voyage, and that ob defectum inde ſhe lay 6 Months at Jamaica, and could not return, infra 12 menſes; Et hoc paratus eſt verificar'.

Plaintiff demurrs.

Mr. Northy and my ſelf argued, That theſe were mutual Covenants, and not one pleadable in Bar to the other; That there was a ſeveral Remedy for each; That upon the Record it appeared, the Maſter died within the time, and ſo could not perſonally provide the Seamen, and they had not averred him alive when

when the Seamen departed, and the Exception excludes all other Accidents.

Tremayne e contra. That they did not plead it as a failure of performing the Plaintiffs Covenant, but as a Disability by means of the Master, whereby they could not perform theirs; That providing of Seamen was the Act and Duty of the Master, and that the Freighters were not to provide Seamen, nor could they, but the Master must do that, and this Disability by the Plaintiffs Means was a good and sufficient Excuse for them. Upon which 'twas adjourned.

The next Term it came on again, and the Court agreed it a good Bar, if the Non-performance of our part disabled them to perform theirs. But Holt C. J. took Exception to the Plea, that it did not alledge that they had done their part; that they had loaded the Ship, or discharged her at Jamaica, or that they had dismissed her, and given Orders for her sailing; and her Demurrage there was upon occasion of want of Seamen, and cited 3 Cro. 194. and Fitz. tit. Debt, and at last Judgment was given for the Plaintiff upon this Reason per tot. Cur.

In pleading an Excuse for Non-performance, the Party must shew all done by him that he was obliged to do.

Dominus Rex *versus* Stone.

Information for Perjury in an Affidavit, where the Defendant swears that A. B. and several others of a Jury that tryed, &c. had since the Assizes acknowledged to the Deponent, that they were treated at Norwich by the Plaintiff in that Cause before the Trial thereof: Ubi revera et de facto, the said A. B. and the several other Jury-men, nor either of them did acknowledge they were treated at the said City of Norwich before the Tryal, nor were they treated by the said Plaintiff, or any other, &c. On not guilty pleaded, and Verdict pro Rege, Mr. Northey and I moved in Arrest of Judgment, that here was no good Assignment of Perjury, because they might acknowledge that they were treated at Norwich, and not acknowledge they were treated at the City of Norwich, for those are different Places, or may be so, and in this Case this Court is not to help the Matter by Intendment, & per Cur' Judgment stayed.

Indictment of Perjury.

Dominus Rex *verſus* Davis *& al'.*

No new Tryal on acquitting the Defendant in a criminal Caſe.

INformation for an Aſſault and Riot tried at Devonſhire Aſſizes laſt, and a Verdict for the Defendants, that they were not guilty.

Serjeant Tremayne moved for a new Tryal upon Affidavits of the Fact, and that the Judges Directions were to find the Aſſault; which I oppoſed becauſe in a Criminal proceeding, and no Corruption or Practice ſhewed; and a new Tryal was denied, for that the Court ſaid, there could be no Precedent ſhewn for it in caſe of Acquittal.

De Termino St. *Mich.* Anno 3 W. & M.

Regula Generalis.

ORdinatum eſt per Cur. quod ſi aliqua perſona in poſterum proſequitur breve de Certior' ad certificand' aliquod Indictament' ſive preſentament' capt. in aliqua Cur. in aliquo Comitat' ſive Corporation. infra hoc Regnum Angliæ Except. Civitat' London & Com. Middleſex, tale breve fiat Retornabil' ſuper primum Retorn. prox' Termini prox' poſt Emanation, talis brevis; quodq; eodem Termino quo Certificat. fuerit pars proſequens dict. breve procurabit duos homines fore Obligat' in Recogn. coram un' Juſtic. hujus Cur. ad placitand. ad Indictament. &c. & ſi exitus ſuperinde junct. erit ad Triand. ſuper Noticiam proſecutori ſive ejus Clerico ad prox. aſſis. ſi tal. non caſſetur, & in Defectu hujuſmodi Recogn. ante finem ejus Termini fiat Procedendo; and no Judgment to be filed till Recognizance without Motion in Court. All Certioraries to be returned at the Return thereof, or within 4 days after, or to be amerced to forty Shillings, and if wilful neglect, Attachment.

Holt,
Dolbin,
Gregory,
Eyres.

Term.

Term. Hill.

3 W. & M.

Coke *verſus* Hawkins.

SUit in Court Chriſtian, for theſe words, She had a Baſtard, ſpoken of a Single Woman. Motion for a Prohibition, on a Suggeſtion that the words are Actionable at Law. Cur. Dubitat. Adjornatur. Prohibition.

Mallack, *qui tam*, &c. *verſus* Sparing.

DEbt on the Statute for ſelling of Wine without Licenſe. Narr. quod cum he ſold Wine in his Houſe at ſuch a Place ſuch a Day, and ſo till ſuch a Time, the which he ſold without Licenſe cont. formam Statut. Nil Debet pleaded. Verdict pro Quer. Motion in Arreſt, that it was ill with a cum, becauſe not poſitive but all recital, and therefore ill; otherwiſe if he had recited the Statute; for the cum would have referred to the Statute, and the other would have been an Affirmation. Debt on the Statute for ſelling Wine without Licenſe, Declaration was *quod cum* he ſold Wine.

Tremayne e contra. The ſelling without Licenſe is poſitively laid; beſides it is in an Action of Debt, and there quod cum is well enough, and the Precedents are ſo.

Court, That 'tis well enough; for the Action is brought for Non-payment, and ſo 'tis like Debt on a Bond. You do not recite now the Statute of Tythes, nor of Hue and Cry; and that for Tythes is always ſo. Cook's Entries Tit. Debt 161. The Statute is not recited; This differs not at all from the Caſe of Debt on a Bond; but 'twould be otherwiſe if it were in an Information. Et Judic pro Quer. per tot. Cur.

Et Milliner

Millner un' Attorn. *verſus* Crowdall.

CAſe for Fees, &c. and Indebitatus for Fees and Labour in al' Negot. Defendant pleads the Statute of 1 Jacobi. That no Bill was delivered under his hand. Demurrer, becauſe he hath not averred his Plea. Et per Cur. it's needleſs, if a Negative Plea. Then inſiſted that 'twas for al' Negot. and ill for that, and per Cur. this Statute may be given in Evidence on the general Iſſue non aſſumpſit. Bill referred to the Maſter.

Knight *verſus* Symmes.

Ejectment de quinque Clauſis Paſture & Prati, uncertain

EJectment de quinq; Claus' de paſtur' & prat. vocat. Faldowne continent' decem acras. After Verdict moved in Arreſt of Judgment, that 'tis too uncertain, not ſaying how many of one, nor how many of the other. Martyn againſt Nichols, 1 Cro. 573. Expreſs in the Caſe, and 1 Cro. 179. and Savil's Caſe, 11 Rep. 55. Unum Claus' vocat' Dovecent Cloſe cont. 3 Acres, ill: And the Caſe of Weekes and Sparrow, 2 Cro. 435. Admits Savill's Caſe for Law, becauſe not ſaid what, whether Land, Meadow, or Paſture, there good, becauſe ſaid un' Claus' vocat' D. containing 3 Acres terre, 1 Cro. 555. Ejectment de Domo repoſitoria Anglicè a Ware-houſe, ill, becauſe not known by that Name in the Law, Harper's Caſe, 11 Rep. Yelv. 117. Owen 18. Moore 702. Styles 202.

E cont. It was urged that it lies for a Cloſe, if a Name be given to it, 3 Cro. 235. 2 Cro. 435. 1 Cro. 126. 3 Leon. 218. Sid. 295. But afterwards held per Cur. to be ill in the principal Caſe, and Judgment was arreſted, becauſe not ſufficient Certainty.

Dominus

Dominus Rex *verſus* Alſopp.

INdictment for ſhooting with Hail ſhot contrary to 2 and 3 Edw. 6. found before Juſtices of the Peace at the Seſſions, and Judic' quod forisfacerit 10 l.

Indictment for ſhooting with Hail-ſhot found before Juſtices at Seſſions, and fined.

Error brought here, and Error aſſigned that the Juſtices of Peace had no Power given by this Statute; and their Commiſſion only gives them Power concerning the Peace, and therefore this Offence is only to be examined by Commiſſioners of Oyer and Terminer. Per Cur. prima facie it ſeemed that they had no Authority.

Holt C. J. This Statute creates a new Offence after the making of the Commiſſion of the Peace, and therefore this may be a Queſtion.

This Statute gives no Direction, as does that in Attwood's Caſe, 2 Cro. 421. Oyer and Terminer have a Juriſdiction, and the Naming them in an Act of Parliament, doth not give them more than they had before; but the Court ſeemed unwilling to determine it, and therefore ask't the Counſel, If they had no other Errors.

Then 'twas urged there was no vi & armis, ſed non allocatur; for that is needleſs. Then urged, that 'twas forisfacerit, whereas it ſhould be forisfaciat, for this difference is more material than Scire & Sciri. Then that he late of ſuch a place, &c. did ſhoot at Coneys, in a Conicote, not being ſaid in what County he ſtood and ſhot. In ſome Places a Man may ſtand in one County and ſhoot into two or three; and here it does not appear where the Offence was committed, for that is where the Party ſtood, or was, when he ſhot, not where the Object he ſhot at was. Reverſetur.

Pitcher *verſus* Tovey. Entr. Mich. ult. 61.

ERror on Judgment in Com' Banco in Action of Covenant for Rent brought againſt an Aſſignee of a Term for Years for a Rent incurred after his Aſſignment over to another, without notice to the Leſſor, and there Judgment was by Pollexfen and Rooksby, that an Aſſignment by an Aſſignee without notice was not good; and accordingly Judgment given for the Plaintiff in the Action, againſt the Opinion of Powell and Ventris ad tunc exiſtentes contra. Now here argued pro Quer' en breve de Error.

Covenant for Rent againſt the Aſſignee of a Term for Rent due after his Aſſignment over to another without notice, does not lye.

That the Caſe is no more than this. Leſſor brings Covenant againſt Defendant as Aſſignee of a Term, for Rent arrear. Defendant pleads, that as to part Cognovit actionem, and as to the reſidue before the ſame became due, he aſſigned to J. S. who entred. Plaintiff demurrs & Judic' pro Quer', and Inquiry general, that this Plea was good; for there's no need of Notice; for the Aſſignee is only chargeable by vertue of the Privity of Eſtate, and that by his Aſſignment is deſtroyed; and there's no need of Notice: Privity of Eſtate is to be immediate, and that is gon by an Aſſignment over, 1 Inſt. 271. Where none is bound to give Notice, there the other is bound to take Notice at his Peril, if neceſſary, 1 Rolls Abr. 469. Godb. 161. Beſides, if he had no Notice, he ſhould have replyed to it; for otherwiſe it ſhall be intended that he had Notice: If there had been any averment of Fraud or no Notice, Iſſue might have been taken upon it, 3 Cro. 234, 355. Hob. 72. Sid. 338. 2 Keble 260. Mich. 29 Car. Rot. 416. Peachey againſt Knight, Paſch. 34 Car. 2. Rot. 397, 398. Trottle againſt King, Trin. 30 Car. 2. C. B. Rot. 636. Chriſty & Wilcox, Noy 97.

E contra. Serjeant Birch. The privity of Eſtate is not gon ſo far as to bar the Plaintiff of his Action without Notice; for how ſhould the Plaintiff know whom to have his Rent from? At this rate it may be aſſignable from one hand to another, and ſo on in infinit', and this Plea may be to every Action he brings againſt any one. And 'tis no Anſwer to ſay he may diſtrain, for Notice is neceſſary in all Caſes, where a Prejudice may arrive, and a Man cannot help himſelf, and cited 2 Edw. 4. 3. 2 Cro. 432. 1 Bulſtr. 44. 1 Rolls Rep. 374. acceptance of Rent will not prevent a Forfeiture of which the Leſſor had no Notice, Pennant's Caſe, 3 Rep. 2 And. 90 3 Leon. 95. Buckley & Keiley, Mich. 19 Car. 2. Sid. 308, 338. Entr. Paſch. 19 Car. 2. Rotl

Routl' 194. Obj. the Caſe of Overton and Siddall, 3 Cro. 355. ---- there never was ſuch a Judgment: Notice was not inſiſted on in that Caſe; the great Quære was in that Caſe whether, when againſt Executor it ſhould be in the Debet & detinet, and in Popham 120, 121. The only Reaſon is, the Action did not lye againſt the Succeſſor of the Prebend; and in Moore 3 [illegible]. the Caſe is taken notice of, and he ſays that the Court was divided: That Caſe hath been adjudged no Law in Sid. 266. in the Caſe of Buckley. Hales was againſt it afterwards, and all the Bar with Twiſden againſt it.

C. J. Holt. That Caſe in Sid. was in the Detinet only, and ſo not contrary to the other. Now what is it that makes the Aſſignee chargeable at all? Is it not the Eſtate? He had nothing to do with the Leſſor; but upon that account, a Bargainee of a Reverſion ſhall maintain Debt for Rent from the time of the Bargain and Sale, though there were no Notice to the Leſſee; and there's the ſame reaſon on the other ſide; the Aſſignee hath the Eſtate without the Conſent of the Leſſor; and why may he not part with it again? That Caſe of Keiley was agreed, and Hale was of another Opinion afterwards in the Exchequer Chamber: And afterwards Judgment was here reverſed per tot. Cur. for that no Notice is neceſſary: And Overton and Siddall's Caſe affirmed for good Law for that Point of the Detinet, for he is not chargeable in the Debet and Detinet after Aſſignment.

Cheeveley *verſus* Bond.

CAſe, on Bill of Exchange. The Defendant pleads the Statute of Limitations. Plaintiff replies, the Defendant was beyond Sea, &c. Held, that the Defendant's being beyond Sea, doth not ſtop or hinder, or excuſe the Plaintiff for not ſuing within the ſix years; and held alſo that Bills of Exchange, and other Tranſactions between Merchants, are not excepted out of the ſaid Statute, but only an Action of Account.

Statute of Limitations extends to Bills of Exchange.

Moore

Moore *verſus* Furſden.

Ejectment. Special Verdict. Held, that two Tenants in Common Leſſors, muſt make ſeveral Leaſes in Ejectment. Quod cum is well enough, becauſe the Ejectment is poſitive.

Stockhold *verſus* Collington.

Conſideration for ſerving the Defendant as Commiſſioner on a Commiſſion out of the Exchequer, good.

CAſe pro eo quod querens at the Requeſt of the Defendant, had ſerved the Defendant as a Commiſſioner on a certain Commiſſion out of the Exchequer, directed to the Plaintiff and others for the Examination of Witneſſes tam ex parte Defendentis quam al' in quadam ſecta ibid' cora' Baronibus de Scaccar' pred. dependen. Defend' in Conſ' inde aſſumpſit ſolvere, &c. ſo much as Quer' meruit pro Labore ſuo ut Commiſſion' ſicut pred. Averred that he deſerved pro Labore et Opere as a Commiſſioner quinq; Libras; Cumq; etiam Quer' ad requiſition' defend' ſcripſiſſit diverſas Depoſitiones in quodam Caſu, and had found and provided divers Parchments, and other Neceſſaries for Engroſſments, &c. Non aſſumpſit pleaded. General Verdict, and Damage pro Quer'.

Serjeant Tremayne moved in arreſt of Judgment, that in the firſt Count here was no Conſideration, it being unlawful to take Money, for the Service is by Command of a Court. 2. That the Court of Equity was held before the Chancellor, &c. and the Engliſh Bills always directed ſo, and therefore there could be no ſuch Cauſe depending Coram Baronibus as to take Depoſitions, &c. and Judgment ordered to ſtay quouſque Moveretur ex altera parte.

E cont. As to the laſt I anſwered, that the very Writ of Subpœna was to appear Coram Baronibus, and had ſeveral in my hands, which I produced to the Court; and the very Subpœna in our Caſe was ſo, and our Declaration was according to that. Then for the other here is a good Conſideration, for he hath ſerve the Party as Commiſſioner; he is named by the Party; for both ſides do name in ſuch Caſes; and this is for labour and pains only, and thoſe beſtowed at the Defendants Requeſt. He was not bound to this under any Oath of Office, and it is a Service to the Party to attend it. Now it's uſual for Maſters in Chancery to take for their Pains, if they go take an Anſwer

at

at a Nobleman's Houſe, &c. Commiſſioners of Bankrupts are conſtantly paid.

In Sir George Moore and Foſter's Caſe, Yelv. 62. 2 Cro. 65. Commiſſioner had taken Bribes, &c. not actionable per Fenner and Williams, becauſe voluntary and at Election of the Perſon to ſit or not; 'tis not in a judicial courſe, not upon Oath; and if he refuſe to ſit, the Suitor hath no Remedy by Action againſt him, for himſelf names the Man, and not the Court: And though perhaps his Refuſal will be a Contempt to the Court, if without Excuſe, yet doubtleſs they'll never puniſh the Perſon for it, unleſs his reaſonable Charges were allowed: Though it be a proceeding in a Court of Equity, yet you will take notice of the Labour, and an Action will lye for Labour and Pains in ſoliciting a Cauſe in Equity, as was Ambroſe and Iſted's Caſe here in this Court. The Books have Caſes in them ſtronger than this, as Anderley's Caſe cited in Noy 76. Latch 55, 56. Aſſumpſit to a Stranger in conſideration of his Labour and Pains in aſſiſting of the Sheriff, is good, becauſe voluntary, and at the Parties Requeſt. The Reaſon why 'tis otherwiſe when made to a Sheriff, is becauſe he is an Officer, and ſuch Practiſe encouraged would promote Extortion; ſo it is of a Bailiff, but otherwiſe lawful to a Stranger; & per totam Cur' the Action lies, and my Client had his Judgment.

Drew & al' *verſus* Barkſdale. Entr. Mich. ult.

SCir. Fac. directed to the Sheriff of Middleſex. Nos accipient' in record' & proceſs' &c. manifeſt Error to have intervened, and therefore the Record we have cauſed to come before us coram nobis jam reſident', and that John Barkſdale 19 May Anno 2d. came before Sir Hen. Pollexfen. C. J. of the Common Pleas at his Chamber in the Inner Temple, London, and there entred into a Recognizance for the due proſecution of the Writ of Error with effect, and to pay the Condemnation if affirmed, prout per Record' recognit' pred. in Cur' nra' Coram nobis jam reſident ſimiliter' conſtat, and that the Judgment was affirmed, and the Damages not paid, Ideo Scir. fac. &c.

Defendant pleads that the Defendant Palmer paid the Money at Exeter, where the firſt Action and Tryal was had. Repl' quod non ſolvit modo & forma, & hoc petit quod inquiratur per patriam, &c. The Plaintiff takes out a Venire Fac. to St Clements Danes, and a Tryal is had thereon, and a Verdict pro Quer'.

A Tryal by a Jury of the proper County where the Action is laid, aided by 16 & 17 Car. 2.

Scire facias in *B. R.* on a Recognizance in the Common Pleas.

I moved in arreſt of Judgment. 1. Becauſe the Tryal was not in the proper County: But per tot. Cur' preter Holt, that that is helpt by the 16 & 17 Car. 2. tho' the County be wrong, and tho' in a Scire Fac.

Then I urged that. 1. Non conſtat how this Record came hither, or that it can be removed hither; for 'tis a Recognizance before the C. J. Poll. and uſually and originally ſuable there. May can be ſued no other where by Scire facias, for that muſt be out of the Court where the Record is, and that is in the Common Pleas. Debt and Scire facias are entirely different; the one is a new Original, the other only a Judicial Proceſs: This Recognizance cannot be removed by vertue of the Writ of Error, though that be to remove the Record cum omnibus ea tangentibus; for this is a diſtinct Record. A Writ of Error may be brought, and no ſuch Recognizance at all; for if I will not have a Superſedeas, or need not, becauſe Execution is executed, there's no Recognizance. It is given by a particular Law for a particular Reaſon and Purpoſe, and therefore Collateral and Diſtinct. Suppoſe the Writ of Error be miſdirected, or a variance between the Loquela of the Writ and the Record, ſo that the Record is not removed, this cannot be removed; but ſuppoſe they have ſued a Certiorari on purpoſe to remove this Recognizance, that muſt needs be uſeleſs; for this Court hath nothing to do with it. Then the removing it hither to ſue it here, is to alter the Law; for it prevents the Bail of that Appeal which they would have by Writ of Error here, if ſued below: The Authority of Fitz. N. B. 245. is only general, that a Certiorari lies, and the Inſtances there mentioned, are only to Oyer & Terminer & Seſſions: Surely 'twill not be pretended that a Certiorari and Scire facias here may be upon any other Recognizance in that Court; and by the ſame Reaſon this is, all others are removeable by the ſame means. Now 3 Jac. 1. cap. 8. that enjoyns this Recognizance, orders it to be taken there, and conſequently ſuable there. If Bail be put in the Common Pleas in an original Action, and a Writ of Error brought, it doth not remove the Record of the Bail, being no part of the Judgment Roll: There's not one Precedent in all the printed Books of any ſuch Certiorari granted, or ever ſued. If a Writ of Error be brought on a Judgment in Inferiour Court, and Bail not certified nor Diminution alledged, and the Judgment being removed, you cannot remove the Bail below by Certiorari; for this Court will not execute their Judgment, 1 Saund. 98.

The

The Court after Deliberation and Search into Precedents, had account of ſeven or eight in all, the firſt 30 years ſince, but none on debate: However they ruled it good, for this Reaſon as I ſuppoſe, becauſe ampliat Juriſdiction', and is no Prejudice to the Suitors, but rather an advantage, becauſe no Writ of Error lies from hence upon ſuch Scire facias, but in Parliament.

Meacock & Uxor *verſus* Farmer.

TReſpaſs by Baron and Feme, for a Battery of the Wife, and taking the Goods of the Husband then and there, ad Dampn' ipſor. General Verdict, 30 l. Damages.

Treſpaſs for Battery of Wife and taking the Husband's Goods, cannot joyn.

Moved in Arreſt of Judgment that they could not join, becauſe the tort concerning the Goods could not ſurvive, and therefore ought ſhe not to be joined.

I did e cont. endeavour to anſwer the Exception notwithſtanding the Authorities againſt me. Regiſt. 105. is expreſs as Words can make a Caſe.

Nota, That one may have a Joint Action for Goods taken, but of Battery or ſuch perſonal Treſpaſs, Action ought to be ſole, unleſs in Caſe of Baron and Feme; and if the Husband and Wife do bring a Writ of Treſpaſs for a Battery, and for Goods taken, the Writ ſhall be of the Goods of the Husband; for the Wife can have no Property in the Goods during the Coverture, Si A. & B. uxor ejus, &c. Pone, &c. Quare, &c. in ipſum B. apud, &c. inſultum fecit, &c. Et bona et Catalla ejuſdem A. ibidem invent' ad valentiam, &c. Cepit & aſportavit et alia Enormia, &c. ad grave dampnum ipſorum A. & B.

Theſe are the Words of the Book, and the Writ, and by this was our Declaration drawn.

The Court ſeemed to wonder at my Pretence of juſtifying the Declaration, till I read the Words of the Regiſter, by which Mr. Dod had made his Narration; but however they were all of opinion according to the conſtant Tenour of the more modern Authorities.

Another Caſe I cited which was as ſtrong, 2 Inſt. 236. A Man dies ſeized of Land in Right of his Wife, or joyntly with his Wife, and his Goods taken away; in an Aſſize brought by the Husband and Wife, he and his Wife ſhall recover Seiſin of the Land, and he alone upon that Original brought by him and his Wife, ſhall have Damages, which is worthy of Obſervation; and there he cites 11 Hen. 6. 16. which is accordingly. Judgment was arreſted.

Vide Hobert 224. Kell. 434. 2 Cro. 473, 355, 655, 664. Cro. 553. 175. 2 Keble 813.

Term.

Term. Paſch.

4 Will. & Mar.

Samborne *verſus* Belke. Entr. Trin. ult. 155.

HEld per Cur. That if there be a Tenant to the Precipe pendente placito before Judgment 'tis well enough though there were none at the time of ſuing out the Precipe. And per C. J. Holt, a Tenant hath been made frequently after the Return of the Precipe, and a Voucher.

Potter *verſus* James.

ERror on Judgment in Indebitatus for ſo much Moneys then due and unpaid, and reverſed becauſe not ſaid upon what account.

Burges *verſus* Steer.

IN Pleading, the Preſcription was for Common for Sheep, and Iſſue joyned thereon, and the Jury finds Common for Sheep and Cows too, and held that the Iſſue was found for the Plaintiff who claimed the Common, and Judgment accordingly given pro Quer'. Vide Grey's Caſe, 5 Rep. Thorowgood's Caſe 1. Brownlow, Hob. 53.

Mudge *verſus* Bridges.

A Matter alledged to be done *in partibus tranſmarinis*, ought not to be laid in London *in Warda de Cheap.*

PER Cur. held, that if the Contract be laid in London, and a Collateral matter, or the thing contracted for, be done beyond the Seas, you need not alledge it done here in the Ward of Cheape.

Carter *verſus* Homer. Entr. Hill. 2 W. & M. Rot. 324.

All the reſt of my Eſtate carries a Fee-ſimple.

EJectment. Special Verdict. A. ſeized in Fee of a Meſſuage, and alſo of Copy-hold Land, makes his Will, and in it are theſe Words; All the reſt of my Eſtate, whether Free-hold or Copy-hold, I deviſe one third part to my Wife, and the reſt to my Children, equally to be divided between them. Serjeant Trinder argued that this carried a Fee; the word Eſtate in legal ſignification, being the Intereſt which he had in the Land, ſed altera parte minime parat. Adjornatur. Vide 1 Cro. 447. 449.

Buck *verſus* Barnard.

An Adminiſtration charged as Aſſignee for Rent.

ON Tryal before C. J. Holt, in Debt for Rent; held by him, that an Adminiſtrator is chargeable as Aſſignee for the time he enjoys it, and is in Poſſeſſion, and Verdict accordingly pro Quer' upon that Evidence, the Declaration being againſt the Defendant as Aſſignee.

Winchurch

Winchurch *verſus* Belwood.

ERror to reverſe a Fine: Mr. Bonython now argued, that the Writ ought to abate, becauſe no ſuch Writ lies coram nob. reſident. for here's no Record to warrant it, the Record remains in the C. B. till Judgment for Reverſal, here's only a Tranſcript. 2 Cro. 384. 1 Leon. 114.

Mr. Northey e cont. It lies upon the Tranſcript, 2 Leon. 157. Herne's Pleader, Title Error, 1 pl. Yelverton 118. In Caſe of the Exchequer Chamber before the Lord Treaſurer, no Error coram vobis lies, becauſe they have a particular Authority only to affirm or reverſe. Upon the bringing the Writ, the Chief Juſtice certifies the Record and Proceſs of the Kings-Silver, and the Chirographer 'tis true doth certifie a Tranſcript, but when reverſed, the Foot of the Fine is ſent for here, and actually cancelled. This is more than is from Ireland, and yet the Writ of Error in that Caſe ſays, the Record is here. The firſt Writ of Error to the Chief Juſtice ſays Record, tho' to the Cuſtos brevium and Chirographer it ſays only a Tranſcript. Adjornatur.

Pentin *verſus* Jenkyns.

TReſpaſs for an Aſſault and Battery. The Defendant venit et defendit vim & injur' quando, &c. and dicit that the Plaintiff was alienigena, et natus extra ligeantiam in partibus tranſmarinis, viz. apud St. Maloe's in Francia ſub Obedientia Lodovici, &c. inimici Regis & Reginæ. And Demurrer, Exception taken becauſe it doth not ſay de Patre & Matre, and held well enough, then there's a full Defence, and for that Cauſe the Court inclined that 'twas ill pleaded. Adjornatur.

Alien nee pleaded with full defence.

Miles *verſus* Etteridge.

TReſpaſs for throwing down of Fences. Defendant juſtifies in Right of having Common. Plaintiff replys, that the Defendant's Father, under whom he claims, did give Licenſe for to make and continue the Incloſure to him and his Heirs; and

Iſſue

Iſſue joyned thereon Utrum licentiavit modo & forma, and Verdict pro Quer. Serjeant Thompſon moves in arreſt of Judgment, that this is an Immaterial Iſſue.

Per Curiam, 'tis ill by way of License, but 'tis good by way of Releaſe of Common; but a License is determined by his death. A Releaſe of Common in one Acre is an Extinguiſhment of the whole Common,

Stayed quouſq; Moveatur ex parte Quer', & Cur. adviſare vult.

Winsford *verſus* Smith. Entr. Hill. 2 W. & M. Rot. 111.

IN Ejectment. Special Verdict finds a Covenant on Marriage of Son to levy a Fine to certain Uſes, and no Fine levied, and a Will ratifying and confirming all thoſe ſeveral Eſtates, Lands, and Tenements granted and ſettled by my Settlement on my Sons Marriage.

Held per Cur', that they paſs by the Will, though no Fine or other Aſſurance was in reality had, becauſe the Intention of the Party doth ſufficiently appear, See 2 Cro. 145. 1 Rolls Abr. 611. 1 Cro. 447. Popham 188.

Dare *verſus* White & Ux.

Treſpaſs for Battery of the Husband and Wife. The Husband is found not guilty, and the Wife guilty.

TReſpaſs for an Aſſault and Battery, for a Battery by both. Non cul' pleaded; The Jury find the Husband not guilty, and the Wife guilty, and per Cur' well, for they may find one guilty, and the other not; and there's no difference between this and other Caſes of different and ſeveral Treſpaſſors, and Judgment was given pro Quer', ſee Reg 105. Yelv. 106, 107. Mod. Rep. 140. 2 Cro. 303. 1 Cro. 294.

Jackſon *verſus* Salway.

ACtion for diſturbing a Water-courſe with a Currere debuit only, and ſays not ſolebat. Quære, If not good.

Fortre

Fortre *verſus* Fortre.

MR. Ward moved for a Mandamus to the Eccleſiaſtical Court, to grant Adminiſtration to the Wife of the Goods of her Husband deceaſed; and denied per Cur', for they may grant it to the Widow, or next of Kin, which they pleaſe; ſo held in Sir George Sand's Caſe. But where the Wife dyes, the Husband is to have the Adminiſtration, being the only true and lawful next of Kin by the Statute of Edw. 3.

Adminiſtration of the Husband's Goods may be granted to the Wife, or next of Kin, otherwiſe of the Wife's Goods.

Term. Trin.

4 Will. & Mar.

Parker *verſus* Edwards *& al'.*

A Claim of Priviledge muſt be in Perſon, or by Attorny.

TRespaſs for Aſſault and falſe Impriſonment againſt the Defendant who was Vice-Chancellor of Oxford.

The Chancellor the Duke of Somerſet, claims Conuſance by Attorney, and ſets forth the Priviledges of the Univerſity confirmed by Act of Parliament, which directs it to be allowed, upon any Notification or Signification of ſuch their Priviledge; but rejected per Cur. becauſe he had no Warrant of Attorney in Latin under the Seal of the Chancellor; for it ought to be claimed either in Perſon, or by Attorney, or otherwiſe there's no Party in Court to claim it.

The like Rule was in the Caſe of the Biſhop of Ely, as C.J. Holt ſaid. And he ſaid that in Caſe of the Iſle of Ely, there's a Day given to appear upon the Allowance of Conuſance claimed to appear before the particular Judge, and a Re-ſummons hither in caſe there be a Failure of Right; but in caſe of the Univerſity 'tis otherwiſe, no ſuch Claim can be after Imparlance.

Ruſſel

Ruſſel *verſus* Oldiſh & al'.

PRohibition moved for by Mr. Conyers to the Court Marſhal, in a Suit there againſt the Plaintiff for aſſuming to, and upon himſelf to make Arms, order Funerals without Authority, and painting Arms contrary to the Rules of Heraldry, and the Degree and Quality of the Perſons concerned. They were incorporated only in the time of Philip and Mary, and they have no Power for the Ordering and Marſhalling of Funerals. The Office of Heralds, 'tis true, was time out of mind; in 4 Edw. 1. was a Patent nominating A. B. an Herald, but for theſe things they are not within their Office, and he cited Ruſhw. 2 vol. Appendix. And thereon prayed a Prohibition. Prohibition to the Court Marſhal.

Serjeant Darnel e cont. No Prohibition lies; for by 13 Rich. 2. Cap. 2. a Privy Seal lies for to ſurceaſe a Suit there which exceeds their Authority, and Privy Seals have iſſued accordingly, 13 Hen. 4. 45. Beſides the Court of Honour is a Court by Preſcription, 3 Inſtit. 126. and that Court hath Juriſdiction or Power to determin all Matters of Honour; if they have any Juriſdiction, they have of this, for giving Arms at Funerals contrary to, and above the Quality of the Perſon, Parker's Caſe, Sid. 553.

C. J. Holt. It deſerves Debate; for if theſe things do belong to their reſpective Offices, then there is an Action at Law for the Wrong. Therefore let there be a Prohibition, and the Plaintiff declare, &c.

Calliford *verſus* Blawford.

THe Plaintiff brings an Action on the Statute for a falſe Return of a Burgeſs for Dorcheſter, the Defendant being Mayor, on that Clauſe which gives to the King the Penalty of 40 l. and moreover to the party choſen, and not returned, or to any other perſon as in default of ſuch perſon choſen will ſue, 40 l. The party grieved to bring his Action within 3 Months after the Commencement of the Parliament; and if he do not, any other to have the ſame Action. Action for a falſe Return on the Statute that gives 40 l. to the King and to the Party grieved. 23 Hen. 6 Cap. 15.

40 *l.* to commence within 3 Months, and in default thereof to any other Perſon to ſue for the 40 l. if ſuch perſon is a common Informer within 31 *Eliz.* or a *Latitat* a Commencement of a Suit.

On the general Iſſue pleaded, the Evidence was a Latitat, was ſued out within the year, but the Bill filed above a year after the Cauſe of Action, and Verdict pro Quer'; but Poſtea ſtayed till the Opinion of the Court was had thereon.

And now by Eyres, the Quere is, Whether this Plaintiff be a common Informer, that he muſt bring his Action within the year by force of 31 Eliz. And I am of opinion that he is not an Informer within that Law; he is not the Party grieved, but comes in default of the Party grieved, and the King hath nothing of the Penalty. A Common Informer within that Statute is only where he is to have but part of the Penalty. The 31 Eliz. limits no time, where the Party is to have the whole Penalty, no more than it doth to the Party grieved, Noy 71. 1 Cro. 336. 11 Rep. 65. b. and therefore he is not a Common Informer within the Statute; and if he were, the bringing of a Latitat is a good Commencement of the Suit, Sid. 53. and therefore Judgment ought to be for the Plaintiff.

Gregory, ad idem. That the Party who ſues in default of the Party grieved, is not limited to any time, nor within 31 Elizabeth.

Dolbin doubted, if it be not within 31 Eliz. but clear of Opinion, that the Latitat ſued out is a ſufficient Commencement of the Suit, and it hath been always held good to avoid the Statute of Limitations, and as good as an Original. No Advantage can be taken of this upon Evidence, but upon pleading the Statute of Limitations.

C. J. Holt. Here is fourſcore Pounds to be forfeited; forty Pounds to the King; the Party grieved is to have another forty, and now comes an Informer in his Default, and in his default brings this Action for his own Penalty only: If the King were to have nothing, then he is out of 31 Eliz. but here the King is to have a part. Suppoſe he had brought his Action for the whole, the King's and his own, were he within 31 Elizabeth? I do for my part, doubt this Matter.

Then for the Latitat, though it be good to avoid the Statute of Limitations, yet 'tis not good to charge a Man with a Penalty. In the former he cannot take advantage of it, but upon pleading, but here advantage may be taken of this upon the general Iſſue, and this Man might have ſued out an Original if he would. A Latitat was never conſtrued to be a Commencement of a Suit upon a penal Law, and the time muſt be reckoned from before the filing of the Bill; the Bill ought to be within the year. But for the other Point I doubt.

Eyres.

Eyres. He could not have brought his Action for the King's Penalty, for that is diſtinct; then 40 l. more to the Party grieved, then he comes in Default of the party grieved, and can only demand that 40 l.

C. J. Holt. Why could not the King's Penalty be ſued for by him? If the Informer ſued after the Year for both, 'tis ill for his own, but ſhould ſerve for the King, becauſe he hath two Years.

Eyres. They are two Penalties in ſeveral Rights.

C. J. Holt. They are one Penalty ſeverally diſtributed, they are but for one Offence, and the Informer may ſue for both. Judic. pro Quer'.

Maſon *verſus* Hanſon.

Action as Adminiſtrator, alledged Adminiſtration was committed by A. *Surrogat' & oficial'* B. *Prebend' prebend'* without *cui adminiſtratio pertinuit*, good.

Action brought as Adminiſtrator, and ſets forth Adminiſtration to have been committed to him per A. B. Surrogat. & Official' J. S. prebendar' prebend' de D. & habuit particular' Juriſdiction'. Urged to be ill, becauſe not ſaid that he had an Authority to grant Adminiſtrations; And the difference cited between Ordinarius and a Peculiar; for the one is intended to have a Juriſdiction, and the other not, unleſs ſhewn. In the Caſe of a Biſhop, he need not ſay cui pertinuit, &c. But otherwiſe of a Prebend. There was cited pro & cont. 3 Cro. 431. 791. 879. Sid. 228. Styles 282. 236. Sid. 302. 2 Rolls Rep. 124. Palmer 97. Barret and Winchcomb's Caſe, 2 Cro. Hob. 38. But per Cur. the modern Authorities are againſt that of Hob. Sid. 98. 1657. in the Caſe of the Lord Moone and Laughton held, that want of Profert is ill, only upon Demurrer, where ſhewn for Cauſe. That this would be ill on Demurrer, for it doth not appear that the place where, &c. is within the Prebendary: But a Verdict helps it, for the words of the Statute of Jeofails are, and all other ſuch matters of like nature. Per Cur. Judic. affirmed pro Quer'.

Term. Hill.

3 W. & M.

Bellamy *verſus* Upton.

BEllamy, in the Sheriffs Court, London, is Plaintiff, againſt Morley, in placito debiti ſuper demand' 50 l. nec non de Attachiamento ſuperinde fact' de 50 l. in pecuniis numeratis ut de denariis dict' defend' propriis in manibus & cuſtod' Johannis Upton un' Aſſiſtent' & Defenſ', &c. And upon nil habet pleaded by Upton, the Jury find,

That the ſaid Morley at the time of making the Attachment, &c. was Maſter of the Ship called Mount-eagle, and that the Garniſhee had diverſa bona et catalla in dicta Nave Onerat' to the ſaid Garniſhees from parts beyond the Seas conſigned, and that the Fraight thereof amounted to 30 l. That there was no Charter-party made between the Defendant Morley, and the ſaid Upton: That Morley had ſigned a Bill of Lading for the ſaid Goods to be delivered to the ſaid Upton, or his Order, paying firſt for the ſame; That the Goods were delivered to Mr. Upton accordingly, et ſi præd. 30 l. are due to Morley pro Naulo bonor' præd. onerat' in Nave præd. tunc dicunt quod Upton habuit et habet in manibus ſuis 30 l. parcell' præd. quinquagint' librarum in prædicto præcepto de Scir. fac. mentionat' ut de denariis dicti defendentis propriis: Et ſi præd. 30 l. non ſunt debit' præd. defend' pro naulo prædict', quod tunc præd. Upton premuniet' præd. tempore Attachiament' præd. fact' ſeu unquam poſtea hucuſq; non habuit debuit nec in manibus ſuis detinuit, nec modo habet debet ſeu in manibus ſuis detinet præd. 30 l. ut de denariis dicti defend' propriis aut aliquam inde parcel' prout præd. queren in præd. præcepto de Scir. fac. ſuperius ſupponit, &c.

I argued pro Querente coram Wy. Dee Judic' ejusdem Cur'.

The general Quere is, If this Attachment lies, and if these Monies are Attachable.

To prove the affirmative, 'tis considerable that the Law makes a Contract for Fraight as certain upon a Bill of Lading, as upon a Charter-party. To make this actionable, the Duty I agree must be certain or reduceable to a Certainty, as here it is by this Verdict; the Garnishee must be the Debtor or Man chargeable, and the Defendant the Creditor or Person who is to demand or receive it; here are all three concurring. As to the Sum, here the Jury finds it certain, that the Fraight amounts to so much; the Jury finds the delivery of the Goods to the Garnishee, according to the Bill of Lading; though no Sum at first agreed on, yet 'tis a certain Debt, as for Goods sold, and no Price determined and agreed upon; and so it is in case of a quantum meruit for Service done; and the Reason of these Cases are, because reduceable to a Certainty both in Pleading and Evidence: here Fraight is debitum in the strictest, largest, and every sense of the Word: The Garnishee was liable for this Fraight, though the Goods had not been delivered according to his order; though the Goods were not in his Property, yet they must be delivered to him, or his order, and the Performance of the Bill of Lading is the Foundation and Merit for the Fraight, and that is found to be fulfilled: But here by the Bill of Lading, the Property accrues to the Garnishee in the very Goods, and he might maintain an Action for not delivering them. Then, though no Person be named in the Bill of Lading to whom the Fraight is payable, yet the Law ordains and directs it to the Master.

'Tis true, the Owners are liable upon Miscarriage of the Goods, but that is in a remote Degree; the first and immediate visible Person taken notice of, is the Master. So is it for Wages, the Owners may be sued, but the Master is the first liable upon the Retainer, and the Master being first liable, he is first intituled to the Fraight; besides, it doth not appear that there were any other Owners but the Master, and you cannot intend such a thing when 'tis not found.

If no Charter-party, the Master stands liable to the Owners for the Fraight, and consequently he must have Remedy against the Importer.

Attachment lies, though the thing be such as Action on Case lies for, as in Sir Nich. Halse and Walker, 1 Rolls Abr. 552. A. lends Money to B. to be repaid by B. at the Death of his Father, and after such Death the Monies is attacht, and then an Action on the Case is brought; and the Attachment held a good Bar, though the Use was only to attach Debts, and the Action

on

on the Case, and only Damages in it are recoverable, yet good, because Debt might have lain for it as well as Case. The next Case there is Read against Hawkins. A Man sells Stockins on a particular Contract by which the Vendee is to give him 10 l. and that if he sell them again before August, to pay 2 d. more: Held that the 10 l. is actionable presently, because that is certain, and Debt lies for it.

Attachments are favoured even against the privilege of Attorneys, as in Turbill's Case, 1 Saund. and Sid. A Debt payable in futuro held attachable. In Debt for Tobacco, &c. held not attachable, because the value did not appear: But if the value of the Tobacco had been averred, the Debt might have been attacht, Prerie and Colcott, 1 Rolls abr. 554.

Now though no Sum be particularly agreed on, yet Debt lies, as for a Chirurgeon or Carpenter, or any Attorny, Woodhouse and Bradford, 2 Rolls Rep. 76. 2 Cro. 520. Rast. Ent. 187. To put a stronger Case; If I pay Mony to B. to the Use of C either B. may have an Action for it, or A. Hutton 11. and if Debt lies, it is attachable.

In Mollam & Herne's Case, 2 Keble 316, 320. in a Quantum meruit Attachment held pleadable, though other Exceptions were, &c. Money in a Mans Hands may be attacht, as if Money be left to be kept, or if the Garnishee found it, and no Contract be to be found, an Action of Debt lies.

Here is a special Conclusion, if the Money be due to Morley for the Fraight; now that's plainly due to him, no Owners being found; especially the Goods being found to be delivered according to the Bill of Lading, then the Quere is no more than this. If an Indebitatus will lie against the Bailee for Fraight without alledging a particular Custom of Merchants; And I conceive that it will, even without setting forth a Bill of Lading: If another retain me to build an House for J. S. and J. S. agrees to it, and I build it; is not J. S. liable to an Indebitatus for the Money? If these Goods were carried for the Use of M. Upton, the Law raises a Promise: Suppose it the Case of a Common Carrier, and 'twere plainer: Now the Master of a Ship is but a Common Carrier by Water, and answerable for Loss by Theft, as was Norse and Shew's Case in Hales's time.

The Reason why Moneys payable upon Bills of Exchange are not actionable, is only because of their Negotiation, because they may be transferred by Indorsement, and being by Law transferred, it might be of infinite Prejudice to third persons who pay the Monies upon sight of the Bills: Here for any thing appears, the Master is Owner, and consequently only chargeable in Case of miscarriage of the Goods, and consequently only entituled to the Fraight:

And

And therefore this Money is well attacht, and the Plaintiff ought to have his Judgment. And Money for Fraight hath often been attacht, though never upon debate.

E contra. Mr. Upton argued, that the Sum is uncertain, the Party to whom payable uncertain, for either Owners or Masters may sue; and though no Owners found, yet Magister Navis ex vi termini imports only the Relation of a Governor of a Ship as a Servant to the Proprietor.

So Mr. Dee started an Objection in the Verdict, that there was no finding non habet as to the residue of the 50 l. Attacht, and consequently an imperfect Verdict, and therefore the Plaintiff could not have Judgment, but a Venire fac. de Novo ought to issue. Et sic stetit una Causa. See Rolls 1 abr. 802. accordingly.

Term.

Term. Trin.

4 Will. & Mar.

The CASE *of* Exeter-College.

MR. Harrington pro Quer' made several Queries. 1. Whether there was a vacancy at the time of the Election of Mr. Painter; Whether the Bishop of Exeter, at the time when he deprived Dr. Berry, were a competent Judge. Concerning a Visitor's Power, he cited Littleton 139. Dyer 209. Sid. 71. 1 Instit. 244. 9 Hen. 6. 32. 9 Edw. 4. 24. That the Visitor may deprive the Head, Bro. Titl' Depositions 217. 2 Instit. 225. Styles 457. Yelv. 61, 62. The Rector's Place is founded on the Will of the Donor, and he takes sub modo illo: They are punishable for Breach of that Will, 3 Bulstr. 189. Popham 154. Rolls Abridgment, Titl' Restitution. 10 Rep. 5.

Then whether the Statutes of Exeter College did restrain the Visitor from thus depriving. The Bishops of Exeter are made Patroni Colleg', N.B. 42, 93, 94. Whosoever is settled Patronus, is in Loco Fundatoris, 6 Hen. 7. 14. He is Visitor, & Ordinarius Visitator, i. e. a continued ordinary Judge. Now an ordinary Judge hath immediate Jurisdiction de mero Jure, 1 Instit. 344. 2 Rolls abr. 220. Davis's Rep. 3. Ordinarius est qui habet propriam Jur', his Power is given him with the Addition of Negative Words, exclusive of all others. Besides it must be agreed, that Eleemosinary Corporations are necessarily at all times subject to some Visitation or other, 10 Rep. 31. Bro. assiz. 55. Summa Angelica tit' Hospitalis; Prescriptio tollens visitationem non valet. Where there is a Local Abbot, no other hath Jurisdiction,

diction, Mod. Rep. 83. Prynn on 4th Inſtit. 228. Duke, of Charitable Uſes 69.

Object. That the Viſitation is to be but ſemel in quinquennio, 'tis limited.

Anſw. That the end of the Limitation is only for the Benefit of a Sportulage, that that Charge ſhall be no oftner, but by the Common Law he may, if he ſee Neceſſity, viſit oftner. The ordinary Juriſdiction of receiving Appeals, and determining of Matters delegated to him, is not hereby reſtrained. This is the Reaſon why Mandamus's have always been denied, becauſe they may at any time appeal, Goddard and Hyde, 2 Ruſhw. Here the Jury hath expreſsly found, that no other hath viſitorial Power there, but the Biſhop. The Commiſſion of Appeals was not a Viſitation, nor a Determination of that Power; Viſitations and Appeals are different Things and Powers, Dyer 377. A void Act tolls not a Right.

Then whether the Concurrence of any other perſon was neceſſary to this Deprivation: Now theſe Senior Fellows were ſuſpended, and that Suſpenſion takes away their Claim to either Power or Profit, Latch. 236. So that the next Senior Fellows Concurrence is ſufficient.

Then for the Sentence, it was but adequate to the Crime ſurmiſed, and if the Viſitor had a Juriſdiction, then the truth of that Surmiſe is not examinable here, 9 Edw. 4. 24. 8 Aſſis. 9. 29, 31. 7 Rep. 70. 12 Rep. 42. Davis 47.

Mr. Sollicitor Trevor e cont'. The firſt Quere is, Whether this Sentence be peremptory; and for that, 'tis not ſo peremptory but this Court may examine if Regular. Particular Authorities muſt be purſued, if otherwiſe, their Acts are void, 10 Rep. Marſhaſen. 22 Edw. 4. 33. The Rector hath a Right to his Place as a Free-hold, 11 Rep. 93. Bagg's Caſe, 8 Rep.

Dr. Bonham's Caſe upon the Statute of Bankrupts, in an Action the Party may traverſe the Bankrupcy, becauſe he hath no other Remedy. So on the Statute of Sewers who have power to proceed, and act according to Diſcretion; the Proceedings of of a Viſitor are Extra Judicial; the Viſitor hath no Power, but by the Will of the Founder; his Authority is not judicial, 'tis only a Miniſterial Power. Where the Ordinary is Viſitor himſelf, of a ſpiritual Foundation, or where the King makes a ſpiritual Foundation, there the Viſitor is Judge; but a Founder of a Lay Foundation is not a Judge, and his Acts are ſubject to the Determination of the Courts of Juſtice here, Dyer 229. 4 Inſtit. 340. 13 Rep. 70. 8 Aſſis. 29, 31. 1 Inſtit. 282. 8 Edw. 3. 70. In Caſes where the Viſitor makes the original Sentence, it muſt be examinable there, becauſe no Appeal in Caſe of ſpiri-

tual Foundations. 'Tis true in Appleford's, and those other Cases, they were expulsed by the Heads, or Masters of Colleges, and so they had an Appeal to the Visitors, here is none. At this time the Visitor had no Power of visiting according to the Institution and Statutes of the College, and Dr. Master had visited within the five Years, for 'tis but once in five Years that he can visit, and though there are no Negative Words to exclude any other Visitation, yet these are the Words that make him Visitor, and that is but once in five Years: The Act of Dr. Master, was a Visitation, for there was no Power to Receive or Examine the Appeal but as Visitor de quinquennio in quinquennium semel; the Visitor hath no particular express Power given him to hold Appeals but in one Case only, so that this Power of taking Appeals in any other, must be as Visitor.

Then that which they call an Intentional Visitation was one, i. e. The administring of the Oath was an Act of Visitation, for his doing more or less at a Visitation is not of its Essence, for he is Judge of that, to do what he pleases. Then further, here is not a sufficient Cause for a Deprivation; the Fact called Contumacy, is not so; and that you will examine for the Reasons before offered, the Doctor's humbly offering his Opinion, is not Obstinacy, or Contumacy.

Then another Quere is, Whether admitting it were Contumacy, If the Bishop can deprive him. This is none of the Offences mentioned in the Statute for which the Rector may be deprived. In the Statute de visitatione, which gives a Power by general Words, it refers to the other Statutes concerning the Matter or Cause: Then the Consent of the Senior Fellows is requisite, which the Bishop here had not. The Bishop hath not Power to deprive the Rector, but upon Complaint from the Fellows and the College. If he may deprive for any Cause not mentioned in the Statute, he may as well deprive without any Cause at all.

C. J. Holt. Suppose the Visitor had deprived him for Murder, whereof he is not convicted. There is a great difference between a Lay and a spiritual Foundation, but a visitatorial Power is incident to every such Society, and a Visitor is the Founders own Creature, and he has made him sole Judge. In Appleford's Case 'twas held that the Visitor's Sentence was a Judgment, and that 'tis a Judicial Act, can be no great Question. Adjornatur to be argued again.

Howard

Howard *verſus* Tremaine.

Depoſitions in Chancery taken *de bene eſſe*, where the Witneſſes die before anſwer, good Evidence at Law.

Ejectment. On the Tryal were produced as Evidence for the Plaintiff, certain Depoſitions taken in Chancery, where was a Bill filed, and Subpœna iſſued, and Depoſitions taken de bene eſſe, and the Witneſs dies before Anſwer: And upon this Evidence a Verdict pro Quer'. But the Poſtea ordered to be ſtayed till the Opinion of the Court was had: And now 'twas argued that they were good Evidence; for the end of the Bill was to examine Witneſſes in perpetuam Rei Memoriam; and if there had been an Anſwer, then they muſt be Re-examined if living, but here they dying before Anſwer, are always allowed to be read in Chancery. It's true, that generally ſpeaking there ought to be Bill and Anſwer proved before Depoſitions; but here the Witneſſes die before Anſwer, and 'twas through the Defendants Default, that there was no Anſwer, and his ſtanding in Contempt, ſhall not prejudice the Plaintiff who cannot keep his Evidence alive. Here the Defendant joyned in Commiſſion, and croſs examined them; this is always allowed as Evidence there, and that Court is time out of mind, and part of their Buſineſs is to perpetuate Teſtimony: And if this be not Evidence, any Defendant may, by his Obſtinacy, deprive me of the Teſtimony of ancient Witneſſes by refuſing to anſwer till their Death. In Godb. 326. 'twas a Quere, if Depoſitions after anſwer between the ſame Parties were to be allowed as Evidence; but held that 'twas, if could not be found upon ſearch, though not dead. See 2 Rolls Abr. 679.

E cont. Serjeant Tremayne. They are no Evidence, becauſe there was no Anſwer. Here was no Iſſue joyned, and no Perjury can be aſſigned upon ſuch Depoſitions, becauſe no Iſſue is joyned, 1 Cro. 352. Sharp's Caſe, 3 Inſt. 167. To make Perjury, it muſt be in a Matter pertinent to the Iſſue; 'tis the Common Practice to produce Bill and Anſwer: In the Caſe of Ford and Gay tryed at Bar in Com. Banco, an Exemplification was produced of Depoſitions in Chancery, and becauſe no Anſwer was ſhewn, the Depoſitions were rejected, per C. J. Pollexfen & al' ibi. 'Tis the Anſwer that makes the Depoſitions of any Validity. Depoſitions in Caſe of an Anſwer by an Infant by his Guardian, may be read, though the Anſwer be no Evidence againſt himſelf.

Ch. J. Holt. Quere, If any Court by course of Law can examine Witnesses till Issue be joyned, and therefore I much doubt if these can be Evidence. We cannot take Notice what the Chancery allow as Evidence, and their Practice is no Rule to us.

Dolbin, Dubitans. For that the Court of Equity is not so ancient, for before Richard 2. the Petitions were to the King, and by him referred sometimes to the Chancellor, and sometimes to the Treasurer, but no settled Court of Equity before the Chancellor, till Rich. 2. his Time.

Gregory. That 'tis good Evidence, because they joyned in Commission, and did cross examine.

Eyres clearly of Opinion, that 'tis good Evidence, that the Court of Equity hath been time out of mind. Sed quia Holt Hæsitavit, Adjornatur.

Whittingham *versus* Andrews.

Ejectment *de Mineris Carbonum* in such a Parish.

ERror sur Judic' in Ejectment in Durham. Exception was taken that the Declaration was on a Lease in Ejectment de Mineris Carbonum in tali parochia, and not said how many, or all, Yelv. 166.

E cont. argued that 'twas well enough; for de Omnibus would be all one with this, and this General was equivalent to an Universal, and cited 11 Rep. 25. Moore pla. 1130. Adjornatur. Note, Cumming's Case, 2 Cro. 150. is the first Case adjudged, that 'twould lie for a Coal Mine.

Dominus Rex *versus* the Mayor and Aldermen *Civit. Exon. Vide Supra.* 250:

EYres. That no peremptory Mandamus lies for to restore him, because they have returned one good Cause of Removal, viz. his own Removal with his Family to live at Topsham. 'Tis the Duty of his Office to attend there to be Resient there, and to be assistant at the Councils there: An Alderman is no Place of Profit, but only of Freedom, Precedence and Authority in the City, which is all to be had and done there; deseruit, & reliquit is a total Desertion with his Family. It's true, we must intend every thing against the Return for the sake of Freedom, and so is 3 Bulstr. 189. 1 Rolls Rep. 409. Rex and Mayor of Glouceſter; but

but here 'tis plain; and I am of Opinion, that though he did return again, yet that does not purge the Forfeiture, though he do return before the Diſfranchiſement for that Cauſe. In Caſe of Eſtates, if a Forfeiture be committed by a Grant upon Condition, though the Eſtate be regained by force of the Condition, yet the Leſſor may enter for the Forfeiture: As to Contemptuous Words, and the like, he ought to be ſummoned to anſwer them before he be diſfranchiſed; but in this Caſe he need not be ſummoned, for they are not bound to go out of the City to ſummon him.

Gregory of the ſame Opinion, that here was Cauſe ſufficient for to remove him, that he with his Family left the City, then the Ex cauſis præd. relates unto all.

Dolbin doubted. Not that the leaving the City is a good Cauſe of Removal, but that they do not ſay, that he never returned again; for that if he returned again, he purged the Offence, and he ought to have been admitted as an Alderman, unleſs that he were removed before.

C. J. Holt. There ought to go a peremptory Mandamus to reſtore him; though I agree with my Brothers in every thing, his Deſertion of the City is Cauſe of Removal, his frequent abſence is a Cauſe; for every Alderman ought to be a Citizen and Inhabitant by the Charter: If he removes with his Family, he ceaſeth to be a Citizen, though he be a Freeman, Moore 135. 833. Deſeruit & reliquit, is an abſolute leaving of the City, and muſt be ſo underſtood. But here is no good Summons; for though he doth commit never ſo many Cauſes of Forfeiture, there ought to be a reaſonable Summons for him to anſwer them, and ſo is James Bagg's Caſe; there is a Summons for his Attendance, but not ſaid that there was any Summons for him to appear to anſwer thoſe particular Matters. Now the frequent abſence can be no good Cauſe, unleſs ſummoned, for he may ſhew Sickneſs, or Buſineſs of the Kings as good Cauſe, then if a Summons be neceſſary upon a Dereliction, I agree no ſummoning is neceſſary out of the Place, and they are not to ſummon him, if out of the City. But there is a Poſſibility that he might return again, and if he did return again with his Family before Diſfranchiſement, poſſibly it might reinſtate him. But undoubtedly if he was an Inhabitant afterwards within the City, and they might have ſummoned him, then they ought to have ſummoned him to have anſwer'd it, and he might have given an Excuſe. Now this being a Return, it muſt be certain to every Purpoſe. If in a Plea, this were well enough, and we could intend nothing elſe than that he continued extra Libertat': But being in a Return, where is no Opportunity of Anſwer, it ought to be more certain. Sup-

poſe

poſe he had been an Inhabitant when they removed him, then a Summons was neceſſary. Now this Return is true, and conſequently no Action lies, if that were the Caſe, and that might be it for any thing appears to the contrary, and therefore a peremptory Mandamus ought to go. Sed cæteri in contrar.

Rogers *verſus* Cooke.

ACtion as Adminiſtrator. Counts on an Indebitatus and quantum meruit to the Inteſtate, and an inſimul Computaſſet between Plaintiff and Defendant of divers Sums due to the Plaintiff, and an aſſumpſit to him, and held ill.

Boteler & Ux' *verſus* Bradbourne.

DEbt ſur Recognizance, and held to lye, and Judic' pro Quer'.

Carter *verſus* Coltroppe, *Hill. ult.* 508.

ACtion on the Caſe for building and erecting, and continuing a Nuſance with an adhuc exiſtit. Et per Cur' ill; becauſe that adhuc exiſtit is to the time of the Declaration, and conſequently Damages demanded for what accrued after the Action brought, if in inferiour Court, becauſe of the Plaint continued here by Bill.

Rudd & Ux' *&c. verſus* Berkenhead, *Hill.* 1 *Rot.* 164.

CAſe ſur Aſſumpſit. Narr. per Bill againſt Defendant in Cuſtody. Statute of Limitations pleaded. Plaintiff replies an Attachment of Privilege ſued out. Defendant demurs, and Exception taken that the Count is by Bill, as in Cuſtod' Marr', and no Imparlance or Continuance.

E cont.

E cont. Whitehead and Brickland's Caſe was urged, Styles 373. That an appearance helps it, ſed Adjornatur.

Per C. J. Holt. An Attachment of Privilege is but as a Latitat, and not as an Original.

Frederick *verſus* Godfreight.

CAſe, ſur aſſumpſit. Defendant pleads, that the Plaintiff had received Goods in Satisfaction, and upon Demurrer an Exception was taken, becauſe doth not ſay that he paid, or delivered them in Satisfaction. Adjornatur.

Dominus Rex *verſus* Litten.

COnviction by Juſtices of Glouceſter-ſhire on 33 Henry 8. Cap. 6. Sect. 16. for going with an Hand-Gun, not being qualified.

Exception, that he was not taken upon the view, and ſo brought before the Juſtices; for without that the Juſtices had no Authority to proceed in that ſummary way. Now here this Conviction is a Month after. Adjornatur. See Dr. Bonham's Caſe, 8 Rep. 3 Cro. 294. Gardiner's Caſe 360.

Carey *verſus* Calleis.

ACtion on the Caſe, by the Bailiff of Weſtminſter brought, and declares in the ſame manner as Carey and Bacon's Caſe, which ſee above; and the Roll of it brought into Court, and the ſame Judgment given as there, viz. pro Quer'.

Burton

Burton *verſus* Woodward.

6 Months mentioned in the Act for taking the Oaths, ſhould be Lunar or Calendar.

IN Ejectment, Special Verdict. The Quere thereon was, Whether the ſix Months in the late Act, &c. for taking the Oaths under Penalty of Deprivation of Church Livings, ſhall be Lunar or Calendar Months.

Mr. Webb pro Quer'. It ſhall be Lunar Months, becauſe of the Uncertainty in the other, 1 Inſtit. 135. 6 Rep. 61. 2 Cro. 166. 2 Leon. 100. 2 Rolls abr. 521, 522. 2 Inſt. 674. Dyer 218. The word Month can have no other Conſtruction than that of Lunar, and in that of the Quare Impedit, 'tis tempus ſemeſtre, i.e. half a Year. And for the Objection, that where a thing refers to Eccleſiaſtical Conſtruction, it ſhall be according to their Law, there can be no one Inſtance ſhewn to prove ſuch a Rule. In Holcroft's Caſe, Mich. 32. Car. 2. B. Regis, upon the Act of Uniformity, held the Commitment to be but for ſix Lunar Months, and the Man diſcharged.

Obj. That the longeſt time ſhall be given to him that Right hath, to ſave his Right.

Anſw. The ſix Months for Suſpenſion cannot be conſtrued to be Calendar Months, for that is againſt their Rule to have the mildeſt Senſe for the Sufferer, and it muſt be ſuch 6 Months as the Suſpenſion was for.

Objection, Hob. 179. Copley and Collet's Caſe, Littlet. 19. That the Suggeſtion to be proved within ſix Months is Calendar. Coke in his Animadverſion on that Statute, takes no Notice of that Caſe or Reſolution. By this Act the Party refuſing is to be committed for 3 Months; they'l agree that muſt be Calendar Months only, 1 Sid.

Sir T. Powis e cont. That they muſt be Calendar Months. Where an Act of Parliament relates to Lay-matters, or Laymen, or to all the King's People, there it ſhall be a Lunary Month, but where it relates particularly to Eccleſiaſtical perſons, there the Computation ſhall be according to the Computation of the Church and Church-men; he cited 3 Cro. 835. Dyer 142. 1 Inſt. 135. That Church men go according to this Computation, and that our Law takes Notice of their doing ſo is no Queſtion, 2 Inſt. 361. If a Man be bound to pay Money the firſt day of Michaelmas Term, it ſhall be reckoned the appearance Day, becauſe commonly known, Weſt. 2. cap. 5. Tempus Semeſtre, the Statute is in Latin, and in our Engliſh Statute Book this is rendred ſix Months. My Lord Coke ſays, Sex menſes, tem-

pus

pus ſemeſtre, i. e. tempus ſex menſium, upon 2 and 3 Edw. 6. for proving Suggeſtion 6 Calendar Months, 2 Rolls abr. 52. 11 Hen. 4. Cap. 7. Sid. 186. According to the Almanack there are but 12 Months; and in many Caſes the Year is divided into twelve only, 3 Cro. 227. It ſeems natural and reaſonable that it ſhould be half a year, for the time given was not to thruſt them out, but to bring them in, and accordingly to give them time to quiet their Scruples; as to that of Suſpenſion, that was not intended as a Puniſhment, but as an Admonition and Warning; All Acts of Grace are to be conſtrued favourably; this was for their Eaſe then as a Penalty 'tis never to be expounded ſtrictly; when the Conſtruction is ambiguous, the moſt eaſy and generally received Opinion is to be allowed: In Hollcroft's Caſe, the Commitment was for 6 Months, there was nothing enjoyned to be done within 6 Months; there was no manner of doubt to him, as there is here, how long he might forbear.

C. J. Holt. That Computation of Lapſe we have received from their Canon Law, and according to their Expoſition; but here, &c. Adjornatur.

Term. Paſch.

4 Will. & Mar.

Symonds *verſus* Cudmore.

Pro Defendente.

Hill. 1 *W.&* *M. Rot.* 743. Ejectment. Special Verdict.

EJectment ſuper dimiſs' Nicholai Martyn Arm'. Non cul' pleaded. Special Verdict finds, that diu ante, &c. Sir Nich. Martyn was ſeized of the Premiſſes in Fee, and that he at Exon by Deed indented ult. Aug. 23. Car. 1. in conſideration of a Marriage then to be had between W. M. his Son and Heir apparent, and Eliz. C. and a Portion with her; Covenants with J. L. and S. L. that before the end of Michaelmas Term following, he would levy a Fine, or by other Conveyance, aſſure the Premiſſes to the ſaid Covenantees, and their Heirs, or ſuch as they ſhould nominate to be joyned, to the uſe of Sir Nich. for Life, Remainder to the ſaid W. M. in Tayl Male, Remainder to Sir Nich. in Tayl Male, Remainder to the right Heirs of Sir Nich. Proviſo, that it ſhould be lawful to Sir N. during his Life, and after his Death to Will. Martyn, and the Heirs Males of his Body at their Will and Pleaſure, to make any Leaſe or Leaſes of any part then in demiſe, or uſually before that time within 20 Years, accuſtomed to be let to any Perſon or Perſons whatſoever, as well in Reverſion as Poſſeſſion for 21 Years or 3 Lives, or for any Term or State whatſoever, not exceeding 3 Lives or Years determinable on 3 Lives, ita quod the ancient and accuſtomed Rent be reſerved, or more, and ita quod no one Tenement or Thing be at any time eſtated or charged with any

larger

larger or longer Eſtate or Term than for 21 Years, or 3 Lives, or any number of Years determinable on the Death of 3 Perſons at the moſt.

That afterwards, 1 Sept. 23 Car. 1. Sir Nich. made a Leaſe for Years, and a Releaſe to the Uſes, and under the Limitations and Powers in the firſt Indenture mentioned. By vertue of theſe Indentures Sir Nich. became ſeized for Life, Remainder to the ſaid Will. Martyn in Tayl Male, &c. That the ſaid Sir Nich. had Iſſue the ſaid W. Martyn his only Son and Heir; that the ſaid Marriage was ſolemnized, that the ſaid W. M. and Eliz. his Wife had Iſſue Nich. Martyn the Leſſor of the Plaintiff.

That 14 March, 23 Car. 1. Sir Nich. by Indenture demiſed to Clement Weſtcombe the Houſe in queſtion, Habend' a prad. 14 Martij for 99 years, if Eliz. Rich and Nich. Weſtcombe ſhould ſo long live, rendring 8 l. 10 s. Rent per Annum; by vertue whereof Clement entred and continued poſſeſſed until the 10th of May, 1689, on which Day Richard Weſtcombe died; by whoſe Death the Leaſe made to Clement was legally determined, and not before; that ſome time after the Demiſe to Clement, Sir Nich. died ſeized of the Reverſion, and W. Martyn became ſeized of the Reverſion. And he being ſo ſeized,

W. M. 6 Octob. 1654. reciting the Leaſe to Dr. Weſtcombe for Years determinable on the Life of Elizabeth, Richard, and Nicholas Weſtcombe, under the ſaid Rent of 8 l. 10 s. doth for 21 years releaſe 8 l. of the ſaid Annual Rent, and leaſeth, and to farm letteth (ſi Lex in hoc caſu ſic poſtulat) the ſaid Houſe to the ſaid Elizabeth for 99 years after the legal Determination of the before recited Eſtate then in the ſame being, if George and William ſhould ſo long live, rendring the Rent of 10 s. That Elizabeth, Richard, and Nicholas, were then, and long afterwards in Life.

That W. M. 4 April, 1662. died ſeized of the Reverſion aforeſaid, and after his Death, the ſaid Nicholas the Leſſor of the Plaintiff became ſeized of the Reverſion; That during the Leaſe to Clement W. and before the Determination of it, viz. 27 Car. 2. Nich. Martyn levies a Fine ſur Conuſance de droit come ceo, &c. to Sir John Carew, and others, with Proclamations to the uſe of the ſaid Nich. Martyn in Fee.

That the Leaſe of Sir Nicholas to Clement W. did, 10 May, 1689, determine by the Death of Rich. Weſtcombe; that the Leaſe made by William Martyn to Elizabeth Weſtcombe, was debita juris forma aſſigned to Cudmore; that he by vertue thereof entred; that Nich. Martyn entred on him, and made the Demiſe

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in Narr. to the Plaintiff, who entred and was poſſeſs'd until the Defendant entred and ejected K. &c. Et ſi pro Quer. pro Quer. et ſi pro Def. pro Def.

The Caſe in ſhort is thus.

A. Tenant for Life, Remainder in Tayl to B. the eldeſt Son and Heir of A. Remainder in Tayl to A. Remainder in Fee to the right Heirs of A. with Power for the Tenant for Life, and the Remainder and his Iſſue in Tayl to make Leaſes: A. makes a Leaſe purſuant to the Power, and dies; while that Leaſe is in being, B. the Remainder man in Tayl, makes a Leaſe for years, rendring 10 s. Rent to commence after the Determination of the firſt Leaſe, B. dies leaving Iſſue N. M. (the Leſſor of the Plaintiff) Heir to the Entail: N M. before the Commencement of the ſecond Leaſe, or the Determination of the firſt, levies a Fine ſur conuſance de droit come ceo, &c. with Proclamations to the uſe of himſelf in Fee-ſimple; the firſt Leaſe determines, the ſecond Leſſee enters, the Leſſor of the Plaintiff enters upon him, &c.

In this Caſe are ſeveral Queries. 1. If this Leaſe were agreeable to the Power; and if ſo, then there would be an end of the Caſe. 2. Admitting that againſt me, If this Leaſe were not void in its firſt Creation; then if not void by the Death of the then Tenant in Tayl who made it, or if only voidable; and then if now voidable at all after the Fine levied by the Iſſue in tayl.

Power to make Leaſe in Poſſeſſion for 21 years, or 3 Lives.

1. As to the firſt I will juſt put the Caſe, and ſubmit it. The Power is, to make any Leaſe or Leaſes of any part of the Premiſſes uſually demiſed in Poſſeſſion, or Reverſion for 21 Years or 3 Lives, or any number of years determinable on 3 Lives: ſo that the thing to be leaſed be not at any time ſtated or leaſed for any longer or larger Term or Eſtate than 3 Lives, 21 Years, or other number of years determinable on 3 Lives at the moſt, rendring the uſual Rent, or more. Now taking this Power according to the words, and then the Leaſe is not repugnant, for that is to be in Poſſeſſion or Reverſion at the Will and Pleaſure of the Tenant or Iſſue in Tayl; ſo that no one Eſtate or Leaſe be for above 3 Lives; now here's no one Eſtate for more; here's one in poſſeſſion for 3 Lives, and one in reverſion for two: The meaning might be, that he might make a Leaſe in poſſeſſion for 3 Lives, and the like in reverſion for 3, but neither for more: And if it be conſtrued that all together ſhould amount to no more in reverſion as well as poſſeſſion, then thoſe words in reverſion would

would be in part uſeleſs: But this ſeems hard to juſtifie, ſo I waved it, and argued the other.

2. If this ſecond Leaſe be good and valid, though not purſuant to the Power, and to make it appear ſo, I inſiſt on 3 things. 1. That when Tenant in Tayl makes a Leaſe for years, rendring Rent, and dies, ſuch Leaſe is not determined by the Death of the Leſſor, or the diſcent of the Eſtate Tayl on the Iſſue, it remains in force till avoided by the Entry of the Iſſue. 2. That if before ſuch Avoidance a Fine be levied, and the Eſtate tayl either barred or extinguiſhed, that ſuch Leaſe becomes thereby indefeaſable; and then, that there's no difference as to this reſpect between our Leaſe, and that of any other Leaſe: That a Leaſe to commence at a future day, ſtands in the ſame plight quoad the Iſſue, eſpecially as our Caſe is, being made by Tenant in tayle Remainder in Fee to himſelf.

A Leaſe by Tenant in Tayl, rendring Rent not void by his Death, only voidable by the Entry of the Iſſue.

1. When Tenant in tayl makes a Leaſe for years, rendring Rent, and dies, the Leaſe is not thereby become void, but the Iſſue may avoid it or not at his pleaſure; this I know will be agreed to me; but I muſt pray leave to inforce, and a little to illuſtrate the Reaſon of it, becauſe the ſame Reaſon will be applicable to the Leaſe in Years, as I ſhall evince preſently: The difference is between a Charge and an Intereſt with Recompence. It's true, if Tenant in tayl grant a Rent-Charge, or the like, when he dies 'tis determined, becauſe as he hath not (ſince the Statute) a Power of Alienation, ſo neither can he clogg or incumber the Land or the Eſtate to the Damage of the Iſſue, for that would intirely evade the Force of that Law de Donis, &c. Now that very Reaſon why ſuch Incumbrance becomes void by his Death, viz. benefit of the Iſſue, is the very Reaſon why a Leaſe for years, rendring Rent, is not ſo void, but only voidable; the one is clearly at firſt ſight an apparent Miſchief to the Iſſue; in the latter Caſe, the Recompence by Rent makes it doubtful, whether the Leaſe will prove ſo or not, becauſe perhaps the Rent may be of more value than the Land; and if ſo, then the Iſſue (for whoſe ſake the Statute de Donis was made) may be advantaged by ſuch Leaſe, and conſequently it is unreaſonable that the Law which was deſigned for his Benefit, ſhould be conſtrued to turn to his Miſchief; and this is the true Reaſon of his Priviledge to elect, becauſe it ſtands indifferent, whether beneficial or miſchievous; and perhaps the Rent (though of leſſer value) may be of more Advantage to the Iſſue, than the Land, as his Father thought before him, becauſe of the diſtance of the Land from his Habitation, or the like; whereas in the other Caſes of Charges, there is no quid pro quo, nothing in lieu or recompence for the Loſs. This difference upon this Reaſon is agreed in Smith and Stapleton's

Stapleton's Case, Plowd. 436, 437. which I shall put at large anon, and in that Book are cited all the Cases to this purpose, which I'le not repeat, as Octavian Lombard's Case, and Cawxton's and others: Nay, if a Rent-charge granted were for the Benefit of the Issue, 'tis not void by the Death of the Grantor; as if Tenant in tayl hath but a defeasible Title, a Rent charge granted for the Release of all Right, shall bind the Issue for ever, because apparently for his Advantage, that Grant preserving to him the Estate: So that the difference on the whole is this; where the Act of the Ancestor is apparently mischievous to the Issue, it becomes absolutely void by his Death; where 'tis apparently beneficial, it is absolutely good and binding for ever: Where 'tis indifferent and doubtful, whether Profit or Loss, there neither valid nor void, but only voidable at Election, 1 Rolls Abr. 841, 842. 1 Inst. 46. Dyer 51. and all the other Cases admit this.

2. That Leases made by Tenant in tayl, are only voidable by the Issue in tayl, while as such. That he may avoid such Lease, must be agreed; and the Reason why he may avoid it, is the Statute de Donis, it is a Privilege given to him by that Statute; for before, his Ancestor might have aliened after Issue, and the Alienee enjoy it for ever, much more might he make a Lease, rendring a Rent so as to bind him; then the Statute is designed for the Benefit of the Issue, and the Issue only; this is a Power belonging to, and following of the Estate tayl; and when that Estate is gon, the Power or Privilege incident to it, must of consequence fail.

I pray your Lordship's Consideration of the Nature of an Estate tayl; it is special and particular, and differs from all other Estates whatsoever; it is not transferrable as other Estates are: Either Fee-simple, for Life, or for Years, may by due Conveyance in the Law be transferred, and the Party to whom such legal Conveyance is made, may, and shall be said to be, and really is seized or possessed of the same Estate for quality, as the Alienor was; but this is not true of an Estate tayl, it is personally inherent in the Blood and Issue of the Donee, and therefore before the Statute of Fines, a discontinuance of it wrought a new and tortious Fee, and now by the Statute a lawful one; but he is no longer seized of an Estate tayl: In all Pleadings now after this Fine, he must alledge himself seized in dominico suo ut de feodo simplici.

Then for this Right of Election to avoid or affirm the Leases of his Ancestors, 'tis only a Power incident to the Estate tayl, and 'tis no more, for 'tis not an incident to the Remainder or Reversion in Fee; for if an Estate tayl be granted to one, Re-

mainder

mainder or Reverſion to another in Fee, and the Tenant in tayl makes a Leaſe for years, and dies without Iſſue, this Leaſe is void quoad the Reverſioner or Remainder-man, as is 1 Inſt. 46. There if Tenant in tayl, Remainder to his own right Heirs (as our Caſe is, and I ſhall obſerve more anon) make a Leaſe for years, and dies without Iſſue, his Heir general cannot avoid this Leaſe: 'Tis only the Iſſue in tayl which can avoid it, and as Iſſue in tayl, and therefore only while ſuch: Now he is become a meer Stranger to the Eſtate tayl, there remains no longer any Privity in him; now the Statute was not made for the advantage of Strangers, but only to preſerve the Eſtate and Inheritance in the Blood of him to whom the Gift was made ſecundum formam doni, and ſo is 1 Inſt. 19. by Coke from the Mouth of Sir William Herle, in 5 Edw. 3. 14. and the old Books of 3 Edw. 3. 2. and 4 Edw. 3. 47. which have been cited, that a Recovery is given to the Blood of the Donee, and not to others; and the Plea of that Statute lies only in their Mouths, and no others: This is plain by Littleton, Sect. 363. the intent of the Statute was, That nothing ſhould be done to the Prejudice of the Iſſue; and my Lord Coke in his Comment on that Statute, 1 Inſt. 224. ſaith, hereby it appears, That to reſtrain Tenant in tayl from Alienation againſt the Profit of his Iſſue, is good, for it agreeth with the Will of the Donor, and the intent of the Statute, and a Condition annexed to an Eſtate tayl, not to ſuffer a common Recovery, is therefore void, becauſe of the ſuppoſed Recompence: All which proves the Iſſue only concern'd, here the Conuſor now is not privy any way: A Fine is a Feoffment upon Record, and no Man can, or ought to make a Title againſt his own Feoffment: By the Fine he acknowledg'd a Fee-ſimple in the Conuſor, and by the Proclamations and Statute, his Iſſue are barred to ſay otherwiſe, and ſo neither he nor his Iſſue can ſay the Eſtate tayl is in being, or avoid this Leaſe by force of the Eſtate tayl, and it muſt be by force of that, or not at all.

To prove ſuch a voidable Leaſe confirmed by a Fine levied by the Iſſue in tayl, whether the Fine be ſubſequent to the Leaſe, or before, ſee Cudmore & Buttſon's Caſe, Sid. 62. It was Mich. 13 Car. 2. R. R. on a Tryal at Bar here, and a ſpecial Verdict waved on that opinion here, though 'twas offered. Baron and Feme, Tenants in ſpecial tayl, Remainder to the Heirs of the Husband, they have Iſſue two Daughters, they levy a Fine to a Stranger and his Heirs, the Husband dies, the Feme makes a Leaſe for 100 years, and dies: held to be a good Leaſe, and to continue in force ſo long as there is Iſſue in tayl in being, and that it could not be avoided

Crocker

Crocker and Kelſey, in Jones 60. 2 Cro. 689. Bridgeman 27. at large is direct in this, 'tis the ſame Caſe, and as 'tis 1 Rolls Abr. 843. It proves the Leaſe not avoidable by the Conuſor, becauſe not in of the Eſtate tayl, and therefore, ſays that Book, 'tis good ſo long as there is Iſſue of the Body, and this though the Fine were levied by the Iſſue in tayl before the Leaſe made by the Feme Mother; and this Judgment affirmed on Error; and no doubt of this Point, ſays Rolls, but only of that on the 11 Hen. 7. of Joyntures: As that Caſe of Crocker and Kelſey, is in Jones 60, 61. This Point of avoiding the Leaſe by the Conuſee is admitted that it cannot; and then, though agreed that to ſome purpoſes the Eſtate tayl had a continuance in right quoad Strangers, yet the Leaſe was not avoidable ſo long as there was Iſſue, though as to the Reverſion 'twould be void, as they there incline; but that is becauſe there the Leaſe was made by the Feme who had not the Reverſion in her, as here the Leſſor had, and I ſhall ſhew more preſently: Now I ſay there could have been no Quere on the Statute of Joyntures, but this Point muſt be agreed, that the Fine ſo alter'd the Eſtate tayl, as to make the Leaſe unavoidable, becauſe the Leaſe was good at common Law, and the Statute de Donis only aided the Iſſue in tayl: As it is in 2 Rolls Rep. 490. Maſon in his Argument agrees this, That if Tenant in tayle do make a Leaſe for Years, and then levy a Fine to another, this Leaſe becomes unavoidable; and though that Caſe hath been cited on the other ſide, yet nothing in it can argue for a contrary opinion: For,

Suppoſe the Eſtate tayl only barred, and not extinguiſhed, yet the Eſtate tayl hath a continuance only for the benefit of Strangers, not to the deſtruction of their Rights; a Stranger may ſay in ſome Caſes, that the Tayl ſtill continues, but never the Party himſelf: And all the Caſes there put, and all that can be found in the Books, where particular Eſtates are drowned or extinguiſhed, or barred or altered by Surrender, or other Act of the Parties, though they are ſaid in notion to have a continuance after ſuch Acts, yet it's only quoad Strangers to preſerve their Rights, never to deſtroy them; the known Caſe of Tenant for Life when he grants a Rent-charge, and then ſurrenders, his Eſtate is gon, and abſolutely merged between him and the Reverſioner, but quoad the Grantee it's ſtill in being; and I know of no particular Caſe, where a particular Eſtate can be ſaid to be in being quoad Strangers that is gon between the Parties, but 'tis for the Strangers benefit, and not the Parties; the Stranger ſhall be admitted to ſay, it continues in being, not the Party: So that if the Eſtate tayl be only barred, and not extinguiſhed by the Fine, yet it makes not for them: if it be extin-

guiſhed,

guiſhed, the Leſſor can't pretend to avoid this Leaſe; if only barred, it ſhall not be avoided by him after the Fine, and the Conuſee cannot avoid it ſo long as there is Iſſue in being by that Caſe afore-cited: In Bridgeman 27. admit, that if the Iſſue do make a Feoffment to a Stranger before Entry, the Feoffee ſhall never avoid ſuch Leaſe; and there it is taken for a general Rule, that the Feoffees of Tenant in tayl, and all that come to the Land under the Tenant in tayl by any Aſſurance made by him, whereby the Eſtate tayl is barred, or diſcontinued, ſhall have held the Eſtate charged with the Leaſes and Charges made by Tenant in tayl: And the ſame Law is for thoſe, that come to the Land under the Tenant in tayl, though the Eſtate tayl remains not barred or diſcontinued (except the Iſſue in tayl who are helpt by the Statute de donis) And therefore if Tenant in tayl, make a Leaſe for years, the Feme ſhall hold it charged, ſo ſhall Tenant per Courteſy of a Feme Tenant in tayl; and Tenant for 3 Lives warranted by the Statute of 37 Hen. 8. ſhall not avoid ſuch Leaſes, and the Reaſon is, becauſe the Statute de donis doth not aid them, as it doth the Iſſue.

The Caſe in 6 Eliz. Daliſon in fine novel Bendl. 65. is ſtrong: Feme Tenant in tayl made a Leaſe for 21 years, and after takes Husband, and they have Iſſue, ſhe dies, her Husband being Tenant per Courteſy ſurrenders that Eſtate to the Iſſue in tayl. Held, that Tenant by Courteſie could not avoid that Leaſe, nor could the Iſſue during Life of Tenant per Courteſy, becauſe ſo long he ſhould be ſaid to be in of that Eſtate; 'tis true, Moore 8. ſeems otherways; but 4 Leon. 200. is according to Daliſon's Report, and the ſame is in Owen 83. Poutrell's Caſe.

Obj. Sir Thomas Wiatt's Caſe, Dyer 107, 115. Tenant in tayl, Reverſion in the King, he makes a Leaſe for years, Tenant in tayl is attainted, the King being in of the Reverſion, ſhall avoid the Leaſe.

Sol. The Reaſon there was, becauſe the King could not have two Feeſimples, one as Donor, and ſo he had the Reverſion; the other by the Attainder as determinable on Death without Iſſue; but held there, that if the King had had the Eſtate tayl as Forfeit by Act of Parliament only, he ſhould not avoid Leaſes made by the Tenant in tayl: There the King became ſeized of the Reverſion by Act in Law, viz. the Attainder; here is an Act done by the Iſſue himſelf: This is rather like to the Caſe of the Lord Aberganey, 6 Rep. 78. 2 Joyntenants in Fee, and one grants a Rentcharge in Fee, then releaſes to his Companion, he ſhall never avoid that Grant, becauſe he came to it by his own Act, viz. Acceptance of the Releaſe, and not per jus accreſcendi, and ſo by Acceptance of the Releaſe, he hath deprived himſelf of the benefit

and means of avoiding the Charge of his Companion, which he might have had by the Survivorſhip.

Obj Sir George Brown's Caſe, 3 Rep. 51. That in caſe of a Leaſe made by Feme Tenant in tayl for 3 Lives contrary to the 11th of Hen. 7. of Joyntures, the Alienee by Fine from the Iſſue, might enter and avoid ſuch Leaſe.

Sol. That's true, but conſider the Reaſon of it, and it makes for me: That Judgment was founded meerly on the words of the Act, to whom the Inconteſtable Title or Inheritance appertains, &c. but 'tis there agreed, that otherwiſe, and by the common Rules, he could not, for a Right or Title of Entry could not be transferred, and the Conuſor could not claim againſt his own Fine.

Obj. 1 Inſt. 46. The Feoffee ſhall have the ſame Election to avoid or affirm as the Iſſue.

Sol. That cannot be Law, nor doth the Authority there cited juſtifie it, Plowd. 437. For 'tis only ſaid by the Counſel arguendo, and put with an and peradventure for the Diſallowance, which Coke omits: Beſides, the Feoffee is in of a tortious Fee; and ſo is the Text of Maſter Littleton, Sect. 599. And then by Conſequence he can no more avoid the Leaſe, than a Diſſeiſor; but by that very Caſe, it ſuppoſes an Entry by the Iſſue in tayl, which plainly proves, that a meer Diſcent doth not make it void, however an actual Entry doth undoubtedly avoid it, and that is true, and further not: And Rolls in his 1 Abr. 842. where he has this of Cokes, adds quære ceo.

Obj. Opis & Thomſon's Caſe, 1 Sid. 260. 1 Keble 788. 910.

Sol. There never was any Judgment in that Caſe, and as 'tis mentioned in 3 Keble 109. 197. it doth appear ſo.

Then Smith and Stapleton's Caſe in Plowd. is in truth a full and direct Authority, that ſuch Leaſe made by Tenant in Tayl, may after the Death of Tenant in tayl, become unavoidable by a Fine with Proclamations, otherwiſe there could have been no Argument nor Judgment that the Leaſe was unavoidable; for if after the Proclamations, and a barr of the Eſtate tayl, the ſame Election remained as before, thoſe other Points there could never have been in doubt; as whether the Leaſe ſhould bind and be unavoidable, which was raiſed on the Grant and Remainder in the Life of Tenant in tayl by the Proclamation coming afterwards: If the Eſtate tayl be extinguiſht, then I take it clear, that the Leaſe is unavoidable; if only barred, it's Continuance is, and can be only for the Benefit, not the Miſchief of Strangers; but by and by I ſhall, I hope, prove it extinguiſht, as this Caſe is.

3. Then

3. Then whether there be any difference between this, and the common Case of a Lease for years by Tenant in tayl. If our Lease now in question be not in the same Plight and Condition, as any other: And with submission, 'tis the same in all Respects with a Term commenced, for 'tis neither void in its Creation, nor void by the Death of Tenant in tayl, nor voidable by the Conusee of the Fine, any more, or otherwise than another Term.

It is not void in its Creation, for whatsoever may by any Possibility take effect, and have its full force, can never be said to be void; now this future Lease might have commenced in the Lifetime of him that made it by the Determination of the former Lease; for no Man can say, 'twould have been invalid with Respect to the Tenant in tayl himself, and consequently not void in its Creation: It is nothing like a Lease made to begin after Death, for there perhaps it may be said to be so, because only a Charge or Incumbrance on his Issue, and none upon himself; the Law restrains him from prejudicing his Issue, which that apparently does, for he himself agrees it inconvenient, because it doth not charge himself; 'tis like the Case of a Warranty, in 1 Inst. 386. where, the Heir shall never be bound by an express Warranty, but where the Ancestor was bound by the same; the same if a Man bind his Heirs to pay a Sum of Money, this is void, and so agreed in Oates and Frith's Case, Hob. 130. That no Man shall charge his Heir, but as part of himself, and so begin with himself; and for that Reason a Contract concerning his Land, which should otherwise go to his Issue, shall not bind, because not bound himself. But even that Case of a Lease commencing post mortom, is but Manwood's Opinion in Dyer 279. And Catlin denied it to be Law, but however taking it for granted, it cannot affect our Case, for the Reason of Manwood was, and only could be, because it could not take effect in esse from the Possession in the Life of Tenant in tayl; there the Issue claims paramount the Lease, and becomes seized of the Estate tayl per mortem secund' formam doni, which is before the Commencement of the Lease, for that is post mortem, and could by no Possibility attach in Possession till then. But,

A future Lease, though it be not of the same validity and force to all intents and purposes as one in Possession, yet it is as to those Respects we are now considering: It is esteemed in Law as an Interest, and as an Interest assignable; it is not as a meer chose in Action, for that cannot be assigned; it is not as a meer possibility, for that cannot be barred, as is Pell and Brown's Case of an Executory Devise; this is forfeitable as other Estates, and may be surrendred or extinguish by Acts done on the Land, or which touch the Realty, though in some Cases in a different man-

ner than ſome other particular Eſtates: It is an Intereſt here iſſuing out of the Eſtate tayl in Poſſeſſion, for it might have attach't in Poſſeſſion in his Life-time.

Beſides, here 'tis under the ſame Reſpects quoad the Iſſue, as a Term commenced, 'tis with a Recompence by Rent, and conſequently only voidable, not void, for the ſame Reaſon as any other Leaſe; the quantum is not conſiderable in the Eye of the Law, and therefore it's petiteneſs is no Objection, for the Iſſue if he had thought the Land better in value, or more eligible in any other Reſpects, might have avoided it by Entry: There's no Rule or Meaſure in the Books, how much or how little ſhall, or ſhall not do in any Caſe; if a Rent, 'tis enough, becauſe of the Election.

As this Caſe for the Point of Recompence, ſo for the Point of Futurity is comparable to others where the Law gives Election, as Leaſes made by Feme Coverts, Infants, or other Perſons under like Diſabilities, their Leaſes (if without render) are void; if with render, are only voidable by Diſagreement when the Diſability is removed; ſo is Smalman and Agborow's Caſe, Hutt. 102. and 1 Rolls Rep. 441. Now thoſe may be compared to this of Tenant in tayl, which is under Protection of the Statute, as they are under the Care of the Common Law. Suppoſe a Feme Covert, or an Infant, make a Leaſe to commence at Michaelmas next, with a Render of Rent, and before that Day the Diſabilities are removed, ſurely Acceptance of the Rent (after ſuch time) will make them good; yet if void, it could not; the ſame here: And as I ſaid before, the Protection of the Statute de donis is not for the ſake of Tenant in tayl, but his Iſſue; for upon the moſt ſtrict Conſtruction of it, he may alien during his Life: And therefore this Leaſe can never be void ab initio, becauſe 'tis conſiſtent with the Eſtate tayl; for notwithſtanding thoſe two ſucceſſive Leaſes, he continues ſtill ſeized of the Eſtate tayl, and that ſecund' formam doni, both Free-hold and Inheritance remained in him ſtill; this cannot be denied me; ſo is 1 Inſt. 334. therefore not void: Beſides, there's not one Reaſon why a Leaſe for Years commenced with Render, may be affirmed or avoided by Iſſue in tayl, but what will reach this Caſe; the two Reaſons aſſigned are, that an Intereſt paſſes, and a Rent is reſerved; here are both.

This Rent ſhall (by Opinion of Law) follow the Reverſion, and that proves this future Leaſe ſounds not meerly in Contract, but in Eſtate too: Brierton and Evans, 1 Rolls Abr. 294. The Caſe was, A Man makes a Leaſe for Life, and afterwards makes a Leaſe for Years to commence after the Death of Leſſee for Life, rendring Rent, and then levies a Fine of the Reverſion to remain

to

to him and his Wife, then dies, the Lessee for Life dies, the Feme in Reversion shall have Debt against this Lessee for years for Rent incurred after the Death of the Tenant for Life, tho' the Lessee for Life or Years never attorned, and the Lessee for years could not attorn, because he had only a future Term at the time of the Fine levied, and yet adjudged as before, which shews that the Rent shall follow the Reversion. The Case of 3 Cro. 718. of Pledger and Lake, is very strong to prove the Regard, Value, and Consideration, which the Law hath of, and for a future Term, that the Law regards it as a Term and Interest, tho' future; Tenant for Life, Remainder in tayl, he in Remainder made a Lease for years to commence after the Death of Tenant for Life; Tenant for Life afterwards suffers a Common Recovery, with Voucher of him in Remainder in tayl, and dies; the Quere was, if this Lease were destroyed and gon; and all the Justices held it in the Negative, and that such Lessee might well falsify such Recovery both at Common Law, and by the Statute of 21 Hen. 8. cap. 15.

Though a Release cannot be made to such Lessee of a future Term pur increaser del Estate, yet he is capable of a Release of the Rent by reason of the Privity between them, and he may assign it, or if he doth not, it shall go to his Executors, 1 Inst. 46. Such an Interest is capable of a Confirmation, and so is it express in Moore 66. Casu. 180. Where a Bishop makes such a future Lease, to be confirmable by the Dean and Chapter: And the Case of Bayley and Moore in 3 Keble 109, 196, 197. is so imperfectly reported, that its Authority cannot contradict this: It's true, 'tis otherwise of a Lease made by a Disseisor to commence at a future Day, 1 Inst. 296. though the Year-Books there cited do not warrant it: But yet supposing it so, that's upon another Reason, because all the Estate of the Disseisor being Tortious, nothing but Possession capacitates him himself to take a Release, and consequently no Interest derived from him can do otherwise without Possession too.

A future Lease to commence at a Day to come, made by Tenant in tayl, if pursuant in other Respects to 32 Hen. 8. is good even within that Law; and so is Dyer 246. by the better opinion there; and in the Margent there, is cited a Case of Thompson and Trafford, the Report is in Popham 9. and 2 Leon. 188. Ancient Lease warranted by the Statute, is good, though to commence at a future Day; and if so, there's the same Reason why, such Lease not warranted by the Statute, should be only voidable, as the other would have been if the Statute had not been made: But what is more than all this, to prove the Consideration of a future Lease to be the same as one in Possession, is the

Case

Caſe of Joyntenants, 1 Inſt. 184, 185, 186. upon Littleton, Sect. 286. If two Joyntenants be of a Term, and one of them grant to J. S. that if he pay to him 10 l. before Michaelmas, that then he ſhall have his Term, the Grantor dies before the Day, J. S. pays the Sum to his Executors at the time required, yet he ſhall not have the Term, for it was but in nature of a Communication: But if he had made a Leaſe for years to begin at Michaelmas, it ſhould have bound the Survivor, but otherwiſe of a Rent-charge, Common, Eſtovers, or the like, they ſhall not bind the Survivor for the ſake of 2 Maxims, jus accreſcendi prefertur oneribus, and another alienatio rei prefertur juri accreſcendi: So that by Coke it is plain, that ſuch intereſſe termini amounts to an Alienation, and is not a meer Incumbrance; of the ſame Mind is Littleton himſelf afterwards, Sect. 289. If two Joyntenants be ſeized of certain Lands in Fee-ſimple, and the one letteth that to him belongeth, for a Term of 40 years, and dies before the Term commences, the Leſſee may enter and occupy the Moiety to him leaſed during the Term, &c. albeit, the Leſſee never had Poſſeſſion in the Life of the Leſſor by force of the Leaſe. And he goes on, the diverſity is between the Grant of a Rent-charge and Years: In the grant of the Rent-charge by one Joyntenant, &c. the Tenements continue always as they were before, without that that any one hath Right to have any parcel of the Tenements, but themſelves, and the Tenements do continue in ſuch plight as they were before the Charge; but where a Leaſe is made by one Joyntenant for years to commence at a future Day, the Leſſee immediately hath right to all which his Leſſor had for the Term leaſed; this needs no Paraphraſe, theſe are his Words, and prove clearly that our Leaſe paſt an Intereſt; accordingly is

Whitlock and Horton, 2 Cro. 91. Ejectment. Special Verdict. Two Joyntenants for Life, one of them grants, that J. S ſhall hold and enjoy the whole after the Death of her Companion; held ill, becauſe ſhe could not contract for the Land of her Partner, becauſe ſhe had no Right therein, but there reſolved, that as to her own Moiety, 'twas a good Leaſe to charge and bind her Companion, if ſhe had ſurvived her; that if two Joyntenants for Life, and one makes a Leaſe to commence after his Death, 'tis good to bind the Companion, and the ſame with a preſent Leaſe, for the future Day of Commencement makes no difference, ſays the Book.

Wood and Reynolds, 3 Cro. 764. 854. is full in this Point. Ejectment, Special Verdict. Sir John Ruſſel ſeized in Fee, by Indenture covenants in conſideration of Marriage, to be had, to ſtand ſeized to the uſe of himſelf and his Heirs till Marriage,

and

and after to the uſe of himſelf and Dame Ruſſel for their Lives and the Heirs of his Body on her, with Remainder over: Afterwards he lets the Land for a Term of thirty one Years, to commence after the Determination of a former Term; afterwards the Marriage took effect; the firſt Term expires, Sir J. R. dies; the Lady enters, and argued, that her Entry was lawful, and that this future Leaſe could not bind or bar the Contingent Uſe: All held, it could not bar the Contingent Uſe, becauſe the Freehold and Inheritance continued as it was unchanged, (ſo here) but all held, that this Leaſe (though thus future) ſhould bind, for a ceſtuy que Uſe ſhould not at common Law avoid a Leaſe made by the Feoffees upon a good Conſideration; this Leaſe tho' thus future being made out of the Eſtate in Fee, from whence the Uſe ariſed, ſhall bind it; and Popham ſaid he had conferred with the Juſtices at Serjeants Inn, and that they were of the ſame Mind: The Caſe of Leigh and Burton in Cur' Wardor', Hill. 43 Eliz. cited in 3 Cro. 765. is ſtronger; that ſuch Leaſe ſhall prevent the riſe of a Contingent Uſe; but yet they all prove no real difference between a Leaſe to commence in futuro and another, that the one paſſes an Intereſt as really as the other.

The Caſe they inſiſt on ſo much out of Coke, which I mentioned before, 1 Inſt. 46. proves, that there is no difference, for there he puts it thus; If Tenant in tayl makes a Leaſe to commence 10 years hence rendring Rent, Tenant in tayl dies, the Iſſue enters and makes a Feoffment, and then the 10 years expire; now may the Feoffee have Election as he ſaith to affirm or avoid? This proves what I now contend for, that this Leaſe paſſes an Intereſt.

Obj. Sir Marmaduke Wynel's Caſe, Hob. 45. Tenant in tayl of an Advowſon, and his Son and Heir joyned in a Grant of the next Avoidance, Tenant in tayl dies, and held to be a void Grant againſt the Son and Heir.

Sol. That no ways affects or governs our Caſe at all, becauſe the Iſſue in tayl could not be bound by his own Concurrence, becauſe he had nothing in it at the time of the Grant, neither in Right nor Poſſeſſion, nor could it bind him as a Grant of his Fathers, becauſe no Recompence by Rent, and for want of that, 'twas void as the Father's Grant, and ſuch is the Reſolution in Bowles and Walter's Caſe, 1 Rolls Rep. 190. When Tenant in tayl of a Manor to which an Advowſon was appendant, grants the next Avoidance and dies, and the Iſſue enters into the Manor, the Grant is void becauſe 'tis a thing which lies in Grant, whereof no Formedon lies, and there's no Rent reſerved upon it; theſe are the Reaſons of the Book: But further, Coke there puts our

Caſe,

Caſe, and gives it for us: Tenant in tayl grants a Leaſe to commence at Michaelmas rendring Rent, and dies before Michaelmas, the Iſſue enters into the reſidue of the Land deſcended, yet he may make this Leaſe good by Acceptance of Rent after Michaelmas, becauſe his Election was not come before: This is the ſame, 1 Rolls abr. 843. and is a direct Opinion, that ſuch Leaſe is not void quoad the Iſſue, but only voidable, for otherwiſe no Acceptance could make it good: The Caſe of Emington, 2 Bulſtr. 42. is a full Proof of this, for there's no Quere made in the whole Caſe about the futurity of the Leaſe, but only whether the Iſſue in the Life-time of the Mother could charge the Eſtate tayl with ſuch a Leaſe, and Coke and all agreed the Reverſion charged, which brings me to my laſt Point, in which the Caſe is thus.

Tenant in tayl, Remainder to his own right Heirs, makes a Leaſe rendring Rent to commence at a future Day, and dies before that Day happens, the Iſſue levies a Fine before Entry; if he can avoid this Leaſe?

Suppoſe Tenant in tayl had died without Iſſue Male, and ſo the Eſtate tayl had been ſpent, could his Brother or Heir general have avoided this Leaſe? Surely no; then I ſay Errington's Caſe is a direct Authority for me: Baron and Feme, Tenants in ſpecial tayl, Remainder to the right Heirs of the Husband, they have Iſſue, the Husband dies, the Iſſue in the Life-time of the Mother makes a Leaſe to commence after the Death of the Mother rendring Rent, then dies, the Reverſion deſcends to Jane Errington, who before Entry or Acceptance levies a Fine; the Quere was, If that Leaſe was good. By Williams, Fleming, and Croke, the Conuſee could not avoid the Leaſe, and the reaſon was, becauſe the Eſtate tayl was gon, and the Conuſee not privy to that Eſtate, could not avoid the Leaſe; they who argued for the Defendant would have it, that that Leaſe did not charge the Eſtate tayl, but only the Reverſion, the Iſſue at the time of making it not being ſeized of the Eſtate tayl, but only had a Poſſibility, and then the Eſtate tayl being only barred, the Conuſee ſhould hold it clear, till Death without Iſſue.

But the then Court held the Eſtate tayl gon by the Fine, and the Conuſee in of a Fee out of the Reverſion, and ſo the Leaſe good: Then comes Coke, and he holds, that the Iſſue had only a Poſſibility, and ſo the Leaſe was void quoad the Eſtate tayl, and conſequently ſo long as Iſſue was, the Conuſee ſhould hold it clear, for that the Leaſe had its Operation by way of Intereſt only out of the Reverſion: Now both theſe make our Caſe plain, they both agreed it paſſed an Intereſt of the Reverſion; they both admit, that if he had been ſeized of the Eſtate tayl at the time,

and

and ſo the Eſtate tayl had been charged, and then a Fine levied, and thereby the Privity deſtroyed, no Body could avoid the Leaſe: The Counſel and Judges that argued for the Defendant, do not any of them contend, that the Conuſee had Election to avoid, but only that the Leſſor not being ſeized of the Eſtate tayl when he made the ſame, that Eſtate was not charged, and ſo that Eſtate, if it continued, the Leaſe could not take effect during its Continuance, and that it had Continuance, becauſe 'twas only barred by the Fine; and Croke agrees that, if made by one in poſſeſſion of the Eſtate tayl, and then a Fine, 'twas a bar and the Leaſe good: Now here the Leſſor was actually ſeized in Fee tayl when he made this Leaſe, and conſequently it muſt charge that Poſſeſſion in Point of Intereſt; then by the ſame Caſe 'tis agreed that it iſſues alſo out of the Reverſion in Point of Intereſt too. If the firſt Leaſe had determined before the Eſtate tayl had been deſtroyed by the Fine, this Leaſe had certainly took effect, for that Eſtate tayl was charged by the Caſes I have cited; then that being barred, the Privity to that Eſtate tayl is ſo far gon by the Fine, that none can ſay it hath Continuance to the Prejudice of a Stranger, and conſequently it muſt be a good Leaſe ſo long as that Iſſue are in being by the opinion of Croke and them: If the Eſtate tayl be extinguiſhed, it charges the Reverſion, and is become unavoidable: Now here the Reverſion being in him that levied the Fine, the Eſtate tayl is extinguiſhed; and the difference put by Mr. Juſtice Jones, in his Argument in Godfrey and Wade's Caſe, Jones 32, 33. and agreed by the Counſel at the Bar reaches this; that Fines levied by the Iſſue in tayl in the Life of the Anceſtor (having no Eſtate) if it be to one that hath nothing in the Land, work only by way of Concluſion againſt him and his lineal Iſſues, and thoſe who claim in the Poſt, but not againſt thoſe who have an elder Title, as Capel's Caſe and Archer's are: But if the Party who levies the Fine hath the Reverſion, or if he levies the Fine to him that hath the Reverſion, there the Fine operates by way of Diſcharge and Extinguiſhment of the Eſtate tayl, and the Conuſor ſhall be in by force of the Reverſion diſcharged of the Eſtate tayl; and this is the third Reſolution in Sir George Brown's Caſe, that there being ſuch a Reverſion, the Eſtate tayl is extinct; and like to it is the Caſe of Huſſey cited in Altonwood's Caſe, 1 Rep. 49. where was Tenant in tayl, Reverſion in the King, and the Tenant in tayl by Deed inrolled grants to the King, and then the 34 Hen. 8. c. 21. was made, by which the tayl was barred, and then the King grants it in Fee, and held a good Grant, for he had but one Fee, and that was by force of the Reverſion.

If Tenant in tayl do bargain and ſell, and levies a Fine to the Reverſioner, in this Caſe the Eſtate tayl is extinct, and the Bargainee ſhall be in of the Reverſion diſcharged of the Eſtate tayl: Pari ratione it muſt be ſo here; and conſequently our Leaſe is good and indefeaſable, and Judgment ought to be pro Def.

E cont. Serjeant Levins argued pro Quer', that this is a voidable Leaſe, and that the Conuſee of the Iſſue in tayl may avoid it according to 1 Inſt. 46. That the Reverſion is not hapned; that the Eſtate tayl remains in him though the Iſſue are barred to ſay ſo by the Statute; that the Eſtate tayl is only barred, but not extinguiſht, and cited Capell's Caſe, Bruden's Caſe, and Beamont's Caſe, 9 Rep. and many other Caſes, wherein 'tis held that the Eſtate tayl is not extinguiſht.

C. J. Holt. 'Twill be hard to make it ſo far to have a Continuance, as to prejudice the Intereſt of a Stranger, eſpecially the Reverſion being in him. Curia adviſare vult.

Farrers *verſus* Miller *& al'*. Ent. Hill. 3. W. & M. *Rot.* 693.

Ancient demean pleaded without defence, good.

EJectment by Bill in B. R. Wherein the Plaintiff declares on the demiſe of John Upton for a Meſſuage, 20 Acres of Land, 10 Acres of Meadow, and 10 Acres of Paſture cum pertinentiis in Brenchley in comitatu Kantie.

Def. per Arthur' Lake attornat' ſuu' ven' & dicunt quod tenementa præd. cum pertinentiis tenentur de Thoma Culpepper Baronetto ut de manerio ſuo de Ayleford in com' præd. quod quidem manerium eſt & a tempore cujus contrarij memoria homin' non exiſtit fuit de antiquo dominico Coronæ Domini Regis & Dominæ Reginæ, quodq; tenementa præd. cum pertinentiis a toto tempore ſupradicto placitat' & placitabilia fuerunt per parvum breve Domini Regis & Dominæ Reginæ de recto in cur' manerij præd. ſecund' conſuetud' ejuſdem manerij præd. & non alibi; & hoc paratus eſt verificare prout Curia hic conſid' unde non intendunt quod cur' Domini Regis & DominæReginæ hic placitum inde cognoſcere vellet, &c.

Plaintiff demurs, and ſhews for cauſe quod præd. defendentes in placito ſuo præd. defendere debuer' vim & injur' ad ſeipſos perinde partes huic actioni faciend' ſine qua defenſione vis & injur' nec hujuſmodi placitum nec aliquod placitum quodcunq; ſive dilatorium ſive aliud eſt bonum ſeu placitabile. Defendants joyn in demurrer.

Pro

Pro Quer'. I argued that the Plea was ill, becauſe here is no defence at all, 1 Inſt. 127. It is neceſſary, for he ought to make himſelf Party to the Suit, and he muſt make himſelf ſo by this defence of the vim & injur' before he can plead any Plea at all: If the Plea be in diſability to the Plaintiffs Perſon, as Villenage, he muſt ſay defendit vim & injur', and ſo is Littleton, Sect. 197. It's true, he is not to make a full defence by an &c. for that implies ubi & quando & quomodo Cur' conſideraverit, and ſo affirms the Jurisdiction, but the other he ought to uſe. Bro. tit. defence 8. Treſpaſs for Corn, and defends force and injury & demand' Jud' ſi cur' cognoſcere vellet, &c. So that (ſays the Book) he ſhall defend the force and injury when he pleads to the Jurisdiction: Plac. 9 & 10. the ſame; and further note, that in Aſſize & Sc. fac. Defendant need make no defence, Pl. 12. expreſs, That he who pleads to the Perſon ſhall defend vim & injur', though he ſhall not ſay quando, &c. the ſame, Plac. 21. If full defence be made, he cannot plead to the Jurisdiction, becauſe that did affirm it, Bro. defence 4. Detinue of Charters, defend' vim & injur' & non plus, and then pleads to the Jury, Pl. 5. is ancient demeſne pleaded, and defence of the Force and Injury: 'Tis true, 'tis not neceſſary in demand of Conuſance, becauſe he is no Party, Dyer 157. And in truth, where nothing in certain is demanded, but the Writ is general, no need of defence, as in Dower, &c. But in all Actions where Proceſs of Outlawry lies 'tis neceſſary: This is the ancient form of pleading, and the want of this we have ſhewn for Cauſe.

E cont. was urged, That 'tis ſometimes with it, and ſometimes without it, and in Raſtall are ſeveral Precedents without it, and Arden's Caſe 5, Rep. 105. The Record is without it. To which I anſwered, that that Caſe is reported in 3 Cro. 826. And there it appears that Anderſon was abſent, and only Walmeſley and Kingſmill held it a good Plea, and Warburton e cont. and there's no Judgment in it, for the Demurrer is waved, and the Defendant afterwards pleaded the general Iſſue; which ſhews the contrary rather; and this never ſtirred in. Now we have demurred and ſhewn it for Cauſe. Then I urged that it ſhould be placitabilia ſunt, Brownl. 57. is ſunt, and ſo is Bro. Ancient Demeſne 2. And always thus pleaded. Per cur' tenentur implies the reſt, and well, and here no need of Defence, for the Plea is a good Plea without Defence; the Precedents are both ways, but you are not bound to receive the Plea without it, as in Caſe of Outlawry it ſhould be ſub pede ſigilli, and you are not bound to receive it without it, but if you do receive it, 'tis good without it: And Jud' pro Defendente

Buſh *verſus* Calis.

Covenant on a Leaſe excepting an Entry with Liberty to waſh in the Kitchin, and a Paſſage for that purpoſe, Covenant lies againſt the Aſſignee for hindering the Leſſee his Paſſage.

COvenant. The Declaration ſets forth an Indenture of demiſe of a Meſſuage or Tenement cum pertin', except two Rooms over the Hall, and except a Paſſage or Entry as then divided, and Liberty to waſh in the Kitchin, and alſo free Paſſage in, through and over the ſaid Hall, Kitchin, &c. That the Term by mean Aſſignments came down to the Defendant; that at the time of the Demiſe, there was a Paſſage or Entry between the Hall and Kitchin, in, by and through which they uſed to go to the Kitchin, &c. That the Defendant erected the ſaid Entry or Paſſage by erecting of a Partition, & ſic infregit Convention'. Defendant demurs; and the Plaintiff joyns.

I argued pro Defendente, That no Action in this Caſe lay upon this Indenture, for here are no Words of Covenant, for 'tis only an Exception, and that's only the Words of the Leſſor. I agree that the Words yielding and paying may (by Implication) be conſtrued the Words of the Leſſee, becauſe he is a Party to the Deed, and the thing imported in thoſe Words is an Act to be done by the Leſſee: This is not ſo, but meerly a Declaration of what ſhall not paſs: And then being only an Exception, Treſpaſs lies, and not Covenant, and ſo would his Remedy have been, if I had entred into the Chamber excepted: If it be an Exception 'tis not a Covenant, for if a Grant be of Lands, except a Cloſe, and an expreſs Covenant be to repair the Premiſes, this ſhall not extend to the Cloſe excepted. Lady Ruſſel's Caſe, Hob. 276. 11 Rep. 50, 51. The Caſe of Pomfret and Roicroft, 1 Saund. 321. Sid. 431. is ſtronger, there was a Leaſe of an Houſe except one Yard, and the uſe of the Pump therein, and Covenant was brought againſt the Leſſor for not repairing it, but permitting it to be deſtroyed, per quod he could not uſe it ſecund' formam Indentur' præd. and held the Action did not lie: But the difference in Dame Ruſſel and Gulwell, More 553. 3 Cro. 657. Covenant to enjoy, no Breach that that was a Diſturbance in the Occupation of certain Land excepted out of the Demiſe, becauſe the Exception excludes it from the meaning of the Leſſee to have to do with it, though ſays Pophamotherwiſe where a Way, Common, or Eſtovers, or Profit apprendre are ſaved or excepted, reaches not to our Caſe, for here the Paſſage, or Entry it ſelf, is excepted out of the Demiſe, and not the bare uſe of a Way or Paſſage, and conſequently Treſpaſs lies, becauſe as to that we are meer Strangers: Then, ſuppoſing Covenant would lie, that will not lie againſt an Aſſignee becauſe 'tis only an implied Covenant,

venant, and not expreſs, according to the difference between an expreſs and implied Covenant, 2 Cro. 522. Waters and Dean of Norwich in 2 Brownl. 159, 160. Dyer 257. 1 And. 12. 1 Leon. 179.

But per Cur', without any Argument e cont. the Action well lies, for 'tis a Covenant only, and the Caſe of the Entry is only reſerved, and it concerning the Premiſſes it binds an Aſſignee; for 'tis an expreſs Agreement of the Parties concerning the Houſe, and that ſhall bind the Aſſignee, and Judgment was given pro Quer'.

Vide March 9. Leſſee to have conveniens lignum non ſuccidendo arbores, &c. Covenant lies for cutting, &c. and Styles 406. againſt an Aſſignee upon an implied Covenant.

Dominus Rex *verſus* Roberts.

INformation in B. R. inter placita Coronæ againſt the Defendant, that time out of Mind there was ſuch a Ferry in Denbighſhire, and that the uſual Rates for all the time aforeſaid were 2 d. for a Man and Horſe, 1 d. half Penny for a ſcore of Sheep; and that the Defendant ſuch a Day was poſſeſſed of the ſaid Ferry-Boat, and deſigning to make unlawful Gain to himſelf, did between that Day, and the Day of exhibiting the Information, extort, take, and receive of divers Subjects, divers Sums for Paſſage in the Ferry-Boat aforeſaid, exceeding the Rates aforeſaid, viz. Secundum ratam ſex denar' pro quolibet homine & equo & quatuor denar' pro quolibet viginti Anglice ſcore of Sheep, &c. Dn non cul'. Verdict quoad the Rates for Sheep, guilty.

Information for extorting divers Sums of Mony for Paſſage in a Ferry *ſecundum ratam ſex denar' pro quolibet homine, &c.* uncertain.

I moved in Arreſt of Judgment, that this Information is too uncertain, it mentions not what Sums were received, but only ſecundum ratam. It mentions not from whom, nor how many times, that no adequate Fine could be ſet in this Caſe, becauſe not ſaid how many ſcore of Sheep we took for; we might take only for half a ſcore, or we might take for an hundred ſcore, which would require different Fines: In Informations and Indictments there is ſo much Certainty required as the Court may be able to give a proportionate equal Judgment; here every taking is a ſeveral Offence: Here non conſtat how many Offences. Rex and Goldsbon againſt Whidder. Indictment for ingroſſing diverſos cumulos grani tritici, ill, becauſe uncertain, upon 5 and 6 Edw. 6. Indictment for erecting diverſa Cottagia is ill; nay for ſtopping quandam partem aquæ currentis, ill, 2 Rolls Abr. 80. Seavell's Caſe, 2 Cro. 324. for ſtopping quandam partem regiæ viæ, ill, becauſe not ſaid how much, Halſey's Caſe, 2 Rolls Abr. 81

Sir William Williams, e contra. Here is ſufficient certainty, it appears here that he hath taken above the Old Rates, Sid. 91. Dominus Rex againſt Lovet. He took 50 s. colore officij held good, theſe are immaterial Circumſtances, Dyer 99. Preſentment of an High-way out of Repair pro defectu inhabitantium, good, becauſe number uncertain; ſo here, he took from all, 'tis pro quolibet, &c. For every ſcore of Sheep he took ſo much; the particular perſons need not be named, for they are unknown to the Attorney, Johnſon's Caſe, 2 Cro. 609. He was Indicted on 13 Rich. 2. For that the common price of Oats was not above 20 d. pro quolibet modio, that he being communis Stabularius ſold diverſis ſubditis infra domum manſional' in Holbourne 200 Buſhel of Oats for 2 s. and 8 d. the Buſhel, cont. form. Statut. and held good, though not ſaid what was the common Price, though not ſaid in his Inn, &c. Sir Edward Lenthal's Caſe. 2 Cro. 365. Information more uncertain and held good, and 2 Cro. 440. 1 Cro. 314. and divers other Caſes, &c.

C. J. H. Every ſeveral taking is a ſeveral Offence; how many ſeveral Offences this Man is Convicted of, we can't judge. Suppoſe, an Indictment, that between ſuch a day and ſuch a day, he beat divers of the King's Subjects; this is not one complicated Offence, conſiſting of ſeveral Facts, but ſeveral Offences jumbled together: Is he not to be fined proportionably to the number and value of what he took and frequency? They are diſtinct Offences: A man may ingroſs magnam quantitatem ſtraminis et feni, yet that has been held ill, though but one Offence; there ought to be a certainty, and I think Judgment muſt be Arreſted. Dolbin, Judgment ought to be Arreſted, we know not how to ſet a Fine. Gregory ad idem. Eyres, It's too univerſal. Judgment muſt be Arreſted. Vide 1. and 2. Leon 38. For per Eyres, that is ſtronger.

Smith *verſus* Cudworth.

Covenant for not accepting 30 Shares in the Stock of Linnen Corporation.

COvenant on an Indenture, That in conſideration of 2250 l. to be paid to the Plaintiff, as afterwards mentioned, the Plaintiff covenants to transfer to the Defendant, his Executors, or ſuch as he ſhould appoint, on the 17 th of February following, 30 ſhares in the Stock of the Linnen Corporation; and the ſaid Cudwotth Covenants, that he, his Executors, Adminiſtrators or Aſſignes, ſhall accept the ſame in uſual manner, upon the ſaid 17 th day, and eodem tempore ſolvent the Money aforeſaid. Plaintiff averrs, that upon that day he was ready, and offered to have transfer'd according to uſual form, and thereof gave the Defendant notice; that the Defendant did not then accept nor appoint any perſon to accept the ſame, nor then, or at any time afterwards, pay, or cauſe to be paid, the

the 2250 l. but the ſaid Stock to accept, did then, and there refuſe. Et ſic infregit, &c.

Defendant Pleads, That the uſual manner of transferring is by Writing, entred in a Book for that purpoſe, kept under the Hand of the Perſon transferring, and the uſual manner of accepting it by Writing entred in the ſame Book after ſuch transfer, declaring an acceptance; That the Plaintiff did not transfer according to that or any other form, by reaſon whereof the Defendant could not accept. Et hoc parat' eſt verificare. Plaintiff Demurrs.

Mr. Northey, This is no Plea, for they are mutual Covenants, and each has his Remedy over; and that the Defendant ought to have tendred his Money, and demanded a Transfer; and the Caſe of Carter and Taylor here, the laſt Term, was the ſame in effect with this: The like Covenant with this about Eaſt-India Stock. And Defendant pleaded, that no transfer could be, but to a Merchant and Freeman of that Company, and that he was neither; and that the Plaintiff had not transfer'd according to the Indenture aforeſaid, and the uſage of the Company, and Judgment pro Quer' though the Declaration was as here, only with a paratus fuit et obtulit transferr'd, &c.

E contra. I argued that the Breach here is a non-acceptance, and not a non-payment, according as 'twas in Carter's Caſe: Then, though they are mutual Covenants, yet one being dependant on the other, in the nature of the thing, and the firſt Act being to be done by the Plaintiff, their Declaration is ill, becauſe have not averred a performance of their part: If it appears upon the whole Contexture of the Deed, or upon the Record before you, that the intention of the Parties was for us to have a Transfer firſt, or that it muſt be ſo according to the natural neceſſary courſe of things, then they have no cauſe of Action: Now, by their Demurrer, they have confeſſed the uſual form for Transferring, to be as we have alledged. Beſides, in that Declaration they alledge not any Transfer at all. Now, the nature of the thing, beſpeaks the neceſſity of a Transfer firſt; we are to accept the Thirty Shares Transfer'd; it can be no other: If they are to do the firſt Act, then we have not broke our Covenant; if the Plaintiff's default diſabled us from doing our part, that is a good Cauſe. In the firſt place he is bound to Transfer by his Covenant, without any Demand from us, becauſe he hath undertaken by ſuch his Covenant to do ſo: Fretivil's and Molinex. 2 Cro. 145, 146. Chapman's Caſe, 1 Cro. 76. Then no Demand being neceſſary to enforce a Transfer, he ought to have transferred and averred it done, before he could charge us with a non-acceptance. The

Caſe

Caſe of Carter and Taylor was different, for there the breach was non payment of the Money, and the Money might have been paid, though no Transfer had been made, and then an Action given for not Transferring; but here the Gift of his Breach is non-acceptance, and that could not be but upon a Transfer. Suppoſe he came to York to us, and ſaid he wou'd transfer, and we told him we wou'd not accept, this could not be a refuſal to accept, becauſe there is nothing to be accepted but the thing which is to be transferred, and conſequently it can't be accepted till transferred. Suppoſe Tenant for Life Covenants with a Reverſioner to ſurrender his Eſtate to him by Deed or generally, and the Reverſioner Covenants to accept; in an Action of Covenant againſt the Reverſioner, would it be enough to ſay that he offered and was ready to Surrender? I do agree that in Conſideration inde will not make a Condition Precedent, 2 Saund. 156. in caſe the firſt be a negative Covenant, becauſe the one requires a continued performance, and the other attaches preſently; but where both are capable of obſervance immediately or at the ſame time, as Brocas's Caſe, 3 Leon. 219. Lord of a Manor Covenants to aſſure the Copyholder in conſideration of that Covenant performed promiſes to Pay; no Action lyes for non-payment till aſſurance made; now though in that Caſe it be ſaid in conſideration content' performat' yet here it quinches, for the nature of the thing implies it: It is generally true, where mutual Remedies, no need of averring performance on the Plaintiff's part, otherwiſe where the Facts to be done are dependant each on the other, as here: But per Cur' our Plea was deemed idle, and the Declaration good and Jud' pro Quer' Vide pro Quer' Bragg and Nightingale's Caſe. Styles 140, 141.

Dominus Rex *verſus* Dn' Dover.

Error to reverſe an Outlawry on an Indictment for Treaſon.

HEnry Lord Dover was Outlawed on an Indictment for Treaſon, and he brings a Writ of Error, and the Aſſignment of Error was, Et ſuper hoc Henricus Baro de Dover, qui per nomen Henrici Dn' Dover utlagat' exiſtit in propria Perſona ſua venit et dicit quod in record' et proceſs' præd. ac etiam in promulgatione utlagarie præd. manifeſto eſt Erratum, in hoc quod Dom. Jacobus Secundus nuper Rex Angliæ per literas ſuas patentes ſub magno ſigillo ſuo Angliæ gerent' dat' apud Weſtm. 13 die Maij anno regni ſui primo quy idem Henricus hic in cur' profer creavit eundem Henricum

Baron'

Baron' de Dover per nomen Henr' Baron' de Dover in Com' Kantie, Unde ex quo præd. Henricus Baron' de Dover præd. in record' proceſs' et promulgatione utlagar' præd. non nominatur Baron' de Dover, nec habet in eisdem aliq' ſufficient' addition' ſive titulum Ideo in eo manifeſte eſt Erratum. Erratum eſt etiam in hoc viz. quod non conſtat per Record' præd. ipſum præd. Henric fore utlagat' per judicium Coronator', nec per cujus judicium utlagat' fuit prout per leges hujus regni Angliæ conſtare debuiſſet, Ideo in eo manifeſte eſt Erratum: Erratum eſt etiam in hoc viz. quod tempore Idictament' et proceſs' præd. locus reſident' præd. Henr' fuit apud Paroch' Sti. Jacobi Weſtm. in Com' Middleſex & non in Civitat' L. vel albi extra præd. Com' Midd' et quod nullum breve de Capias unquam emanavit Vicecom' Com' Middleſex præd. ſuper indictament' præd. prout per Stat' hujus regni Angliæ emanaſſe debuit Ideo in eo manifeſto eſt Erratum. Erratum eſt etiam in hoc viz. quod per record' et proceſs' præd. apparet eundem Henr' utlagat' eſſe ubi per legem terre nullum judicium utlagat' verſus eundem Henricum ſuperinde promulgari ſeu aliquis proceſſus verſus præd. Henr' ſuper indictament' præd. fieri emanari ſeu adjudicari debuiſſet Ideo in eo manifeſto eſt Erratum et hoc paratus eſt verif' unde petit jud' &c. **Note that the ſaid Judgment was reverſed, for the firſt Error Aſſigned, viz. Want of a true addition according to the Statute.**

As to the Second, that's none, becauſe in London, and the Practiſe there is always different.

As to the Third Quer' les Statutes. 8 Hen. 6. Cap. 1, **and** 8 Hen. 6. Cap. 10.

Radford *verſus* Taylor. Enter Trin. 3 W. Rott.

ERror to reverſe a Judgment in Ejectione Firmæ in Cur' Regis coram Ballivis et civibus civitat' Lincoln'. **General Error Aſſigned, I argued that 'twas Erroneous, the plaint was** de placito tranſgreſſionis et ejectione firm' ad dampn' querentis viginti librat'. **That 'twas too uncertain, that the plaint in thoſe Courts, is in nature of an Original here above, and that it ſhould have mentioned what Houſe or Land; here 'tis not ſaid** firmæ ſuæ: Sed non allocatur. **Then I urged that the Judgment was Erroneous, becauſe it 'twas** quod recuperet Termin' ſuum præd. &c. Et damp' ſuum præd. &c Necnon quinque libras eidem querenti ad requiſition' ſuam pro miſis et cuſtagiis ſuis præd. per eandem Cur' hic de incremento adjudicat' &c. **and doth not ſay** circa

ſectam ſuam præd. as are all the Precedents here; and inferior Courts are more precisely bound to observe the true ancient and legal Forms, especially in Judgments; and for any thing appears, it might be Costs in another Suit; and I cited the Case of Crible and Orchard, in Styles 164. Error on Judgment in Debt in Barnſtaple Court, and ſeveral Exceptions moved and over-ruled; and Rolls upon reading the Record at laſt found this, and 'twas allowed per Cur', and the Judgment accordingly Reverſed. But per Cur' non allocatur: Then I urged another Exception, that the placita was of a Court held before ſuch and ſuch, Secundum conſuetud' Civitat' præd. a tempore cujus contrarij memoria hominum non exiſtit uſitat' et approbat' in eadem ac juxta libertat' & privileg' dicte Civitat' per. diverſas Chartas regias inde confect' conceſs' & confirmat'; that this was inconſiſtent and contradictory that they ſhould hold one and the ſame Court by Cuſtom time out of Mind, and by Charter both; if it had been Confirmat' only, 'twere well enough. Per Holt. That hath been an Exception. But Eyres ſeemed to incline 'twas well enough: But this was not much conſider'd, becauſe the Writ was quaſhed, the Writ being coram ballivis & civibus, and the Record coram ballivis Seneſchallo & communi Clerico Civitat'.

Tallent *verſus* Jermyn.

HUmfridus Tallent gen' queritur de Johanne Jermyn in caſu ſur Aſſumpſit,& præd. Johan. per E.H. Att' ſuum venit & defendit vim & injur' & petit jud' de billa præd. quia dicit quod ipſe nominatur & vocatur per nomen Johannis Jermyn & per idem nomen a tempore nativitatis ſuæ ſemper cognit' & vocat' fuit abſq; hoc quod ipſe vocatur per nomen Johannis Jermyn ſeu per idem nomen cognit' & vocat' fuit & hoc paratus eſt ver' unde petit jud' de billa præd. & quod billa illa caſſetur. Plaintiff demurs.

And per Cur', they are different Names, but the Plea is ill, becauſe he doth not ſay quod Johannes Jermyn verſus quem billa præd. &c. venit & dicit, but ſays & præd. Johannes, &c. which per Cur' is ill, though the printed Precedents in Thompſon are as above: And Judgment was pro Quer' quod reſpondeat ulterius.

Vide 1 Keble 105. 2 Keble 437. 3 Cro. 85, 198, 257. Bro. tit. Miſnoſmer 44, 48 and 58. what Names are different.

Saunders

Saunders *verſus* Vigor.

ERror on Judgment in Briſtol Court, and I urged the Exception of their Courts being held by Cuſtom and Charter, both according to Styles 131. Sed non allocatur: And Judgment affirmed.

Crabb *verſus* Bowdler.

ERror on Judgment in Briſtol Court. Indebitat' for Wares ſold, ſays, That at Briſtol he was indebted, and at Briſtol he promiſed, but 'tis not ſaid ibid' vendit', and held ill, and Judgment reverſed.

Dominus Rex *verſus* Carrocke.

DEfendant was committed by the Mayor and an Alderman, 2 Juſtices of Peace of Taunton by Warrant, reciting that he and three others had been Overſeers of the Poor of the Pariſh of------within the Borough, and duly ſummoned to appear that Day to ſhew Cauſe why they had not rendred an account of Monies receiv'd and paid by them to the uſe of the Poor; That the Defendant had appeared before them two Juſtices of the Peace, and being demanded to give a juſt and true Account of all ſuch Monies as hath been receiv'd and paid, and hath only produced an Account in groſs of his Receipts and Payments, and refuſes to give a particular Account, or to produce his Books, by which he receiv'd the Monies on Rates aſſeſſed, &c. and alſo a particular Account to whom he paid ſuch Money charged in groſs: And therefore they believed ſuch Account to be no Account according to 43 Eliz. And the ſaid Defendant hath refuſed to give any other Account, they therefore commit him to be detained until he ſhould make a true Account before them, or two other Juſtices of the Peace for that Borough; and upon an Habeas Corpus he was here diſcharged per tot. Cur', becauſe the Juſtices had no Authority to commit in this manner by the Statute of 43 Eliz. for that an Account was confeſſed to have been rendred, &c.

Delbye *verſus* Proudfoot & *al'*.

Prohibition to the Commiſſioners for determining Policies.

PRohibition. The Defendants had ſubſcribed a Policy of Aſſurance to the Plaintiff, and a Loſs happening, the Defendants were ſued at Law, and Declaration delivered, thereupon the Defendants ſummon the Plaintiff before the Commiſſioner for determining of Policies, the ſame being made in the Office, pretending that the ſaid Policy was had and procured by Fraud, and endeavour'd to have the Policy delivered up by order of the Commiſſioners there, according to 43 Eliz. cap. 12. and 14 Car. 2. cap. and 19 Car. 2. cap.

Thereon I moved for a Prohibition on a Suggeſtion of this Matter, For theſe Reaſons, That they have no Juriſdiction in this Caſe; That Fraud and no Intereſt annulls the Policy at Common Law; That 'tis good Evidence upon the general Iſſue; That we had our Action on the Policy here, and ſo a Juriſdiction was attacht; That this Method would deprive us of our Evidence at Law, viz. the witten Policy; That this would erect another Court of Equity in conſequence to controul Suits at Law: Beſides, That they had no Authority in this Matter by the Acts of Parliament: That that ſummary Method therein preſcribed without Trial by Jury, was never intended further than the Relief of the inſured againſt the Inſurers, and being ſuch a Law, was not to be extended further than the Words; That the Miſchief recited was Trouble for the inſured to ſue every ſeveral Inſurer diſtinctly; That though the purview be general, to hear and determine Cauſes ariſing upon Policies of Aſſurance, yet ſeveral other Clauſes ſhew the intent, as that upon Appeals the Party grieved ſhall firſt ſatisfie the Decree, or at leaſt depoſite the Monies decreed in the Commiſſioner's Hands, which plainly means the Aſſurers to be Appellants, and upon Suit ſo brought before them by the Aſſurers upon Appeal, the Chancellor is to award double Coſts; That any other Conſtruction would make a claſhing of Juriſdictions: And we had a Rule for a Prohibition unleſs Cauſe, and to ſtay in the mean time, but they never moved it again, and ſo my Client was quit of them there.

Term.

Term. Trin.

4 W. & M.

Dominus Rex *verſus* James.

Information for Perjury in an Affidavit in C.B. made before the Commiſſioners in the Countrey, in a certain Cauſe depending there, was tried before Eyres, and convicted, and ſeveral Exceptions ariſing upon the Evidence, he ſtopt the Poſtea till the opinion of the Court was had upon motion. The Proof of a Cauſe depending was only a Capias and Warrant thereon, and Affidavit filed, and allowed. I urged another Exception, that there was no Proof that the Party (before whom the Affidavit was ſworn) was a Commiſſioner, and held that it need not, unleſs you diſprove it on the other ſide: That the Proof was only by Copy of an Affidavit, and no Proof that 'twas the Defendants.

What is good Evidence in an Information for Perjury in an Affidavit.

I urged, that this is a Dangerous Practiſe, any Man might be repreſented, a falſe Oath may be ſworn by another Man in my Name: And per Cur' the Affidavit being of the Defendant in the Cauſe, and uſed by him, upon motion in Court it's enough, otherwiſe if not ſo, but a Copy of an Affidavit only produced againſt a Man without Proof that he made it, uſed it, or was concerned in the Cauſe, That wou'd be inſufficient. Judgment pro Rege.

Dominus

Dominus Rex *verſus* Marriott.

An Indictment for keeping an Ale-houſe without Licenſe.

INdictment that he kept a common Ale-houſe without Licenſe contra form' Statut', Non cul' pleaded, Verdict pro rege.

In Arreſt I moved that no Indictment lies, becauſe 'tis a new Offence created by a particular Statute, and a particular Method appointed for the Conviction and puniſhing of it: At common Law any Man might keep an Ale-houſe, and might ſell Beer or Ale, out of, or in his Houſe at pleaſure, and there was no Law to reſtrain them; tho as to Inns, ſome Opinions have been, that Licenſes were neceſſary, as Juſtice Croke and ſome others held, 1 Bulſtr. 109. Contrary is Godb. 345. and 2 Rolls Abr. 84. That no Indictment lies at common Law for erecting an Inn without a Licenſe; it's true, they may be puniſht as Nuſances, if in inconvenient Places. In the Reſolution concerning Inns in 19 Junii. 22. Jac. 1. 'Tis reſolved that any might erect an Inn without any Allowance or Licenſe, and any Man might keep an Ale-houſe before the Statute of Edw. 6. as at this Day any Man may ſet up Hackney Coaches for Hire, or uſe any Trade not prohibited by 5 Eliz.

Now where a particular Method is preſcribed, that is to be purſued, and no other. By the 5 and 6 of Edw. 6. cap. 25. The Juſtices have Power to remove and put away the common ſelling of Ale and Beer in any ſuch Places as they ſhall think fit, and none ſhall be admitted or ſuffered to ſell, but ſuch as ſhall be licenſed, &c. giving Recogniſance, Sect. 4. If any Perſon ſhall do it of his own Authority, two Juſtices ſhall commit for three days, and before deliverance the ſaid Juſtices ſhall take Recogniſance not to ſell again, then he is to make a Certificate to the Seſſions, which ſhall be a ſufficient Conviction, and there they are to aſſeſs 40 s. Fine. Now it is plain, this Method can never be obſerved upon an Indictment, and the Makers of this Law never intended ſuch a Proſecution; here are no negative Words, but only by way of Prohibition to the Juſtices not to ſuffer any without Licenſe: The firſt gives them Authority to remove and put away from ſuch Places as they ſhall think fit; then 'tis ſaid none ſhall be ſuffered, which is a Prohibition on the Juſtices, not upon the Party: Then the third Statute ſhews it plain, for there where Order is taken about Inquiry into the Breach of the Recogniſance for keeping an orderly Houſe, there 'tis ſaid by Preſentment or otherwiſe; now here in this Clauſe is no ſuch thing.

Then

Then for 3 Cro. 1 Cap. 3. There 'tis to be on view by the Mayor, Juſtice, or Head Officer, on Oath of two Witneſſes before him, and the Penalty to be levied by the Conſtable upon Warrant, and the Words are only, if any Perſon or Perſons &c. and no negative Words at all.

In Palmers, Rep. 388. per Juſtice Haughten, A Man cannot be Indicted for keeping an Ale houſe without Licenſe, for the Stat' of Edw. 6. is that they ſhall be Committed, and the Juſtice ſhall therefore imprſon the Party, And 2 Rolls. Rep. 398. is the ſame.

Caſtle's Caſe on 18 Hen. 6. Cap. 11. in 2 Cro. 643. and 2 Rolls Rep. 247. is expreſs, Indictment for taking on him to be a Juſtice of Peace, not having Lands to ſuch a Value: And the ſame Exception taken as here, becauſe the Statute appoints a Penalty, which is to be Recovered by Bill, Plaint or Information, and therefore not by Indictment, becauſe no Offence before: And the Court was all of Opinion, that where a Statute inflicts a Penalty for the doing of a thing that was no Offence before, and appoints how it ſhall be Recovered, it ſhall be puniſhed by that, and no other means, not by Indictment, and that Statute is preciſely as this, that none ſhall be Aſſigned, &c. It is one of the Reſolutions upon the Caſe of Penal Statutes, 7 Rep. 36. That every Act which gives a new Penalty, ought to be purſued ſtrictly, both in the Proſecution and Levying of it, according to the Method preſcribed by the Act: And in Plowd. 206. Stradling's Caſe, its allowed as a Rule, when an Act of Parliament gives Power or Intereſt to a particular Perſon, that particular deſignation is Excluſive of any other; the like Caſe was here, Paſch. 2 Jac. 2. B. R. Dom. Rex againſt Joice, Indictment for keeping an Ale houſe without Licenſe, and Sir Henry Poll. moved then as I do now, to arreſt the Judgment for theſe and the like Reaſons, and the Judgment was arreſted: Beſides,

This is to inflict a greater Penalty; for the charge of trying an Indictment is more than the Penalty, perhaps it may be more juſt and fair for Trial, but the other is leſs Expenſive, and that may be the reaſon why this Law doth not mention Indictment.

Obj. Crafton's Caſe. Mod. Rep. 34. Sid. 439. Nonconform' reſiding in a Corporation. But that was Zachary Crafton's Caſe, there 'twas to be by Bill, &c. Here are Clauſes that particularly ſeem to reſtrain it to this Method, viz. Committed till give Recogniſance, that the Juſtice is to certifie, which this Court cannot execute.

Dominus Rex againſt Baker. Hill. 24. Car. 2. in 3 Keble. 106. For Wages gain; that ſeems to the contrary; but Caſtle's Caſe is as ſtrong an authority for me; and I know of no Judgment

ment ever had in this Caſe, but that of Joyce; this hath been rarely practiſed, which ſhews the current Opinion to have been againſt it. Dominus Rex againſt Fawkner, 2 Keble 501. was one, and Saunder's took exception, becauſe not ſaid cont' form' Statut' and quaſht, but this Quere could not happen there, becauſe upon the Statute. C. J. Holt ceteris conſentientibus, let it ſtay. Eyres. It can't be maintained I doubt.

Butcher *verſus* Porter. Hill. *ult'*. 282.

Judgment in *Winſor* Court, in *Replevin* Reverſed what Judgment ſhall be given.

ERror upon Judgment in Court apud Windſor en Replevin, Butcher 9 Junij. Anno Secundo, Levies a plaint there againſt Thomas Porter in placito captionis et injuſte detentionis Bonor' et Catallor' ſuorum et invenit pleg' & petit proceſs' in placito præd. And there's a Precept to replevin and deliver the Goods to the Plaintiff, and a return of a Deliberar', and a Summons of the Defendant, and he appears, and the Plaintiff counts for the taking and unjuſt detaining of the ſeveral Goods in the Plaint, and the Defendant Pleads quod præd. Quer' action' ſuam præd. inde verſus eum habere ſeu manutenere non debet quia dicit quod tempore captionis bonor' et catallor' præd. fieri ſuppoſit' proprietas bonorum et catallorum præd. fuit cuidam Rogero Saubec adhuc ſuperſtiti et non prefat' Joanni Butcher Et hoc paratus eſt verificare Unde petit Jud' et retorn' bonor' et catallor' præd. ſibi adjudicari, &c. Plaintiff Demurrs, Defendant joyns in Demurrer, & ut prius petit judicium et quod præd. Johanni Butcher ab actione ſua' præd. inde verſus ipſum Thomam haben precludatur. The Court gives Judgment quia videtur placit' præd. fore ſufficient' Ideo Conſiderat' eſt per eandem Cur' quod præd. Johannes Butcher nil capiat per nar' ſuam præd. ſed quod ipſe ſit in miſeriordia pro falſo clamore ſuo inde et præd. Thomas eat inde ſine die, et quod habeat retorn' bonor' et catallor' præd. detinend' ſibi irreplevabilia imperpetum, &c. General Error aſſigned by the Plaintiff Butcher, who brings the Writ, &c.

I argued, pro Quer' That this Judgment ought to be Reverſed, becauſe 'tis not ſaid et pleg' in manu mea, as it ought to be, and ſo are the Precedents, Hern's pleader, tit. Second Deliverance, 650, and Cokes Ent' 591. Then 'tis nil capiat per nar', it ſhould be querelam, for the Plaint is that which makes his Demand in Court, and inferior Courts are bound ſtrictly to obſerve and purſue Legal Forms. But per Cur' that's true, and the Judgment muſt be Reverſed, but we muſt give a good Judgment

ment as they ought to have given, according to Slocomb's Case, in 1 Cro. 412. But then I argued that here could be no return awarded, because there was no avowry made for it, and so are the Precedents in Rastal's Ent. 562. where he pleads a property in another. And for Sackold's Case, 2 Cro. 519. it referred to a Case moved before, and there's no such to be found in the Book. Bro. Replevin. 1. Replevin against two of a taking in P. in the Ville of B. The one says P. is in C. and not in B. and for a return avows as for Damage feasant in his several Soyl The other pleads Property in another Per Bro. He ought to crave Judgment of the Writ, Plac. 31. It is 39. Hen. 6. 35. Plea of Property in another, and an avowry to get a Return, quel Avowry n'est bon, and there held he shall have no Return, for that always where the Defendant pleads in Abatement, he must make an Avowry for to have a return; by which it seems not pleadable in Barr. But per Cur' it is pleadable in Barr and needs no avowry: for per Prisot. in that Case I cited, he shall have a Return without avowry, because the Plaintiff had a deliverance without Cause: And for Sackold's Case, 2 Cro. 519. Though the Case was not put there, yet 'tis 2 Rolls Rep. 64. and both together make a good Report. Then adjudged that though no avowry, yet notwithstanding he should have Judgment for a Return; for it appears by the Plaintiff's Declaration that the Defendant took them, and so he had Possession; and that by the Replevin sued, they were delivered to the Plaintiff, wherefore when the Writ is abated, it is reason that a Return be adjudged, that the Defendant may be in Statu quo prius. In case of non-suit, before Declaration, the Defendant shall have a Return, for that there he is prevented of his avowry, and here it is no Reason the Plaintiff should have the Goods from the Defendant's Possession, when he has no Property: And by that Book Return shall be awarded in every Case, where it appears that the Defendant was in possession of the Beasts, if delivered by Replevin. But then I urged that here no Judgment could be given for a Return, because here was no Replevin sued of any taking, nor could the Plaintiff have a delivery, for the plaint was 9 days before the day of Caption supposed, and then the precept for delivery was Illegal, which was as none, for 'tis mandatum est ex parte Domini Regis, &c. and then the Plaint was of things where no Replevin lay, and a variance between the Plaint and Count, and therefore there ought to be no Return; for if the Count abate for false Latin, or other defect of the Clerk, and not of the Party, no Return, 2 Rolls Abr. 433. 3 Hen. 6. 3. But per Cur' your own fault in bringing a Plaint before you had cause for it, or adding

particulars which could not lie, ſhall not prejudice him that had the Poſſeſſion. And at laſt the Court gave rule for the reverſal of the Judgment, and that a new Judgment ſhould be entred, quod nil capiat per querel', &c. and no Return awarded. Vide 35. Hen. 6. 40. pl. 1. And Wildman and North's Caſe. Trin. 25 Car. 2. Rot. 357. mentioned in 3 Keble, 219, 232. That property in another may be pleaded in Bar or Abatement, for that he cannot plead non cepit, for he took the Cattle though not ſua. But in all other Caſes he muſt avow, and make Title for to have a Return.

No Bond but pledges in Replevin, 1 Brownlo 175. though the courſe is to take Bond. No inquiry of damages can be without avowry, 3 Keble 837. and not on 17 Car. 2. in inferior Court. 2 Keble 550. Vide 2. Inſt'. 340. where a Second deliverance lies.

Howard *verſus* Pitt *et al'*.

Judgment againſt 5, pending a Writ of Error, one dies, the year expires: *Capias* may be taken againſt Survivours without *Scire facias* or *Remittitur*

TRelpaſs. And in Michaelmas 1688. Verdict and Judgment againſt Sir John Lawrence, Sir William Pritchard, Sir B. Newland, Sir Edward Abney, George Pitt Eſq; and James Smitheby, for 1515 l. damages and coſts. The Defendants brought a Writ of Error, and the Record is certified into the Exchequer Chamber, and Smitheby Died, and the ſurviving Defendants fearing the Writ of Error was abated by his Death, brought another Writ in the nature of the five ſurvivours, and the Writ allowed, and Bayl put in, and no Nonpros nor affirmation of the Judgment, nor any Remittitur of the Record upon the Writ on which 'twas certified: But Sir John Lawrence being dead, the Plaintiff brings an Action, and Arreſts Mr. Pitt, on a Bill of Middleſex, with an ac etiam Bill for 1515 l. Debt, and after five hours Impriſonment charges him with an Execution, ſued out only againſt four of the Defendants, but never removed the Judgment by Sc. fac. Hereupon 'twas moved for Mr. Pitt to diſcharge this Execution as Irregular and Erroneous, for theſe three Reaſons, 1. That there ought to have been a Sc. fac. in regard the Judgment was three Years old, and not affirmed on the Writ of Error. 2. That no Execution ought to have iſſued until the ſecond were remitted back out of the Exchequer Chamber. 3. That the Judgment being againſt ſix Perſons, and ſome dying, Execution ought not to have gon againſt the reſt, without a Scire fac.

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As to the firſt, its true, the bringing of a Writ of Error, prevents the need of a Scire fac. but that is only on an affirmance of the Judgment, becauſe there's a new Judgment, and ſo they may ſue out Execution within the Year after that, without Sc. fac. but not where 'tis only abated or diſcontinued. But per Curiam 2 Cro. 364. is Error diſcontinued, and no affirmance, and yet the party prayed in Execution after the Year, without Scire facias; as 'tis in Rolls. Rep. a diſtinction is made, where actually in cuſtodia Mar' and where not; but Croke takes no notice of any ſuch diſtinction, Yelv. 7. 3 Cro. 891.

Secondly, There ought to be a Remittitur. The Act of Parliament that erects the Court ſays, the Record ſhall be ſent thither, and afterwards remitted, that ſo Proceſs and Execution may be done thereupon; and the conſtant practice is to remit it, and to joyn a Record of all the proceedings there to the Plea-roll of this Court, and there's reaſon for it; the Record is certified; this Court ought to be appriſed of ſomewhat before they award Execution Their hands were once cloſed, what is there that warrants a liberty to ſue Execution? But ſay they pro Quer' there muſt be a Remittitur upon an affirmance, and ſo when the Plaintiff in the Error is non-ſuited, or the Writ of Error diſcontinued, but not when abated by death. We anſwer, that the abatement ought as well to appear by a Remittitur, as any other proceedings; the reſolution in Palmer's Rep. 186. is general, that the Writ of Error cloſes the hands of this Court, ſo that they cannot award Execution until it be diſcuſſed; and when 'tis determined there, they remit the Tranſcript hither, 'tis Scire fac. quare Executio non is to be brought there, and then the Plaintiff to be non-ſuit, and then a Remittitur, which ſhall be an authority to award Execution here.

This Court cannot take notice of an abatement, or other end of that Writ, but upon a Remittitur; there's always a Remittitur upon a reverſal, for otherwiſe this Court could not give a new Judgment here as they ought to do. The Caſes of Latch. 59. Jones 66. of Crouch and Hayn, are of Error in Parliament, abated by diſſolution of Parliament by demiſe of the King, which this Court muſt take notice of; otherwiſe here: Beſides, the Statute requires a Remittitur generally, Bellaſis's Caſe, 2 Cro. 364. is for us in this particular, for there 'tis ſaid by Man, Execution without Scire fac. upon Remand, ſo that by him a Remittitur was neceſſary there.

Thirdly, Here is one dead, here is an alteration of the Parties, the nature of the Execution is changed, for they ought to purſue their Judgment; every Execution ought to follow the Record, and the Writ muſt agree with it, otherwiſe 'tis illegal, and ſo

are all the Books, Vicars and Okey, 2 Keble 307. Sid. 351. and 1 Keble 92. 123. In 2 Inſt. 471. No Execution, if the Parties be altered, without Scire fac. whether on the Plaintiffs or Defendants part, N. B. 267. Iſted's Caſe, 3 Cro. 367. If two recover, and one die, a Scire facias is neceſſary; the ſame reaſon e cont. The Caſe of Noy, 150. is denied for Law in Carters Rep. 112, 122, 193. Though there Bridgeman inclines againſt us, the Printed Precedents are with us, Theſaurus Brevium 18. Brownl. Judicial Writs, 11 Scire fac ſued in this Caſe; here the Judgment was joynt, the Execution ought to be ſo; they might have brought a Scire fac. and then we ſhould have had liberty to anſwer: Suppoſing the Party ſurmiſed dead in their Capias, be not dead, what then?

E contra. Thompſon and Squibb, there needs no Remittitur nor Scire fac. Execution might have iſſued againſt them all, without taking notice of any man's Death, and then the mentioning of the death of one, ſurely can be no harm to the reſt. If one of the Defendants die after Judgment, no abatement of any judicial Proceſs; no need of Scire facias but where the Parties are altered, and ſo that they are not here: One Plaintiff dies, the ſurvivor may take out Execution, Moore 367. Noy 150. In Elegit, it muſt be againſt all, here each is liable. In caſe of Verdict againſt Four, and one dies, I may there alledge one dead, and pray Judgment againſt the reſt, and 'tis well, and there need no Scire facias; beſides, it is a diſcretionary thing in the Court to ſuperſede an Execution, in this Caſe they may bring their Writ of Error in adjudicatione executionis.

C. J. Holt. Why ſhould there not be a Remittitur in caſe of an Abatement, as well as in caſe of a Non-ſuit or Diſcontinuance, which are equally within the Words of the Statute, for neither of them are expreſsly there; there you might have had Judgment on a Sci. fac. quare Executio non, but to have Proſecution immediate without any notice to us of what is become of the Writ of Error, I do not underſtand: I think you can't have an Execution after the Year without a Scir. fac. or a Remittitur: Here's a year expired, pray how do they happen to ſtop upon the death of one of the Plaintiffs? if they take notice of it, they ought to remit it for that Cauſe: And of that Mind was all the Court; but for the Execution againſt one, the other dying after Judgment, if a Sc. fac. be needful, the Practice hath been different. Suppoſe two Plaintiffs, and one dies, there muſt be a Sc. fac. but here you know your Remedy, you muſt bring a Writ of Error tam in redditione judicij quam in adjudicatione Executionis, and a Superſedeas being a diſcretionary act, the Court would

would not relieve us upon motion, nor declare any opinion upon the laſt Quere: And Mr. Pitt paid the Money.

Vide 4 Leon. 197. Not Law. 1 Rolls Abr. 899. 15 Hen. 7. 16.

Dominus Rex *verſus* Pett, *and the Inhabitants of* Beingfield *in* Suffolk.

By the Juſtices one Crane was put Apprentice to one Browning. He dies. Adminiſtration is committed to the Defendant; the Prentice falls ſick and becomes chargeable to the Pariſh; the Juſtices make an Order for ſending him to the Defendant, and to maintain and provide for him; he appeals; the Seſſions in Suffolk confirms the Order; theſe are removed by Certiorari: I moved to quaſh them, for that the Juſtices had no Authority to make an Order on my Client, their Juriſdiction is only upon the Perſon of the Maſter, and not upon his Executors or Adminiſtrators; that ſuch a Conſtruction muſt bring a great deal of Confuſion in the Law; for ſuppoſe no Aſſets, ſhall the Juſtices try that? Shall this Expence and Charge be pleadable to any? And what Suit by Creditors? Suppoſe the Adminiſtrator live in another Pariſh or County, muſt the Prentice be ſent after the Adminiſtrator? Suppoſe that he proves poor himſelf, then that Pariſh where he lives muſt be chargeable with this Apprentice; which certainly the Statute never intended: If there be Covenants in the Indenture that reach the Executors, thoſe may be ſaved, and then we have Liberty to plead to it: But now by this Order we are ſettled, &c. And per Cur' the Order was quaſht.

Orders of Seſſions for one Executor to provide, where by Sickneſs became chargeable; not good.

Term.

Term. Mich.

The CASE *of a parol Administration.*

A. makes B. his Executor and dies, the Ordinary commits Administration to C. the Widow of A. by parol only, taking an Oath of Administration, and giving Security; all which is entred in the Register, C. sells several Goods to D. by Vertue of this Administration, and then B. refuses. C. dies, Administration is granted to E. by Letters, who brings Trespass against the Defendant D. the Vendee. If 'twill lie?

1. Q. If the first Administration to C. the Widow of A. be good?
2. Admitting it void, if the Sale be good against E.?

I am of Counsel with the Defendant in the Cause who is a Purchaser of Goods upon valuable Consideration, as the very Term (Sale) implies, and on that account we may expect more Favour than otherwise; and truly if this Action be allowed, the Vendee will have a hard Bargain of it, to pay twice for his Goods, and to pay a Fine to the King too, or else be liable to an Outlawry; but yet we hope to have the Plaintiff in misericordia pro falso clamore for his vexatious Suit, without the least Colour or Pretence, as will be plain and manifest, if we prove either of the two Points. Therefore,

Quant al primier Point. If the Administration to C. be good. And I humbly conceive it is, and question not but you'le conceive the same presently. Now it is well known, that if a Man seized of Lands and Tenements, or possessed of Goods and Chattels in his

his own Right doth die, the Heir at common Law is he that by right of Blood shall succeed to the former, but with him we meddle not; as to his Goods the Law hath appointed two sorts of Persons for the Administration of them for Payment of his Debts, and Distribution of the Residue for the good of his Soul; one of them is constituted by the Party in his last Will; the other may more properly be said to be appointed by the Law in default of the former; these two differ in this, that the former may appoint an Executor to the first Testator, so cannot the latter, and they agree in this, that an Administrator is entitled to all the Goods and Chattels of the Intestate, as much as an Executor to those of the Testators, both alike liable to Payment of Debts and Legacies, and they are both accountable; about the latter only is our present Business: It may not be amiss therefore to consider how the Administrator came by this Power, and I take it to be chiefly given him by the 31 Edw. 3. cap. 11. Which gave him Authority to sue for, and recover the Intestate's Debts; for before this, though the Ordinary was liable to Debt as far as the Goods in his Hands did reach by W. 2. yet he could not get any of the Intestate's Goods out of other Men's Hands, neither could he nor his Committee, or whatsoever you'll call him, recover any Debt, though due by Specialty, till this Statute of Edw. 3. Therefore I account this the principal Statute that gives him Authority, &c. But this is not much material since now he hath it; and our sole Question is, if the Administration in our Case be well committed to C. the Widow of A. and there can be no dispute, but we are next of Kin, and if to any Body, it ought to be granted to her, by 21 Hen. 8. Now all the Pretence that can be to make it void, is either, 1. Because there was an Executor in being; or, 2. Because it was granted by parol only, &c. For the first, I think it scarce worth mentioning, for I do take the Law to be clear, that the Ordinary may commit Administration till the Will be proved; and if it be never proved, the Administration stands good and cannot be revoked; and in our Case the Executor meddles not with the Goods, nor does he release any Debt; he doth no way administer: without all question, by this Authority from the Bishop she hath an Interest in her Husband's Goods against all but B. and albeit that B. need not be at the trouble to repeal the Administration, but may avoid it by seizing the Goods, or otherwise Administring, or proving the Will, yet till he doth one of them 'tis good: I might cite many Authorities to prove all this, but shall only refer you to Godolphin's Orphan's Legacy, &c. But further, when the Executor doth afterwards refuse, it is as if there never had been a Will, and so none appointed by the Party, and then the Ordinary's Power

comes

comes fairly in play, and his Power is well exerted, and his Office duly perfoꝛmed in granting Adminiſtration to the Widow, who by Law ought to have it: I conceive this may be granted to me, as to the ſecond rub of its being granted by parol only, &c. It is ſufficient, and my Opinion in this Point is grounded both upon Authoꝛity and Reaſon. Firſt upon Authoꝛity, and that is the Woꝛds of the Author laſt mentioned, Godolphin, in his Legacy, p. 231. where he ſaith, an Adminiſtration muſt paſs under Seal in Writing, not by Woꝛd of Mouth, foꝛ the Oꝛdinary cannot commit Adminiſtration by Woꝛd of Mouth, otherwiſe is it if it be granted and entred in the Regiſtry, though Letters of Adminiſtration be not Dꝛawn; theſe are his own Woꝛds: Now though he were neither a Judge noꝛ a pꝛofeſt common Lawyer, yet his known Skill in both Laws, and his long Experience in the Eccleſiaſtical Courts, may well attract ſo much Credit to his Woꝛds, as to judge him capable of knowing what was the allowed Pꝛactice. But I depend not ſolely on him; foꝛ 2dly. The Reaſon of the thing makes it good. Now what's the Cauſe why regularly there ſhould be Letters? It is foꝛ Certainty, and that it may not be done raſhly, and alſo that the Party may have them to ſhew in Court. Now Certainty enough, and Deliberation ſufficient there is in regiſtring it, and to that the Creditoꝛs and the other Relations of the Party deceaſed, may have recourſe to know whether Adminiſtration be granted, and to whom: And then as to the ſhewing them in Court, I'le grant the Plaintiff ought if he do ſue as Adminiſtrator; but perhaps the Inteſtate had no Debts due to him, but only Money and Goods in poſſeſſion, and then the Adminiſtrator hath no occaſion foꝛ the Letters; foꝛ if he be Defendant in any Action, he need not ſhew them, much leſs need a Vendee, oꝛ any other perſon claiming under him who is not pꝛivy, and therefoꝛe (by the Law) is not ſuppoſed to have the Cuſtody of them, and this is reſolved in Plowd. 276, 277. a. So that as to the Defendant, 'tis not material, whether there be Letters oꝛ no, becauſe not obliged to ſhew them further: Suppoſe the Widows being Adminiſtratoꝛ be traverſed, it is a Matter in fait, and ſhall be tried per pais, 9 Rep. 10. and not by Certificate from the Oꝛdinary (and if that were, the Regiſter would be ſufficient Gꝛound foꝛ him to certifie that 'twas granted) and there's no doubt but the Regiſtry (as it may be bꝛought foꝛ Evidence) ſo 'twill be allowed good Evidence at the Tryal. Suppoſe again, that Letters be thereon, I traverſe them as foꝛged, then I think the Regiſtry is the only Pꝛoof, foꝛ oꝛ againſt; if not regiſtred, the Iſſue muſt be found foꝛ me, foꝛ what other way of pꝛoof? Put the Caſe, that the Letters of Adminiſtration be loſt thꝛough the Careleſſneſs of the Adminiſtrator, muſt the Ven-

dees

dees and Releasees be undone? Here in our Case all other Dues and Rites are rightly performed, and here is no Fraud in the Case, so as to make it void by 34 Eliz. cap. 8. Then as to the Regularity of it, that needs not always be so precisely observed and followed, for the Ordinary may grant several Administrations of several parts of the Intestate's Goods, 18 Hen. 6. 22 b. He may grant it upon Condition, Rolls Abridgment, tit. Executor. He may grant it for a particular Time, as till, &c. And all these are good. Then lastly, let us consider the Statutes; whether any of them oblige him to grant them by Letters, and no other way. The first Statute that I know of, was 13 Edw. 1. which we call W. 2. Cap. 19. This is the first, but mentions not Administration, for it only renders the Ordinary liable to Debt, as an Executor, for all the Goods that come to his hands, and my Lord Coke, 2 Inst. 397. tells us, this was only in affirmance of the Common Law; though by the by I conceive otherwise, it being de cætero, which he himself says in those ancient Statutes, signifies for the future, or from hence forward, which to my Reason seems plainly to imply, 'twas not so before: But this is not much to our purpose, therefore let us consider the next, which is the 31 Edw. 3. cap. 11. which is only thus; That the Ordinary shall depute the next and most lawful Friend of the Intestate to administer his Goods, which Deputie shall have the Benefit, and incurr the Charge of an Executor; so that this also mentions nothing of the manner of deputing these Administrators, whether it shall be by Letters, or by registring them, or by parol; this therefore can sway nothing. As for the 21 Hen. 8. that only limits and determines to whom Administration shall be committed, and enacts nothing about the manner of granting them. As for the 37 Hen. 8. 19. that only gives Doctors of the Civil Law Power to exercise Jurisdiction Ecclesiastical, and therefore matters nothing. As for the 34 Eliz. that's only about Administration gotten by Fraud for deceit of Creditors; so that the manner of granting Administration is not settled by the Statutes; for the 31 Edw. 3. which is the principal, and gives them the Authority, saith, only makes Deputies, and that may be by the registring of it, &c. So that on the whole, no Statute being against me, neither directly nor indirectly, and the Ordinary's Authority, and Godolphin's Opinion, and the Reason of the thing being for me, I think, doth need no more; yet too much being always less perillous than too little, I shall say somewhat more of this, because of the other I have no great scruple. In Styles's Register tit. Administration, we find it resolved in 22 Car. 1. That Letters of Administration may be revoked by a Revocation without a Seal: Now from hence I would argue, that

Administration by Parole void, *Dyer* 294. *Henſloes* caſe. 9 Rep. 40.

Adminiſtration may be Granted, and not under Seal, for unumquodq; diſſolvitur eo modo quo creatur, and conſequently after the ſame manner in which a thing may be diſſolved, it may be created, for if an Adminiſtration never be granted but under Seal, I think it could never be revoked but under Seal; and ſo it is in caſe of a Will, it can't be made but in Writing, and therefore can't be revoked but in Writing, by the late Statute. I ſhall no longer inſiſt on this, but Conclude the point upon what hath been ſaid already, that the Adminiſtration was well committed.

Secondly, Let us conſider the Second Adminiſtration to E. if he by this can avoid the Sale by C. to D. And I hold the ſale good againſt him. And here it may be well obſerved, that it hath been often adjudged, that when once Adminiſtration is granted to a right perſon, unleſs a Will appear or the like, the Ordinary can't at his pleaſure Revoke it and commit it a-new to another, eſpecially not ſo as to avoid all Acts done by the former Adminiſtrator, for thence wou'd enſue much Confuſion: But ours is not Revoked, nor no other granted in the life-time of C. I do readily yield Greisbrook's Caſe in Plowden, to be Law, that if Adminiſtration be committed, and he ſell Goods, and afterwards a Will be proved, the Executor may avoid the ſale, by bringing a Detinue againſt the Vendee; but I cou'd never find that an Adminiſtrator might avoid a ſale. And it is to be noted in our caſe, that C. dies, and her Adminiſtration is never repealed nor declared void by ſentence, and ſo it may be well intended that E is only Adminiſtrator de bonis non, &c. And then I'm ſure he can never avoid the ſale, unleſs 'twere fraudulent, which is not ſuppoſed in the caſe. In that of Plowden, the probate hath relation to the death, and ſo avoids all Adminiſtrations and Acts done by them; but here an Adminiſtrator dies, and Adminiſtration is committed to another; though the firſt were void, (which doth not appear) yet I conceive clearly the ſecond can't avoid all mean acts as an Executor can: Again, C. our Adminiſtrator hath good authority to Sell, till her Adminiſtration be revoked, eſpecially againſt all claiming under the Ordinary, as the Plaintiff doth, therefore I think the ſale good. The very caſe at Bar we find in terminis in Gulſton and Gliſſon's Epitome of the Common-Law, Title Treſpaſs, Page 408. where are theſe words, If Adminiſtration be committed by word to A. who ſells Goods to B. and dies, and Adminiſtration is committed to C. Quære if C. ſhall have Treſpaſs for the Goods Sold. Thus

be

he makes it a Quære, but then answers it himself in these words, It seems he shall not, for A. had Authority as it seems to sell. Now here is no mention of its entrie in the Register: If without it, when only by word of Mouth, the sale seems good, then with it 'tis certainly good, as Godolphin saith. Further, though it be true that an Executor or Administrator may have Trespass for Goods taken before the Administration granted, yet he can't have it against him that justifies under the Ordinary, for such a one is Administrator pro tempore, 18 H. 6. 22. Pl. 7. 36 H. 6. 8. Now we claim the Goods by Sale from one who had power to make it, by virtue of an Administration from the Ordinary. We have latter Cases too; first, the Case of Packman, 6 Rep 18, 19. where Administration is committed to a stranger, and the next of Kin sues a Citation to have the former Repealed, pending the suit the Administrator sells the Goods, the Administration is repealed, yet 'tis resolved that the first had the absolute property of the Goods in him, and he might sell them to whom he would; and though there be a revocation, yet the sale stands good, though 'twere pending the suit, which ours is not, nor is ours ever Revoked: If Administration be granted upon condition, and the Administrator sells the Goods, the condition is broken, yet the sale stands good, Ibid. And as in these Cases the Administration was lawful, till countermanded; so I hope on the whole you'l conceive ours, it being to the next of Kin too; for Packmans Case is much stronger than ours, the Administration being to a stranger, and the sale being pending the Suit. Supposing the Administration void to C. yet she only was liable as Executor de son tort is, and not the Vendee. For if another doth take the deceased's Goods and Sell, or give them to me, this shall charge him as Executor de son tort, and not me: Nay, if he that from the Ordinary hath authority by Letters, ad colligend' & vendend' bona peritura, and do sell or dispose of any Goods, though otherwise subject to perishing, it makes him Executor de son tort, though he had authority from the Ordinary to do so, and the Vendee is not liable, Dyer 105, 166, and 256. Now I take the Law to be clear, as 'tis in these Cases, yet the Vendee of an Executor de son tort, is not liable to Trespass for Goods bought of such Executors. The Application of this to our Case is easie and natural; so that if the first Administration be void without repeal or sentence declaratory, then the Action is not well brought against the Vendee, but ought to have been brought against C as Executrix de son tort. If it be not void, but only voidable, then all acts done by her till 'tis avoided, stand good.

If neither void nor voidable, then there's not the least ſcruple but the ſale is good, therefore take it which way you will, the Action of Treſpaſs lies not againſt the Vendee. This you may ſee in Prince's Caſe, 5 Rep. Needham's Caſe, 8 Rep. and Doctor Drury's Caſe, 8 Report.

Many other things might be added, but this I think may ſatisfie at preſent; and therefore upon what hath been ſaid, I humbly pray Judgment pro Defendente.

B. S.

Octob. 3. 1679.

DE

Term. Sanct. Trin.

Anno Regni Regis & Reginæ Will. & Mar. Sexto.

IN

BANCO REGIS & REGINÆ.

Die Jovis decimo quarto Jun. Anno Dom. 1694.

Dominus Rex & Domina Regina *verſus* Epiſcopum London & Petrum Burch, *S. T. P.*

THis day this Cauſe came to be argued for the Preſentation hac vice to the Rectory of St. James's, in the Liberty of Weſtminſter. Sir Bartholomew Shower, who argued for the Defendants, it reſting upon their Demurrer to their Majeſties Count upon the Quare impedit, opened the Record at large, and then proceeded in his Argument thus.

My Lord, I ſhall not at preſent meddle with any thing that relates to the other Caſe of St. Martin, as to the Point which was over-ruled by the Court, that the King hath ſuch a Prerogative in ordinary Caſes. But that which we humbly inſiſt upon is, That this Caſe is not within the reach or extent of this Prerogative. And this, with Submiſſion, doth appear of My. Attorney's own ſhewing in his Declaration here on the King's behalf; he hath ſet it forth to be a Pariſh newly created by Act of Parliament, and a thing not in Eſſe before. And it appears by the Declaration what that Act is, and you muſt take it as it is there ſet forth. We have demurred to the Declaration, and if upon that Act it doth appear that there is no Right doth accrew to the King,

King, to preſent to this upon this Avoidance, then your Judgment muſt and will be for the Defendants.

Mr. Attorney, My Lord, has agreed by his Writ and Count, that it is an Avoidance within this Act of Parliament, upon the promotion of Dr. Tenniſon; and he doth likewiſe admit and agree, that the King is not Patron of this Benefice of St. James's, and that this Act hath given no Right to the King to any Turn or Preſentment. For it is to be by the Biſhop of London. And the Lord Jermyn he doth alſo admit by this Declaration, That Dr. Tenniſon was never preſented to this Living: And admits, he comes not in by vertue of any Preſentation from any particular Patron, nor indeed by any ſort of Preſentation whatſoever. And that this Pariſh Church was never preſented to by any perſon at all. But he concludes, That now it is void, the King has a Right to preſent to it by force of his Prerogative upon this Avoidance, though the Act ſays the Biſhop ſhall preſent after the deceaſe of Dr. Tenniſon, or the next Avoidance.

Then, My Lord, The Queſtion is, Whether this Prerogative can operate upon this vacancy of this Benefice thus filled, and thus avoided, againſt the expreſs words of an Act of Parliament; which words are, That the Biſhop ſhall preſent after the deceaſe of Dr. *Tenniſon*, or the next Avoidance.

My Lord, I muſt crave leave to repeat the words of the Act; and they are to this effect; That all that Precinct, or Diſtrict of Ground within the Bounds and Limits there mentioned from thence forth, ſhould be a Pariſh of it ſelf, by the Name of the Pariſh of St. *James's*, within the Liberties of *Weſtminſter*, and a Church thereupon built is dedicated by the Act to divine Service, and that there ſhould be a Rector to have the Care of Souls inhabiting there; and then after a full Commendation of the Merits and Service of Dr. *Tenniſon* in that Place, (the now Reverend Biſhop of *Lincoln*,) it doth enact and ordain him to be the firſt Rector of the ſame; and that the Doctor and his Succeſſors Rectors of the ſaid Pariſh, ſhould be incorporated, and have a perpetual Capacity and Succeſſion by the Name of Rector of the ſaid Pariſh, and ſue and be ſued, and hold and purchaſe Lands for ever, over and above what is ſettled by the Act, not exceeding two hundred Pounds *per Ann.* And then it enacts the Patronage or Preſentation after the Death of the Rector or Avoidance, ſhould belong and appertain to, and by the Act, be veſted in the Biſhop of *London* for the time being and his Succeſſors, and *Thomas* Lord *Jermyn*, and his Heirs for ever.

So

So then, My Lord, Here is a Patronage given by Act of Parliament; and by the way I would obſerve it is not a fixed Patronage till after the vacancy; nay, it is no Patronage at all, for there is no words of preſent veſting it, and then I am ſure the King's Prerogative can have no operation upon any Benefice till after it become an Advowſon.

Then, My Lord, This Law enacts, that the firſt Rector, after ſuch a deceaſe or vacancy, ſhall be preſented or collated by the Biſhop for the time being, and the next to ſucceed him by the Lord Jermyn and his Heirs; the two next by the Biſhop, and the next by my Lord Jermyn; and ſo twice by the Biſhop, and once by the Lord Jermyn for ever.

This is the Act, and I would beg leave to make four or five Obſervations upon this Act.

Firſt, My Lord, It is a new Law; in the whole it is a new Pariſh, it is a new Advowſon; nor (with Submiſſion) is it any Advowſon till after the avoidance. Nay by the Words of the Act (if there can be any difference in an inſtant) between at, and after as in our Law in ſeveral Caſes it is allowed as per mortem & poſt mortem, &c. 'tis no Advowſon till after the avoidance, for ſo are the words; after the death and avoidance of Dr. Tenniſon, the Advowſon, Patronage, and Preſentation ſhall be veſted in the Biſhop and the Lord Jermyn; and till then, they are veſted in no body, and that which is in no body, is no where at all; and it is vain to ſay, that that exiſts, which is in abeyance, as ſometimes for Neceſſity ſake we do; for that is almoſt the ſame thing, as to ſay that the thing is not; but to ſay that an Advowſon ſhall be in abeyance before it is created and veſted, muſt favour ſomething of abſurdity.

Secondly, Dr. Tenniſon comes not in to this Rectory by our Preſentation, but by the donation of the Act of Parliament, and the King has no Prerogative in the Caſe of a Donative upon a promotion, nor is there any Precedents of ſuch a thing; the King cannot preſent to that which the Patron could not have preſented to; and the Patron could not preſent to a Donative quaſi a Donative; for for him to preſent to it, is to make it Preſentative; 'tis to alter the nature of the thing, and ſo injureth the Patron, and yet a Donative with Cure of Souls, will be void by a promotion of the Incumbent, as appears, Yelv. 61. 2 Rolls Abridgment 341.

And this is further evident, My Lord, from the pretended Notion and Reaſon of this Prerogative; for here is an Incumbency by the Gift of King, Lords and Commons; and then conſider what this Prerogative is; as it is ſtated in the Books, it is a Prerogative to preſent upon the promoting of the Patrons Preſentee,

ſentee, or of the Incumbent by his Grantee, and in his Right, to a greater Dignity in the Church. And when they would avoid the Objection that the King could do no wrong, they ſay there is no Injury, but a Kindneſs to the Patron, becauſe it is a Kindneſs to his Friend, being preferred to a higher degree of Honour and State in the Church; all which fail here; and there is no reaſon for the exerciſe of this Prerogative, as there is in the other Caſe.

It is a good Argument, according to Mr. Littleton, Becauſe no ſuch thing ever was before, therefore of Right no ſuch thing ought to be. Novelty is always an Argument againſt the Right pretended to; and becauſe this is in the Caſe of a Gift by Act of Parliament, there is no reaſon it ſhould be allowed for a Prerogative, that was never uſed; and in Propriety of Speech can never be called a Prerogative, much leſs if there be no Practice or Precedent to warrant the Claim in the Caſe of any Donative.

My Lord, prima facie we have the Right: To avoid that Right of ours is this Prerogative ſet up. Now they ought to demonſtrate, that there is ſuch a Prerogative to controul our Right in this Caſe, and the Arguments ought to be convincing and undoubted; and it is no Conſequence, that becauſe where a Patron's Incumbent is preferred by being conſecrated a Biſhop, the King ſhall preſent, that where the Parliament's Incumbent is preferred, the Patron ſhould loſe his Benefit; becauſe the Caſes are not the ſame, for the ſuppoſed Recompence and Conſideration in the one Caſe, will not hold in the other.

And we are not here in the Conſideration of a Prerogative incident to the Crown for the Benefit of the Government; nor is it a Prerogative which reſpects the Continuance or Improvement of the Treaſury; ſo as for the Benefit of the Kingdom, and extending or enlarging of it beyond the former Practice, ſhould ſeem needful, and therefore the common pretences of Preſumption and Intendment are no more on their ſide, than they are on ours; nay, it is rather on our ſide who have common Right to preſent; and we inſiſt (with Submiſſion) on the Act of Parliament in this Caſe, and that there is neither Record nor Book Caſe, nor judicial opinion, nor any Inſtance in Hiſtory or Tradition, that there was ever any ſuch Prerogative in the King, or practiſed by him; we ſay that there never was a particular Caſe wherein the King did ſo preſent.

And, My Lord, It is no Objection to ſay, that there never was any ſuch promotion or avoidance before this. Whether there was or no, I ſhall not pretend to anſwer; but that turns upon them, for that ſhews there never was any Exerciſe of ſuch a Pre-

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rogative Preſentation in Fact, as they now contend for; an Argument a Simili is the weakeſt of Arguments; but I ſay they have no Caſe like this; nay, they have no Book declaring on their ſide; the Books ſay, that it is only to preſent to a Benefice vacant by promotion that was antecedently preſentable. But here the Doctor is ſo far from coming in by our preſentation, that he is here in by the whole Kingdom as Patron, and all that they can pretend, is when a Man is dignified by promotion who came in by preſentation, admiſſion, inſtitution, and induction, or by collation and induction, which is all one, and no otherwiſe.

My Lord, We have had many new Pariſhes created, and we never read, I can ſay it, I never read, that this Prerogative was ever extended to them, not ſo much as in a Moot Caſe, or any extrajudicial Opinion of any Judge, or any Reader upon a Statute.

My Lord, I am not to diſpute when the Prerogative ſhall commence, or begin in this Church, or if ever; it is time enough to diſpute that when another Occaſion offers it ſelf upon the preferment of my Client, or his Succeſſor; it ſufficeth me to argue, whether in this Caſe the King ſhall have a Prerogative to prevent the next Turn belonging to the Biſhop.

Next, My Lord, That which is conſiderable is, That this Benefice is not an Advowſon created as others uſually are, for it is to commence de futuro; and beſides it differs from all others in other reſpects; the ſame perſon is made a Pluraliſt by Act of Parliament, though the Act it ſelf ſays, the Pariſh was too big for one; and it differs in other things; the Rector is made a Corporation capable of ſuing, and being ſued, and of receiving and purchaſing Lands to ſuch a value. I offer this only to ſhew that it is not a common ordinary Rectory.

Next, My Lord, I would further obſerve, that this Turn which we claim, is not a Patronage Turn; for it muſt be admitted, that this Act veſts the Fee-ſimple of the Advowſon in the Biſhop and my Lord Jermyn, and their reſpective Heirs and Succeſſors by Turns; and ſo the Succeſſion is enacted to be for ever: Now this is none of thoſe patronage ſucceſſive Turns, but a particular preſentation, which is given to the Biſhop of London by expreſs Limitation. And the words and penning are different; that which gives the Patronage, and that which gives the Preſentation; the firſt is to the Biſhop, the other is by Turns; ſo that there are no words in the firſt Preſentation, which look like a Gift of an Eſtate in the Patronage, but only one firſt particular Preſentation given to the Biſhop more than ordinary; this is not to be a Turn which he is to have as Patron; but firſt he is to have one Preſentation before it comes in to the form and manner of

Turns preſcribed by the Act, to wit, in perpetual Succeſſion; for if otherwiſe the Patronage would be to the Biſhop three Turns in four to one of my Lord Jermyn.

And then as for their Objection, that a Patronage newly created, ſhall be in the ſame plight, and under the ſame Rules and Circumſtances as another, that Objection can never take place here, becauſe it can never take place, till it becomes a Patronage, which was not, nor can be till it hath been preſented to, nor where a particular Preſentation is at firſt given by expreſs Words.

Suppoſe the Act had ſaid, That the Patronage ſhould, after the Death or Avoidance of Dr. *Tenniſon* would be veſted in *A. B.* but that the firſt Rector ſhould upon that Avoidance, be preſented by *C.* a third Perſon; This would never be reckoned a Common ordinary Turn ſubject to the like Prerogative as others; here the Biſhop doth not claim this particular Preſentation in Right of Patronage, but by expreſs Gift by Act of Parliament.

And then, My Lord, I inſiſt upon this, That this Act binds the King in point of Intereſt and Prerogative, for every Act of Parliament binds all perſons, and includes their Aſſent paſt, preſent, and to come, as my Lord Hobart ſays, and it has the Royal Aſſent, and binds the King and his Succeſſors, as well as the Subject: Suppoſe then the King had been Patron of St. Martins in his own Right; I dare ſay, they would not contend, but that this Act thus creating a new Pariſh, a new Rectory, and new Patrons, would have bound the King, if the Act had given the Patronage to another.

But this is not ſo much; for the Quere ſtrictly and properly here is not, Whether the King ſhall not be bound by this Act, becauſe he is not named, but whether this Prerogative ſhall hold place upon a vacancy by this promotion of an Incumbent made by this Act, never preſented, collated, inſtituted, or inducted, and where the firſt Preſentation is by the ſame Act given to a particular perſon? And the King is as much bound by this Act, as to Prerogative, as he would have been, had he been particular Patron of the Church, out of which the new Pariſh is taken.

And here the King himſelf gives the firſt Preſentation to the Biſhop of London, for the King and People all together are Grantors. Then, ſuppoſing ſuch a right as this, in a Subject, and the Subject were able to preſcribe for it, he muſt then have ſet forth that, time out of mind, whenſoever the Incumbent of another's Preſentation was preſented by him to another Living, he ſhould have the preſentation ea vice. this is the moſt that ever can be made of this Prerogative: Now no body would ſay that this Caſe falls out to be under, ſuch a preſcription or the reaſon

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of it; and as for the prerogative, though it be part of the Law, yet every prerogative hath its Boundaries and Limits, and a reason for it too; and that which is not within the reason, is not within the Limits, or else it is no prerogative that the Law allows.

Suppose that we turn this Argument into the manner of Querying or Interrogating, according to the practice of the Civilians, what if the avoydance be by promotion? The words of the Act are a natural Answer to that Quere, That the Rector shall have the first Incumbency by presentation of the Bishop, and that is the opinion of the Act, of the King and Parliament. But My. Attorney says no; the King shall have it by Prerogative.

Besides, We know there was good reason in fact for this Provision, for the Bishop was Patron originally of the Parish of St. Martins, out of which this new Parish is taken, and there being possibly a reason why he should have the first presentation, when it was taken out of the Parish of which he was the original Patron, and a third Presentation given away to a stranger, it shews it was a particular designed kindness in the Parliament, to the Bishop, in recompence of dividing his Parish.

And then, My Lord, There is another thing considerable, to shew that there is no need to strain the prerogative here; for one and the same person being Parson, and Incumbent of both Parishes, the King has had the effect of his prerogative upon the promotion of this very Incumbent; for the King has presented to that Church into which he came, by presentation and induction; but here we insist upon it that the prerogative cannot operate, because he came into this Living, not by donation of the Patron, but of the Parliament, and consequently, as I said, of the King himself: Besides, this Act of Parliament giving the first presentation in this manner, it does of it self bind and foreclose the prerogative, being introductive of a new Law, and of a new Law upon a new Subject, it implies a negative of every thing, which is contrary to the purview of this Act; and it is no Objection to say, that the King is not obliged by it, if he be not named, for there are numerous Cases in our Books that prove him bound, though even where he is not named; all that tend to the promotion, and prevent the decay of Religion. So is 5 Co. 14. and 11 Co. 68. So by all the Acts that are to give speedy remedy against Wrong; he is bound by the Statute of Marlb. Cap. 22. against distraining Tenants to Answer without Writ, as the 2 Inst. 142 and 169. And by the Statute of 32 Hen. 8. Cap. 28. concerning Discontinuances, 2 Instit. 681. and 682. because they are made to give her who

had a right a more speedy Remedy, to wit, by Entry; where at the Common-Law, she is forced to a real Action; so is Barkley's Case, Plowd. 233. 1 Co. 44. 1 Inst. 116. The King is bound by the Statute De donis, and the reason given is, because an alienation would be a wrong to the Subject; therefore, unquestionably the King is bound by this Act; for here would be an injury to the Bishop by the loss of his presentation upon this prerogative.

And, It is now no Objection, that this Law is in the affirmative, because it is Introductive of a new Law in the very Subject Matter, created de novo; before the Act the King had no Right, and if he had none before, he can only have it now, how and when the Act gives it; not contrary to it, Bro. Tit. Remitter 49. agreed 1 Co. 48. and 2 Co. 46. If Lands be given in Fee, to one who was Tenant in tayl, his Issue shall not be remitted, because the latter Act takes away the force of the Statute De donis.

Supposing we had been enacted to be the Patron of this Living, and it had existed before, and we had been before Patrons in another nature, then there had been no Remitter, because as to particulars the Act is like a Judgment, and estops all Parties to Claim, otherwise than as by the Act, though that of Remitter be a Title favoured in Law. Then if we have this only by force of this new Act, and another should present in our Turn so given, it would be an injury if a Subject did it; and consequently the King cannot do it; for the prerogative which this Act gives, or which the Common-Law gives, not inconsistent with, or contradictory to the particular provision of this Act, is not yet come to take place.

Though this be an Affirmative Law, yet being introductive, or creative of a new thing, according to the Rule in Hob. 298. in Slade and Drakes Case, if the subject Matter, be new, and introductive of a new thing, it implies a Negative of all that is not in the purview. The 31 of Edward 3. Cap. 12. that prescribes the form of redressing Error in the Court of Exchequer before the Treasurer, is held to exclude all other Methods, being introductive of a new Law; and so was it resolved in the Case of the Lord Mackelsfield; and though it be a particular Expression Affirmative, yet it implies a general Negative too; for both can never take place.

And then I would observe, that all Prescriptions and Customs will be foreclosed by a new Act of Parliament, unless saved; and there is the same reason that the prerogative should be, for it is so in the King's Mannors, as well as the Mannors of the Subject, as to Customs. I agree that a Man may pre-

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ſcribe to have a Cuſtome againſt an Act of Parliament, when his preſcription is ſaved by that, or another Act; So is the 1 Inſtit. 115. But regularly a Man cannot preſcribe to, or alledge a Cuſtom againſt an Act of Parliament, becauſe it is a matter of Record, and the Higheſt Record that we know of.

Suppoſing, that by a By-Law Money was payable Annually, and one and twenty days of Grace, notwithſtanding any Cuſtom for the making of ſuch a By-Law. If an Act comes and ſays it ſhall be paid Quarterly, by even Portions, this will alter the Law. I muſt agree that a conſiſtent Deviſe or Statute, is no Repeal or Revocation: But if the new Act gives a new Eſtate as in this Caſe, there the latter ſhall Controul the former; for this amounts to a Repeal; and ſo the Lords held it, as it was held in this Court, in the Caſe of the Clerk of the Peace, between Fox and Harcourt. And in Dr. Foſter's Caſe, 11 Co. 59. The Query was upon the Statutes of Recuſancy, whether a Man might be Proſecuted for both the Penalties: And it is held he might, becauſe the Acts were conſiſtent; but there the Rule is taken and agreed, If an Act of Parliament gives a Power or an Intereſt to one Perſon, there by that expreſs Deſignation, all others are excluded; and ſo in caſe of Eſtates, the ſame muſt hold; as is cited in Stradley and Townſend's Caſe, Plowden 206, and 113. and in Gregory's Caſe, 6 Co. 19. The ſame Rules taken and agreed, that a latter Statute in the Affirmative ſhall not Controul a former Law, if the firſt be particular, and the latter general; which implies the contrary if the Fact were otherwiſe, as it is here.

The Caſe there was about the Weaving of Cloth, not having ſerved Seven Years as an Apprentice, againſt the Statute of Philip and Mary; and the Queſtion was, whether 5 of Elizabeth had Repealed it: And agreed it did not, becauſe the former was particular, and the latter general; but if the former had been general, and the latter particular, the latter would controul it; and the ſame Rule holds in the Caſe of the King, as in the Arch-Biſhop of Canterbury's Caſe, 2 Co. 46. Hob. 310. The Queſtion was if Lands came to the King by 31 of Hen. 8. Cap. 13. or by 10 Edw. 6. And it was objected that the latter was in the Affirmative; and yet held it came by the latter, becauſe though they were Affirmative words, yet the latter were differently Penned, and the laſt being of as High Authority as the former, the latter Act ſhall take place.

Now, my Lord, Suppoſe I ſhould admit that there ſhould be no Contradiction for the King to have the like Prerogative

prevail,

prevail, where the Act of Parliament generally Limitts the Presentation, as where it was anciently Presentable, because there the King may have such a Prerogative, and a Man still be a Patron of the Living, as he was before; yet here it will not do, because the King can never have this Presentation and the Bishop too, and being particulary vested for the first Presentation in the Bishop, it must go according to the Act.

Therefore, there is a vast difference now, between the reason of the one Case and the other, when the Patronage comes to be in Exercise, and when a particular Presentation to the Living, is given by express Words of the Act of Parliament; as for Instance, in an Act where Churches are United; as that for Rebuilding the Churches in London, there 'tis ordered that the first Presentation should be by the true Patron of the Living, of the highest Value in the King's Books. Suppose then, the King happen'd to be a Patron of the Living, (of the lesser Value) as he is of many in London; there it is held, and hath been practised, that the King could not have his Common Prerogative of the first Presentation, which he hath in all other Cases, where his Interest is intermixed with others, as in the Case of Coparcenary, where the youngest is in Ward, he shall present first, though by the Common-Law, the eldest is to have the first Turn; but where an Act of Parliament prescribes a particular way, though in the Affirmative, the method limitted in the Affirmative shall take place, and shall controul the common Prerogative, which the King would have of being preferred in Interest, before any others; and I cannot see but it must be the same in this Case: And for a Precedent there was Mr. Crook's Case for Wood-street, in Doctor's Commons, before the Delegates, and upon Advice, the King's Presentee acquiesced.

My Lord, you will consider the Reason how the King comes to be exempt out of an Act of Parliament; it can only be by construction of Law; now that construction shall never be against the express Words, Sense and Reason of the Act, either plainly expressed in it, or plainly inferrable from it: Now, here are the express Words, and the intent of the Act both concurring; and then there is a great deal of reason for the making such a Construction as this we would have; that it is an Act for the promoting of Religion, and then it should have bound the Interest of the King: If he had been Patron of the Parish of St. Martins, then, with Submission, it will bind the Prerogative, though I suppose for the present, that the prerogative should operate, if it were an ordinary Turn of a presentation.

Therefore, to say, the King shall have such a prerogate in such a Case as this, is to do wrong, and to deny the words of the Act,

which

which expreſſly ſays, the Biſhop ſhall have it; and the King and he both cannot; beſides, our preſentee was never Preferred by the King, which is the reaſon of the Prerogative.

And again, My Lord, with Submiſſion, Firſt Fruits and Tenths are not reſerved out of this Pariſh, as they are now in ordinary Livings, and therefore not demandable, becauſe there is no ſaving in the Act for the King's Right; and I do not doubt but they will ſay, that Firſt Fruits and Tenths are due to the King by Common-Law, though the quantum be ſettled by the Act of Parliament, and they were ſharp enough in the late Reigns to have exacted it, but it was denied in both Houſes to be Inſerted in this, though it be in other Acts; for erecting of new Pariſhes there is generally ſuch a ſaving, as in the Act of St. John at Wapping, and that I mention of rebuilding the Churches of London after the Fire. There are expreſs Proviſions and Savings, which ſhews that ſuch a Saving is neceſſary. And the Statute of the 25 th of Hen. 8. Cap. 1. which gave and annext them to the Crown, has been declared to be Affirmative of the Common-Law, and then there is as much reaſon to argue that a Saving ſhould be as neceſſary for this Prerogative, as for that other Right.

My Lord, 'till it is once preſented to, it cannot be ſubject to that Prerogative, (which for the preſent I will not diſpute againſt) becauſe the courſe ſeemeth to rely upon the authority of Woodley's Caſe, but yet that can be no Objection, for it is plainly diſtinguiſhable from the Caſe of a Grantee of the next Avoydance, who comes in the Caſe of the Grantor, and takes his Grant, ſubject to all Incumbrances and Titles his Grantor was ſubject to. Ours is now firſt by the Act of Parliament, their's by Avoydance, by the promotion of one preſented by him that Claimed under the Patron, and that is the ſame as if he had been preſented by himſelf; this Caſe is not ſo, for we cannot ſay he is Preſentee to us, or any other that Claims under us.

Suppoſing the Act had expreſſly Declared that Dr. Burch ſhould have been Collated by the Biſhop, to this Living, upon the firſt Avoydance, then they ſcarce will pretend that this Prerogative ſhould take hold of it, upon the promotion of Dr. Tenniſon. They ſay, indeed, no Grant but muſt come under the Contingency of this Prerogative; but they ſay an Act of Parliament cannot alter it, ſo that it is not applicable to our Caſe, either in reſpect of the Limitation, nor of the King's Prerogative at large.

It has been inſiſted on, that the difference is trifling between this and the other Caſe of Dr. Lancaſter; nay it has been ſaid, that this was a ſticking in the Bark, and the opinion on their ſide is a Notiſſimum, ſo that it was below the dignity of this Court

Court to have an Argument about it, and that it was not the intent of the Law to exempt this Living from the Common Case of others; and that the question is not, whether the Words of an Act shall bind against the general Reason of the Law which is for the Prerogative.

My Lord, We insist upon it, 'Twas the intent of this Act to difference it in this, as it hath differenced it in several other Particulars; however it sufficeth, that the first Presentation is by express Words exempt, else their Kindness to the Bishop of London was frustrate.

They say, there would have been special, and other words used, if what I argue for had been intended: But that will not reach to this first Presentation whatsoever it may to any afterwards; and likewise we return the Argument, and say, If the contrary had been intended, other words, and contrary words would have been used.

And, My Lord, It is no Argument to say, That if a Vacancy had been in the See of London, and the Temporalties in the King's Hands, then the King must have presented, and not the Bishop; that would by no means contradict the Act, so much as this doth, for that had been the same, as if the Bishop had done it, for then the King for that time was in Loco Ordinarij, and has all the Benefits as he had.

And to suppose, that if my Lord Jermyn had been attainted of Treason, the King should present, it would be contrary to the Words of this Act, that is no Argument neither, for in the Case of Attainder, the King claims in the Right of the Person so attainted, and therefore it is no Conclusion against us neither, nor indeed any Conclusion at all.

And for the Objection if an Estate Tayl be given by Act of Parliament it is dockable, that is not any Argument in this Case neither; for suppose an Act of Parliament say, That A. shall have the Mannor of D. for and during his Life, and after his decease, it shall descend to, or be enjoyed by C. or by the eldest Son of the Body of A. that shall be then living, Will any Man say that against these words, any Act of A. shall prevent an Enjoyment according to the Act; nor can any thing Dr. Tennison doth or agreeth to (as no Question he doth to his own Promotion) hinder the Operation of the Act of Parliament.

And though it is but a general Argument, That the Bishop of London hath no more Right than the Common Grantee of the next Avoidance has by his Grant, that is no close reasoning, for there is some difference between the one and the other; for in our Case we claim under an Act of Parliament, that can change, alter, annul, abridge, diminish, qualify, enlarge, or transfer any

Common

Common Law Right, and then here is particularis deſignatio, which is always excluſio alterius, an Act of Parliament having the Common Law and the Prerogative too under its Controul.

And to evidence, that the Prerogative is not ſo much valued in Law, as an Intereſt the King hath, we may ſee Baskervil's Caſe, 7 Co. 28. If the King has the Title to preſent by Lapſe, and the Patron preſents, and his Preſentee is admitted, inſtituted and inducted, and dyeth, the King has loſt his Turn; for nullum tempus occurrir Regi extends only where he has an Intereſt certain and permanent, not to a limited Prerogative Title.

My Lord, We have all the common Topicks of Argument on our ſide, that the King's Prerogative is bound, becauſe not ſaved, and the Act is for the Benefit of the Church, and that which we humbly inſiſt upon is this, That not only this is a new Law, and inconſiſtent with the former, as to perſons and things, but that this avoidance is upon the promotion of a perſon never preſented by us, but who comes in by Act of Parliament; and they can ſhew no Precedent for the Prerogative in this Caſe neither, and if it be, that he hath a Prerogative in ordinary Caſes to preſent, he ought not here when we claim under an expreſs particular Limitation by particular words. Suppoſe it had been given to the Arch-Biſhop of York, who never had any thing to do in the Living before, he had had as much Right to preſent as the Biſhop of London has now, and that we take to be good; and the ſame Act which made it at firſt a Pariſh, is that which gives the firſt Preſentation in a particular expreſs way, and it would be the ſame if it were given to a Stranger, and that conſtruing it as they would have it, to leave a Loop-hole for this Prerogative to get in at, is to overthrow the Intention of it.

And for theſe Reaſons we pray your Judgment for the Defendant.

DE
Term. Sanct. Hill.

Annis Regni Regis & Reginæ.

Quarto & Quinto.

Die Mercurij 8 Februar', Anno Dom. 1692.

IN
BANCO REGIS & REGINÆ.

Harcourt *verſus* Fox.

Sir *T. Powis.* My Lord, I am of Counſel in that Caſe for the Plaintiff.

J. Dolben. Then go on, Sir.

Sir *T. Powis.* May it pleaſe your Lordſhip, Simon Harcourt Eſq; is Plaintiff, and John Fox Eſq; is Defendant, and this is an Action upon the Caſe brought by way of Indebitatus Aſſumpſit by the Plaintiff againſt the Defendant for forty Shillings by the Defendant, had and received for the Plaintiffs uſe; There is Non aſſumpſit pleaded, and upon the Tryal of that Iſſue, there was a ſpecial Verdict found at the Niſi prius before your Lordſhip, and in that ſpecial Verdict, the Jury do find,

Firſt, The Statute of 37 Hen. 8. intituled, a Bill for Cuſtos Rotulorum and Clerkſhip of the Peace.

And then the Verdict goes on, and finds the Act of Parliament made in the firſt Year of King William and Queen Mary, Intituled, An Act for enabling Lords Commiſſioners for the Great Seal, to execute the Office of Lord Chancellor, or Lord Keeper; and the Verdict doth likewiſe find ſeveral Clauſes in this laſt Act that particularly relate to the Offices of Cuſtos Rotulorum, and Clerk of the Peace. Then

Then they find, That the Right Honourable John, Earl of Clare, was by Letters Patents from this King and Queen, dated the 9th Day of July, in the first Year of their Reign, according to the Statute of 37 Hen. 8. made Custos Rotulorum for the County of Middlesex, and they set forth the Letters Patents in hæc verba.

They next find, That the Office of Clerk of the Peace for this County being then void, the Earl of Clare by Writing under his Hand and Seal the 19th of July, 1 Will. & Mar. Did Nominate, Appoint and Constitute the Plaintiff, Mr. Harcourt, to be Clerk of the Peace for Middlesex, for so long time only, as he should well demean himself therein, and the Instrument is likewise found in hæc verba

They also find the Plaintiff to be a Person capable and sufficient to have and execute this Office, and that he did take upon him the Execution thereof, and that before he did so, at the Quarter Sessions for the County in open Sessions, he took the Oath required by the last mentioned Act of this King and Queen, and the Oath of Clerk of the Peace, and did do and perform all other things necessary to make him a Compleat Clerk of the Peace, and that during all the time that he did Exercise and Execute that Office, he did well behave himself therein.

Then they find, That on the fifth of February, in the third Year of the King and Queen, the Earl of Clare was in due manner removed from the Office of Custos Rotulorum, and the Right Honourable William, Earl of Bedford was, by Letters Patents of the King and Queen, dated the 6th of February, in the Third Year of their Reign, made Custos Rotulorum for this County, according to the Statute of 37 Hen. 8. and those Letters Patents are also found in hæc verba.

They find, That the Earl of Bedford by a Writing under his Hand and Seal, dated the 15th of February, in the Fourth Year of the King and Queen, constituted and appointed the Defendant, Mr. Fox, to be Clerk of the Peace for this County, to hold the Office for, and during the time that the Earl should occupy and exercise the Office of Custos Rotulorum, so as he well demean himself therein.

They find likewise, That Mr. Fox, the Defendant, is a Person capable and sufficient to have and exercise the Place, and in open Sessions did take the Oath required in the late Act, and did all other things requisite to qualify him for the Office, and did thereupon enter upon the Execution of it, and, during that time executed it, did well demean himself therein, and did take the Fees belonging to the Office, which they find to be to the value of five Shillings.

But, whether or no the Plaintiff ought to receive this five Shillings againſt the Defendant they cannot tell, but ſubmit that, upon this whole matter thus found, to the Court.

My Lord, I take it, the ſingle Queſtion in this Caſe upon ſpecial Verdict will be, Whether or no Mr. Harcourt, who was duly conſtituted Clerk of the Peace for the County of Middleſex by the Earl of Clare, while he was Cuſtos Rotulorum, did thereby become Clerk of the Peace for Life, only removeable for Misbehaviour, or whether his Continuance in that Office depended upon the Continuance of the Cuſtos in his Office, ſo as upon his Death or Removal, the Clerkſhip of the Peace was to ceaſe and be determined.

And I do take it, with Submiſſion, that he was, and ſtill is Clerk of the Deceaſe for his Life, only removeable for Misdemeanors in his Office, and not Dependant upon the Death, or removal of the Cuſtos Rotulorum; And to make out this, I ſhall conſider three things;

First, How this Matter ſtood at Common Law, I mean, before that Statute of 37 Hen. 8. for ſtrictly ſpeaking, at Common Law there, was neither Cuſtos Rotulorum, nor Juſtice of the Peace, nor Clerk of the Peace.

Secondly, How it ſtood upon that Statute, and another which I ſhall have occaſion to take notice of, though not found in the Verdict, and that is 3 & 4 Edw. 6. cap. 1. And

Thirdly, How it now ſtands at preſent upon this late Act, in the firſt Year of this King and Queen about the Lords Commiſſioners for the Great Seal. Now as to the

First, I take it, by the Common Law, and the ancient Conſtitution of the Kingdom, all Officers of Courts of Juſtice, and immediately relating to the Execution of Juſtice, were in for their Lives, only removeable for Misbehaviour in their Offices. Not only my Lords the Judges of the Courts in Weſtminſter Hall were anciently, as they now are, ſince this Revolution, quam diu ſe bene geſſerint, but all the Officers of Note in the ſeveral Courts under them were ſo, and moſt of them continue ſo to this day, as the Clerks of the Crown in this Court, and in the Chancery, the chief Clerk on the Civil Side in this Court, the Prothonotaries in the Common Pleas, the Maſter of the Office of Pleas in the Exchequer, and many others; I think, ſpeaking generally, they were all in for their Lives by the Common Law, and are ſo ſtill to this Day.

So

So it was, and is with the Clerks of Assize, and so I take it, before this Statute of 37 Hen. 8. it was with the Clerk of the Peace.

And in this particular the Wisdom of the Law is very great; for it was an encouragement to Men to fit and prepare themselves for the execution and performances of those Offices, that when by such a Capacity they had obtained them, they might act in them safely, without fear or dependance upon Favour; and when they had served in them Faithfully and Honestly, and done their Duty, they should not be removable at Pleasure.

And, on the other side, the People were safe, for Injustice, Corruption, or other Misdemeanors in an Office, were sufficient causes for removal and displacing the Offender.

My Lord, I shall not enlarge upon this Matter; I need not, it being so well known; I do rather but touch upon it, to introduce what I am considering upon this First Head, how it stood before this Statute, which seems Calculated to reduce it to the Ancient Course; for perhaps Affectation of Power and Unlawful Gain, were the Mischiefs that occasioned both the Acts found in this Verdict.

But to come to the matter more closely, I take it, that anciently the Custos Rotulorum was in the Nomination of the Lord Chancellor or Keeper, and, I think, as antiently the Nomination of the Clerk of the Peace was in the Custos Rotulorum: but, my Lord, though he was nominated by the Custos Rotulorum, yet he was not Dependent on him, nor removable upon his Death, or removal from the Office of Custos Rotulorum, and that, I conceive, upon these Grounds.

First, From an Uniformity, (which the Law loves and useth) between this Officer, and all other Officers of this nature, as those I mentioned in this Court, and the Common Pleas, in the nomination of the Chief Justice, and more particularly the Clerk of Assize, who, upon any Vacancy, is put in by the Senior Judge of Assize, at that time, for that Circuit, but yet he is not dependent upon that Judges continuance in his Place; for all these, though they be nominated by a particular Person, yet when they are in, they are Officers of the Publick, and not of those Persons that placed them first in their Offices.

Secondly, the next thing I could offer is this, That the Clerk of the Peace is not the Clerk of the Custos, but of all the Justices of the Peace in General, and properly Clerk of the Sessions of the Peace. And so Expressly the Statute of 12 Richard, 2. Cap. 10. where the Law appoints the Wages of the Justices of the Peace at the Sessions, it says, that every Justice of the

Peace

Peace ſhall take for his Wages, for every day of the Seſſions, Four Shillings, and their Clerk Two Shillings; ſo that this Statute doth expreſſly call the Clerk of the Peace their Clerk. It is true, the Cuſtos Rotulorum is uſually a Perſon of great Quality, and firſt and moſt Eminent among the Juſtices, as Lambert in his Eirenarcha, L. 4. fo. 387. ſays, and he has the nomination of the Clerk of the Peace. But, as he afterwards ſays, Folio 394. when he is ſo nominated, he is not the Clerk of the Cuſtos Rotulorum, but the Clerk of the Juſtices.

So, as the Clerk of Aſſize, who in the Execution of his Office, is near of Kin to the Clerk of the Peace, though he be nominated by the Senior Judge, at the time of the Vacancy, yet he is not the Clerk of the Judge, but of the Aſſizes; ſo is the Clerk of the Peace nominated by the Cuſtos, but is not the Clerk of the Cuſtos, but of the Juſtices in their Seſſions; and, as the Clerk of the Aſſize is not dependent upon the Death or Removal of him, who put him in, ſo the Clerk of the Peace is not dependant upon the Death or Removal of him, who put him in. I ſpeak now of what was antiently. Nay,

Thirdly, The Clerk of the Peace is ſo far from being the Clerk of the Cuſtos, that in the Year Book of 2 H. 7. Folio 1. he is called the Clerk and Attorney of the King. As the Clerk of the Crown is here Clericus & Attornatus Domini Regis, and, ſays that Book, by the Duty of his Office, he is to Proſecute for the King, as his Attorney.

Nay, he is ſo far a Servant of the Crown, that by the Statute of 27 Elizabeth, Cap. 13. if a Robbery be Committed, and Huy-and-Cry raiſed, and the Inhabitants of the Hundred do not make freſh purſuit, and ſo the Hundred incur the Penalties of former Laws, there it is provided that ſuch Inhabitants ſhall forfeit and loſe one Moyety of ſuch Penalty as ſhall be recovered againſt the Hundred, to be ſued for, by, and in the name of the Clerk of the Peace, for the time being, without naming his Chriſtian or Sirname, and ſuch Action not to abate for his Death or Removal; ſo that it ſeems to make ſomething like a Corporation in that Office.

And therefore by the ancient Conſtitution, I take it, that it is pretty clear the Clerk of the Peace had his Office for Life; was not the Clerk of the Cuſtos Rotulorum, but the Clerk of the Juſtices, or of the King, and a Servant of the Crown, and not dependant upon the Death, or Removal of the Cuſtos. And then, now my Lord, I come to the Second thing, and that is the Statute of 37 H. 8. Cap. 10. to conſider how it ſtood there upon that Statute, and the other I mentioned before, that is, 3 and 4 of Edward 6. Cap. 1.

The

The Statute of 37 Hen. 8. that recites, that whereas heretofore the Lord Chancellor, for the time being, by vertue of his Office, had the nomination and appointment of the Custos Rotulorum, and the Custos Rotulorum by his Office, had the nomination of the Clerk of the Peace; but says that Act, of late, persons unlearned and unfit for those Offices, had by Labour, Friendship and means gotten them for Terms of their Lives, by Patents from the Crown; Therefore it is Enacted, that none should be appointed Custos Rotulorum for the future, without a Bill Signed by the King's own Hand, which should be a Warrant to the Chancellor or Keeper, to make him out a Commission for that Office, to continue only till the King, by another Bill so Signed, do appoint another Person to be Custos: Thus it is, as to the Custos.

Then, as to the Clerk of the Peace, it says, that the Custos Rotulorum shall appoint the Clerk of the Peace, and grant that Office to an able Person to hold, during the time that the Custos shall enjoy his Office, so as the Clerk demean himself well in the Office.

Thus says the Statute of 37 Hen. 8. And now it hath made an alteration in this Matter, from what it anciently was in these particulars.

First, That whereas the Chancellor alone, did by virtue of his Office, absolutely appoint the Custos Rotulorum, now he is to give out the Commission, but Sub modo, by a Warrant, by a Bill Signed by the King's own Hand, and then he was to continue in the Office till another were appointed by another Bill Signed with the King's own Hand; so that he was removable at the King's pleasure: And then,

Secondly, As to the Clerk of the Peace, there is likewise made a very considerable alteration; for whereas before, as I have offered, his Office must be for Life, he is now made dependant upon the continuance of the Custos Rotulorum, and removable upon his Death or removal; for he is to hold during the time the Custos shall enjoy his Office, which words do seem to make it clear, that he doth depend upon him, so long as the one is Custos Rotulorum, so long, and no longer, the other is Clerk of the Peace.

But not long after this, about three or four Years after, comes the Statute that I mentioned of 3 and 4 Edw. 6. Cap. 10. And that Statute takes notice, that by the Statute of 37 Hen. 8. the Lord Chancellor or Keeper could not Commissionate a Custos, but by Bill Signed by the King's own Hand, and there being vacancies for some long time, for want of such a Bill, whereby Justice was hindred, and it was troublesome to the King

King to be moved, for Bills upon ſuch Vacancies, and it being anciently accuſtomed to be done by the Chancellor or Keeper: Therefore, that Act doth Enact, that the Chancellor or Keeper ſhall again nominate the Cuſtos Rotulorum, and thereby doth reſtore the Chancellor or Keeper, as to a former Right, taken away by the Statute 37. Hen. 8.

But that Statute ſaying nothing at all as to the Clerk of the Peace, he ſeems ſtill to be remaining under the Statute of 37 Hen. 8. and therefore, my Lord, I think 'twas taken till of late, that is, till the Act of this King and Queen, that the Clerk of the Peace did ſtill depend upon the Poſſeſſion of the Cuſtos Rotulorum of his Office, and was to continue no longer, than the Cuſtos continued to be Cuſtos; Therefore, I now come to the Third and laſt thing, which I propoſed to Inſiſt upon in this Caſe, and that is, the Statute of Primo of this King and Queen; and I take it, My Lord, that this Statute hath clearly reſtored the Clerk of the Peace to his ancient Intereſt in his Office, to hold it for Term of his Life, determinable only upon his Misbehaviour in his Office.

Here I ſhall firſt conſider the clauſes of this Act, that relate to the Cuſtos Rotulorum, and then what relates to the Clerk of the Peace.

Now, as to the Cuſtos Rotulorum, this Statute hath placed it again, as it was by the Statue of 37 Hen. 8. and conſequently hath repealed the Statute of 3 and 4 Edw. 6. For it hath Enacted that the nominating and appointing of the Cuſtos Rotulorum ſhall be, as is directed by 37 Hen. 8. any Law, Uſage or Statute to the contrary, in any wiſe notwithſtanding.

But, My Lord, as to the Clerk of the Peace, it will be obſervable how this Statute provides for that; It ſays, that the Cuſtos Rotulorum, or other perſon to whom it doth of right belong to nominate or appoint the Clerk of the Peace, ſhall from time to time, where the Office is void, nominate and appoint one able and ſufficient Perſon, reſiding in the Country, or place for which he is Clerk, to Execute the ſame by himſelf, or ſufficient Deputy, and to take the Fees and Perquiſites of the Office for ſo long time only, as ſuch Clerk of the Peace ſhall well demean himſelf in his ſaid Office.

By virtue of this Clauſe, I take it, that the Clerk of the Peace hath an Eſtate for his Life in the Office; Firſt from the plain and poſitive Words, and Secondly from the Intention of this Act of Parliament.

My Lord, The words ſeem as plain to me, to ſignify ſo much as any words can do. For if any Act of Parliament be made at this day, that doth Erect a new Court, it doth likewiſe appoint that Court

Court to make Officers, which shall Execute their Offices so long time only as they shall well behave themselves in their Offices; those words would give them an Estate for Life in their Offices.

If the King, or any Subject, who hath the disposal or granting of any Office, shall grant this Office to J. S. to Execute it so long as he shall demean himself well in the Office only: No Question, but, that if the Party granting, had a power to grant it for Life, the Grantee would have an Estate for Life in the Office; so that I take it, the words here in this Act, are as full and plain as can be; and I need not repeat them again.

But, My Lord, Besides these Express Words that seem to me to be so very Plain and Clear, there are many things in this Act, that will be found upon Consideration, to Enforce this to be the meaning.

First, The Clause relating to the Clerk of the Peace, hath Industriously and Carefully, as on set purpose, omitted that Clause in the Statute of 37. Hen. 8. which made the Clerk of the Peace dependant upon the Custos Rotulorum, and removable upon his Death and removal, but hath as carefully used the other words in this Statute, about his removal for Misdemeanor.

For, whereas the Statue of 37. Hen. 8. says, that the Clerk of the Peace shall hold and enjoy the Office, during the time that the Custos Rotulorum shall occupy and Exercise his Office, so as the Clerk demean himself well in the Office: This act says, the Custos Rotulorum shall appoint and nominate one able and sufficient person to Execute the Office of Clerk of the Peace; and take the Fees for so long time only, as such Clerk of the Peace shall well demean himself in the Office, and omitts totally those other Words, during the time that the Custos shall continue Custos.

And, That omission is not by over-sight, and through Inadvertency, but is Industriously done, because this Act expressly takes notice of the Statute of 37. Hen. 8. and appoints the nomination of the Custos to be according to that Statute, and therefore the omission cannot be by Chance.

A Second thing that I would offer to your Lordship, to prove this to be the meaning of this Act, is this. The Statute having impowered him that hath the right, to nominate one to hold it, for so long time only as he shall well demean himself in the Office, goeth on, and maketh provision how he may be removed for a Misbehaviour. For having made him removable only for Misdemeanor, it was proper next to consider, where, and how, and by whom this removal shall be made.

Therefore the next Clause doth direct, that an Accusation shall be put in against him in Writing, and this to be done in open Sessions before the Justices, where it shall be examined into and proved; and being adjudged to be a Misbehaviour by the major part of the Justices present, they may then suspend or discharge him from the Office. They may remove him in such a Case, but it is not said that the Custos Rotulorum shall remove him or suspend him. And this proves

First, That he is an Officer of the Justices of the Peace, and under the Controul of that Court, and not of the Custos; And

Secondly, That by reason of the great Formality and Ceremony that the Act requires to be used in his Suspension or Removal, they did look upon him as so fixed in his Office, as that he was not removeable, but only for Misbehaviour in his Office.

But, there is further a third thing, that is to be considered in this Act, and that is this, Suppose the Clerk of the Peace should be removed by the Justices for Misbehaviour, in case the Custos doth not nominate or appoint another before the next General Quarter Sessions, then the Justices shall nominate and appoint one.

Now, I would fain ask this Question, Whether, if one be removed by the Justices, and the Custos neglect or refuse to nominate another before the next Quarter Sessions, and the Justices do appoint one, whether or no, he that is so put in by the Justices, shall be so dependant upon the Custos, as to be removed upon his Death, or removal?

And, I take it, he shall not; and surely it never was the meaning of the Act, that he who comes in by the appointment of the Justices in the Sessions upon the Default and Omission of the Custos to nominate one, should have a greater Estate in the Office, than he that had the primary Title by the Nomination of the Custos Rotulorum.

The last thing that I would offer, and which seems to me, with Submission, to be a strong Argument, that the Parliament did intend the Clerk of the Peace should have a more durable Estate in his Office, than to depend upon the Continuance of the Custos in his Office, is, the great and strict Provision that is made in this Act, that a Clerk of the Peace should not buy his Office.

My Lord, It was considered, and that very rightly, that if he were now established for his Life, and subject as to his Office to no Accident, but Misbehaviour, or Death, it might be very well worth his while to bid Money for it, and People would be eager

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to chaffer for it, whereas before the uncertainty of the Eſtate depending not only upon his own Life, but the Life, Surrender, or Removal of the Cuſtos, it would be very hazardous to give Money for ſuch an uncertain Intereſt.

But now, if he were in certainly for Life upon his good Behaviour in the Office, it might prove a good Bargain, and upon this account doth the Act ſtrictly provide againſt any thing of that nature; It firſt makes it illegal to buy or ſell under the Penalty of forfeiting on both ſides the double of what is given or taken, and of Diſability to hold their Places; nay not only ſo, but it orders, that the Clerk of the Peace before he enters upon his Office, ſhall in open Seſſions take an Oath, that he hath not, nor will pay any Money or Reward, nor given any Bond or Aſſurance to pay Money, Fee or Profit, directly or indirectly to any perſon or perſons whatſoever for ſuch Nomination or Appointment.

Now, My Lord, What was the meaning of all this Caution and Care; firſt about the removing the perſon, but that he was in for Life, and therefore more heed was to be taken, that ſuch an Intereſt ſhould not lightly be deveſted. And ſecondly, What means the great Care, that he ſhould be let in by clean Hands, but that now the Eſtate for Life was a valuable Intereſt to purchaſe and give Money for.

My Lord, Theſe are the things that I do humbly offer to your Lordſhip's Conſideration.

That by the ancient Conſtitution he was an Officer for Life.

By the Statute of 37 Hen. 8. he was made Dependant upon the Continuance of the Cuſtos in his Office.

But upon the laſt Act, he is reſtored to his ancient Eſtate for Life, both by the plain words, and alſo by the meaning of the Act to be collected from the ſeveral parts of it that have been mentioned.

So that I take it, he is now in for Life, and the Conſequence of that will be, that the Fees received by the Defendant belong to the Office, and are received to his uſe who hath Right to the Office; and ſo the Plaintiff ought to recover; and therefore I humbly pray your Lordſhip's Judgment for him.

May it pleaſe your Lordſhips to favour me with a word for the Defendant Mr. Fox. Mr. *Hawles.*

The ſpecial Verdict has been already truly opened by Sir Thomas Powis, and therefore I ſhall not go about to repeat it, but I will follow the Method in conſidering this Caſe which he has done before me.

And firſt, with Submiſſion, whatſoever the Common Law was to Offices that were ſo ancient, is no Rule in this Matter; tho' 'tis we know, that as our Books tell us, ſome Offices were for Life. And the Office of Chancellor of England, my Lord Cook ſays, could not be granted to any one for Life. And why? Becauſe it never was ſo granted. Cuſtom and nothing elſe prevails and governs in all thoſe Caſes; thoſe Offices that were uſually granted for Life, a Grant of ſuch an Office for Life was good, and of thoſe that were not uſually granted for Life, a Grant of ſuch an Office for Life was void.

But as to this Office now in diſpute, there can be no pretence of its being a Common Law Office, for the Common Law knew no ſuch thing as a Clerk of the Peace, nor Juſtices of the Peace, to whom they ſay he is a Clerk; we know, that the Statute of Edward the 3d. that makes Juſtices of the Peace, makes no mention of any ſuch Clerk or Officer as Clerk of the Peace, but it was an Incident; perhaps ſome Body was neceſſary to officiate in that kind, for the Juſtices would not make and write their own Records themſelves, and therefore muſt have ſome Officer to do it for them; and that Statute that was mentioned on the other ſide of R. 2. ſhews plainly, that there was no ſuch Officer then known by that Name as Clerk of the Peace, for he is called there the Juſtice's Clerk, ſo that in all probability he was one that was appointed by them to do that Work for them.

May, My Lord, As to any thing that we know, it is very probable, and I believe it was ſo, at that time, he that was their Clerk was Cuſtos Rotulorum, and intruſted with the keeping of the Records, and afterwards it coming to be an honourary thing to be the Cuſtos Rotulorum, he that was the moſt eminent for Quality among them, was appointed to that Truſt, and then he appointed the Clerk as his Deputy, or Servant under him.

My Lord, There is no Statute or Law that I can find, that ever gave any Power to the Chancellor to make a Cuſtos Rotulorum, but the Chancellor making out the Commiſſion for conſtituting the Juſtices of the Peace, might very well put upon them one to be the Keeper of the Records, and to have the firſt Place or Degree among them; and then, that Cuſtos might very well put one upon the Seſſions as his Servant or Deputy, for the Management and Cuſtody of the Records; who, being Clerk at the Seſſions, came in time to be Clerk of the Peace. This looks to be the moſt probable account that can be given of this Matter, for a certain one cannot be given; we have no Hiſtory of it in our Law-Books, or elſewhere.

But

But the Statute of 37 Hen. 8. recites, That the Chancellor had very much perverted the Inſtitution, and altered the intended Courſe, by taking upon him to make Grants of the Office of Cuſtos Rotulorum for Life; and ſo likewiſe the Clerks of the Peace were for Life too. It was not only that ignorant and inſufficient perſons were put into the Office, for then the Common Law it ſelf will turn out of any Office if they be not able to perform it. That was not the main Reaſon of making the Act, but the Grants for Life was the great Grievance; and therefore it does enact for a Remedy of that Miſchief, that the Cuſtos Rotulorum ſhall be appointed by Bill ſigned with the Kings own Hand, and at his pleaſure removeable and alterable, and the Clerk of the Peace is to be appointed by the Cuſtos, and to continue only during the time of the others continuing to be Cuſtos.

By this Act the Cuſtos by way of Remedy to the former Inconvenience, has a Power to grant the Clerkſhip of the Peace for ſo long as he is Cuſtos, and he is to receive the Fees ſo as he behave himſelf well in the Office; and though there be no negative Words that he ſhall continue Clerk of the Peace no longer, yet with Submiſſion, theſe affirmative Words amount to a negative. For when the Act recites that the Grants that were made for Life were miſchievous, and the Law was to make Proviſion of a Remedy to that Grievance; and in order ſo it ſays, the Cuſtos ſhall be removeable at the Kings pleaſure, and the Clerk of the Peace ſhould be appointed by the Cuſtos to continue during his time of being Cuſtos, ſo as he behave himſelf well in the Office; that, with Submiſſion imports, that the Clerkſhip of the Peace ſhould never be granted for a longer Intereſt than the Cuſtos had in his Office.

The Statute of 3 and 4 Edw. 6. does indeed repeal part of this Statute of 37 Hen. 8. not by expreſs Words of Repeal, but by a very ſtrong Implication, by giving the Chancellor or Keeper the Power of nominating and appointing the Cuſtos Rotulorum, but the Office of the Clerk of the Peace is not touched in this Statute of Edw. 6. but continued as it was ſettled before by 37 Hen. 8. which was only during the time of ſuch Cuſtos continuing in his Office.

It is then, my Lord, This new Statute of the firſt of this King and Queen, that if any be, comes and makes the Variation as to this Matter, at leaſt that miniſters the occaſion of Diſpute; And truly, with Submiſſion, if the Caſe ſtands barely upon that Point, as it ſhould ſeem it does, I think, that there is nothing in this Act that makes any ſuch Alteration of the Law as they now contend for.

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It is true, the Words seem to have something of a change in them at the first reading; but if your Lordship pleaseth to look a little nearer and more narrowly into them, there is no change at all; the words, (so long only as he shall well demean himself in the Office,) are not only enlarging of his Estate, but restrictive only. And, with Submission, when ever you will make a Grant for Life to be good, you must consider the Power and Capacity of the Grantor, and how the thing granted is capable of having a Grant made of it.

If Tenant in Tail make a Lease for Life of his intailed Lands, that is only a Lease for the Life of Tenant in Tail, and not for the Life of the Lessee, because he could not grant any further Interest; But if Tenant in Fee grant an Estate for Life, that will be a good Lease for the Life of the Lessee, because he was capable of making such a Grant, which the other was not.

And, as I said, it must be considered further, Whether the Office or thing granted be capable of having a Grant made of it for Life; and, with Submission, when there is an express Statute before, that saith, it shall be but during the continuance of the Grantor in his Office of Custos, then every Grant is to be construed according to that Provision, and is good, if it persue that Provision, but otherwise it is not good.

I know very well, that it is said a Grant quam diu se bene Gesserit is a Grant for the Life of the Grantee: But, my Lord, if you look into those words more narrowly, they do not import any such thing at all, it is indeed a restrictive Condition that the Law puts upon all Officers for Misdemeanour in any Office, though granted in Fee, is a Forfeiture of the Office.

But all that is to be considered is, if it be an Office that is capable of being granted for Life, those words may amount to a Grant for Life, as expounded by the Usage and Capacity of the Office it self, otherwise it will not. For those words seem only to be an Expression of what the Law always implieth, though not particularly expressed. If it operate any thing, it seems only to have Reference to the Power of the Grantor, as a Restriction, not an Enlargement of the Estate of the Grantee, especially where there is by Law an Incapacity upon the very Office of being granted for Life.

Therefore, that which I most principally rely and must insist upon, is the Statute of 37 Hen. 8. which is not repealed, as to this Matter by 3 & 4 Edward 6. nor by 1 Will. & Mar. And this Statute expressly says, That the Clerk of the Peace is to continue in his Office only during the time that the Custos who put him in, continues to be Custos. The Statute of 3 & 4 Edw. 6.

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did not alter this Matter, and where it did make any alteration, it ſelf is expreſly Repealed by this laſt act of this King and Queen, which revives 37 Hen 8. as to what Alteration was made by 3 and 4 Edw. 6. about the nomination of Cuſtos: And appoints that the Order appointed by 37 Hen. 8. be conſtantly obſerved; and as to the Clerk of the Peace, I take it, this laſt act is no way a Repeal of 37 Hen. 8.

My Lord, I hold it as a ſettled Rule, that if there be two Statutes that are conſiſtent with one another, and not repugnant and contradictory, the latter Statute ſhall not be expounded to be a Repeal of the former. I do indeed clearly conceive, that the Act of the firſt of this King and Queen, did Repeal that of 3 and 4 Edw. 6. but is conſiſtent with, and conſequently did not Repeal the Statute of 37 Hen. 8.

When the matter of two Statutes is directly contradictory the one to the other, I do agree, this laſt muſt be obſerved, and doth repeal the firſt; but where they do not contradict one another, but may conſiſt and ſtand together, the latter is no Repeal of the former, as the Rule is given in Dr. Foſter's Caſe, in 11 Co. 5. 6. The Statute of 23 Elizabeth, that gives the 20 l. a Month for Recuſancy, it is reſolved did not repeal the Statute of 1 Elizabeth, for the 12 d. a Sunday, becauſe they are both inconſiſtent and ſtand together; and do not directly contradict one another.

It were to no purpoſe to cite any more Caſes to this Point, or to multiply Authorities: It is an agreed ſettled Point, that where Acts of Parliament are conſiſtent, the latter does not Repeal the Prior. They are to be taken as Wills are. If there be two Wills that are inconſiſtent with each other, the latter Will ſhall be a Revocation of the former; but if they can ſtand together, it ſhall be no Revocation, as is the Caſe of Hodgkinſon and Wood, Cro. Car. 23.

My Lord, It will be the ſame thing as to Acts of Parliament, Leges poſteriores priores contrarias abrogant. But if they are not contrary, but conſiſtent, then they do not Abrogate the former. Let us then look upon theſe Statutes, and ſee whether they are not conſiſtent. The one ſays, the Clerk ſhall continue in his Office, during the time that the Cuſtos continues in his Office, ſo as he demean himſelf well; the other ſays, he ſhall enjoy the Office ſo long only as he demeans himſelf well in it. Now, if you take the Office to be grantable, but only during the time that the Cuſtos continueth to be Cuſtos, as the Statute of 37 Hen. 8. ſays, And after there ſhould come theſe words that are in this latter Statute, they are plainly conſiſtent together, and not contradictory at all.

Par,

May, The Expreſs Grant to Mr. Fox, from the Earl of Bedford, is purſuant to the words of the Statute of 37 Hen. 8. which reſtrains it as well as the laſt Statute, to well demeaning himſelf in the Office. His Grant is to hold the Office during ſuch time as the Earl continued to be Cuſtos, ſo as he demeaned himſelf well in the Office. But Mr. Harcourt's Grant is without any relation to the Proviſion of the Statute of 37 Hen. 8. which is intended by this laſt Act to be revived; and all the meaning of it, as to the Clerk of the Peace, is to give the Juſtices a Rule and Method how to diſplace him for Miſdemeanour.

All which things are conſiſtent with the Order appointed for this Office, by the Statute of 37 Hen. 8. and not Contradictory to it; and being ſo they cannot be Expounded to be a Repeal of that Statute; and therefore the Office became void upon the removal of my Lord of Clare; and the preſent Cuſtos was Intituled to make a new Grant of it for his time, which he has done accordingly to the Defendant. And I hope your Lordſhip will pleaſe to give your Judgment for him.

no 6.

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DE
Term. Sanct. Mich.

Anno Regni Regis & Reginæ W. & M. V.

Die Sabbati quarto Novemb. Anno Dom. 1693.

IN
BANCO REGIS & REGINÆ.

Rex & Regina *verſus* Epiſcopum London Willielmum Lancaſter, *et al'*.

Mr. *Cooper*,

MAy it pleaſe your Lordſhip, I am of Council in this Caſe, for Their Majeſties, who bring a Quare Impedit againſt Henry Biſhop of London, and William Lancaſter Divinity Profeſſor, for Recovery of the Preſentation (hac vice) to the Vicaridge of St. Martin's in the Fields.

The Declaration ſets forth, That Humphrey late Biſhop of London, was ſeized of the Advowſon of the ſaid Vicaridge in Gros, as of Fee, in Right of his ſaid Biſhoprick: And that being ſo Seized (the ſaid Vicaridge being within the Dioceſs of London) he Collated the ſaid Vicaridge then Vacant, unto Thomas Lamplugh, who by virtue of ſuch Collation, was put into the Corporal Poſſeſſion of the ſaid Vicaridge. And the ſaid Thomas Lamplugh being thus Vicar, was afterwards Created and Conſtituted Biſhop of Exeter: By virtue of which Promotion the ſame Vicaridge became Vacant, and belonged to the late, and then King Charles the Second to Preſent, by reaſon of his Prerogative, who, accordingly Preſented William Lloyd, Divinity Profeſſor, who was Admitted, Inſtituted and Inducted.

And then the ſaid William Lloyd being thus Vicar of the ſaid Vicaridge, was afterwards Created and Conſecrated Biſhop of St. Aſaph: Upon which Promotion the Church again became Vacant; and the ſaid King Charles the Second, by reaſon of his Prerogative, again Preſented Thomas Tenniſon Dr. of Divinity, who was Admitted, Inſtituted and Inducted.

And the ſaid Thomas Tenniſon being Vicar as aforeſaid, was Created and Conſecrated Biſhop of Lincoln, by which Promotion the Church was again Vacant, by reaſon whereof it belongs to the now King and Queen to Preſent, Ratione Prerogativæ ſuæ Regiæ, but that they are hindred by the Defendants.

My Lord, There is upon the Record (which I ſhall Skip) an entry of a Demurrer, upon a Plea in Abatement, which Plea was over-ruled, and a Reſpondeant Ouſter adjudged againſt the Defendents.

Upon that the Defendant, the Biſhop of London, comes in and Demurrs to the Declaration Generally.

The Incumbent, the other Defendant, Dr. Lancaſter, Pleads in Barr that he is Vicar of the ſaid Vicaridge, by the Collation of the other Defendant, the Biſhop of London. And then he Confeſſes the Seiſin of Humphrey late Biſhop of London, as it is Alledged in the Declaration, and the Collation, to Thomas Lamplugh; and the Promotion of Dr. Lamplugh to the Biſhoprick of Exeter; and the King's Preſentation of Dr. Lloyd, and his Inſtitution and Induction; and the Promotion of Dr. Lloyd to the Biſhoprick of St. Aſaph; and the King's Preſentation of Dr. Tenniſon, ratione prerogativæ, and his Inſtitution and Induction.

Then he ſets forth the Statute of 25 Hen. 8. made againſt Suing for Licenſes and Diſpenſations from the See of Rome; and for Conferring the Power of Granting ſuch Diſpenſations on the Arch Biſhop of Canterbury, for the time being, under the Confirmation of the King by his Broad Seal, in ſome ſpecial Caſes.

Then he ſets forth, That after the making of that Act, and before the Teſte of the Original Writ, the other Defendant Henry, was made Biſhop of London; and that afterwards, and before the Teſte of the Original Writ (to wit) the 20th of December 1691. the ſaid Dr. Tenniſon was Elected Biſhop of Lincoln.

Then he ſets forth, That the Arch-Biſhop of Canterbury the 22d. of December, 1691. did by his Letters of Diſpenſation, according to the form of the ſaid Statute, (reciting as is uſual, the King's Pleaſure ſignified to him) diſpenſe with the ſaid Thomas Tenniſon,

Tenniſon, and granted that he ſhould have Power and Authority to retain together with his ſaid Biſhopſick of Lincoln, the ſaid Vicaridge of St. Martin's, and Rectory of St. James's Weſtminſter, which the ſaid Biſhop Elect was then poſſeſſed of, till the firſt of July then next following, and hold the ſame in Commendam in tam amplis modo et forma quibus ante tunc uſque tempus Confectionis literar' Diſpenſationis predict' diebus Epiſcopus Lincoln electus retinebat et poſſidebat, and might take and diſpoſe of the Profitts of the ſaid Livings, Etiamſi in dictis Vicaria & Rectoria non reſideret, &c.

Then he ſets forth in his Plea, That the King and Queen by their Letter Patents under the Great Seal, Dated the 23 d. of December, in the 3 d Year of their Reign, and Inroll'd in Chancery, according to the form of the ſaid Statute, Confirmed the ſaid Letters of Diſpenſation; and then Avers that the ſaid Diſpenſation and Confirmation are not Repugnant to the Law of God; and that Diſpenſations in like Caſes, were uſually Granted before the ſaid Act from the See of Rome.

Then he ſets forth, That afterwards, to wit, the 25 th of December, 1691. Dr. Tenniſon was Created and Conſecrated Biſhop of Lincoln; and that Vigore premiſſorum the ſaid Biſhop of Lincoln took to his own uſe the Profits of the ſaid Vicaridge till the firſt of July, Ad quem quidem Diem Vacaria illa ſecundum limitationem in predictis Litteris Diſpenſationis mentionat' vigore premiſſorum vacavit, whereupon the ſaid Biſhop of London put the Defendant Dr. Lancaſter into Poſſeſſion of the ſaid Vicaridge by Collation; and then Concludes with another Averment or two, for greater certainty of Pleading.

The Attorny General joyns with the Biſhop of London in his Demurrer; and as to this Plea of Dr. Lancaſter he Demurrs, and the Dr. joyns in Demurrer.

My Lord, there is (for I would take both Caſes together) another Record of the like Quare Impedit, brought by the King and Queen againſt the Biſhop of London, and Dr. Birch, for the Preſentation to the Rectory of St. James's Weſtminſter, which I ſhall not now ſtand to open particularly, becauſe I take it to be the ſame in ſubſtance with the other. There are ſome material Variations, as indeed there is a particular Act of Parliament ſet forth in Dr. Birch's Plea, made 1 Jacobi Secundi, for Erecting that Pariſh, which I ſhall take notice of in the end of my Argument: Not that of my ſelf I ſhould have thought it neceſſary to do ſo; but becauſe when I moved to make theſe Records Conſiliums, I received an Admonition from the Counſel on the other ſide, at the Barr, that I ſhould find a Difference

when I came to argue them, and except they mean that that Act of Parliament makes the difference, I know of none. And I muſt yet confeſs, I know no eſſential Difference at all. And if they mean a difference that is not ſo, I am glad to find they begin to pleaſe and comfort themſelves with this Expectation, that when they have loſt all hold of the former Cauſe, there yet be that Straw left to catch at in the latter.

My Lord, I think the Points in Law, ariſing from theſe Records, are generally but two; The one ariſing from the Biſhop's demurring to our Declaration; the other from the Attorny General's Demurrer to the Pleas of the Incumbents.

The Declarations entitle their Majeſties to the Preſentations (hac Vice) upon the laſt Incumbent's being made a Biſhop ratione Prerogativæ ſuæ Regiæ. The Biſhop of London has demurred to this Title of the Kings, by which he has forced me for Method-ſake, to make that a Point, which otherwiſe I had taken for undoubted and ſettled Law, to wit, 1. That whenever there is an avoidance of a Living by Ceſſion, or by the Incumbent's being made a Biſhop, the King by reaſon of his Prerogative, is to preſent for that turn, and not the Patron.

And, My Lord, As to the other Point, I conceive that the Title of the King is not hurt by the Diſpenſation, or Confirmation thereof pleaded by the Incumbents, or any other Matter appearing upon theſe Records.

2. My Lord, As to the firſt Point, I am ſenſible it is a Prejudice to a clear Right, founded upon plain and ſettled Law, to enter into any Reaſoning concerning it, or to produce Arguments to prove the Fitneſs and Juſtneſs of that Law. For that is to draw the Matter again into Queſtion, and then that may not appear Reaſon to one Man, which has ſeem'd ſo to another. Whereas I take it, the Authority of a conſtant uſage for a whole Century of Years and upwards, backt and ſtrengthned with judicial Reſolutions and Allowances from time to time thereupon had, is a ſort of ſenſible Argument which is ſure of Succeſs, and being in the Nature of a poſitive Law, can command a Submiſſion where it is not able to perſwade an Aſſent in Reaſon.

Therefore, my Lord, I ſhall only produce ſome of the principal Authorities, which are to be found for this Prerogative, and rely upon them, without entring into the Reaſonableneſs of this Law, only ſo far as ſhall be found incidently neceſſary to the confeſſing, and avoiding ſome ancient Authorities which ſeem to be againſt us in this Point.

Firſt,

First, there is the Case of Eeds against the Bishop of Oxford in Vaughan's Reports, fol. 18. In the beginning of that Lord Chief Justice's Argument in that Case, It is one of the Points which he takes for granted, and lays as a Foundation for his opinion; That the King, and not the Patron, is to present to Benefices so void by Cession, which shews that this Point was then taken for a settled Point in Law by the Counsel on both sides, and by the Judges on the Bench, or else he would not have put it among the Principles which he was about to argue from, without farther proving it; and this I take to be one of the strongest sorts of Authorities that can be cited.

So in the Case of Basset and Gee, Cro. Eliz. 790. That is an Authority much of the same nature; It is not indeed judicially the Point in question there, but it is preliminary to that which is there the Point in Judgment; And it seems there to be admitted on all hands as settled Law.

Rolls Abr. 2d Part 343. After enumerating some old Books wherein the contrary Doctrine seems hinted at, concludes with this Caution, But the Law is now otherwise generally taken; and agreed, that is, that the King shall have the Presentation.

In the Case of Armiger and Holland, Cro. Eliz. 542. this Prerogative happens to be mentioned accidentally to the Point in question; and Coke (then Attorny General) says, I can shew the Resolution of all the Justices, that the Queen in such Cases shall present: And Popham (then Chief Justice) says, That so is the Common Experience to this Day. This Case was Hill. 39 Eliz.

In the 37 Eliz. Wright's Case reported in Moore 399. There this was the very Point in question, and if that Report be true, the Judges there call'd it the Ancient Law, and Prerogative of the Crown; and at last it was adjudged upon many Precedents shewn, and many Books cited and perused, That where a Church becomes void by Cession, the King, and not the Patron, shall present.

The next I shall mention, My Lord, is Woodley's Case in Cro Jac. 695. There this Prerogative is adjudged for the King, and that in one of the hardest Cases that can be put, which I shall have occasion to mention more particularly hereafter.

5 Mar. Bro. Abr. tit. Presentment al Esglise pl. 61. cites a Presentation by King Edward 3d. pro hac vice ratione prerogativæ suæ upon the Incumbent's being made a Bishop; and the Book concludes with a Remark, that the Law is so.

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The ſame Book, and the ſame Title, pl. 14. in the Abridgment of part of the great Caſe of 11 Hen. 4. 37. It is now ſaid in ſuch Caſe of Creation, the King ſhall preſent to all Benefices de cujuſcunq; Patronatu exiſtunt.

And the ſame Book, and the ſame Title, pl. 3. Abridges a Caſe, 41 Edward 3, 5. Where a Clerk is made a Biſhop by his Conſecration, all his other Benefices are void, and the King ſhall preſent de quibuſcunque Patronatibus exiſtunt.

My Lord, I have not prepared my ſelf to trouble you with producing more Authorities of this kind, though I queſtion not, more might be found in the Books; nor do I think the conſtant uſage and practice has been for the King to have the Prerogative; the Crown has been in Poſſeſſion of it for ſo many years paſt for a time ſufficient to procure any private perſon in the quiet Enjoyment of his Eſtate and Property.

My Lord, it is true, There are ſome old Books in the Times of Edward 3d. and Henry 4. which in the time of Queen Elizabeth, and thereabouts, did induce now and then a ſingle Judge, to heſitate and queſtion the Legality, or at leaſt the Antiquity of this Prerogative. But I could obſerve this upon all theſe Caſes, which are generally of the ſame nature, they are Quare Impedits brought by the King to recover the preſentation upon an avoidance by Ceſſion, where he makes his Title either by the Statute of Proviſors, or as Guardian of the Temporalties during the vacancy of the See; And the King does not mention in making his Title this Prerogative, from whence ſome would infer that he had it not.

My Lord, At preſent I think I have no need to go about to look into the Probability of this Argument. But I cannot admit the Inference to be good. The King has two Titles to preſent, one as in Right of the Temporalties, in his Hands; the other by Ceſſion ratione prerogativæ; upon a Quare Impedit brought, he is, I think, regularly by Law to hold himſelf to one of them; but then becauſe he does ſo, I take it to be no Argument to prove, and therefore he hath not the other in him.

However, I do not diſpute. But admit the old Books till the time of Hen. 8. are not very clear in this Matter; and I find that that Caſe which I cited of Woodley in Cro. 696, ſays, That many Precedents were ſhewn and produced to prove the Lawfulneſs of this Prerogative ſince the time of Henry the 8th. and it muſt be confeſſed, that the Law-Books ſpeak of it ſince that time with greater Clearneſs than they did before; putting all which together, I conceive it may very well be accounted for, and reconciled in this manner.

One

One great Reaſon among many which I find given for this Prerogative in Wentworth and Wright's Caſe, Cro. Eliz. 527. and where-ever it hath been reaſoned upon, is, that the vacancy proceeds from the King's own Act; it is ſufficient for the Patron, that he ſhall have the Advantage to preſent upon voidance by the Act of God, as Death, or by the Act of the Incumbent, as Reſignation, and the like; but the voidance upon the promotion of the Incumbent to a Biſhoprick proceeding from the King's own Act, it is fit he ſhould have the Benefit of it; for if the King had not done it, the vacancy might have been ſuſpended till the death of the Incumbent.

Now, My Lord, This Reaſon was not in force from the time of King John, till the 25th of Hen. 8th. What it was before the time of King John, we are perfectly in the dark about it, having no Reports of Law-Caſes ſo old, but during that Interval between his time, and the 25th of Hen. 8th. the King had little or nothing to do with the Elections or Conſecrations of Biſhops; The Elections of the Chapters were then, or by Law, ought to have been free after the King's general Licenſe to proceed to Election firſt had, as appears by the Statute of Proviſors, 25 Edw. 3. and the 13th of Rich. 2. Cap. 2. And the Conſecration or Inveſtiture was under the Authority of the See of Rome, and ſuch Election and ſuch Conſecration made the Incumbent perfect Biſhop, eſpecially as to the avoidance of his former Livings; Indeed, it's true, they afterwards did come and pay a formal Compliment to the King in asking his Aſſent, and renouncing every thing done by the Court of Rome in derogation of his Royal Authority, which was in order to get the Temporalties out of the King's hands. But ſtill the Biſhop was perfect Biſhop, and all his former Benefices voided by the free Election of the Chapter, and the Conſecration by virtue of the Pope's Bulls. So that during that time the avoidance could hardly be ſaid to happen by the King's Act.

But now ſince the Statute of 25 Hen. 8. the Tables are turned, the King has all the Eſſential Power neceſſary for making a Biſhop, and the Clergy have nothing left them but a meer Shadow of Power, a negative Voice indeed, a very Snare to them, which it is as dangerous as vain and idle to make uſe of.

So that, as the Reaſon of this Prerogative grew ſtronger and ſtronger, I obſerve the Judges grew clearer and clearer in their Opinions for it; and have given it from time to time judicial Allowances, I think, without Interruption; till at length they have added to the reſt, one Argument more for it, and that the ſtrongeſt of all, the Authority of a long and conſtant Uſage for ſo many Years paſt, to this Day, and which it ſeems, has intitled

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the Crown to ſo many ſeveral Preſentations to this very Church of St. Martins upon the ſame Title that is now contended for.

So that, my Lord, I ſhall venture to truſt this firſt Point upon what has been ſaid, and paſs to the ſecond the more conſiderable of the two.

That this Title of their Majeſties to preſent pro hac vice upon the promotion of the Incumbent to a Biſhoprick, is not alter'd or hurt by the Diſpenſation in the Retinere, or any other Matter appearing upon theſe Records.

My Lord, Having proved already, that there is ſuch a Prerogative of the Crown, That upon all avoidances by Ceſſion, the King, and not the Patron, is to preſent. The next Step I am to take, is to ſhew, that theſe avoidances in theſe Livings of St. Martins and St. James, did happen by Ceſſion, or by the promotion of Dr. Tenniſon to the See of Lincoln, notwithſtanding any Matters ſet forth in the Pleas of the Incumbents, and that I hope may be done in a very plain Method.

Firſt, my Lord, The Election in this Caſe comes in point of Time before the Diſpenſation, but the Conſecration is after the Diſpenſation. Now it is moſt clear Law by many Authorities ancient and modern, that it is the Conſecration, and not the Election, which makes the Biſhop; and conſequently that the Benefices of the Biſhop are not voided by the Election, nor until Conſecration; ſo is 41 Edw. 3, 5. B. and the great Caſe of 11 Hen. 4. 37. and Eed's, and the Biſhop of Oxford's Caſe, Vaugh. 19. and indeed all the Books which ſpeak of an avoidance by Ceſſion, agree this to be Law.

Next, my Lord, I take to be as clear, that this Diſpenſation and Confirmation pleaded by the Incumbent's coming before the avoidance by Conſecration, did prevent and ſuſpend the avoidance; ſo that it did not happen at the time of the Conſecration, nor until the firſt of July, when the Force of the Diſpenſation expired.

And this Matter is the better opinion of the great Caſe already cited, 11 Hen. 4. and largely treated of in the other Caſe of Eed's, and the Biſhop of Oxford; and ſufficiently proved there by the Lord Chief Juſtice Vaughan, whoſe Labours I might uſe if there was any occaſion for it upon theſe Records: But I think, my Lord, the Defendants in their Pleas, have in a great meaſure ſaved us that Trouble, for they have aver'd that ſuch Diſpenſations are not contrary to the Law of God; That the Popes uſed to grant ſuch Diſpenſations before 25 Hen. 8. and indeed all the other things by which the Lord Chief Juſtice Vaughan in Eed's Caſe, proves, that the Arch-biſhop and the King may legally

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Grant such a Dispensation by that Act. Which was necessary for them to do, for if the Dispensation was not good, it would make nothing for them upon the Points that they go upon.

If then the Dispensation be admitted Legal and Valid (as I say it must be, or the Defendant's have nothing in their Case) it is to be consider'd next, what is the Effect of it, and that is best seen from the Dispensation it self. It is a Dispensation giving a faculty retinere, not capere, and to retain in the same state that the Incumbent had it before.

My Lord, It appears in Eed's Case, Vaugh. 24 and 25. besides many Authorities there cited, to the same purpose (and I never saw any Book that doubted but that) by virtue of such a Dispensation in the retinere, the Incumbent after his Consecration continued in his Benefice per vim prioris tituli to all intents and purposes whatsoever, during the Dispensation.

But I shall not trouble your Lordship with a long Bead-Roll of Authorities upon this Head; for the Defendant's have agreed this too in their Plea; they allow the Dispensation retinere in tam amplis modo & forma to be effectual: They plead the Consecration, but do not say the Livings immediately avoided upon the Consecration; but on the contrary they say, that Dr. Tennison did enjoy the Livings, and continued to take the Profits untill the first of July then next following, at which time the said Churches, according to the Limitation in the Dispensation became void.

So that we seem agreed thus far, That the Churches then first became Void; and the only Question (if it be a Question) is how the Churches did then become Void? And truly, as to that Question, let them but give me a single and determinate Answer, and I dare refer my self to the Counsel on the other side, to tell how. Can it be by any other means then by Cession, by the Promotion of the Incumbent to be a Bishop?

This is so clear a Truth, That they who drew the Defendant's Plea, found it stared them in the Face; and they could not avoid taking notice of it, nor cover it, but under a general and ambiguous Expression; for they say it became void that first of July, vigore premissorum.

But now, with submission, I could ask which of the Premises it is that made the Livings become Vacant? It was not the Election of Dr. Tennison to be Bishop of Lincoln; that is proved already and agreed to be no avoidance in Law. It was not nor could be the Dispensation or Confirmation, for they were made to prevent the avoidance, and did actually suspend it while they had a being, and for want of which it had been vacant; so that there remains nothing but the Consecration that could cause

the Avoydance, and the vigore premiſſorum muſt ſignifie that at the firſt of July, when the Diſpenſation Expired, the Livings became Void, by virtue of the Conſecration.

The Lord Chief Juſtice Vaughan, in the end of Eed's Caſe, ſpeaking of a Diſpenſation in the retinere, ſays thus, that when it comes to be determined, the matter is as if it had not been; but if this Diſpenſation had not been, no doubt the Livings had been avoided by Ceſſion.

My Lord Hobart in his Reports, 143. Colt and Glover's Caſe (whereas they call it Commendam) ſays, a Commendam retinere, is properly no Commendam, but only a faculty of Retention, and a continuation of the Benefice in the ſame Perſon and State wherein it was, notwithſtanding ſomething intervening, as a Biſhoprick or the like, which, without ſuch a Faculty would have avoided it; ſo there this Faculty keeps the Benefice in the ſame Perſon and State it was till the firſt of July, when for want of it the Living became void by Ceſſion.

And, My Lord, it being thus proved, and taken for granted, that the King is to Preſent upon an Avoidance by Ceſſion, and that theſe Benefices did void by Ceſſion only, the Concluſion is ſelf-evident, and therefore I need not mention it; and I can ſee but one way of evading the force, that hath any Colour.

They may ſay, it is true, the general Practice hath ſo gon, and ſo the Law is generally taken, and in ſtrictneſs of Law, if you follow it cloſe, it is an avoidance by Ceſſion; but all General Rules have their Exceptions; and this general Rule has this Exception, where it happens after a Commendam. And in this Caſe the Churches continuing full after the Conſecration, by virtue of a Diſpenſation which the King Confirmed, the King hath thereby ſupplied his Turn; and ſo this may be excepted out of the general Rule of this King's Prerogative, to preſent upon an Avoidance by Ceſſion.

But for this, My Lord, I give it this Anſwer:

Firſt, My Lord, I ſay it will lye upon them on the other ſide, to produce Authorities to prove this Caſe of theirs to come within any ſuch Exception of the General Rule, which otherwiſe lyes hard upon them.

But truly, My Lord, in the mean time, I think it may be proved in the Negative, that the Law admits of no ſuch Exception, and that this Act of the King's, ſet forth in the Incumbent's Plea, cannot in Law or Reaſon amount to a fulfilling of the King's Title by Prerogative, or an uſer or ſatisfier of the Turn which the Law gives him, and that upon theſe Authorities and Conſiderations.

Thoſe

Thoſe two great Chief Juſtices Hobart and Vaughan were of Opinion, that there were no ſuch Exception.

And my Lord Chief Juſtice Vaughan in Eed's Caſe 25. puts a much ſtronger Caſe than this preſent Caſe, that is, of ſuch a Diſpenſation in the retinere, to laſt for three Years. If I ſay, he obtain a Diſpenſation before Conſecration, to hold my Benefice for three Years, during the force of that Diſpenſation, I remain Parſon of the ſame Benefice, of no leſs Eſtate than before; and when the three Years are paſt, the Benefice voids as it did at firſt, if there had been no Diſpenſation.

The Lord Hobart before him, in Colt and Glover's Caſe Fol. 156. ſays the ſame thing in almoſt the ſame Words, but with this Addition, That here is no Injury done, either to Church or Patron; for though it be Damnum, yet it is abſque injuria, and ſo they make no Difference between this avoidance by Ceſſion, and after a Diſpenſation. For they ſay in the caſe of a ſuſpenſion, by diſpenſation in the retinere for three Years, it does avoid at the end of the three Years, as it would have done at firſt, if there had not been a Diſpenſation.

But then, My Lord, to enter into the conſideration of the reaſon of the thing, as there is no Law to juſtifie this Difference, ſo neither can there be any Reaſon Aſſigned, why this Diſpenſation in the retinere thus confirmed by the King, ſhould amount to an uſer and fulfilling of the King's Turn, and that upon theſe Grounds.

Firſt, This Diſpenſation or Grant of this Faculty to retain, is the Act of the Arch-Biſhop, and not of the King, who only confirms. My meaning in this is to be found in my Lord Vaughan (who obſerves very well in Eed's Caſe, Folio 26.) where ſpeaking of this ſame Act of Confirmation, he ſays, the King by ſuch Confirmation, does not intend to Transfer any Right of his into the Incumbent, by continuing his Poſſeſſion; but his Confirmation is only formal, to compleat the Diſpenſation of the Arch-Biſhop.

Again, My Lord, this I reckon is but a day or two longer than a Commenda Semeſtris, et de minimis non curat Lex. Now if the Arch-Biſhop had in this Caſe, ſubſequent to the Conſecration, granted a Diſpenſation or Faculty, which they call a Commenda Semeſtris to Dr. Tenniſon, then Biſhop of Lincoln, Capere et tenere, theſe Livings in Commenda, for half a Year from the time of the Avoydance; this is, (though it be in the Capere) but a temporary Proviſion for the Church, for ſuch time as the Law gives the Patron to preſent in; and though the King had Confirmed ſuch a Diſpenſation, that might have been without hurting his Right of Preſentation;

and I hold, that at the end of that Commenda Semeſtris, the King, and not the Patron, ſhould preſent.

For it is plain in Hob. 144. Colt and Glover's Caſe, where all this Doctrine is treated of, and from the many learned and laborious Citations by him there made out of the Canon Law, that this Commenda Semeſtris had nothing of a Preſentation in its nature, nor medled with the Preſentation, or Right of Patronage; but was meerly a Temporary Care or Proviſion for the Church during the time which the Patron had by Law to preſent in, and grew out of a natural Equity, that the Cure of Souls might be always ſerved, and therefore it might legally be made without Conſent of the Patron, and it expired at the time limited; which a Commendam in the Capere for a longer time after the Avoidance could not, for that amounted to a Preſentation in its nature, and could not be for a leſs time than a Perpetuity; and the Commendatory was regularly to have been preſented by a Patron, and ſometimes inſtituted and inducted.

My Lord, The Uſe I make of this matter is this, If the King might (as I make no doubt he might) have confirm'd ſuch a Commenda Semeſtris without infringing his Right of Preſentation, much more might he do ſo in a Diſpenſation retinere, which prevents the avoidance for ſo long as it continues in force, it being made in time before his Right happened.

It is proved, and indeed admitted, I ſee, that the Church firſt avoided the firſt of July; and ſince that, there is nothing pretended to be done to the Prejudice of the King's Title, or towards the Supply of his Turn. And it is very hard to pretend to have him do any Act before he had a Title in him that ſhould hurt his ſubſequent Title, or be an Uſer or Executor of it.

Beſides, my Lord, How can it be ſaid, that this Diſpenſation and Confirmation do amount to an Uſer or Execution of the King's Turn, which he has by Ceſſion? For it is inconſiſtent in it ſelf to ſay, that one and the ſame Act ſhall be conſtrued a Suſpenſion of the Vacancy, whereby the Title ſhould ariſe, and yet at the ſame time be a uſing of the Turn, and a ſupplying of that Vacancy which was ſo ſuſpended, from happening. The Diſpenſation and Confirmation kept of the King's Title from accrewing till the firſt of July, and could they likewiſe give him the full Benefit of that Title in the mean time? That is repugnant and impoſſible.

But,

But, my Lord, There is another Consideration which extends it self only to the Church of St. James, where the Bishop of London has only the next avoidance, and the Lord Jermyn the next after that; now if the King has had his Turn by this Dispensation and Confirmation, then the Bishop of London hath lost his next presentation, and so the Bishop hath made no Title; for then the Lord Jermyn is to present next, and not the Bishop, according to Woodley's Case, Cro. Jac. 169. where it is adjudged, that if the Grantee of the next avoidance has it evicted from him by this Prerogative of the King, it is lost for ever, and he shall not have the next to that, for there the King presents in the Grantee's Turn; but if the King has not used it, then it is not lost.

And they there put the Case of an Eviction by Title of Dower subsequent to the Grant of the next avoidance, or by Statute: But my Lord Coke in his Commentary upon Littleton, Folio 378. B and 379 A. denies that of Dower to be Law in this special Case, where the Grantor seized of an Advowson in Fee, takes a Wife by which she becomes intituled to the third Presentation, and then grants the third Presentation to another, and the Husband dyes, it shall be taken the third Presentation which he may lawfully grant, that is indeed the fourth. But it should seem otherwise, if the Grant had been made before Marriage, for there the Grantee loses his Turn for ever by such Eviction: And so is Cro. Eliz. 790. William's and the Bishop of Lincoln's Case.

My Lord, It has been already observed, and further may be seen in Jones 161. Evans and Aswith Fitzh. N. B. 36. B. Lit. H. there the Law is made very plain from Cases put, that by vertue of this Dispensation in the Retinere, the Incumbent continues in per vim prioris tituli; and if Dr. Tennison continued in till the first of July per vim prioris tituli, then it seems the King's Confirmation could not transfer any new Title to him, and so the King by this Act of Confirmation did not impare or diminish his own Title.

I have now, my Lord, gon through the two main Points which I mentioned at first to concern both the Cases, and now come to take Notice of the Difference and Distinction between the two Cases, that was hinted at by the other side, as far as I can apprehend it, and it stands thus.

In the Declaration upon the second Quare Impedit brought for the Presentation to the Church of St. James Westminster, is set forth the Act of Parliament primo Jacobi Secundi made for erecting that a Parish. It enacts, That there shall be a perpetual Succession of Rectors there to have Cure of Souls, &c. Then it comes to appoint the Right of Patronage, and over of Presentation:

ſentation: Dr Tenniſon, for his great Services particularly to that Place, is appointed the firſt Rector: Afterwards, upon his Death, or the next Avoidance, the Advowſon or Preſentation ſhall belong to the Biſhop of London and his Succeſſors, and the Lord Jermyn and his Heirs. There it is given promiſcuouſly, but then it ſettles it in this Order, That the Biſhop of London ſhould preſent or collate firſt, then the Lord Jermyn, or his Heirs, then the Biſhop of London twice, then the Lord Jermyn once, and ſo twice and once for all time coming. This by the Act is the Diſtribution made of the Preſentation, and the Advowſon being given to the Biſhop of London, and the Lord Jermyn in Fee, their ſeveral Turns are appointed to them.

And now, What uſe would they make of this Act? What would they have this Matter amount to? Truly I have all the Reaſon in the World to ask their Pardon, if I miſtake their Difference, this is ſuch a trifling one. The Act ſays, That after the Death or Removal of Dr. *Tenniſon*, the Biſhop of *London* is to preſent firſt, or which is all one, the firſt Turn is the Biſhop of *London*'s, or his Succeſſors; but if the King ſhall preſent by his Prerogative in this Caſe, then the Biſhop will not preſent firſt; and ſo the Letter of this Law will not be fulfilled.

I grant it, but the meaning will, for here the King preſents by Rule of Law, and in the Right of the Biſhop of London, the Living Avoiding by Ceſſion, in which Caſe the Law takes the Preſentation from the ordinary Patron, and gives it to the Crown.

And as to the Hardſhip of that in this particular Caſe, may be objected, that the Biſhop may loſe his Turn.

I anſwer, That is not our preſent Queſtion, whether he will or no, or what will be the Effect between the Title of the Biſhop, and the Title of my Lord Jermyn. But if that ſhould be the Conſequence that the Biſhop ſhould loſe his Turn, the Biſhop of London's Caſe will be but the ſame with Woodley's Caſe, and the ſame with the Caſe of every Grantee of the next Avoidance, who upon Eviction by Statute or elder Grant, or even this Prerogative of the King, is to loſe his Turn: And to this purpoſe there is another Authority that I would mention, and that is Brooks Abridgment, tit. Preſentment al Eſglize, pl. 52.

Now if ſo, then no doubt it was never the meaning of this Act of Parliament, to tye this Preſentation, or this Turn, ſo faſt about the Biſhop of London's Neck, as an Incident inſeparable, that nothing could take it off; or to give the Biſhop and the Lord Jermyn this Advowſon in ſuch a manner, as no Patron or Patrons in England hold theirs: It was never the Intent of this Law, to make the Preſentation to this Church a ſingular

Inſtance,

Inſtance, and different from all the Churches of England beſides, a Peculiar exempt from the ordinary Rules and Government of the Laws and Cuſtoms of the Realm.

Such a ſpecial meaning ſhould have appeared in ſpecial expreſs particular Words in the Act; and the Reaſon which induced the Parliament to this Singularity, ſhould have been evident too: Elſe whenever an Act gives any thing generally, and without any ſuch ſpecial Intention declared, or rationally to be infer'd, it gives it always ſubject to the general controul and over of the Common Law.

As to keep to the preſent Inſtance; If this Living had voided during the vacancy of the See of London while the Temporalties were in the King's Hands; I take it for undoubted Law, that the King then, and not the Succeſſor of the Biſhop, ſhould have preſented; and yet the Letter of the Law had equally as much failed in that Caſe, as in the preſent Caſe. For then the King, and not the Biſhop of London, nor his Succeſſors, had preſented.

If my Lord, who has the Title of his Turns in the ſame Words that the Biſhop hath his Title to his Turns in, ſhould be attainted of Treaſon or Felony, the King ſhould preſent in his Turns, and not the Lord Jermyn, or his Heirs: And here again, the Letter of the Law would fail again as bad, or worſe than in the preſent Caſe, for then the Lord Jermyn and his Heirs would not only not preſent in the ſecond Turn, but would never preſent to this Church at all.

If I have Land given or convey'd to me by Act of Parliament in the uſual Words of Intayl; I take it, ſuch an Eſtate tayl is dockable by the uſual Means of Docking other Eſtates tayl, except there appears a plain meaning in the Act, that I ſhould not do it.

A Grantee of the prochein Avoidance is to loſe it in ſuch Caſes as before, particularly where the Living becomes void by Ceſſion; but yet ſuch a Grantee, if he claim under one who had a Power to make ſuch a Grant, hath as good a Title to it by the Common Law, as the Biſhop of London here hath by the Statute Law, for both are but the Law of the Land, the one as well as the other; and ſo I ſee no Reaſon of difference, why the Rule of Law about the King's Prerogative ſhould not operate as ſtrongly upon this latter Title, as it does upon the other.

My Lord, I know not what to ſay further in this Matter; tru it ſeems to me to be very clear of it ſelf; it is one of thoſe Notiſſimums where I muſt confeſs my ſelf at a loſs to find Notiora to prove it by. When an Act gives any thing generally, it gives it ſubject to the Rule and Government of the Laws and Cuſtoms

ſions of the Realm. This is ſo Evident a Truth, that I could Argue from it, if there were occaſion; but I know not how to Argue to it. If I ſhould dwell all day upon it, I could only twiſt it and turn it, and ſhew your Lordſhip a plain thing, and in different Lights.

And truly, the contrary Aſſertion, that the words of this Act of Parliament have Exempted this Advowſon from the ordinary Rules of Law, ſeems to me (I beg your Lordſhip's Pardon if I miſtake) to be no better than a meer Cavil, a Playing with the Letter of the Law; a ſticking in the Bark, (as my Lord Coke calls it) a ſort of learned trifling, which, were I never ſo zealous for my Client, I ſhould eſteem (as I hope your Lordſhip will) unworthy the grave Attention of a Court of Juſtice.

My Lord, I ſhall trouble you no farther, but only to recapitulate the Method I have gon in, and ſo Conclude. I hope it appears clear to your Lordſhip,

Firſt, That the King has this ſettled Prerogative; that he, and not the Patron, is to Preſent upon Avoydances by Ceſſion.

Secondly, That this is not hurt by this Diſpenſation in the retinere, but theſe Livings did avoid by Ceſſion only, the firſt of July.

Thirdly, That there is no difference in Law, or Reaſon, between an avoidance happening by Ceſſion, immediately upon the Conſecration, and where it is by Ceſſion ſuſpended for a time, eſpecially by ſuch a ſort of Diſpenſation as this is, for Six Months and a few days. And,

Laſtly, That this Act of Parliament ſet forth in one of the Declaracions, makes no diverſity at all in Law, between the one Caſe and the other.

And therefore, I pray your Lordſhip's Judgment for their Majeſties, and Writs to the Arch-Biſhop, to admit their Clerks, quia Epiſcopus eſt pars.

Mr. Serjeant *Levins*,

May it pleaſe your Lordſhip, I am of Counſel on the other ſide; and ſhall argue both Caſes together as this Gentleman has done, becauſe as to the main Point, they are alike; though I think they do likewiſe differ in ſeveral Points, which are not ſo little Material as he is pleaſed to make them; as I hope to prove to your Lordſhip by and by.

My Lord, The Record that has been opened, I will take as a Caſe, and not trouble you to open it any more.

The Parſonage of St. Martin's, is in the Gift of the Biſhop of London, who Collateth Dr. Lamplugh: The King makes

Dr.

Dr. Lamplugh a Bishop, and then presents Dr. Lloyd, and afterwards makes him a Bishop; and then presents Dr. Tennison; then Dr. Tennison is Elected Bishop, and there is a Dispensation given him, confirm'd by the King, to retain this Church for above Six Months, and then he is Consecrated. Now, whether after all this, the King shall present a new Parson to the Living, is the Question?

Indeed, as to the other Case of the Church of St. James's it does not fall out to be the same Case appearing upon the Record, or that the King has had so many Turns in Presentation, because it was made a Parish by Act of Parliament, since the Presentation of Dr. Tennison, and so there hath been no Turn to present till now. But as to St. Martin's, there have been a great many Presentations by the King, one after another: And I know not when they will be at an end after this Rate: He has had three Turns already, and how many more he may Claim by the same Title I cannot tell.

But, My Lord, That which I have humbly to offer to your Lordship's Consideration is this, That there arise Three Points upon the Case of Dr. Lancaster, as to the Living of Saint Martin's.

First, Whether the King have such a Prerogative as is here Contended for? And I take leave to differ from the Counsel on the other side in that Point: That by Law the King has no such undoubted Right, in Case of an Avoidance of a Living, of which a Subject is Patron, by the Incumbent's being made a Bishop, to Present a Parson to the Living.

Secondly, Whether the King hath such a Prerogative as this toties quoties? That as often as he makes a Parson a Bishop, though he were presented by himself, by such a Prerogative before, yet he shall Present again. And the

Third is, That which has been touch't upon by the other side, whether or no this Dispensation and Confirmation (admitting the King had such a Right to Present upon this Avoidance, for this time) this Commendam retinere for above Six Months, hath not satisfied the King's Turn.

These points arise upon this first Case, and as to the other, there is only one to be added; whether in the Case of St. James's this Act has not made such a Difference, as that the Prerogative is thereby Extinct.

My Lord, as to the first Point, I humbly Crave your Lordship's leave to look a little into it; though I know there have been some late Cases that seem to admit this Prerogative in the King; yet I dare be bold to Assert, that the Old Books are all against it. For I take it for clear ancient Law, that where the

Incumbent is made a Biſhop, all his Livings become Void; and as for the King's Prerogative it is all part of the Common Law, (which is Law time out of mind) and if there had been any ſuch Prerogative, it would have been known; but in all our Old Law we are certain it can find no Foundation.

But, My Lord, to come cloſe to this firſt Point, that the King hath no ſuch Prerogative, upon his making the Incumbent a Biſhop, to Preſent to a Church, that is anothers Patronage, I would firſt mention what I find in that Caſe, which has been cited on the other ſide, 2 Cro. 691. Woodley's Caſe, Juſtice Hutton does expreſly deny that the King had any ſuch Prerogative, or any Title to Preſent but where he himſelf is Patron, and that there was no ſuch Preſentment till of late days, nor any Book of Law to warrant it, but that Caſe which is in Bro. Abr. preſ' al' Engliſe 61.

But in the Report of that Caſe of Woodly, Cro. does ſeem to admit that Winch was of Opinion for the Prerogative, and only Hutton againſt it. For he makes Winch ſay, that the King has an abſolute Title by his Prerogative, as well in the Caſe of a Common Perſon's Patronage as of his own. But if you look into Winch's Reports, where the ſame Caſe is Reported, Fol. 96 and 97. you will there ſee that they are both of another Opinion, that there was no ſuch Ancient Prerogative. And there it ſhould ſeem that Winch did ridicule that opinion of Bro. 61. that it was the ſaying of the Biſhop of Ely, who was then Chancellor, and might have right to Preſent to it, by his place, if the King had ſuch a prerogative. And indeed, Bro. himſelf has made a Remark upon it, as if it was a thing never heard of before; for at the end of it he puts quod Nota. My Lord, I do agree that the King has many times preſented Parſons in ancient times, to Livings of the Subject's Patronage; But I deny they were Jure Prerogativæ; but upon other Grounds, and particularly it was ſo, 40 Edw. 3. 40. There the King preſented a Prebend, upon making the Pebendary Biſhop, but how came that? The Book tells you, becauſe the Temporalities of the Biſhop (who was Patron of that Prebend) were in the King's Hands, and then he preſented as Patron ſo long as the Temporalities were in his Hands.

And ſo is the Book of 41 Edw. 3. 5. A Caſe was cited on the other ſide, out of the Abridgement, but you will find it at large in that Book, It was a preſentation of the King's to a Prebend, becauſe the King had the Temporalities in his Hand, and there it is a preſentation as Patron, for ſo long as they ſo continued in his Hands.

So

So likewise is 44 Edw. 3. 24. 6. The King does there present to a Living, where the Parson was made a Bishop, but why was it? Not because of this prerogative, there is no such thing mentioned; but the Patron was the King's Tenant in Capite, and the Heir was in ward to the King, and so he had Jus Patronatus in him.

Then there is Fitz Abr. tit' Quare Impedit. Pl. 35. The King claimed Title to present to the Provostry of Wells, in the Gift of the Bishop, void upon the Provost's being made Dean, because the Temporalities of the Bishoprick were in the King's Hands at that time.

And that Case that is cited on the other side in my Opinion, is as strong a Case against this prerogative as can be, that is 11 Hen. 4. Folio 37. 59 and 76. The Ancientest Case of a Commendam in our Law, or that is any where extant in our Books, and the Case in short is thus.

The King brings a Quare Impedit, and makes his Title by the Creation of the Incumbent, to be a Bishop; there was some Debate upon the Declaration, but the Defendant Pleads that the King Granted the Temporalities to the now Bishop, before the Living became Void. There the King waves that Declaration, and makes a new one, and Declares upon the Statute of Provisions, because the Pope had usurp'd a Power which that Statute denied him, and so it would go to the King.

There is no Judgment at all given in that Case, upon the first point, but it should seem the King's Counsel in that Case were of Opinion against this Prerogative, because they did not stand to that Title, but mended their Declaration, and betook themselves to another Title. Now that was a point directly to have been judged upon, if they had thought fit to have abode by it; for the Plea of the Defendants was no Answer at all to the Title that the King made; because if the Law be, as they say it is now taken to be, the Temporalities being in his Hand, or out of his Hand, would not alter the Case. And this I say is a great Authority, that in so ancient a time as that the King was satisfied, he had no such Prerogative, because he waves that Title and goes to another.

My Lord, there is a Case in the 4th. Inst. 356 and 357. taken out of the Record of 24 Edw. 3. The King makes the Arch-Deacon of Cornwal in the Gift of the Bishop of Exeter, an Arch-Bishop in Ireland, and the King presents to the Arch-Deaconary; but the Observation made upon the Record is this, by my Lord Coke, That it was not by his Prerogative, but because the Temporalities of the Bishop of Exeter were then in his Hands.

I do agree, my Lord, That there are ſome late Caſes that have been cited, which do go that way that the King hath ſuch a Prerogative; and the firſt that is to be found in Print, is that Caſe of Wright, Paſch. 37 Eliz. Moore, pl. 522. There indeed this was the Point directly in Judgment before the Court, and there is Judgment for the Prerogative, though it was oppoſed by the other ſide (for this Title was demurred unto) but with very little Arguments as ſhould ſeem by the Report of that Caſe in that Book, for there were only ſeven or eight Precedents of ſuch Preſentations ſhewn; and without more ado, the Court gave this Anſwer, That it was the ſettled Prerogative of the Crown to preſent, when void by Ceſſion, and not the Patron, and they would not alter the Ancient Prerogative. There, I confeſs, is Judgment for the King, but I ſay without much Argument.

Then there is that Caſe that has been ſo often mentioned of Eeds and the Biſhop of Oxford, Vaugh. 18. And there indeed it goes ſo far, as to take it for ſettled Law, as to this firſt Point, That upon Avoidance by Ceſſion the King, and not the Patron, ſhall preſent. But as to the other Point, That he ſhall not preſent a ſecond time; and ſo toties, quoties: I do not know that there has any Authority been cited, or is to be found.

My Lord, I confeſs theſe two Authorities are in point againſt me upon this firſt Matter; but I would beg your Lordſhip would pleaſe to conſider the Times when theſe two Caſes were adjudged, and the diſtance of Time between them; the firſt is 37 of Eliz. the other is 26 Car. 2.

But now, my Lord, I deſire to offer what Authorities I have to the contrary; I take it, thoſe old Caſes that I mentioned before, ſhew, that the King's Title was upon account of the Temporalties being in his hand, or by the Statute of Proviſors, and then there being a Judgment, one for the King upon the Incumbent's being made a Biſhop, without conſidering what other Reaſon may be given for it, a little Strain might be made to extend it from the other Caſe, and take that of Prerogative to be a good Title to the King too.

But, my Lord, By what I ſhall now come to ſhew you out of our old Books, and other Authorities, I take it I ſhall make it clearly appear, that the King hath no ſuch Prerogative to preſent to a Living in the Patronage of a Subject that is void upon his making the Incumbent a Biſhop.

And

And I begin with Doct. & Stud, c. 31. Where he is treating of Lapſes, and ſhews how the ſix Months are to be accounted, and there he ſpeaks of the Patron being to preſent, (but no mention at all of the King) within ſix Months after the avoidance by Creation, Ceſſion, or Death; ſo that then there was no ſuch thing thought of as this Prerogative.

My next Authority is Dyer 228. B. the Lord Sidney's Caſe; there this Matter was before the Court, though not judicially; for there was Iſſue upon another Point which was to be tryed, Whether the Living was void by Reſignation or Deprivation? But there it is ſaid, the Defendant's Title was under the Preſentation of the Queen, who, the Book ſays, ſuppoſed ſhe was intituled by Prerogative to preſent upon her making the former Incumbent a Biſhop, and the Benefice was void by Ceſſion; but there my Lord Chief Juſtice Dyer hath theſe Words very remarkable.

Que neſt ley come jeo entende, quod alij Socij mei ſentiebant.

There you have the Opinions of the whole Court of Common Pleas, and this is before that Caſe of Wright and Moore.

But now, my Lord, I come to cite you a Caſe that was four Years after that Caſe in Moore, and that is 41 of Eliz. It is reported in Owen 144. There this Point came in queſtion directly, Whether the King had ſuch a Prerogative to preſent where the Parſon was made a Biſhop, yea or no. And there it is ſaid there were eight or nine Precedents in the time of Henry the 8th. that the King uſed to preſent in ſuch a Caſe, but all of them were between ſpiritual perſons, and the Court ſaid they would take no regard of thoſe Precedents, for they were late things; and truly though the Pope uſed before that time to preſent in ſuch Caſe, yet the Pope had uſed to do ſtrange things by Uſurpation upon the Clergy who were the Pope's Servants, as indeed he began all his Uſurpations upon the Layty, by firſt uſurping upon the Clergy who by degrees brought the Layty under them too.

So that, my Lord, Your Lordſhip ſees how the very pretence of this began, by the Uſurpation of the Pope upon his Clergy in ſuch Caſes; he having all Eccleſiaſtical perſons under his Girdle, they were his Servants, and he could deprive them, or do what he would with them; and therefore he made uſe of them to hook in his Juriſdiction too over the Layty. And the Clergy have all along, before the Reformation, done great things for exalting his ſpiritual Power, and as long as they were under the Pope's

Pope's Girdle, whatſoever he would have, was a Law to them, which made the Lord Hobart 146. Intitle the Pope Demon Meridianus. And Walmſley in that Report of Owen, doth cite a Precedent which he ſays he had ſeen to be adjudged in the time of Edwatd the 2d. That the King had no ſuch Prerogative. But, my Lord, I will now preſume to ſhew you the Book in print, that he there ſays he had ſeen. It went up and down in Copies by Manuſcript long before, but now it is printed by my Brother Maynard, and it is 5 Edward the 2d. Folio 48. And the Caſe is this.

Hugh de Courtney brings his Quare Impedit againſt Thomas de Hutwat for the Church of Bingham, and ſets forth, That Iſabel de Force, Counteſs of Aumerle, preſented ſuch an one upon the Living's becoming void by Ceſſion, to wit, by the Incumbent's being made a Biſhop, but never a word of the King's Title in all the Caſe, or any ſuch Prerogative, as is now contended for.

Stamford, in his Book of the Prerogative, Cap. 8. is treating concerning the King's Prerogative about Eccleſiaſtical Livings, but there he takes no Notice of any ſuch Prerogative as this, either in the Statute, or his Treatiſe about it. Therefore I conceive I may well argue, that there was none ſuch, and that thoſe other old Caſes that I mentioned before in the time of Edward the 3d. were of Preſentations upon other Grounds, which come at laſt to be extended in theſe latter Judgments as far as to this Caſe, but without any good Foundation. And that may be reaſonably inferred, at leaſt doubted of, becauſe no ancient Book of Law giveth us any Hint of any ſuch Prerogative.

And that, my Lord, is all I ſhall trouble your Lordſhip with upon that Point, denying that the King hath really any ſuch Prerogative to preſent to a Church that is in the Patronage of another Man, when it is void by Ceſſion, as by the Incumbent's being made a Biſhop, or the like.

But, my Lord, The ſecond Point carries this Prerogative a great deal further: The King firſt makes the Parſon preſented by the Patron, a Biſhop; and then by this pretended Prerogative, preſents to the Church ſo void by Ceſſion; then he makes his own Preſentee a Biſhop; and upon that preſents another; and then makes that ſecond Preſentee a Biſhop, and now would preſent again: And I cannot tell where it will end, if he have ſuch a Prerogative of preſenting toties quoties, though he have done it never ſo often; if he may carry it on thus, the Patron will always be a great way off from preſenting to his Living.

It

It is true, my Lord, in Eed's Case the King did not only give a Commendam to Paul, when he was made Bishop to hold the Living, but when Paul dyed, he gave another Commendam to the new Bishop. The first Commendam was indeed good, but there is not one word in that book, of Justification of this point of presenting by Prerogative, toties quoties, upon a Commendam retinere. I agree the Parson is in upon the first presentation in the same Estate, and so it is positively resolved by my Lord Chief Justice Vaughan, but the second Bishop should have it, there is not the least word spoken in Justification of it; nay, it is adjudged expresly against the second Bishop. So that Case cannot be made use of for the King's Prerogative as to this Point.

My Lord, If the Law should really be in this manner, That as often as ever the King makes a Parson a Bishop, he shall present to the Living, then the Patron of a great Living shall never have his Patronage, but by meer accident. For there are not many great Livings in England, such as are fit to be given to Men of great Learning and Parts, out of whom, when a Bishoprick falls, an Election should be made. And thus the King would have opportunity to get all these Presentations, and keep them still on, because when a Bishoprick falls, he would present such an one, and when another falls he would present another; and so the Patron would never come at his Living: Here have been two already: Besides this Commendam to Dr. Tennison, which we say is a third, and to what number it will encrease unless the Law put a stop to it, cannot easily be foreseen; and this Point is applicable only to the first Cases, and not to the other where this has never happened till now.

But then the next Point which concerneth both the Cases is, If the King have such a Prerogative, whether he be not satisfied with his Turn by this Commendam for above six Months, that is, having gon so far as the first of July, when the six Months ended the 25th of June. We say it is to be supposed, that the King intended to have his Presentee to hold it no longer, but that he would leave it to the Patron to present afterwards.

My Lord, These Commendams have never been of very good Reputation, and in the Canonists there may be found many hard Words against them: In Davis's Reports 76.a. he says, they call it Commenda quasi Comedenda quia Ecclesiæ quæ traditur in Commenda quasi Comedetur & Devoratur; and indeed the Commendams were many times ad mensam of the Bishop.

My

My Lord Hobart cites the Council of Lyons as the laſt Council that gave leave to Commendams, and that Council decrees, that a Commendam ſhould not exceed ſix Months; And that Conſenſus patroni & omnium qui lædi poſſunt ſhould be had; And out of the Conſtitutions of Othobon here in England in the year 1248. a Canon de Commendis Eccleſiarum, which upon the Miſchief of them revokes all Commendams, niſi ex evidenti utilitate unius tantum Eccleſiæ commendatio facta ſit.

Theſe Commendams my Lord Hobart reckons up to be three; the firſt is Commenda Semeſtris, and that faith he does grow out of a natural Equity; that in the time of the Patron's Reſpite given him to preſent in, the Church ſhould be ſupplied with a provisional Paſtor before a Lapſe happened. The next is perpetua or for Life; and the third is limitata.

Now this Commenda in our Caſe is neither for ſix Months, or for Life, therefore by Conſequence it muſt be of the third ſort, a limited Commenda, for it is more than for ſix Months, which was only to ſupply till a Lapſe or Preſentation, and it is not for Life. In ſhort it was ſuch an one as the Pope uſed to make ex plenitudine poteſtatis ſuæ. And therefore when the King hath done that which the Pope did ex plenitudine poteſtatis, it muſt be reckoned an Execution of his Prerogative. It cannot be in purſuance of the Canon which limits it to ſix Months, and no more; if he do it out of his Royal Prerogative and Fulneſs of Power, then this muſt be an anſwering of his Prerogative as to this Turn.

This Diſpenſation is the 22d of December, and it is to hold till the 1ſt of July, and ſo it might have been as well for 16 Months, or 16 Years: And then I take it, when the King had made ſuch a Commendam, it had been an Execution of his Prerogative without all Diſpute, and he has done all that he can do to preſent in his Turn; for if it ſhould fall out that the King ſhould give a Diſpenſation for longer than ſix Months, and afterwards have the Preſentation for Life too, that would be a ſtrange Prerogative; it might firſt go for 20 or 30 Years, and afterwards he preſent for Life at laſt; which would run into the ſame Miſchief as the other Point of toties quoties, and that would be, I think, very hard to maintain.

My Lord, I confeſs there have been variety of Opinions in the Books about the Conſtruction of ſuch Diſpenſations that have been made for longer than 6 Months. In 2 Cro. 691. Woolley's Caſe, they ſay, If a Commendam be for a time limited, yet the Commendatory ſhall be Parſon for Life, and retain it ſo; for the King can no more limit the time, than another Perſon can confirm another Man's Eſtate for a time only, or an Executors

ecutor's Assent, to a Legacy for a time, or a Tenant At will for a time.

But, My Lord, others are of another Opinion, that the Party shall have the Living but for so long time only as the Dispensation limits, as my Lord Hobart 156. who says a Commendam Retinere may be for Years, and for a lesser time than for Life; and this Opinion seems much more reasonable than the other, that he should hold for Life, contrary to the import of the very Commendam, and truly my Reasons for it are these:

First, If the King had not given this Commendam, the Church had been absolutely void upon the Consecration of the Incumbent; nothing hinders this avoidance but this Dispensation, and that very Dispensation doth not say, that it shall be held any longer than the first of July.

Secondly, That which is alledged, would be as good a Reason for holding the Benefice after a Commendam for Six Months; but that was never pretended to be insisted upon as good, to give a Title for Life.

And this is not like the Cases that were put of Confirmation, assent to a Legacy or Attornment. For there is a prior Grant of another Man, which is good, but not so firm, till the person the Law puts that upon, does assent to it; and when once he hath assented, it is good for the whole Estate Granted, and cannot be Divided; but now here is a Parson in, that should be out, if it were not for the Dispensation, which is the only Title he hath, and therefore may be limited; and if it should be otherwise great mischief would follow.

But, My Lord, this I say, if it be only for a limited time, I do agree that he is Parson for that time, to all intents and purposes; but it being beyond Six Months, it is by virtue of the King's Prerogative, and if so, that will Answer his Turn, and if it did answer the King's Turn, then the Benefice became void again, the first of July, after the King's Turn served; and we have well presented, our Clerk is in possession of the Living, and the King has no Title. And so much for that Case of Saint Martin's.

As to the other Case, My Lord, of St. James's, I shall only trouble your Lordship with a very few Words.

The Parsonage of St. James's is a new Created Living, by Act of Parliament, that bounds and buts the Parish, and Enacts who shall present after the Avoidance by Death, (or otherwise, of Dr. Tennison) to wit, the Bishop of London for the first Turn, and the Lord Jermyn for the next; and then the Bi-

ſhop of London twice, and the Lord Jermyn once, and ſo for Ever.

Now as to this, with Submiſſion, My Lord, I ſay, that by this making of Dr. Tenniſon Biſhop, the Living is void of him, and the Biſhop of London ought to have the next Turn, and ſhall not loſe it by the King's Prerogative, if there be ſuch an one, for this Act of Parliament having particularly and expreſly limited, that the Biſhop ſhall have the firſt Turn after the voidance, without ſaving the King's Prerogative, hath excluded that Prerogative of the King's for this Turn, for it creates a particular way and method of the Preſentation, & Deſignatio unius, eſt excluſio alterius.

And, My Lord, though this Act of Parliament does not name the King, yet I conceive it is the ſtronger for that, there being more need to have ſaved this prerogative, becauſe new Acts of Parliament made for the benefit of the Church, do bind the King's prerogative unleſs it be ſaved; as is held in the Caſe of the King's Eccleſiaſtical Laws, 5 Co. 24. and Magdal. College Caſe, 11 Co. 67.

And another thing is this; This is a new affirmative Law; and tho' they do not always implie a Negative for the Abrogation of Old Laws, yet they do not in ſome Caſes; and theſe are two eſpecially:

Firſt, If the two Laws be inconſiſtent, as to perſons and things, which I think is our Caſe; for the Statute ſays the Biſhop of London ſhall have the next Turn after the Avoidance, then the King cannot have it by his prerogative; and it is as much as if the Statute had ſaid, he ſhould not, becauſe they both cannot do it.

A Second Caſe is, where the new Law is for Creating ſomething that was not before, there an Affirmative Law implies a Negative, as in Hobart 298. Sleake and Drake's Caſe, and ſo the Statute that appoints Writs of Error upon Judgments in the Exchequer to be before the Chancellor, &c. no other can intermeddle with them, becauſe it is a new Law that creates a new Judicature.

And, My Lord, I reſt upon this Matter, in this Caſe; Here is a new Church made, that was not a Pariſh before, but created by this very Act: The preſentation is directed in particular and expreſs affirmative Words; there is no reſervation of the King's prerogative, therefore that is bound, if he had any, though we do not agree he has any, and ſo we pray your Judgment for the Defendants.

L. C. Juſtice.

I ſuppoſe you intend to ſpeak to it again.

Mr. Serjeant *Levins*.

Yes, My Lord, If you pleaſe, ſometime next Term.

L. C. Juſtice.

Why, Brother Levins, truly as to the firſt point, I thought it had been too much practiſed now to be Diſputed. It was a Queſtion heretofore, we know, as appears by that Caſe you mentioned in Dyer, and it was a doubt made in Woodley's Caſe, in Cro. But, I thought, ſince Wright's Caſe, where it was ſo ſolemnly reſolved that the King had ſuch a prerogative, it was not to be made a Queſtion now. And then, that point was taken for granted, and admitted on all Hands in Eed's Caſe, in my Lord Vaughan, and ſo it has been practiſed ever ſince, as appears by this very Caſe before us.

Mr. J. Dolben.

But it has been always grumbled at, my Lord.

L. C. Juſtice.

But it could never be got over.

Mr. *J. Dolben*.

The Caſe never came in Queſtion; but ſome Judge or other was againſt it.

L. C. Juſtice.

The truth of it is, it did import you very much, that were Counſel for the Defendants (as to the firſt Caſe, that of St. Martin's) to make it a diſputable point. If you could take but the point for granted once, that the King had ſuch a Prerogative, then the other thing about the reiterating of the Preſentation toties Quoties, I doubt would be a hard point againſt you.

Mr. *J. Dolben.*

My Lord, A great deal has been ſaid on both ſides; Pray let it be Argued on all the points when it comes to be ſpoken to again.

L. C. Juſtice.

Yes, it will be ſpoke to again, I ſuppoſe, ſometime the next Term, and we will give our Opinions with as great deliberation as we can. It is plain in Practiſe, it hath been for many Years after that Judgment, particularly we ſee within theſe 20 Years paſt, in this very Church, it has been experienced Thrice, and ſo it has at St. Andrews Holburn, in ſeveral inſtances, in our remembrances; and that Living is now enjoyed under ſuch a Title.

Mr. J. Dolben.

And the frequency of it, in theſe great Livings is to me a very great Argument againſt the reaſonableneſs of it; for in St. Andrews the true Patron did not preſent above once in 100 Years, and that was Dr. Stilling-Fleet.

Mr. Attorney General,

Then the King has been in poſſeſſion of this Prerogative 100 Years.

L. C. J.

L. C. Juſtice,

Brother, I ſay not any thing as to the Conſequence, but it has been practiſed and adjudged, and that is a great Argument of the Law in this Caſe: I give you no Opinion now, nor will I enter upon an enquiry into the Reaſons upon which it is Grounded. But it ſeems conſiderable that it hath the countenance of uſage and judicial Allowance. And as to the other thing, if the King has ſuch a prerogative, the ſame reaſon and occaſion happening again, will give him a renewal of his prerogative: And therefore, I ſay, it was very warily, and perhaps neceſſarily done of you, who are for the Defendants, to make it the main point in Diſpute, for it concerns you very much to have it ſo.

Mr. J. Dolben.

I pray, My Lord, Let us deliver no Opinion till it be argued again.

L. C. Juſtice.

I do not give my Opinion Brother.

Mr. J. Dolben.

No, My Lord, It is a Caſe of great Conſequence; and that point I deſire may be argued as well as any of the reſt.

L. C. Juſtice.

But, Brother, If I be ready to give my Opinion, I hope you will not reſtrain me.

Mr. *J. Dolben.*

If it be to be argued again, I deſire the whole Caſe may be argued intire.

L. Chief

L. C. Juſtice.

Well Brother, I tell you I do not give any Opinion, but only we are breaking the Caſe that we may ſhew what is a Doubt with any of us. And as to that Point of the Diſpenſation and Confirmation, being an Aſer of the King's Turn, It is agreed, I perceive, that thereby the Incumbent is in upon his former Title, and then if it comes to be void, how comes it to be void? Is not the Promotion the Avoidance? Certainly it is. For the Diſpenſation only prevented it for ſuch a time as the Diſpenſation is in force.

Mr. J. Eyres.

And as for the Prerogative, the Queſtion is, Whether this be ſuch a Prerogative as the Law allows, and whether the Diſpenſation be ſuch as is incompatible with the Prerogative. The Prerogative has received Judgment, though as my Brother Dolben ſays, It has been always oppoſed too. And this Diſpenſation is not ſure a ſerving the King's Turn, by reaſon that the King is not to have any Benefit by it; it is only to prevent the Avoidance which makes the King's Title, and therefore ſuſpends his Title, but does not fulfill it.

Mr. J. Dolben.

The Patrons of the great Livings in England, have a very hard Caſe of it if this be Law, and the Church will ſuffer by it too: For there is no one that has a great Living, but will preſent a Block head that is not likely to be made a Biſhop, to preſerve his Preſentation.

L. Ch. Juſtice.

But ſurely as to the other Caſe of St. James upon the Act of Parliament, it hath a great deal of weight in it, for this being a new Parſonage created by Act of Parliament, The Execution of the Limitation of the Advowſon of the Act ought to be purſuant to the Act. If the Limitation had been once executed, and Advantage

vantage taken thereof accordingly, then upon the happning of ſuch a Caſe for the Prerogative, it might have been ſomething. But now the Act of Parliament having expreſly appointed, That after Avoidance as to Dr. *Tenniſon*, the Biſhop of *London*, or his Succeſſors, ſhould preſent; Whether that would be complied with if the King ſhould now preſent upon this Avoidance, is a Point worth Conſideration.

Mr. Cooper.

My Lord, If it be otherwiſe, that will be to conſtrue this Act of Parliament to make this Pariſh a ſingle Inſtance different as to the Title of the Advowſon from all the Pariſhes in England: Certainly, my Lord, it was only meant to declare the Right of Preſentation in whom it ſhould reſide, but not to prevent any legal Title, that according to the Rules of Law ſhould intervene.

Mr. J. Dolben.

As to the Uſage, I confeſs there are ſome Precedents, but they do not make the Law; and as for Eed's Caſe, I know what a noiſe it made in the World, and Sir Jeffry Palmer who was then Attorney General was of Opinion that there was no ſuch Prerogative. And the Judgment of that Caſe went upon another Point, becauſe it voided by the death of Paul; and ſo I do not take that to be ſo ſtrong an Authority.

Mr. J. Eyres.

But then there is the Book in Rolls 2d Abridg. 344.

Mr. J. Dolben.

That was but the Opinion of Rolls.

L. Ch.

L. Ch. Juſtice.

I remember that at the time of that Caſe of Eed's, it was taken notice of, that a Clergy-man was the firſt Man that ever queſtioned the King's Prerogative, but we will not trouble our ſelves any further with this Matter: Now let it be argued again.

Mr. Attorny General.

When is it your Lordſhip's Pleaſure it ſhould be ſpoke to again?

L. Ch. Juſtice.

It cannot be this Term; take your own time next Term, ſome time in the beginning of the next Term.

Mr. Finch.

My Lord, I am of Counſel in this Caſe for Dr. Birch, and we hope, notwithſtanding what Mr. Attorny has now offered; we ſhall have your Lordſhip's Judgment for us. I need not open the Record at large, becauſe Mr. Attorny has done it already. The Queſtions that have been made in this Caſe have been,

Firſt, Whether the King have any Prerogative at all, ſuch as is claimed in this Caſe?

Secondly, Whether if the King have ſuch a Prerogative, that be not ſerved by the Commendam in this Caſe. And,

Thirdly, Which is the Point now; Whether this Act of Parliament has made an Alteration in this Caſe, to differ it from the other of St. Martins, Suppoſing the King had ſuch a Prerogative in an ordinary Vacancy.

The two firſt Points have been adjudged already in that other Cauſe, and ſo I ſhall not take upon me to argue them now, but only conſider this Caſe as it ſtands upon this Act of Parliament: And there,

My Lord, The Queſtion will not be, whether this Act of Parliament has not taken away the King's Prerogative; but whether or no in this Caſe, as it ſtands before your Lordſhip, the King has ſuch a Prerogative as will affect this Caſe: Though I will

will not at preſent meddle with the Point that has been ſettled, yet I muſt beg leave a little to obſerve the Authorities that have been urged for it, and the Books where it is adjudged, and the Reaſons of thoſe Authorities: And,

Firſt, I think, my Lord, I may venture to ſay thus much to that point, That before the time of Queen Elizabeth, there is no Reſolution of any Caſe to be met with in any of our Books, that proves this Point to have been ſo adjudged. For the Book of 11 Hen. 4. with Submiſſion, my Lord, I think if it be conſidered, will rather be an Authority againſt it; I am ſure it is far enough from being an Authority for ſuch a Prerogative in the Crown. And I would only mention this to your Lordſhip, becauſe I find formerly all the Preſentations made by the King to any Church where another perſon is Patron that we meet with in the Books, were either where the Biſhop's Temporalties were in the King's Hands, or by Reaſon of the Wardſhip of the Patron.

My Lord, I mention this, becauſe if it had been ſuch an ancient Prerogative as is pretended, ſome Reſolution about it would appear in the Books, and the Reaſon of ſuch Reſolution been declared, that ſo it might ſerve to govern other Caſes by.

My Lord, In the Caſe of Wright in Moore 99, it is adjudged indeed, That the King hath ſuch a Prerogative, but upon what Reaſon was it ſo judged? The Book tells you, it was upon Precedents ſhewn; But what were theſe Precedents? The Book does not ſay they were Precedents of Reſolutions in point, but of practice and uſage by the King. In the Caſe of Wentworth and Wright, as it is reported in Cro. it is ſaid it was adjudged upon Precedents ſhewn, and there is ſome Attempt made to give a Reaſon for it, that is, the Law gives the King this Prerogative, becauſe of the Advancement of the Incumbent to a higher Dignity; I ſuppoſe the meaning of that is, it is in Recompence of ſo great an Honour done to the Incumbent of the Patron, by making him a Biſhop. Then another Reaſon is, the Loſs that the King has by parting with the Temporalties of the Biſhop, which during the vacancy, he kept in his own Hands. But that, my Lord, is a very odd Reaſon, and with Submiſſion, ſeems to have no very good Sound, that the King's reſtoring the Temporalties, which is the Patrimony of the Church, ſhould have a Recompence required for that act of Juſtice, as a Loſs, much leſs would it be reaſonable that that Recompence ſhould be carved out of the Inheritance of another perſon. And then the laſt Reaſon that is given, is, Becauſe the King, by promoting the the Incumbent, is the Cauſe of the Avoidance.

Truly, my Lord, I think, with Submiſſion, it had much better have reſted upon the firſt Reaſon, becauſe the King beſtowed ſuch Honour upon the Patron's Incumbent, than to have gon any further with the other Reaſons, or rather it would have done well to have ſtopped with this Anſwer, as I remember one Book ſays, It is one of the Prerogatives of the Crown, of which no Reaſon can be given, but that ſo it hath been done: And if that be the Foundation of the Judgment, then my Lord, as to this Point the Caſe is ruled upon the ancient Uſage of the Crown. Uſage then muſt be the Meaſure of the King's Prerogative in ſuch a Caſe, and then I may take leave to argue that where there is neither Reaſon of Law, Practice, or Uſage, nor any Judicial Reſolution to warrant it, there can be no ſuch Prerogative in the Crown; where it is founded upon Uſage and Practice, that Uſage and Practice muſt limit it, and you cannot go beyond that.

Pray then, my Lord, Give me leave to conſider this Caſe as it ſtands before your Lordſhip. In the Caſe of a Donative as has been obſerved in the former Arguments, (for indeed I think there is little that can be obſerved in this Caſe that has not been mentioned before) there is no ſuch Prerogative, and yet there the ſame things that are given as Reaſons, are all found as in the other Caſe, it is the King that preſers the Incumbent, and loſeth the Temporalties, and is the Means of the avoidance. And therefore ſince though there be the like Reaſon, yet it is agreed there is not the like Prerogative, it muſt reſt upon this, that ſo it is, becauſe there is not the like Uſage and Practice; for it ſeems the Practice is only where the Patron's Claim came in by Preſentation, and not where he was in by Donation.

Now, my Lord, This Caſe before you, I muſt take leave to ſay, is a Caſe that comes neither within the Uſage, nor within any of the imagined Reaſons upon which this pretended Prerogative is founded.

Firſt, my Lord, Dr. Tenniſon the now Biſhop of Lincoln, came into this Living by Donation of the Act of Parliament, and not by Preſentation, or Collation from the Biſhop of London as Patron; he was in it as of a Donative, and therefore the Act of of Parliament thought it abſolutely neceſſary to inſert a Clauſe to ſubject this Church to the Eccleſiaſtical Juriſdiction of the Biſhop of the Dioceſs; otherwiſe upon the bare erecting of this into a new Pariſh, it might have been a Donative exempt from the Eccleſiaſtical Juriſdiction. If then this be a Donative, the Patronage ariſes to the Biſhop, not till it becomes preſentative, which muſt be after the avoidance of this Donation by the Act of Parliament, for ſo the very Words of the Act are, That the Advowſon

vowſon and Patronage after the next Avoidance, ſhall belong to the Biſhop and my Lord *Jermyn*.

By Lord, I cannot agree with Mr. Attorny in his Imagination, that the Biſhop of London was ſtill Patron of this Living, becauſe he was ſo of St. Martins. I think that point would be very hard for Mr. Attorny to maintain, this being wholly new created as a diſtinct Pariſh by this Act of Parliament, and a diſtinct Benefice from that of St. Martins, and the one could have no Influence upon the other. For I believe he will hardly be able to maintain, that if the Biſhop preſented any one after Dr. Tenniſon had taken a ſecond incompetent Living, that he could maintain a Spoliation in that Caſe; for he does not come in under the ſame Patron, as to this Living, but only by Act of Parliament.

And then, my Lord, Beſides as the Patronage and Advowſon is in the Biſhop, and my Lord Jermyn, after the next avoidance, and not before, by the very words of the Act of Parliament: So I would obſerve further, that there is another particular Clauſe in the Act, That the ſucceeding Rector, after the Death or Avoidance of Dr. *Tenniſon*, ſhall be preſented by the Biſhop of *London*, and the next to him by the Lord *Jermyn*, which ſhews that without theſe Clauſes this was ſuch a Church as wherein the King's Prerogative could never obtain, becauſe it was meerly a Donative; and without theſe ſpecial Proviſions it would neither have been preſentable, nor ſubject to the Eccleſiaſtical Juriſdiction. And then it is more like the Caſe of a Donative, than of an Advowſon, in which the King has a Prerogative according to thoſe Authorities.

Now, my Lord, I would ſuppoſe, that an Act of Parliament ſhould be made, That after the next Avoidance of a Donative, the Patron ſhall preſent one to ſucceed: In ſuch a Caſe, if the King make the Incumbent of the Donative a Biſhop, would the Prerogative work upon that avoidance, ſo as to let in the King's Preſentee in the firſt Inſtance? Surely no, my Lord, for till the Act was made it was a Donative, and not ſubject to the Prerogative; and after the Act made, it is no ſuch Caſe as intituleth the King to ſuch a Prerogative by Practice and Uſage.

Then, my Lord, Pray let us ſee what our Caſe is here; the firſt Inſtance of a Preſentation is after this Avoidance, and to ſay, That when the Act creates the Advowſon and Patronage, it is ſubject to all the Rules of Law that affect other Advowſons, comes not up to this Queſtion. For till a Preſentation has been made to this Living, it is but a Donative, and that has no ſuch matter as this Prerogative ſhould work upon; for with Sub-

miſſion, it becomes not an Advowſon till after the avoidance; and to object that this is to create a ſtrange ſort of Living different from all others, which certainly the Act of Parliament never intended to do, is not applicable here neither; for the Queſtion is of a Church that never was preſented to before the avoidance hapned; what it will be after it is become preſentable, and has been preſented to, is time enough to conſider when that comes to be the Caſe: But ours is a Queſtion concerning the firſt Preſentation to a new erected Church; and we hope the Act of Parliament that makes it preſentable, muſt be the Guide of that Matter; and where that Act gives the firſt Preſentation, certainly the perſon to whom the Preſentation is given by the Act, muſt enjoy it according to the Act. Now the firſt Preſentation in this Caſe is given by the expreſs Words of the Act to the Biſhop of London.

But, ſays Mr. Attorny, This may be taken as the Gift of the next avoidance, and then the King's Prerogative would operate upon it, as it would in other Caſes againſt the Grantee of the next avoidance. For the other turns, there is another proviſion made, That after my Lord Jermyn has had one Turn, the Biſhop is to have two for one, and he would make the Act of Parliament's Appointment of Dr. Tenniſon to be the firſt Incumbent to be in the nature of one Turn to the Biſhop. But ſure that is a very ſtrange Imagination, that becauſe the Act carved this Living out of another, whereof the Biſhop was Patron, and giving the preſent Incumbent the new erected Living, that this ſhould be taken upon as the Biſhop's Turn, when by the very Act the Biſhop had no Turn till the avoidance.

My Lord, I grant the Caſe, that the Grantee of the next avoidance would loſe his Turn by this Prerogative, and that is, becauſe the Grantor could grant it no otherwiſe than he himſelf had it, that is, ſubject to the King's Prerogative. But I do not find that ever it was adjudged, That the King, if he be Patron, and makes a Grant of the next avoidance, and then makes the Incumbent a Biſhop, ſhall defeat his own Grant by this Prerogative. It never has been adjudged ſo far yet, and this Caſe I take to be much ſtronger, it being the King's Grant in Parliament. I believe Mr. Attorny would have a very hard point in that Caſe to maintain the King's Prerogative againſt his own Grant.

My Lord, To let in the Prerogative in this Caſe to defeat the Biſhop's Preſentation, is to overthrow the expreſs Words, and meaning of this Act of Parliament, unleſs they will ſay, that this avoidance, by the promotion of Dr. Tenniſon, is ſuch an avoidance as is not meant by the Act that ſays, after the next a-

voidance

voidance the Biſhop ſhall preſent, that is, ſay they, the Act means other avoidances, but not this by Ceſſion. I ſee not truly how ſuch a Conſtruction can be made, for it is ſuch an avoidance as makes the Living void, ſo as to let in another to be preſented, and would let in the next Preſentation of the Patron, were it not for this pretended Prerogative: Why then muſt it not mean ſuch an avoidance as well as any other, ſince the Act does not particularly mention what ſort of avoidance it is? ſure it muſt be ſuch an avoidance that the Biſhop muſt preſent in, or loſe his Turn which the Act expreſly giveth him.

So that, my Lord, I take it, with Submiſſion, this avoidance being the meaning of the Act of Parliament, then this Law that does create this new Advowſon, directs the firſt Preſentation to be by the Biſhop, which expreſly excludes all others. When this avoidance happens, this firſt Preſentation is to take place, and then, and not till then, it is preſentative, and conſequently the Prerogative cannot operate upon it. What the Conſequence may be hereafter is not at all to the preſent Queſtion. Perhaps all may be let in that other preſentative Churches are ſubject to, when once it has been preſented to: But for the preſent Caſe, for the Reaſons that I have given, I muſt pray your Lordſhip's Judgment for the Defendant; for all thoſe Arguments that this is to erect a new ſort of Church different from, and not ſubject to the Rules of Law in other Churches, are not at all in the preſent Queſtion: For we are ſingly upon this queſtion, Who ſhall preſent the firſt Turn to a new Church, erected by a new Act of Parliament, which limits the firſt Preſentation to the Biſhop of London.

L. Ch. Juſtice.

I ſuppoſe you intend to ſpeak to it no more, do you?

Mr. Attorny General.

No, my Lord, I think not.

L. Ch. Juſtice.

It has hung long enough, it is time it were made an end of.

Mr. Attorny General.

My Lord, We ſubmit it to you.

L. Ch.

L. Ch. Juſtice.

Well, we will take a little time to conſider of it.

Mr. Attorny General.

Some time this Term if your Lordſhip pleaſe.

Then the Judges conſulted together.

L. Ch. Juſtice.

We will give our Opinions to morrow ſeven night.

Sir *Henry Gold*, their Majeſties Serjeant at Law, Argued for the King and Queen.

Mr. Serjeant Gold.

May it pleaſe your Lordſhip to ſpare me a word on the behalf of Their Majeſties, the King and Queen, who are Plaintiff's in this Quare Impedit.

My Lord, Sir Bartholomew Shower has put the Caſe at large upon this Record, and has put the points upon the Biſhop's Demurrer, to our Declaration, and what appears in the Declaration it ſelf, for there the Act of Parliament is ſet forth, and that makes the Caſe now in Judgment before you.

It doth appear in the Declaration, that this St. James's is a new Pariſh, erected by Act of Parliament, and taken out of the Pariſh of St. Martin's, whereof the Biſhop was Patron, and Dr. Tenniſon Incumbent. The Act of Parliament Enacts firſt the Creation of the Pariſh, and makes it a Rectory, and then Enacts the Patronage and Advowſon, and preſentation to the Rectory, which is, that it ſhall appertain and belong, and by that Act is veſted in the Biſhop of London and his Succeſſors, and the Lord Jermyn and his Heirs, in this manner, viz. That Doctor *Tenniſon* ſhall be the firſt Rector, and after his Death or Avoidance, the firſt Rector ſhall be preſented by the Biſhop of *London* and his Succeſſors; and the next after that by the Lord *Jermyn* or his Heirs; and then twice by the Biſhop and his Succeſſors, and then once by the Lord *Jermyn*, and ſo by Turns, twice and once for Ever. Dr. Tenniſon is conſecrated Biſhop of Lincoln,

Lincoln, upon which their Majeſties preſent their Clerk as by prerogative they ought, but the Biſhop refuſeth to admit him, and upon bringing this Quare Impedit, Demurreth to the Declaration.

With Submiſſion, My Lord, the King's Prerogative ſhall prevail, as we hope to carry this Preſentation. For if you pleaſe to conſider the Act, that makes it plain in ſeveral parts of it.

Firſt, Conſider that part of the Law that creates it a Pariſh, and ſettles the Advowſon, Rectory and Patronage in the Biſhop and my Lord Jermyn, before you come to the firſt Rector; for it makes a new Pariſh of part of the old one, and makes it a ſucceſſive Rectory, and enacts that the Rectorſhip be preſentative, and ſo annexeth the Patronage and Advowſon to it, and veſts it in point of Inheritance, in the Biſhop and my Lord Jermyn. Now, ſuppoſe it had been veſted there, then plainly it could not have altered the operation of this Prerogative in Law upon it; for here had been an Advowſon veſted in Inheritance, and then it would have been ſubject to the Prerogative; for I do take upon me to affirm, that whether it be an old preſentative Church, or a new preſentative Church, where-ever it is preſentative, the King ſhall have his Prerogative. There is no more difference between them, than between an old Biſhoprick, and a new one created by Act of Parliament, which I ſhall ſhew anon, is none at all.

My Lord, I ſee the Objection that Sir Bartholomew Shower makes; he would not have it an Avowſon until after the Death or Avoidance of the Church, that is, the very time ſays he, that it becomes preſentative firſt.

Truly, My Lord, I take it to be quite otherwiſe, and ſo ſhould he too, or elſe it would not ſerve his Turn, as I conceive, for I take it to be an Advowſon preſently veſted in Inheritance, as much as a Deviſe to one, when he is one and twenty, that is the time of Poſſeſſion, but the Eſtate veſts preſently. 'Tis in the words of my Book Patronatus.

The Advowſon ſhall work preſently, the Preſentation when the Avoidance happens.

But, My Lord, taking it as he would have it, yet it will not avail him, as I conceive, for the Advowſon. Suppoſe it ſhould veſt juſt as the Avoidance happens, then there is an inſtant of time when it veſts, and even in an inſtant our Books are for the ſake of the King's Prerogative, there ſhall be a priority and a poſteriority to ſave the King's Prerogative according to Habs's Caſe and Sadler's Caſe, Co. 4. 55

But,

But, My Lord, there is no difference, I say, between a new Rectory created by Act of Parliament, and an old Rectory, as to this matter, more than there is between a new Bishoprick and an old one. Now in the Case of the new Bishopricks, which were made 31 Hen. 8. which gave the King power to found Bishopricks when they were so; all incidents did follow upon the Foundation, which did belong to the old Bishopricks at Common-Law.

And so it was agreed in Ridney and Pownel's Case, about the Register of the Bishop of Worcester, he had the same power by the new Creation that the old Bishops had, and if he had granted the Office immediate between the Statutes of 2 and of Eliz. he might have granted it as he pleased; and the like was held in the Case of Bridstock and Stamp, in the Common Pleas, Mich. 5 of this King and Queen, after the Statute of 31 Hen. 8. the King by brevis Patronat' 33 of his Reign, did found the Bishoprick of Worcester, and did, that the Bishop for the time being new Founded, should grant the Office of his Register, as other Bishops used to grant theirs, the Bishop makes a grant,

It happens there was no such grant by any other Bishop, the Question was, whether it being found that the Bishop of Worcester did Grant, so this should be adjudged a good Grant? for that it differed from the others, and it was held ———

But in that Case it was held, when the Bishoprick was founded, there doth all the incidents follow with it, presently upon it; and when this was done, it was done by Act of Parliament; yet the Election must be by Conge d'eslire, and all the Prerogatives belonging to the Bishoprick, were to be accordingly, as in all other Cases: So here, when this Parish is Created by Act of Parliament, it is subject to the Rules of Law, as all other Parishes are ———

11 Hen. 7. 19. B. there is a Case of an Office, found, that A was seized of an Advowson in Fee, held of the King, as of his Crown, and Dyed, his Heir within Age, and that a stranger was seized of Ten Acres of Land, held of another by Knight's Service, and in Fee of A. and others to the use of A. and his Heirs. A. Dies, and the other survived; upon the Death of A. the King entred. There Ledaswick argued, that the entry was not good; but he makes a difference where a thing is by the Common Law, in which the King shall have Prerogative, and that thing is enlarged by Statute, the King shall have Prerogative in that enlargement, and he puts this Case for instance. Suppose Forgery be made Felony by Act of Parliament, there the King

King, as in another Felony, shall have the Year, Day, and waste.

If the Act had ceased here, and gon no farther, then it had vested the Patronage and Advowson in the Bishop and his Successors, and the Lord Jermyn and his Heirs, and plainly they had been Tenants in Common, and the Bishop should always have Collated for the same Reason that is given in the Case of Copartners, 1 Inst. 163. Litt. Sect. 241. Now to prevent that inconveniency, the Law makes a Partition between them, that they are to present by Turns, which, is the proper way of Partitions of Advowsons, and so does this Act in this Case afterwards, viz. two Turns to the Bishop, and one to the Lord Jermyn and his Heirs.

That, now, My Lord, is the true and natural Construction of the thing, as to the fixing the first Presentation in the Bishop; for I take it plainly, it is a dividing the Inheritance, and making that useful to my Lord Jermyn, which otherwise could not have been but useless to him, if they had continued Tenants in Common. It was not to erect a Rectory, different from, or contrary to all other Rectories, or to annex this Advowson and Presentation so to the Bishop and the Lord Jermyn, as to exclude the King's Prerogative, which is as ancient as the Law.

That is the consequence, if their Argument be true, that because these things are not particularly saved, they shall be excluded. But we say, because they are not particularly named, therefore they shall work as all incidental things to other Advowsons will work, as Lapses and the like; but there would be no Lapses to the Arch Bishop or to the King, if what they say held good, because they are not named neither; for if you allow the one, you must allow the other upon the same reason: So it would be if the Act of Parliament were so Strait-Laced, that because there is no particular saving, all should be excluded.

My Lord, I will so far come up to Sir Bartholomew Shower, as to agree, that had the Parliament made it a Donative it had been quite another thing, as it might have been, though a Parish Church, according to 1 Inst. 344. A. Yet if there once be a Clerk Presented, and Admitted, and Instituted, this is now become a Presentative Church; and the first time that it becomes a Presentative, it becomes subject to all incidents of other Presentative Churches; for, as that Book says, then shall incur a Lapse to the Ordinary, as of other Benefices; and if it be so subject, as soon as ever it becomes Presentative, the King shall have his Prerogative operate upon it too, as well as the Ordinary. The King could not have it indeed, till upon the Presentation, because it was a Donative, which it is not here; for though he says that the King must stay for his Prerogative,

till an actual Presentation, yet, I say, that as soon as ever it is Presentative, it is subject to the King's Prerogative.

My Lord, there is one thing more that he has Objected. The Act of Parliament says expressly, that the Bishop shall present upon the Death or next Avoidance by Dr. Tennison, and so this Prerogative, and the Act of Parliament cannot consist, and therefore this shall work out the Prerogative; that I deny: I do agree if the parts of an Act of Parliament cannot consist, the latter must be a Repeal by the former. But this Avoidance spoken of here, is an ordinary sort of Avoidance by Death, Resignation, or taking an incompatible Benefice; a Patronage Avoidance, and not Prerogative Avoidance.

And I will put you one Case, which you may find in Owen 116. and Powel's Case, It is there said by Eggerton, Sollicitor, that in 4 Eliz. it was adjudged in the Common-Pleas, that if the Queen made a Lease under the Exchequer Seal, to begin immediately after the Forfeiture, Surrender, or expiration of a former Term, and the Lessee is Outlawed, the Second Lease shall not Commence, it is a Prerogative Forfeiture, and not that mentioned in the Lease.

As to the Objection that has been put of the not saving the King's Prerogative, and the express words of the Act, I would say this further to it, that the Words of the Act, that the first Rector shall be presented after Death or Avoidance by the Bishop that is, his Turn shall be first only by way of Preference to the Lord Jermyn and his Heirs, and it is no otherwise possibly to be taken; for the clause of first Rector, is not a clause of Creation, but rather of Explanation, for it is handed in by a viz. So that it comes in consequently upon the Foundation, how the Patronage and Advowson should be distributed after the Death or next Avoidance, and where it shall be lodged to be vested as to Presentation, that is, by Turns first, by Collation by the Bishop, then by presentation by the Lord Jermyn, and it would be hard if in this, the King should lose his prerogative by Construction, when there is express Law for it, and that for these Reasons;

First, His Prerogative is a Favourite of the Law.

Secondly, If you consider it by the Common Rule, the King is not bound by an Act of Parliament, except it can appear by some particular thing in the Act, that he was intended to be bound, as in Plowd. Com. 11. and 243. but all are to be construed in favour of the Crown, and to preserve his Right.

Thirdly, In all Cases general Words shall not exclude the King, or carry it against the Prerogative, so is the Case in 2 Hen. 7. Statute, the King grants to one all Issues, Fines and Amerciaments

aments of all his Tenants, in such a Lordship, the Question was, how far this grant would extend: And it was held it should not extend to Royal Fines and Amerciaments, which are declared to be the Fines of his great Officers, for their Misdemeanours, so by a grant of Mines royal Mines do not pass; and so it is hard the King should be barred, of his Prerogative without an apparent intention to barr him, and there is a particular Rule taken in Magdalen College Case, 11 Co. 74. B. that where the King has any prerogative, Estate, Right, Title or Interest, by general Words of an Act of Parliament, he shall not be barred of them, and so, my Lord, it would be hard to exclude the King in this Case from his Prerogative, by these general Words.

It has been Objected, that this is a new Act of Parliament; and this is made for the benefit of the Church, and therefore the King is bound by it; and he cited several Cases, and among the rest that which I mentioned, Magdalen College Case, but that comes not to our Case. There's no doubt but that the King is bound by the Statute of the 13 th. of Eliz. and all other Laws made for the Church to preserve the Revenues of the Church, and wherein the Church has a manifest Advantage, but there is another reason given there, for they would have made the King to be an Instrument of Fraud, which the Law abhorreth.

But let them put me one Case, if they can, where there is an Act of Parliament, relating to the Church, and the King's Prerogative, relating to the matter of the Act, is such, as by which the Churches have no loss, that it was ever adjudged that the King's Prerogative is shut out, though not saved or named.

Besides, My Lord, this Advowson is part here in the Church, and part in Lay-hands; and by this Prerogative the Church is at no loss, for it is with this Church, as it is with all other Churches Presentative besides.

Then they say that it is an Affirmative Law, and implieth a Negative, the Words being general, and that by such an Affirmative general Law the King is bound, as well as all other Persons. No doubt but it is thus where the King hath an Interest, and an Affirmative Law is made against him; but I would put you two Cases, the one is in the first Inst. 115. A. That an Affirmative Act doth not take away a Custom, as the Statute of Wills does not take away a Custom to Devise. The other, is the Case of Clench and Cudmore, in the Common Pleas, Pasch. 3. of this King and Queen, Rot. 304.

So ſay I, this Caſe, though the Act be an Affirmative Law, yet being general without the ſaving of any Right, in conſequence the King's Prerogative is ſaved.

May, I ſhall go yet a little further to conſider that Matter. He tells you, (and I would agree it) his Client the Biſhop, was Patron of St. Martin's Originally, and therefore there was all the reaſon in the World, the Patronage ſhould be continued in him. So that I take it, it is in the nature of a Salvo Jure to the King's Prerogative, that as the Patronage continued, ſo ſhould all the Incidents to it.

My Lord, for that which he ſays, that Dr. Tenniſon came to be firſt Incumbent by Parliament, I think it may receive this Anſwer, from what was ſaid juſt now: He was Incumbent of the whole before, and the making him to continue Incumbent ſtill, that is a ſaving to him of his right to the Living; and then as the Parliament takes care that there ſhall be a right ſaved to the one and the other, the Biſhop, and the Incumbent, why, in conſequence there ſhould not be the King's Right ſaved as to this incident Prerogative, I can ſee no colour of reaſon in the World, nor that there is any need that he ſhould be particularly named, when it is a royal Prerogative, and ſprings by operation of Law, as charged upon all Preſentative Livings, and therefore it would be vain to ſay, that this Preſentative Church ſhould be ſubject to it.

So that, My Lord, I take it upon theſe conſiderations and reaſons which I have mentioned, that as to the King in this Caſe, his Right is ſaved to him by Conſtruction of Law, as it is given him by operation of Law, to all preſentative Churches, and therefore I humbly conclude for Their Majeſties the King and Queen; and pray your Judgment for them, and a Writ to the Arch-Biſhop to admit their Clerk.

L. C. Juſtice.

It has been well Argued on both ſides truly: I ſuppoſe you intend another Argument.

Sir Bartholomew Shower.

Yes, My Lord, my Clients do deſire another next Term, if you pleaſe.

Mr. Attorney General.

I do not Queſtion but you deſire to delay.

Sir

Sir Bartholomew Shower.

This is the firſt time that this Point has been Argued.

L. C. Juſtice.

We can hear no other Argument this Term: Nor, indeed, do I believe either ſide can be ready.

Mr. Attorney General.

We muſt ſubmit, My Lord, if you pleaſe, to put it off till next Term.

L. C. Juſtice.

The Matter in debate is, Whether the King's Prerogative be not conſiſtent with this Act of Parliament, for that this is not the ſubject Matter of the Act. Now we muſt conſider the deſign of every Act, which was here to make this a new Pariſh to ſettle the Right of Patronage, and then to make diſtribution of the Patronage according to that Right which they thought fit to give to each one. Now when the Act of Parliament has done this, and they were thereby made Patrons to all intents and purpoſes, as if they had been in an ancient Right, whether this Act be not fully ſatisfied by this, whether the King be mentioned in the Act or not, as to his Prerogative, is the thing to be conſidered; becauſe the Pariſh is ſo large, therefore there is another taken out of it, and the Limits of a new Pariſh ſet out, and Regulation made of the Patronage and Advowſon. Now, if there be a new Rectory created, and the Right of Patronage is ſettled generally, I think it would be hard to diſtinguiſh that from a Common Caſe as to the Prerogative; but here is a particular Right and Preſentation given to my Lord of London, he to preſent one time after the firſt avoidance; and then my Lord Jermyn, he is to preſent another time; whether or no this being ſo ſettled, when the Act ſays expreſly he ſhall preſent, this be not a diſtinct Right of preſentation for that time different from the ordinary Courſe? Or whether it be not a preſent Advowſon veſted in Inheritance, as to one part in my Lord of London; as to the other in my Lord Jermyn, is the main Point in the Caſe.

Now, Brother Gold, you ſay this is a Prerogative Avoidance. I take it not to be ſo; it is an avoidance by Law, as much as if he had taken a Living incompatible; for if he had done ſo without a Diſpenſation, would not that have avoided both theſe Livings? Certainly it would; therefore it is not an avoidance by

reaſon

reaſon of the King's Prerogative, but becauſe it is another Preferment in the Church incompatible with that of holding this Living; and then you put the Caſe of Knolls and Powell in Owen; which is likewiſe repoꝛted in Moore twice by the Names of Knolls and Luce; and the laſt is that Caſe cited by Eggerton. The Term foꝛfeited by Outlawry, is a Royal Foꝛfeiture, and not the Foꝛfeiture meant as to the ſecond Leaſe, which was really ſo; But foꝛ what Reaſon? Becauſe in that Caſe the Term foꝛfeited has ſtill a being, and the King claims as Aſſignee in Law; but if the King have the Reverſion where the Term is extinguiſhed by a Foꝛfeiture, the ſecond Leaſe will commence: Theꝛefoꝛe, though the Means of the Preſentation hac vice coming to the Crown be by Prerogative, yet the Avoidance is by Operation of Law. Theſe things are conſiderable, I deliver no manner of Opinion now, but only mention what I take to be the main Point in queſtion.

J. G. Eyre.

Truly, I take it, the Queſtion is no moꝛe; but whether this Act of Parliament (being a new Act) ſhall bind that which it had no Intention at all to meddle with.

L. Ch. Juſtice.

Well, we will hear you to it ſome time in the beginning of the next Term.

Mr. Juſt. G. Eyre.

This Caſe upon the Recoꝛd is but ſhoꝛtly this.

A pꝛivate Act of Parliament is made, 1 Jac. 2. to make a certain Pꝛecinct of the Pariſh of St. Martins in the Fields, and a diſtinct Pariſh Church of St. James, within the Liberty of Weſtminſter, and to be a perpetual Rectoꝛy with Cure of Souls. And the Act doth diꝛect oꝛ oꝛder, That the then Vicar of St. Martins (foꝛ it takes notice that he is ſo) Dꝛ. Tenniſon, ſhould be the firſt Rectoꝛ of this new Pariſh, and then ſettles the Patronage, Advowſon, and Pꝛeſentation, to this new Rectoꝛy after the Deceaſe of that Rectoꝛ (which was Dꝛ. Tenniſon named in the Act) oꝛ the next avoidance thereof, in the Biſhop of London, and his Succeſſoꝛs, and my Lord Jermyn and his Heiꝛs, in ſuch manner as is there expꝛeſſed, to wit, the firſt Rectoꝛ after ſuch deceaſe oꝛ avoidance to be collated by the Biſhop and his Succeſſoꝛs; the

next

next after that to be presented by my Lord Jermyn, or his Heirs, and then the Act gives two Turns to the Bishop, and his Successors, and one Turn to the Lord Jermyn, and his Heirs for ever.

After this Act so made, Dr. Tennison who was made the first Rector by the Act of Parliament, is elected Bishop of Lincoln; but before Consecration, the Arch-Bishop doth dispense with him to hold these two Livings in Commendam from the 22d of December 1691. to the 1st of July following, which Dispensation their Majesties, according to the Act of Hen. 8. confirm, and then the Bishop is consecrated, and holds this Rectory and Vicaridge together with his Bishoprick till the first of July following, and then this Rectory of St. James's became void by Cession. And my Lord Bishop of London, it being within his Diocess, collates it to the Defendant Dr. Birch, and the King and Queen by Prerogative present their Clerk, but the Bishop refuseth to admit him, upon which this Quare Impedit is brought by their Majesties to recover this Presentation to which the Defendant Birch pleads this Special Matter, and Mr. Attorny has demurred to his Plea.

And I am of Opinion with my Brother, That Judgment in this Case ought to be given for the King and Queen, they being by their Prerogative well intituled to this Presentation and Dispensation of the Arch-Bishop, nor the Statute for making this a parochial Church hath not any ways debarred their Majesties of this Prerogative Presentation.

It is agreed by all, that where the Incumbent is made a Bishop, the Advowson by his Consecration becomes void: But whether this were an Avoidance by the Common Law, or by the Ecclesiastical Law of the Kingdom, was the doubt, which as I take it, occasioned that variety of Opinions in our Books between the King and the Patron, which should have the presentation. Those who held the Patron should present, do also hold, that this avoidance by Cession is an avoidance by the Common Law, which occasioned the Error, I think, of denying the King this Prerogative which I am of opinion he hath; and that this avoidance is an avoidance by the Ecclesiastical Law of the Kingdom, and not otherwise an avoidance by the Common Law, than as the Ecclesiastical Law is part of the Law of the Kingdom.

And as the Law of Holy Church hath originally made this avoidance, so it may at that time that it makes it an avoidance, provide that the King himself who makes the promotion that causeth the Cession as Supream Ordinary, shall present upon such avoidance: And the Patron is not thereby prejudiced; for by

his

his presentation of the Incumbent who is afterwards made a Bishop, he had dismist himself of the avoidance till the Death, Deprivation or Resignation of that Incumbent.

And that the Church is discharg'd of the Incumbency by this Promotion and Cession, doth appear by that Book, 11 Hen. 4. Fo. 60. b. And the Case of Commendams, Davis 81. And Eed's and the Bishop of Oxon's Case, Vaugham 22. Wherein there are so many excellent Reasons given to contradict what my Brother says; That it is an avoidance by reason of the Incompatibility of the Bishoprick and the Incumbency, that I should do him a great deal of Wrong to mention all that I find there to that purpose. And the Fact is plainly otherwise: For it is plain, there can be no Incompatibility in the things themselves, because many Bishops do hold Livings for ever in Commendam, as annext to their Bishopricks, and particularly the Bishop of Wincheſter hath two.

No, the avoidance is only by the Constitution of the Church, for the Bishop was originally Incumbent of all the Livings in his Dioces, and the Clerks all employ'd under him as his Vicars and Curates.

Now, that the King hath such a Prerogative of filling a Church so void by Cession upon promoting the Incumbent to be a Bishop, is plain in Rolls 2d Abr. 393. and Wright's Case in Moore 399. where it is resolved, That so the Law is by Multitudes of Precedents, and Authorities there produc'd, and considerately perused.

I confess those Precedents are, that so it had been used and practised, Precedents de facto: But I pray, can there be a better Title to any Right than continual Usage even in the Case of a common Person? Continual Usage in the Case of the King cannot be but by matter of Record: And when Precedents of such an Usage for the King from time to time are produced, can there be a better or a stronger Argument of a Title for the King? And the Case of Eeds, and the Bishop of Oxford, admits it beyond all Dispute, for there they will not so much as let it be argued; and so 3 Cro. 790. and Rolls 2 Abr. 344. All say the King has an undoubted Prerogative to present upon an avoidance by Cession.

Though little appears in our Books of this Prerogative before Queen Elizabeth's time, that I presume hapned because the Pope claimed it in Diſherison and Usurpation upon the Crown, being an avoidance by the Ecclesiastical Law of the Kingdom; yet I take it as a setled Resolution and Maxim of the Law, that constant and continued Usage and Practice for

more

more than 100 is more than a good Warrant to conclude that the Law is so.

And this Argument will not be shaken by saying it is once out of the Prerogative, for which no Reason can be given, for the King's Prerogative is part of the Law of the Kingdom, and the Law is the Judge and Measure of Right and Wrong: And Stamford in his Treatise of the Prerogative, fol. 5, 6. says, That the Statute of Prerogativa Regis doth but confirm and declare that that was the Common Law before.

But let me demand of him who makes his Objection, what Reason there is to be given for Collateral Warranties: Yet that is Law, though a natural Reason cannot be found out to maintain it; and yet I take it to be a good Reason, that in this Case the Presentation upon this avoidance is given to the King as Supream Ordinary by the Ecclesiastical Law: We are, I hope, better Sons of the Church, than to think the Constitution of our Church void of all Reason.

But I do but weaken this Prerogative which hath been so long settled, by saying so much, as if it wanted Arguments to support it; and I had not mentioned it, had not the Gentlemen that argued last for the Defendant given occasion for it; for tho' they pretended they would not undertake to argue it, it having been before settled in the other Case, they seemed to rack their Inventions for Arguments to overthrow it.

The King then having this Prerogative to present upon an avoidance by Cession, I think he is not debarr'd of it by this Dispensation; which I did not observe, that the Gentlemen who argued, did admit, and therefore I shall speak but shortly to it, neither by the Dispensation, nor the Act of Parliament that impowers it, nor the King's Confirmation pursuant to the Act of 25 Hen. 8. For the King, by his Confirmation of the Arch-Bishop's Dispensation, transfers not any Right of his to the Incumbent, but barely continueth his Possession in the Living, which would otherwise have been void by the Consecration; and when the Dispensation determined, it is as if it had never been, and then the avoidance is made, and the King's Prerogative is to take place, the avoidance for that time being only suspended by the Dispensation which had not been of force without the King's Confirmation.

But had the Incumbent dyed or resigned during the Continuance of the Dispensation, he being compleat Incumbent for that time, the Church had voided by Death or Resignation, and their Majesties could not have presented to it; and this appears by Parkhurst's Case, Dyer 228. b. and 233. a. and Rolls 2 Abr. 344.

Then the King having this Prerogative, and being no ways debarred by this Diſpenſation and Confirmation, I think he is not prejudiced neither by this private Act of Parliament; for I think this no ways alters the Caſe, or takes from the King's Prerogative, for it is plain upon the whole face of the Act, that what the Parliament deſigned by it, was to erect a new Pariſh Church, which being to be taken out of another Pariſh at that time full of an Incumbent, might not be prejudiced by this Diviſion, and the Patronage of this new Church for the future ſettled. In order to the filling it after every ordinary Avoidance, It enacts, that Dr. Tenniſon, whom the Act takes notice of, to be the preſent Incumbent of St. Martin's, out of which this of St. James's is Carved, ſhould be the firſt Rector of this new Pariſh, and then veſts the Patronage in the Biſhop and my Lord Jermyn, by Turns, to wit, the firſt Turn of the next Avoidance to the Biſhop, and the ſecond to my Lord, and then two to the Biſhop, and one to my Lord for ever.

So that to make a Rectory Preſentative, and ſettle the Advowſon of it, and not to injure the preſent Incumbent, out of whoſe Pariſh the new one is taken, is all that the Act indeed intended; and it will be a ſtrange conſtruction of the Act that it veſting the Advowſon in the Biſhop and my Lord Jermyn, and giving the next Avoidance to the Biſhop, thoſe words (the next Avoidance) ſhould exclude the King's Prerogative, which the makers of the Act never intended to meddle with.

For where the King claims a thing, with reſpect to his Royal Publick Capacity, there I think it as a certain Rule of Law, That general Words is an Act of Parliament without naming him, will not bind him, ſo is 7 Co. 32. and ſo many Caſes cited in Magd. Coll. Caſe, and Plowd. Com. 240.

And that this being newly made a Rectory Preſentative, by this Act of Parliament, will not exempt it from the King's Prerogative is plain; for where there is a Ceſſion of a Rectory preſentative, the King is to have his Prerogative; and be it old or new that makes no difference. And therefore, it has been reſolved, that the Wardſhip of the Heir of Ceſtuy que Uſe being given by the Statue of Hen. 7. If after that Statute Ceſtuy que uſe himſelf makes a Feoffment to the Heir, and Dyes, the Heir within Age, by force of the Statute of Marlb. made 200 Years before, he ſhall be in Ward. And many other Caſes upon the like reaſon there are in Vernon's Caſe, 4 Co. 4. and Plowd. Com. 127. Bulkley's Caſe.

To make this a Donative till the avoidance of Dr. Tenniſon, I muſt confeſs it is a very great ſtrain of Wit, it being to expound an Act of Parliament quite contrary to the intent of the

Makers,

Makers, which by every Clauſe of the Act ſeems to be, to make it a Pariſh Church of it ſelf, continue the preſent Incumbent, and ſettle the Patronage. And conſtructions of Statues are to be made of the whole Acts, according to the intent of the Makers, and ſo ſometimes are to be Expounded againſt the Letter, to preſerve the intent, 3 Co. 59. b. and Jones 105. But I think no Caſe can be put in Law, where an Act hath been Expounded contrary to the Letter, to overthrow the Intention.

And it is plainly a fallacy to ſay Dr. Tenniſon came in by Donation of the Parliament to this Rectory, and thence to infer, that it is a Donative, and not a Rectory preſentative, till it is made ſo by the Biſhop's preſentation. For be it admitted, that Dr. Tenniſon came in by Donation (though it may as properly, if not more, be called a preſentation by the Parliament who erected the Living, than a Donative, which is without formal Inſtitution and Induction, the Biſhop being a Party, and his conſent, and all Acts of Juriſdiction being included in it) but, ſuppoſe I ſay he ſhould come in by Donation, how comes it to be a Donative in him, and preſentative afterwards?

The Parliament, it is plain, gave Dr. Tenniſon no right that he had not before; but having divided the Pariſh of which he was Incumbent, confirm'd him in the poſſeſſion of what he had before, by making this a new Rectory, and this Act immediately upon the paſſing of it, having made it preſentative, can it ceaſe to be ſo till the Biſhop preſent? Or can the Words of this Act give away the King's Prerogative right, if it happens in the next Turn, which could not be foreſeen upon the making of the Act? That was only to ſettle the ordinary courſe of preſentation, and not to meddle with the King's Prerogative, which was but an accidental thing.

Many Acts of Parliament have received particular Interpretations, to avoid a particular Prejudice, 4 Inſt. 33. 3 Co.

But no Caſe can be ſhewn where the words of an Act of Parliament have been enlarged, to make a Conſtruction to barr or overthrow that which the makers never thought of or intended to meddle with.

And ſhould I admit of (which I deny) that the words of this Act are as forcible as if the King were Patron, and had made a grant of the next avoidance, and ſo he ſhould be bound by them, yet in that Caſe which was boaſted at the Barr to be a ſingular Caſe, and unanſwerable, I think the King would not be prevented of his Prerogative, for by ſuch a grant nothing paſt but the right he had to the next Turn, as ordinary Patron, not any thing of his Prerogative right; for an Eſtate that the King hath in any thing which comes to him by ſuch means as others come to them

by is one Eſtate, and an Eſtate that comes to him by Prerogative is another Eſtate, and they have diſtinct Conſiderations and Operations in Law, Plowd. Com. 333. Rolls Abr. 195. 1 Co. 46.

But I take it, that Caſe though the Law is plain, yet is not the King's Caſe here; but this is rather as if the King were ſeized in Fee, and when the Church is full, he grants away the Patronage, and long after the Grant the Incumbent is made a Biſhop, and ſo the Living void: Would any ſay that this Grant in Fee would include his Prerogative Right? That can never be intended; for at the time of the Grant it could not be foreſeen, and therefore it cannot be included in the Grant ſo, nor will it in the Caſe of a Grant of the next avoidance. I take it, the Books are plain, that they are two diſtinct Eſtates.

Therefore the Act having made this a Rectory Preſentative, which becomes void by Ceſſion, the King's Prerogative operates upon it; and not having ſatisfied the Prerogative Turn by the Commendam, nor barr'd by the Confirmation, or this Act of Parliament, their Majeſties have a good Right to preſent to this Living, and therefore Judgment ought to be given for them againſt the Biſhop and Dr. Birch.

DE

Term. Sanct. Mich.

Anno Regni Regis & Reginæ W. & M. VII.

Die Lune 19 Novemb. Anno Dom. 1694.

IN

BANCO REGIS & REGINÆ.

Rex & Regina *verſus* Epiſcopum London & Dr. Birch.

Mr. Juſt. S. Eyre.

THis Caſe between the King and Queen, and the Biſhop of London, ſtands for the Reſolution of the Court.

The King and Queen, by their Attorny General bring a Quare Impedit againſt the Biſhop of London and Dr. Birch. to permit the King and Queen to preſent a fit Perſon to the Rectory of St. James's, within the Liberty of Weſtminſter. And this comes on now upon the Demurrer of the Attorny General to the Plea of Dr. Birch.

The Attorny General in the Declaration ſets forth, that by an Act of Parliament made 1 Jac. 2. a Precinct of Ground therein expreſſed, and which formerly was part of the Pariſh of Saint Martins in the Fields, ſhould from henceforth for ever after be a diſtinct Pariſh as it is now, to be called the Pariſh of Saint James's, within the Liberty of Weſtminſter, independant upon the Pariſh of St. Martins; That the Church ſituated within that Precinct ſhould be the Pariſh Church; That there ſhould be a Rector

Rector who should have Curam Animar' of the Inhabitants of that Parish, and that there should be a perpetual Succession of Rectors there; and that Dr. Tenniſon, the then present Vicar of the Parish of St. Martins, should be the first Rector of this new Parish, and that Dr. Tenniſon and his Successors Rectors of that new Parish, shall be incorporate, and have a Corporate Capacity and a Succession by the Name of Rector of the Parish of St. James's, within the Liberty of Westminster, and to have Care of Souls. That the Patronage, Advowſon, or presentation of this Parish and Rectory after the Decease of the first Rector, or the next avoidance, should belong to and be vested in the Bishop of London for the time being, and his Successors, and Thomas Lord Jermyn and his Heirs for ever, by such Turns as in the Act is expressed, that is, that after the avoidance of Dr. Tenniſon's Incumbency, the Rector shall be presented or collated by the Bishop of London for the time being, the next by my Lord Jermyn or his Heirs; then the two next Turns by the Bishop and his Successors; the next one Turn by my Lord Jermyn or his Heirs, and so to continue in that manner for ever.

He sets forth further, That by Vertue of this Act of Parliament Dr. Tenniſon was Rector of this new Parish, and Parson Imparsonee of that Church, and was afterwards consecrated Bishop of Lincoln, whereby the Living voided, and that it belongs to the King and Queen by reason of their Royal Prerogative to present a fit Person to that Church so voided, and that the Bishop of London and Dr. Birch hindred them, &c.

To this Dr. Birch comes in and pleads, That he is Parson imparsonee of the Church by Collation of the Bishop of London.

He confesseth the Act of Parliament, and that Dr. Tenniſon was Rector there: And sets forth further, That Dr. Tenniſon was duly created and consecrated Bishop of Lincoln, and that thereby the Church became void; and that thereupon the Bishop of London did collate him Clerk, and he was Parson imparsonee of the Church before the Writ, Et hoc paratus est verificare. Hereupon the Attorny General demurs.

And I am of Opinion in this Case, that the Plea of Dr. Birch is not sufficient, but that the King and Queen ought to present to this Church, and that Judgment ought to be given for the King and Queen accordingly.

This Case has been argued twice at the Bar on each side; and it seems to me, that those who have argued on the part of the Defendants, have made two Points in this Case. The

First is, Whether or no the King's Prerogative of presenting to a Rectory void thus by Cession, and the promotion of the In-

cumbent.

cumbent ſhall operate and take effect upon this new Rectory And the

Second Point that is made is, Whether or no this Rectory is preſentative, or at leaſt was ſo in the time of Dr. Tenniſon, for they would have it be, that at leaſt during this time it was a Donative; and that it was never heard that the King preſented to a Donative upon his promotion of the Incumbent. As to the

Firſt Point about the Prerogative. For I ſhall ſay nothing upon the Point of the Commendam, neither have I opened it, becauſe the Counſel for the Defendant waved it, (it was a Point adjudged in Dr. Lancaſter's Caſe.) Upon arguing this Caſe the firſt time the Counſel for the Defendants owned the Prerogative in general to preſent to a Benefice upon the promotion of the Incumbent to a Biſhoprick, but they would have it that it ſhould not extend to this new Rectory. But upon the ſecond Argument it ſeemed to be ſuggeſted, that this Prerogative of the King's was a new thing in general, and that Wright's Caſe in Moor was grounded upon late Precedents.

Now that Point hath been ſo often adjudged, that I ſhall not take any pains about it: But ſomething I ſhall ſay, and that ſhall be ſhort; That I think that Matter was ſufficiently ſettled in Wright's Caſe, and upon great Conſideration. For the Book ſays, That the Point was adjudged upon many Books, as well as Precedents cited, vouched and peruſed. Many Evidences are loſt by time; But if the Biſhop of Ely ſpoke Truth (which I doubt not at all he did) as it is reported in Br. Abr. tit. Preſentation al Egliſe 12. 61. the King had ſuch a Prerogative in Edward the 3d's time, and did preſent by Vertue of this Prerogative: And certainly there ought not to be any doubt of that Point at this time of Day.

But as to the Queſtion, Whether or no this Prerogative ſhould take effect upon this newly created Rectory. My Lord Coke in Magd. Coll. Caſe. lib. 11. fo. 74. tells us, That in any Conſtruction of Acts of Parliament, the original Intent and Meaning of the Makers of the Law is to be obſerved: And that will appear in this Caſe by the whole purview of this Act of Parliament, whereby it is obvious to collect that there was no other Intention in it, but to make part of the Pariſh of St. Martins a Pariſh of it ſelf, it being of too large an Extent to be taken care of by one Parſon, and that therefore this Pariſh ſhould be a diſtinct Church, and conſequently ſubject to the King's

King's Prerogative as well as any other Rectories whatsoever that are presented to.

It is Enacted that the precinct of Ground therein mentioned, which was part of the Parish of St. Martins, should be thenceforth a distinct Parish of it self; That it should be called the Parish of St. James's within the Liberty of Westminster; That the Church and Church yard already set out, should serve for those purposes; That there should be a Rector there, who should have Curam animarum, and perpetual Succession; That the Rector should have the House in the Church-yard to live in; and it settles the Patronage. These are all the particulars of this Act of Parliament. But there are no words, nor any matter in the Act of Parliament, which do any way import an intent that the King should not have the same Right of presenting upon the promotion of a Bishop, as he has in other Cases and Parishes.

Perhaps, if the King had any interest upon the Soyl, upon which the Church-yard stands, and it had so appeared, or had any Interest in the Parish Church of St. Martins, out of which this new Parish Church was taken, the Act of Parliament might have bound such the King's Right. But as to any Right the King hath by reason of his Prerogative upon this accident of his promoting the Incumbent, there is not one word of that in the whole Act of Parliament, nor any thing like it.

We have a Rule in Law, that the King is not bound by an Act of Parliament, unless he be particularly named, for the Law giveth him that Prerogative, for the dignity of his Person, that he shall not be by construction of Law included in common Words, much less where his Prerogatives are concerned. There are many Cases to this purpose, and I shall instance but in one, the reason whereof seems to come close to the reason of this Case, and that is the Case upon the Statute of 24 Hen. 8. of Dispensations; and the name of this Case is Armiger and Holland, 3 Cro. 542. and Moor 542. That Statute appoints that Dispensations should be granted by the Arch Bishop, and confirmed under the Great Seal; and there are in that Statute negative Words, that they shall not be granted in any other manner. There they did adjudge that this Statute only transferred to the Arch-Bishop the Authorities the Pope had; but the Prerogative which the King had at Common-Law to grant such Dispensations, were not taken away by that Act, nor he could be restrained unless expressly named. And so is the opinion of my Lord Hobart 146. Colt and Glover's Case; and there are several Cases cited there likewise, upon other Statutes to the same effect.

Now the Case before us is a much stronger Case, for here are no negative Words in this Act of Parliament. It is well said in

Wright's

Wright's Caſe, that the Judges will well adviſe before they will alter any ancient Prerogative in the Crown. I do not deny but that there are Caſes in Law, where the King ſhall be bound by general Words in a Statute. My Lord Coke, Lib. 6. fol. 14. brings them all under theſe Heads:

Firſt, Such Acts as are to ſuppreſs wrong.

Secondly, Such as are to take away fraud.

Thirdly, To prevent the decay of Religion.

Now certainly this Act of Parliament was not made upon any ſuch Accounts. It could not be made to ſuppreſs a wrong, for the thing was not in being, not in eſſe before: Here is no pretence of Fraud; and as to the decay of Religion, this Act of Parliament is made for the advancement of Religion and the Profeſſors of it. Here is greater care taken for the Souls of the Inhabitants, and two Church Preferments made out of one; and in neither of theſe things doth the King's Prerogative interfere at all. For let the King or the Biſhop have a Right to preſent, theſe ends are equally ſerved.

Ay, but ſay they, here is a wrong done to the Biſhop, for he loſeth his Collation to the Living. If the Biſhop loſeth his Collation, there is no wrong done, for it is not his right to Collate. The Law is the true Standard of wight and wrong. The King's Prerogative is part of the Law of England, as my Lord Coke ſays, 2 Inſt. 246. And if by the King's Prerogative he ought to preſent in other Caſes, as our Books ſay he ought, then it is a wrong to the King to deprive him of the Preſentation.

It is not a greater wrong in this Caſe, than the Prerogative to preſent to a Church, during the vacancy of the See. The ordinary Preſentation belongs to the Biſhop in both Caſes, but the Law in theſe accidentals giveth them to the King.

And, to ſay, the Rectory is the Patrimony of the Church, I grant it; but is not that ſatisfied by the Incumbents receiving the Profits, who is a Member of the Church, if he is preſented by the King as well as by the Biſhop?

But, ſay they then, this is a new Rectory, created by this Act of Parliament. I cannot ſee any reaſon why, or how, that ſhould make any difference in the Matter at all; that the one is an ancient Rectory in the other Caſe, and this is a new one: This a Prerogative inherent in the Crown, and operates upon all preſentative Churches, when once they are made ſo. And this was precedented before, in that new Pariſh of St. Paul Covent-Garden,

den, taken out of St. Giles's, and erected into a new Parish in King Charles the first's time. And it was now lately presented to by the King and Queen, upon the Incumbent Doctor Patrick's being made a Bishop. I have caused the Act of Parliament in that Case to be looked for, and have perused it, and there is not one word in it to save the King's Right any more than there is in this.

The reason holds as well in Bishopricks newly created by Act of Parliament. For it may as well be said this is a promotion to a new Bishoprick, and therefore the Prerogative shall not take place; and yet this Prerogative of the King's was never questioned. It hath taken place upon the King's presentation, when the Incumbent was promoted to a new Bishoprick, erected by Act of Parliament.

And now I come to the Second Point that hath been made in this Case, when this Rectory became Presentative, at least, whether it was in the time of the new Bishop of Lincoln. For they that argued for the Defendant, would have the Incumbency of Dr. Tennison to be a Donative, and then the King's Prerogative could not operate upon the avoidance of a Donative. Now for that,

First, I am of opinion that Dr. Tennison's Incumbency was of a Rectory presentative, and this appears by the Act of Parliament its self, whereby the Patronage is settled as well as the Parish. It Enacts that there shall be a Rector, and a perpetual succession of the Rector; and then that there shall be a prerogative and Right of presentation, then it first appoints Dr. Tennison to be the first Rector, he being Vicar then of St. Martin's, and after that the presentation shall be in the Bishop and my Lord Jermyn, as the Act directs, by which it appears that it was to be a Rectory presentative; and there are no other words that make it to be otherwise.

But say they, Dr. Tennison is made the first Rector, and then afterwards the Patronage and Presentation is settled. I answer to that, Those words which make Dr. Tennison Rector, are though necessity, that he might be the first; and yet it doth not alter the nature of the Patronage. And it would be a very strange absurdity to say, that the makers of this Act of Parliament did intend to settle a Rectory, that should be partly Donative, and partly Presentative; that would be a very strange Construction.

As

As Plowden ſays in Aſhton and Stabs's Caſe, The ſenſe and reaſon of the Law, is the Law, and not the words taken ſtrictly: And it appears by the whole frame of this Act, that as this Parish was made out of another, ſo it ſhould be preſentative as the Church out of which it was taken was preſentative.

By the Pleading it muſt be underſtood to be preſentative; for it is agreed that the Church becomes void by the promotion of the Biſhop, which could not be, if it had been Donative.

And therefore I ſhall conſider the Reaſons why an Incumbency of a Church preſentative is void, by the promotion of the Incumbent to a Biſhoprick; and I ſhall conſider the nature of a Donative, and upon what principles it is founded.

As to the firſt, I do not take it to be as has been ſaid, that this is a prerogative avoidance. I take it there is no ſuch thing as a prerogative avoidance; for as it is ſaid in the Caſe of the King, and the Biſhop of Wincheſter, 2 Cro. 54. The Law gives no privilege to the King to avoid an Incumbency. But the Church becomes void by reaſon of the Biſhoprick and the Rectory are incompatible in one Perſon. And this is ratione eminentiæ by reaſon of the dignity of the Biſhop, that he who is advanced to the ſuperintendency of the Church, ſhould not be Rector in the ſame Church. And ſo it is ſaid in Woodley's Caſe, as it is Reported in Winch 98.

Then as to the nature of a Donative, although the exerciſe and function of it is Eccleſiaſtical and Spiritual, yet it is a Lay Foundation. As it is ſaid 2 Roll. Abr. 343. It is of the foundation and erection of the Donor, not by the Ordinary, and follows the Rules and Laws Eccleſiaſtical, as in Fairchild and Grayes Caſe, 2 Cro. 63. reported likewiſe in Yel. 61. It is no way ſubject to the Eccleſiaſtical Juriſdiction, nor any part, nor any Order in the Church.

Now to apply this. If the Church becomes void, it is by the promotion, as it is agreed by the Defendants in this Plea; it muſt be underſtood to be by reaſon of the incompatibility for a Perſon to be a Biſhop and Rector of the ſame Church; but the ſame perſon might be a Biſhop, and yet Incumbent of a Donative. It was never known, as hath been ſaid by the Defendants Counſel, that the King ever preſented to a Donative, upon making the Incumbent a Biſhop; and I take it, that the reaſon of that is becauſe a Donative makes no figure in the Order or Deconomy of the Church, and ſo too the Biſhoprick, and a Donative are compatible.

For these reasons, I am of Opinion first of all, That the Prerogative of the King shall operate upon this, though a new Rectory: And then,

Secondly, That this Rectory is presentative, and therefore the presentation belongs to the King and Queen, by their Prerogative, and that Judgment ought to be given for them accordingly.

THE

THE CASE OF

HENRY, *Lord Biſhop of* London,
AND
Peter Birch, *Doctor of Divinity*, } Plaintiffs.

The King and Queen's Majeſties, Defendants.

In a Writ of Error in Parliament, brought by the Plaintiffs, upon a Judgment in a *Quare Impedit* given for Their Majeſties in the Court of *King's Bench* by the Uniform Opinion of the whole Court, for the Preſentation to the Rectory of St. *James's* in the Liberty of *Weſtminſter*, vacant by the Promotion of Dr. *Tenniſon* to the Biſhoprick of *Lincoln*.

DR. Thomas Tenniſon being lawful Vicar of the Pariſh of St. Martins in the Fields, one part of the ſaid Pariſh was by Act of Parliament erected into a diſtinct Pariſh and Rectory, and called by the name of the Pariſh and Rectory of St. James, within the Liberty of Weſtminſter; and Dr. Tenniſon appointed the firſt Rector there. *Anno* Dom. 1685. 1 *Jac.* II.

The ſame Act veſts the Patronage in the Biſhop of London and his Succeſſors, and Thomas Lord Jermyn and his Heirs; and then appoints in what Order and Proportion each of the ſaid Patrons ſhall preſent; viz. That the firſt Rector after the Deceaſe of the ſaid Dr. Tenniſon, or other next Avoidance, ſhould be Preſented or Collated by the Biſhop of London for the time being, and the next by the Lord Jermyn and his Heirs; the Two next by the Biſhop of London and his Succeſſors, and the next by

by the Lord Jermyn and his Heirs; and the like Succeſſion of Two Turns and One Turn, for all times to come.

20 *Decemb.* 1691. Dr. Tenniſon was duly elected Biſhop of Lincoln

22 *Decemb.* 1691. Before Dr. Tenniſon's Conſecration, the then Archbiſhop of Canterbury did grant a Diſpenſation to him in due Form of Law, to retain and keep the Vicaridge of St. Martins, and the Rectory of St. James, together with the Biſhoprick of Lincoln, until the Firſt of July, then next following.

23 *Decemb.* 1691. This was Confirmed by the King and Queen, by Letters-Patents under the Great Seal of England, (as the Statute of 25. Hen. 8. requires). After which, viz.

25 *Decemb.* 1691. The ſaid Biſhop Elect was Conſecrated; but by Virtue of the Diſpenſation, and according to the Rules of Law, the Living did not become Void at the time of the Conſecration, (as otherwiſe it would have done); nor did it become Void until the Firſt of July, 1692. at which time it voided by Ceſſion: In which caſe the Crown hath an undoubted Right to ſupply it by Preſentation for that Turn, to whomſoever the Patronage belongs.

This Cauſe was ſeveral times argued at the Bar, and afterwards ſolemnly at the Bench, and Judgment given by the whole Court for Their Majeſties.

The Matters which have been, and probably may be again ſtirred againſt Their Majeſties Right in this Caſe, are theſe,

I. Whether the Crown, upon the promotion of the Incumbent of a Subject's Living to a Biſhoprick, hath a Right by Prerogative to Preſent to that Living for the next Turn?

II. If there be ſuch a Prerogative, yet, Whether the Diſpenſation and Confirmation in this Caſe do not amount to a ſerving of that Turn?

III. Whether this Act of Parliament hath made any Alteration in this Caſe, to differ it from the Crown's preſenting upon ordinary Vacancies in other Livings, upon the Promotion of the Incumbents?

The two firſt of theſe Points being adjudged with the Crown in the Caſe of St. Martins, (which was enjoyed accordingly); and there being no difference as to theſe Points between Saint Martins and St. James, the Third Point riſing upon the Act of Parliament was principally and indeed only intended to be conſidered in the Caſe of St. James's; but ſome of the now Plaintiffs Counſel ſtirring the two firſt Points again, the Court of King's-Bench took them alſo into Conſideration, and gave Judgment upon all Three for Their Majeſties; which was done by

by the Uniform Opinion of the whole Court with great Clearneſs.

First, As to the First Point,

This Prerogative and Right of preſenting by the Crown, upon the Promotion of the Incumbent of a Subject's Living to a Biſhoprick, is an ancient Right ſetled and eſtabliſhed by divers ſolemn Judgments in the Reigns of King Henry VIII. Queen Elizabeth, King James I. and downwards; and whenever queſtioned or doubted, always prevailed; and there is no one Judgment or Judicial Opinion in the Law-Books againſt it, but many for it. And if ſo full and particular an Exerciſe of that Prerogative doth not appear in the Old Books of the Law, as hath done in and from the Reign of King Henry VIII. downwards, it may reaſonably be ſuppoſed to be occaſioned by the unlimited Power and Uſurpation which the Popes of Rome aſſumed to themſelves in this Kingdom, in making Biſhops, conferring Titles to vacant Livings, and the like, not only againſt the Prerogative, but even againſt the Statutes of the Realm. And if any Inferences have at any time been drawn from any thing ſaid in any old Book in doubt of ſuch Prerogative, the ſame have been rectified by ſettled Judgments in Courts for many Ages paſt, in times when the Learning and Integrity of the Judges admitted of no diſpute.

Nor is it any Objection againſt this Right of the Crown, that it hath not been put in Execution in ſome caſes anciently where the Crown had another Title, by reaſon of Wardſhip, or of the Temporalities of a Biſhoprick being in the King's Hands; for beſides what is ſaid before as to the Pope's Claims and Uſurpations, the Crown, without prejudice to the Prerogative, might make uſe of that other Title not Claimed by the Pope, upon which to bring Quare Impedits (wherein one ſingle Title muſt be relyed on) rather than to make uſe of that which the Pope then Challenged and Uſurped, it being improper for the King to ſet up his own Prerogative againſt himſelf, when he had another Title in him by way of Intereſt.

And it ſeems a ſtrange attempt after ſo many Ages, and ſuch ſetled Judicial Determinations, to queſtion that Point of Prerogative, whereunto (till this Caſe) an entire ſubmiſſion hath been made, and many Eminent Clergy men of the Church of England have enjoyed, and ſome now do hold Livings under the Title of that Prerogative; and it appears by ſome Books of Preſentations to Livings, in and ſince the Reign of Queen Elizabeth, ſtill extant (the former being loſt or deſtroyed) that the Crown hath preſented ſeveral hundreds of times upon ſuch Vacations, and Enjoyment were had accordingly.

II. As

II. As to the ſecond Point about the Diſpenſation; that can in no ſort be any Objection to the Right of the Crown; for this Diſpenſation being granted to the Incumbent to retain his Living, is not in Judgment of Law any Commendam but coming before the Conſecration was lawful and effectual; and the now Plaintiffs by their Pleadings in the Cauſe, have owned and admitted it to be ſo; and then thereby the Avoidance was ſuſpended, and no Vacancy happned by the Conſecration, nor till the Diſpenſation expired, which was the firſt of July 1692. So that to affirm this Diſpenſation, or Confirmation, did Serve or Execute the King's Turn, is to ſay the King uſed his Turn before he had it, or filled a Vacancy before it was, and that not by his own, but by the Act or Inſtrument of the Archbiſhop; the Confirmation (which is the King's Act) being barely a Formality required by the Statute of Hen. 8. to the Diſpenſation of the Archbiſhop.

III. As to the Third Point upon the Act of Parliament, there have been Two Things Objected by the now Plaintiff's Council.

1. That St. James is a new Rectory created by Act of Parliament, and that Dr. Tenniſon came not into it by Preſentation, but Donation; and that the Prerogative Operates only upon preſentative Livings.

2. That by the expreſs Words of the Act it is provided, That the firſt Rector, after the Deceaſe of Dr. Tenniſon, or next Avoidance, ſhall be preſented or collated by the Biſhop of London.

As to the Firſt; There is no doubt but that St. James is by the Act made a preſentative Rectory, participating of the nature of other preſentative Livings, and Dr. Tenniſon was continued in his former Cure, though under another name: And there is no reaſon in Law to make it a Donative, or otherwiſe than of the nature of a preſentative Living in Dr. Tenniſon, nor for a diſtinction between old and new Rectories; but the Right of the Prerogative being founded upon the promotion of the Incumbent that holds equally both in old and new Rectories where ſuch promotion happens to be, and when this new Rectory voided by Promotion, then, and not till then, the Crown's Prerogative to preſent aroſe, as much as it would or could have done in the Caſe of an old preſentative Living.

As

As to the Second ; There can be no Reaſon to think the Act intended to take away the Prerogative of the Crown, which generally ſpeaking, is not bound, unleſs ſpecially named: But the end of this Act was to Erect a new Pariſh and Rectory, and to make them of the ſame nature with other Pariſhes and Rectories, and to ſettle the Rights of each as between the Patrons and Pariſhioners, but in no ſort to meddle with, much leſs to take away the Rights of the Crown; nor was there any need of a ſaving of the King's Right which aroſe by the Act by making the Rectory preſentative.

And it is not of any weight to ſay the expreſs Words are for the Biſhop's preſenting; the Intent of the Act is ſatisfied by ſetling the ordinary Courſe of Preſentations, without excluding the Prerogative, and the Biſhop muſt take his Right ſubject to the Rules of Law, one part of which is the Prerogative; and it hath been reſolved that the Grantee of the next Preſentation muſt give way to the Prerogative, though he loſe his Turn by it: And if this Act ſhould be taken Literally, then there would be no Right to preſent by Lapſe, nor Preſentation by the Crown, in caſe of any Forfeiture, or of the Temporalities being in the King's Hands, which would be abſurd to maintain; and ſuch a literal Conſtruction is againſt the Rules and Reaſon of Law, and many Judicial Determinations in the like Caſes.

Wherefore it is prayed the Judgment may be affirmed.

DE

Term. Sanct. Paſch.

Anno Regni Regis & Reginæ W. & M. VII.

IN

BANCO REGIS & REGINÆ.

Sabbati Decimo tertio Maij. Anno Dom. 1693.

Harcourt *verſus* Fox.

Serjeant Levins.

MAy it pleaſe your Lordſhip, Simon Harcourt is Plaintiff, and John Fox is Defendant; and this is in an Aſſumpſit for 40 s. had and received by the Defendant for the Plaintiff's uſe. Upon Non-aſſumpſit pleaded, the Jury find a Special Verdict.

First they find the Statute of 37 Hen. 8. Cap. 1. And that Statute doth recite, That the Lord Chancellor before then had had the Nomination of the Cuſtos Rotulorum, and the Cuſtos had the appointment of the Clerk of the Peace; and then takes notice, That of late ſeveral perſons had been made Cuſtodes and Clerks of the Peace for Lives, whereby great Misdemeanours had been; and for Reformation of them, it enacts, That none be made Cuſtos, but by a Bill under the King's Hand, and he ſhould remain Cuſtos till the King by another Bill under his Hand appoints another perſon to be Cuſtos; and that every Cuſtos Rotulorum do appoint the Clerk of the Peace who is to hold

the

the Office ſo long as the other ſhould continue Cuſtos, ſo as he demean himſelf well in the Office.

Then they find the Statute of the 1ſt of this King and Queen, which appoints, That the Cuſtos ſhall be made according to the appointment in the Statute of Hen. 8. which had been altered by a Statute made in the Reign of Edward the 6th. which I ſhall have occaſion to open by and by. And it further enacts, That the the Cuſtos Rotulorum ſhall appoint a Perſon to be Clerk of the Peace to execute the ſame by himſelf or his ſufficient Deputy, and to take and receive the Fees and Profits for ſo long time only as he ſhall well demean himſelf in his ſaid Office.

Then the next Clauſe is, That if any Clerk of the Peace do misdemean himſelf in the Office, upon Complaint in writing to the Juſtices at the Quarter Seſſions, they may remove or ſuſpend him, and then the Cuſtos ſhall nominate another, but if he neglect to nominate before the next Quarter Seſſions, the Juſtices of the Peace at that Quarter Seſſions ſhall appoint one to hold the Office and execute the ſame by himſelf or Deputy, and to receive the Fees and Profits: Here indeed it is not ſaid how long he ſhall hold it, but it is added by way of Proviſo, That he ſhall be lyable to all the Penalties, Forfeitures, Conditions, Limitations, and Proviſions therein and thereby mentioned and expreſſed, and be removed or diſcharged by the Juſtices in manner abovespecified.

Then there is another Clauſe in the new Statute which enacts, That the Cuſtos, or any other perſon to whom it belongeth, to appoint a Clerk of the Peace, ſhall not ſell the Place, or take any Bond or Aſſurance to receive any Reward, Money, Fee, or Profit, directly or indirectly to him, or any other for ſuch Appointment, upon pain that both the Buyer and the Seller ſhall be diſabled to hold their Places, and ſhall forfeit the double value of the things given or taken.

Then comes the laſt Clauſe; That every Clerk of the Peace before he enter upon the Execution of the Office, ſhall in open Seſſions ſwear that he has not, nor will pay any Money or Reward, or give any Bond or Aſſurance to pay Money, Fee, or Profit, directly or indirectly to any perſon or perſons whomſoever for ſuch Nomination or Appointment.

Then the Jury find further, That on the 9th of July in the 1ſt of William and Mary, my Lord of Clare was made Cuſtos Rotulorum for the County of Middleſex, and he appointed Mr. Harcourt the Plaintiff Clerk of the Peace, and they find the Patent in hæc verba, whereby he is appointed to be Clerk of the Peace for ſo long time as he ſhall well demean himſelf in the Office.

And then they find, That afterwards in the 3d of William and Mary, my Lord of Clare is removed from the Place of Cuſtos, and my Lord of Bedford is made Cuſtos, and he makes the Defendant Mr. Fox Clerk of the Peace, with a Limitation in the Words of 37 Hen. 8. to continue Clerk of the Peace ſo long time as my Lord of Bedford ſhould continue Cuſtos Rotulorum, he demeaning himſelf well in the ſaid Office.

They find likewiſe, That this Clerk of the Peace thus put in by my Lord of Bedford, hath received Money as Fees for the Office for which the Clerk of the Peace put in by my Lord of Clare, hath brought his Action; but which of them is really Clerk of the Peace the Jury are doubtful, and ſubmit it to the Judgment of the Court: And if the Law be for the Plaintiff, they find for the Plaintiff; If the Law be for the Defendant, they find for the Defendant.

My Lord, The Cauſe upon this Verdict is ſhortly but this. The Earl of Clare is put into the Office of Cuſtos Rotulorum ſince the Statute of the firſt of this King and Queen; he puts in the Plaintiff to be Clerk of the Peace in the Words of that Statute: My Lord of Clare is removed, and my Lord of Bedford is made Cuſtos Rotulorum, and he puts in the Defendant to be Clerk of the Peace in the Words of the Statute of Hen. 8. And the Queſtion in the Caſe is, Whether of theſe two be Clerk of the Peace at the time of the Defendant's receiving the Fees of the Office. And with Submiſſion I conceive the Plaintiff was then, and ſtill is Clerk of the Peace by vertue of the Conſtitution and Appointment of my Lord of Clare: But however the Defendant is not, if the Plaintiff ſhould not be, for he is not put in according to the Limitation in this laſt Law.

My Lord, There was a Statute that came between theſe two mentioned in this Special Verdict, and which in ſhort was the occaſion of making this laſt Statute, and that is 3 & 4 Edw. 6. which recites the Statute of Hen. 8. And the Inconveniencies that aroſe thereupon for want of a Cuſtos many times, becauſe they could not come immediately to get the King's Hand to the Bill, and therefore it doth appoint the Cuſtos ſhould be made by the Chancellor or Keeper, as it was before this Statute of 37 Hen. 8. Now this Statute of William and Mary doth reſtore the Statute of 37 Hen. 8. As to the Cuſtos Rotulorum to be appointed by the King by Bill to continue till the King appoint another by Bill.

But,

But, my Lord, As to the Clerk of the Peace, that Statute of 3 and 4 of Edward the 6th. ſaid nothing, but appointed only the manner of making the Cuſtos; and the Clerk of the Peace, as to his Office, it ſtood as it was before. Now this laſt Statute appointing that the Cuſtos ſhall be made according to the Method preſcribed in the Statute of 37 of Hen. 8. Therefore I do humbly conceive, the Defendant would infer from hence, that becauſe the Cuſtos Rotulorum was to be made according to the Statute of 37 Hen. 8. The Clerk of the Peace muſt be made according to the Statute too, and thence I do imagine the Difference between the Plaintiff and Defendant doth ariſe.

But with Submiſſion to your Lordſhip, I conceive this Inference can be drawn neither from the Words, nor from the meaning of the Statute of the firſt of this King and Queen; for tho' it did intend, that the Cuſtos Rotulorum ſhould be made and continue as he was before the Statute of Edward the 6th. Yet I think it is plain it did not intend that the Clerk of the Peace ſhould continue as he was by the Statute of Hen. 8. But I rather take it, that this is a new Law as to this Office of Clerk of the Peace to new mould the Office, and make it different from what it was before this new Act.

My Lord, I conceive that what they would have, cannot be inferred from the Words of the Statute; for the Words are, that the Cuſtos Rotulorum ſhall be made according as is directed by the Statute in the 37 of Hen. 8. And if it had gon no further, what had that been as to the Clerk of the Peace? They might then have had more Ground to inferr, that the Clerk of the Peace ſhould continue as he was before, if this Statute had ſaid no more, though perhaps it might have been ſomewhat difficult to have made ſuch an Expoſition ſince the Statute had reſtored the one Officer, but not mentioned the other. Truly I cannot tell what Expoſition might have been, but here I am ſure there can be none ſuch; for when it comes to declare the Right of Nomination of the Clerk of the Peace to be in the Cuſtos, it plainly ſays the Clerk ſhall be made in another manner, than he was to be made by 37 Hen. 8. For the Words of the Limitation are otherwiſe in this Statute than in that.

The Statute of 37 Hen. 8. ſays, He ſhall be Clerk ſo long as the Cuſtos ſhall continue in his Office, demeaning himſelf well; but the Words of this Statute are, That the Cuſtos ſhall make the Clerk of the Peace to execute the Office ſo long as he ſhall demean himſelf well in the Office. It does not ſay as long as he continues Cuſtos, ſo as he demean himſelf well, which are the Words of the old Statute, but ſimply and abſolutely, ſo long as he well demean himſelf in the Office.

Now

Now, My Lord, This I take plainly to be an Eſtate for Life; for if any judicial or miniſterial Office be granted to any Man to hold, ſo long as he behaves himſelf well in the Office, that is an Eſtate for Life, unleſs he loſe it for Misbehaviour. So was Sir John Waller's Caſe, as to the Office of Cheif Baron of the Exchequer; and ſo was Juſtice Archer's Caſe in the time of King Charles the II. He was made a Judge of the Common-Pleas quam diu ſe bene geſſerit, and though he was diſplaced as far as they could, yet he continued Judge of that Court to the time of his Death; and his name was uſed in all the Fines and other Records of the Court: And ſo it is in all Caſes of Grants from the King, or from any other Perſon.

And then with your favour, My Lord, This Statute of Will. and Mary appointing that the Cuſtos Rotulorum ſhall be made according to the Proviſion of 37 Hen. 8. but the Clerk of the Peace ſhall remain Clerk, as long as he well demeans himſelf in his Office; that is a quite different limitation from that other Statute of Hen. 8. and the only qualification of his Eſtate in the Office, is by the Words of this Statute, during good Behaviour; and that is an Eſtate for Life, unleſs his misbehaviour in his Office: And from thence I am ſure it cannot be Collected, as out of the Words of the Statute, That he ſhall be removable by the Cuſtos, or by the removal of the Cuſtos, or by any body elſe, but for Misbehaviour.

My Lord, I conceive they will find it as hard to make out any ſuch Inference from the intention of this Act of Parliament, from the Words that he ſhall be removable any ways but for Miſdemeanor: I confeſs it will be hard by an implacit intention to think, that when the Statute ſays he ſhall continue ſo long as he demeans himſelf well, which gives him an Eſtate for Life, any Collateral Words ſhould take that Eſtate out of him, and make him to hold his Office no longer than the Cuſtos continues Cuſtos.

But, My Lord, I take it with ſubmiſſion, from the whole frame of this Statute, it is plain the Parliament did not intend to reſtore the Statute of 37 Hen. 8. in all Points, but did intend to new mould this Office of the Clerk of the Peace, in another, and a very different manner, than as it ſtood by that Statute; for if they had intended the other, there had need been done no more than to have repealed the Statute of Edw. 6. and then all had been as it was before; but that they have not done: For they have indeed made the Cuſtos Rotulorum to be as he was before, by that Statute; but the Words concerning the Clerkſhip of the Peace are quite otherwiſe than the Words in the Statute.

This

This Statute of William and Mary differs in many things from both our former Statutes.

Firſt, In the Words that have been mentioned how long he ſhall remain in his Office, ſo long only as he ſhall demean himſelf well in it, that is, ſimply and abſolutely, without dependance upon the Cuſtos, or upon his removal out of his Office.

It differs in the manner of putting him out, that is by Complaint to the Juſtices in Seſſions, and that in Writing, and that proved before them; and then they upon the Proof may ſuſpend or diſcharge. Now theſe Circumſtances were not neceſſary before; for if the Clerk of the Peace had Committed a Miſdemeanor, having but an uncertain Intereſt in his Office, he might be removed without Complaint in Writing; the Cuſtos might have put him out by word of Mouth, as the Caſe is in Dyer, 114. B. which I take to be a far ſtronger Caſe than this; the Lord Chief Juſtice of the Common-Pleas, by the opinion of the whole Court, diſcharged Vaux a Philizer for Miſdemeanor in his Office, and Swore in another; but there was no Record of this Diſcharge made upon the Roll, nor Vaux called to Anſwer, according to Law, and there it is reſolved a good Diſcharge notwithſtanding: And ſure the Juſtices of Peace might much more eaſily Diſcharge the Clerk of the Peace, if he had ſo uncertain an Intereſt; but now this Law requires that the Complaint muſt be in Writing, and proved, which Argues that they thought he had ſuch an Intereſt in his Office, that he was not ſlightly to be ouſted of it.

And then, My Lord, When he is put out, it differs in this too, that the Juſtices of the Peace may now appoint a Clerk of the Peace by this Statute, if the Cuſtos neglect to name one before the next Seſſions: It is true, it is not ſaid for how long he ſhall hold the place whom the Juſtices put in, that is not material to our Caſe at preſent: But I think upon the whole face of the Act he ſhould have the ſame Eſtate in his Office, as he had who was put in by the Cuſtos, becauſe it is ſaid he ſhall be liable and ſubject to the ſame Penalties and Conditions before-mentioned, and to be Removed and Diſcharged in the ſame manner; and if the Cuſtos had not named a Clerk, and the Juſtices had put in one, the reaſon of the thing argues he muſt be in upon the ſame Terms, as if he were put in by the Cuſtos, upon whoſe neglect and default he was put in by the Juſtices.

Another difference there is in this Statute, from both the former; and, which indeed, is a ſingular difference from other Offices in the Law, and that is, he muſt take an Oath before he enter upon the Office, that he neither hath given or will give any thing for it; this was never incumbent upon the Clerk of the

Peace

Peace before, nor upon any other Officer of the Law. I know it is true, the Statute of Edward the 6th. where Proviſion is made againſt buying and ſelling of Offices relating to Adminiſtration of Juſtice, puts Diſability upon him that grants the Place, and upon the Party that is let in. But this Statute does not only do ſo, but it gives the Forfeiture of double what was given and received, which is beyond what any Law hath done in this kind before.

From all which, my Lord, I conclude that it appears that the Intention of the Parliament was by this Act, to new-mould the Office, and put it in other Circumſtances than it was in before; and therefore I take it, my Buſineſs is to keep cloſe to this Statute; and if I ſhould go about to enquire into the Original of the other Office of Cuſtos Rotulorum, I ſhould ambulare in tenebris, that is, I ſhould attempt to do a thing, I ſhould be able to make very little of. He hath been a very ancient Officer, and of conſiderable Power in the Country; he keeps the Records of the Crown in the County, and draws up Indictments: This Court hath taken notice of him as a known Officer, and I know this Court hath fined him for Faults in his Office; he is an Officer known in the Law, and a Miniſter of Common Juſtice to the Nation in the Country.

And therefore I think, with Submiſſion, the Parliament's Meaning was to ſettle this Office, ſo that he ſhould not come in by Corruption, and that he ſhould have Encouragement to demean himſelf well when he doth come in. The Act hath not ſo carefully provided for the Cuſtos himſelf, which they thought Honorary and Titular, and not ſo neerly intereſted in the Miniſtration of Juſtice to the Nation, and therefore he may be in and out at the King's Pleaſure; but they take care that the Clerk of the Peace, who is a Miniſter of Juſtice, ſhould have a more fixed Eſtate in his Office, and have eſtabliſhed particular Qualifications for him.

I cannot ſay how it was before the Statute of 37 Hen. 8. But I can ſay that it was granted for Life before that Statute; for the Statute it ſelf ſays ſo, and ſets it forth for a Grievance, that ſure muſt be that it was granted to unskilful Perſons for Life, or elſe the meer Grant for Life is a ſtrange kind of Grievance, and it is a Grievance if it be one that runs through the whole Common Law, as to miniſterial Offices; for all the Offices in this Court in the Chancery, in the Exchequer, in the Common Pleas, and generally all over the Kindom relating to the Adminiſtration of Juſtice, and even the Judges themſelves are Officers for Life; and why there ſhould be more of a Grievance in this Caſe than in theirs,

theirs, I do not see; In general they are all for Life, though some few particular ones may be excepted indeed.

And, my Lord, though I cannot say this Place was ever granted anciently so, for they will tell me there was a time when there were no Justices of the Peace; and this being their Clerk, there was a time when there was no Clerk of the Peace; yet I can tell, that before there were Justices of the Peace, there were Conservators of the Peace, and it is like they had their Clerk in their Courts to do their Business for them, and keep the Records, and it is likely this Officer was in Imitation of that. But I cannot direcly tell how things might be, for this Matter is all in nubibus.

But I can say, my Lord, If the Clerkship of the Peace was not granted for Life before, I think it had been better it had been so, and will be better now if it be so, and not leave it as an uncertain Interest: And I think I am justified in this Opinion by the Practice of the whole Law; for surely the Law would not admit that generally the Offices of Justice should be granted for Life, if it had not thought that it was better they should be so, and certainly it is better they should be so, and that too in many Respects.

First, It is better for the Office; for if the Party be in for Life, he will take more Care to collect the best Precedents for drawing up Indictments and other Records for the Management of an Office wherein he is to spend his whole Life.

And I conceive it is better for the Officer, for he will have the more Encouragement to do what belongs to the Duty of the Office when he knows he has a fixed Estate in his Office, and that will make him look very carefully to the Rights of the Office.

And I likewise conceive it is better for all the Subjects, that it should be so; for they may well expect to have Justice better done by a Man that is bound to it upon the Penalty of Forfeiting a Place that he hath for his Life, if he behave himself well in it, than by a Man that may expect to be turned out every day, or for a slight occasion; for it is all one to him whether he behave himself well or ill in a Place he cannot promise himself any Enjoyment of, though he behave himself never so well; and so there may be more Damage or Injury from such an one, than from one that hath a fixed Estate in his Office.

With your Lordship's Favour, I say it is no hurt to any body that it should be an Office for Life, for it hath an annexed Condition to be forfeited upon Misdemeanour, and this hath been a Condition and Provision annexed by the Law to all Offices, they being Trusts, and Misdemeanours in the Office is a Breach of Trust.

And truly I think it is worſe for no body, but for thoſe that have the placing and diſplacing at their Pleaſure, becauſe they cannot bind them to ſuch Obſervance and Obedience to them, as if they had a Power to turn them out if they would not do what they might have a mind to have them do, it is injurious in no other reſpect whatſoever; and I think that will not be thought a Publick Miſchief.

I conceive this might be ſome reaſon for the making this new Act; for the Parliament might obſerve, that ſome Years before there had been great changing of Offices that uſually were for Life, into Offices quam diu placuerit, this is very well known in Weſtminſter-Hall; and I did know ſome of them my ſelf, particularly the Judges of the Courts of Common-Law, for I my ſelf (among others) loſt my Judges Place by it, and this might be the reaſon why the Parliament puts this Oath upon the Clerk of the Peace, that neither directly or indirectly he had given, or would have given any thing for the Place.

It is poſſible they might take notice that the uſual way was to apply to the Secretary in Chancery for Clerkſhips of the Peace, and when the bargain was made that ſuch an one ſhould be Clerk of the Peace, giving ſuch a Gratuity, then ſuch an one was to be made Cuſtos, as would make this Man Clerk of the Peace; and ſo the CuſtodesRotulorum were changed many times, and at one time altogether, when ſuch Application was made; ſo that in effect the Clerk firſt made the Cuſtos, and then the Cuſtos the Clerk; for the Clerk gave the Secretary a Gratuity, and then he was to be Clerk, and ſuch a one made Cuſtos as would make him Clerk. I apprehend this may be taken notice of by the Parliament, it being ſo much in uſe before, and therefore is there ſo ſtrict an Oath impoſed upon this Office as never was before, nor is now upon any other Office.

My Lord, If the Parliament had ſuch thoughts as theſe are, which ſhould be the Reaſons of new moulding this Office as I conceive this Act doth, then I cannot apprehend that they would intend to make him removable at will, but give him ſo fixed an Eſtate in his Office, as ſhould encourage him to behave himſelf well in it. So that ſince neither the Words of this Act, nor the intent of it are ſufficient Grounds for inferring the Clerk's being removable for any thing but Misdemeanour, I humbly hope your Lordſhip will think he is not ſo.

My Lord, As for the Defendant Mr. Fox, I conceive, as I ſaid, he is not Clerk of the Peace, for the Statute of W. and Mary ſays he ſhall execute the Office, and take the Fees for ſo long time only as he ſhall behave himſelf well in it; but

but the Defendant is made Clerk according to the Words of the Statute of Hen. 8. which are quite otherwiſe than thoſe of this Statute, and this being the laſt Law is to take place: So that I think he is not made Clerk of the Peace at all, and ſo not intituled to the Fees of the Office; but the Plaintiff is Clerk of the Peace, and has a right to the Fees: And therefore I pray your Judgment for him.

Ayer

DE

Term. Sanct. Trin.

Anno Regni Regis & Reginæ W. & M. V.

IN

Banco Regis & Reginæ.

Die Veneris triceſimo Junij. Anno Dom. 1693.

Harcourt *verſus* Fox.

This Day the Court delivered their Opinions in this *Cauſe Seriatim.*

Mr. J. Eyres.

HArcourt is Plaintiff, and Fox is Defendant. This is an Indebitatus Aſſumpſit for 40 s. Upon non aſſumpſit Pleaded, The Jury find a ſpecial Verdict. They find the Act of 37 Hen. 8. and ſeveral Clauſes of it concerning the Cuſtos Rotulorum, and Clerk of the Peace; and they alſo find that the Act of the firſt of this King and Queen about the Commiſſioners for the Great Seal, and ſeveral Clauſes of that Act, relating alſo to thoſe Offices of Cuſtos Rotulorum, and Clerk of the Peace. Then they find that after the making that laſt Act, the Earl of Clare was duly conſtituted Cuſtos Rotulorum of the County of Middleſex, and afterwards he did by Writing under his Hand and Seal, which the Jury find in hæc verba, appoint the Plaintiff to be Clerk of the Peace for the County, to hold and Execute that Office by himſelf, or his ſufficient Deputy, for ſo long time as the Plaintiff ſhould well demean himſelf therein; And they likewiſe find that the Plaintiff at the time when he was named to this Office, was a Perſon Reſident within the County, and capable of the Place; and afterwards

wards at a Seſſions held for the County, the Plaintiff was duly admitted to the Office, and duly exerciſed the ſame. They further find, That on the 5th of February, in the 3d Year of this King and Queen, the Earl of Clare was removed from being Cuſtos Rotulorum, and the Earl of Bedford was duly conſtituted Cuſtos, and he by writing under his Hand and Seal, found likewiſe in hæc verba, named and conſtituted the Defendant to be Clerk of the Peace, to hold and exerciſe the Office during ſuch time as he ſhould remain Cuſtos, the Defendant demeaning himſelf well therein; and that the Defendant afterwards, at a Quarter Seſſions for this County was duly admitted into the Office, and during the time that he had and executed the Office, did receive Fees belonging to the Office of Clerk of the Peace, to the value of Five Shillings; and if upon the whole Matter the Court does adjudge the Defendant did aſſume upon himſelf to pay this Money, they find for the Plaintiff; if otherwiſe, they find for the Defendant.

And upon this ſpecial Verdict I am of opinion Judgment ought to be given for the Plaintiff; I ſhall not ground my ſelf in giving this Judgment upon that which was much inſiſted upon at the Bar, that it was plain within this ſpecial Verdict, that however it happened as to the Plaintiff, the Defendant could have no Title to this Office, becauſe his Appointment does not purſue the Words of that laſt Act, it being only for ſo long time as the Earl of Bedford remained Cuſtos; for I take it, the Plaintiff muſt recover by the Strength of his own Title, and not by the Weakneſs of the Defendant's Title; but withal I am of opinion, that notwithſtanding that Limitation in the Defendant's Grant, if the Plaintiff was not ſtill Clerk of the Peace, the Defendant would be Clerk of the Peace within this Act of Parliament; for I take it, the Cuſtos Rotulorum has only a Power to nominate, and when once the Clerk is in his Eſtate in the Office, he is ſettled by the Statute, and not by the Limitation in the Grant; and it is like the Caſe in Dyer 153. b. The Caſe of the Regiſter of the Admiralty which was granted to two, and the longer Liver of them; whereas the Cuſtom alledged was of a ſingle Perſon, and there it was much inſiſted upon that this was an ill Limitation, and that ſhould avoid the Grant; but it was held otherwiſe, and that the Intereſt is by the Cuſtom, and not by the Limitation, and ſo there it is plain, though it be an ill Limitation and Nomination that would not avoid the Defendant's Title to the Office, he being in by the Statute, and the Cuſtos having nothing but the Nomination thereof, that Objection, I think has nothing in it.

But

But that which I found my Judgment upon is, That the Plaintiff does continue still Clerk of the Peace, notwithstanding that the Earl of Clare is removed from being Custos Rotulorum.

We are, I must confess, much in the dark as to the beginning of the Office of Clerk of the Peace, and as to what Estate and Term he had in the Office anciently that no where appeareth further than what may be collected out of the preamble of the Statute of 37 Hen. 8. which does recite that till then, of late the Custos Rotulorum had the Nomination of Clerk of the Peace, as the Chancellour or Keeper had of the Custos, and that several unlearned Men had then for several late Years, got Grants of this Office for their Lives, which being recited there to be mischievous; to reform it; it is enacted that the Custos shall be appointed by the King, and then he to appoint the Clerk of the Peace, which Clerk of the Peace was by express Limitation of that Act to hold the Office for so long time as the other remained Custos, so as he demeaned himself honestly in the Office, which Office it provides the Clerk may execute by himself or his Deputy, so as that Deputy be admitted by the Custos, and be sufficient to execute the Office.

By which Statute, to remedy the Mischiefs complained of in the Act, the Clerk of the Peace is put wholly under the Power of the Custos Rotulorum, having his creation from him, and a Power to make a Deputy by his Approbation and his Duration with him, being to continue with him in the Office so long as the other continued Custos, behaving himself well, and the Words (unless displaced by the Custos, I take it,) are to be interpreted for Misdemeanour, which I take it by this Act the Custos might do, and the Sessions of the Peace had no Power to displace him of all; for though they being the Court where he was an Officer, might suspend him for Misdemeanour, yet they could not deprive him of his Office, but he might still continue in the Office tho' suspended from Execution; for the Words, (So that the said Clerk demean himself in the said Office justly and honestly in this Act) were added to abridge the Estate of the Clerk of the Peace in his Office, and to enlarge the Power of the Custos Rotulorum, and to give him that created him a Power to displace him for Misdemeanour, and not to set up a Jurisdiction in others.

From all which parts of this Act so penned, I think it must be obvious to every Man's Understanding, that this Act was but declarative of what was the Law before the making of the Act; and the chief thing designed in it, was, That the Office of Clerk of

the

the Peace ſhould be filled and executed by a Learned, Able, Honeſt Perſon; and the beſt Means to effect this End the Parliament thought to be, by putting the Clerk of the Peace wholly under the Power of the Cuſtos Rotulorum in the ſeveral Reſpects that have been mentioned.

And Matters ſo ſtanding upon the Statute of 37 Hen. 8. at the time of the making this laſt Act, which makes the Queſtion before us in this Caſe; and the End deſigned by that Statute of Hen. 8. not being ſo well effected by the Means therein preſcribed the Parliament by this Act, intending the ſame thing to have the Office filled by a Perſon every way fit to diſcharge the Duty of it, deſigned to procure the Performance of this Intention by quite different Means from thoſe in the former Statute, as by taking the Clerk of the Peace wholly out of the Power of the Cuſtos, ſave only the Nomination and ſubjecting him when named to another Juriſdiction, that is, to the Seſſions of the Peace to which he was properly an Attendant.

And that this was the Intention of the Act, appears from the ſeveral parts of it, as particularly the Cuſtos Rotulorum's Nomination is abridged to a Perſon reſiding within the County, and Care is taken that he ſhall not be put in for Money, and that ſuch Eſtate as he has in the Office, ſhall be only upon good Behaviour; which Behaviour ſhall be under the Inſpection of the Court of Seſſions to which he is an Officer, and that for the Means of obtaining the Ends which they deſigned, was by putting him wholly under the Power of the Court of Seſſions, is plain, by their giving the Cuſtos the bare Nomination, and giving the Seſſions the Power of ſuſpending and diſcharging, and in giving the Clerk of the Peace another Eſtate in his Office, than that depending upon the Cuſtos's Eſtate in his Office, which I think will not be denied is done whatſoever Eſtate that proves to be in Law, and by giving him a Power to make a Deputy without the Approbation of the Cuſtos, which he could not do before; for as my Lord Coke ſays in Lincoln College Caſe, the Office of a good Expoſitor of an Act of Parliament, is to make Conſtruction upon all the parts together, and not of one part only by it ſelf, and from theſe ſeveral parts of this Act taken together, I think it will not be denyed but this was the Intent of Parliament; and this, the Remedy, provided they deſigned to have the Clerk of the Peace's Office well ſupplied, and it being one Branch of this Remedy preſcribed by the Act, that is of taking him out of the Power of the Cuſtos, to wit, the giving him a diſtinct Eſtate in the Office from the Office of the Cuſtos; the Words of the Act herein are certainly to be conſtrued moſt favourably to anſwer the Intent of the Law Makers, and they are

to

to have the largeſt Conſtruction that they can bear, in order to advance that Intent.

And I do think, that without any ſtrained Conſtruction both by the Intent of the Law-Makers, and the Words of the Act there is plainly given to the Clerk of the Peace an Eſtate for Life in his Office determinable upon his good Behaviour; for the expreſs Words of the Act are, to execute the ſame by himſelf, or his ſufficient Deputy for ſo long time only as he ſhall well demean himſelf in the Office; which Words in Lands and Tenements, as well as in Offices, requiſite Circumſtances and Ceremonies being performed (as it is ſaid) 3 Inſt. 42. is an Eſtate for Life determinable upon the good Behaviour of the Party.

And truly I take it, the expreſs Limitation in this Act is an Excluſion of the former Eſtate of the Clerk of the Peace in his Office, which was only ſo long as the Cuſtos continued in his Office according to the Rule in Law,

Expreſſio unius eſt excluſio alterius:

And this Clauſe in this Act is a Subſtantial Enacting Clauſe no way relating to the Statute of Hen. 8. And as to the Clerk of the Peace, his Eſtate thereby limited ſeems to be as it were introductive of a new Law; and though the Words are penned in the affirmative, yet they do imply a negative, that he ſhall have this Eſtate in his Office, and no other.

Where a ſubſequent Statute affirmative is a Repeal of a former Statute made concerning the ſame Matter, is a large Field to walk in, and no way pertinent to this Caſe; for all thoſe Statutes depend upon the penning: And the Intent of the Makers muſt be collected out of the Words, how far they meant to repeal or confirm; and therefore leaving that Conſideration, I ſhall rather betake my ſelf to that which is more pertinent to our Purpoſe; which is, That Statutes introductive of a new Law penn'd in the affirmative, do always repeal former Statutes concerning the ſame Matter, as implying a negative; and if this be a new Eſtate in this Office created by this Act of Parliament, as plainly it is, it being different from that which was the former Eſtate by the Statute of Hen. 8. I take it, this Statute introducing a new Law being in the affirmative, does plainly imply a negative.

Now that affirmative Statutes introductive of a new Law, do imply a negative, I rely upon the Caſe of Wethwen and Baldwin, 1 Syderf. 55. and Plowd. Com. 113. B. Townſend's Caſe, where you may ſee a great deal of this Learning plainly laid down to this purpoſe.

And

And if this be not ſo conſtrued, you may as well ſay this beco Clauſe, That the Cuſtos ſhall name one reſiding in the County, does not imply a negative, That he ſhall not name a Foreigner; as the Clauſe which creates the Clerk's Eſtate in the Office, does not imply a negative, That he ſhall have no other but that.

Beſides, I think it will not be denied, but that the Clerk of the Peace that's named by the Juſtices upon Default of the Cuſtos's nominating, ſhall have an Eſtate for Life in his Office, for then it is introductive unqueſtionably of a new Law, for the Juſtices had no ſuch Power before; and in that Caſe, if the Words had been, That he ſhall execute the Office for ſo long time only as he ſhall demean himſelf well in it, who will deny that to have been an Eſtate for Life? But though the Words are not ſo, yet I take it, the Statute hath done the ſame thing; for when he gives the Juſtices Power to nominate in default of a Nomination by the Cuſtos, and ſays, one ſo nominated ſhall have the Office under the ſame Limitations and Proviſoes as are before mentioned in this Act; it is plain, there is no Limitation in the Act, but only that he ſhall hold it for ſo long time as he demeans himſelf well in it: Then the Proviſo being added to the other Clauſe, it is as much as if the Limitation had been in that Clauſe.

Now, If the Parliament did intend the Clerk put in by the Juſtices, ſhould have an Eſtate for Life in his Office, then ſurely they did not intend the Clerk that is put in by the Cuſtos ſhould have a leſs or a greater, or other Eſtate than the Clerk put in by the Juſtices.

Therefore upon this Act being thus penned, and thus conſtrued as I take it, ought to be for the Reaſons that I have mentioned, I do conceive that the Plaintiff continues Clerk of the Peace, notwithſtanding the Removal of my Lord of Clare from being Cuſtos Rotulorum, and that he is well entitled to receive this 5 s. received by the Defendant out of the Fees of the Office: And therefore I think Judgment ought to be given for the Plaintiff.

Mr. J. Gregory.

Simon Harcourt is Plaintiff, and John Fox is the Defendant. This is an Action on the Caſe, wherein the Jury find a ſpecial Verdict, which I ſhall not need to repeat, my Brother Eyres having opened it at large. The ſole Queſtion upon it is,

Whether the Plaintiff being made Clerk of the Peace of this County, by the Earl of Clare, when he was Cuſtos Rotulorum, doth ſtill continue Clerk of the Peace, notwithſtanding the Earl of Clare was removed, and the Earl of Bedford made Cuſtos Rotulorum, who hath named the Defendant to be Clerk of the Peace. And the Doubt is, which of theſe two hath the better Title to this Office.

The Matter comes in queſtion upon the Conſtruction, and comparing together of two Statutes; That of the 37th of Hen. 8. concerning the naming of the Cuſtos and Clerk of the Peace, and the Statute of the firſt year of this King and Queen about enabling the Lords Commiſſioners of the Great Seal, to act as Lord Chancellour, or Lord Keeper.

I was not in Court the laſt Term when this Caſe was argued the ſecond time, therefore I ſhall not take upon me to anſwer the Objections that were made on either ſide; but I ſhall only apply my ſelf to conſider what Conſtruction is to be made upon the Act of the firſt of this King and Queen, and how far it either conſiſts with, or is repugnant to the former Statute. And indeed I do agree with my Brother, that the Plaintiff hath a good Title to the Office, and ought to recover the Fees.

Firſt, I do conſider what Alterations this Statute hath made from the former Statutes; and there I find,

Firſt, It doth in a ſort repeal the Statute of 3 and 4 Edw. 6. which had taken the Nomination of the Cuſtos Rotulorum out of the King, as it was ſettled by 37 H. 8. and placed it in the Lord Chancellour, or Lord Keeper. For this Act doth appoint, That the Cuſtos Rotulorum ſhould be named, as was ordained by the Statute of 37 H. 8. and ſo the Nomination comes to the King again.

Secondly, I take it, this Act doth abridge the Power of the Cuſtos, as to the naming of the Clerk of the Peace in that Particular, which is not in the other Statute, that whereas before the Cuſtos might have named any Man, let him live where he would, to be Clerk of the Peace; and the common Practice was, That neither before, nor after the Nomination, the Party named was reſident in the County, but the County Buſineſs was all tranſacted by a Deputy. Now it is enacted, That the Cuſtos Rotulorum ſhall appoint one Reſident in the County, and cannot name a Foreigner Reſident in another County.

Thirdly,

Thirdly, It doth abridge the Power of the Cuſtos, as to the determination of the Clerk of the Peace his Office: For whereas before he was removable for miſdemeanor by the Cuſtos, now that power is transferr'd to the Juſtices of the Peace at their Quarter Seſſions: Nay, if after he is removed by the Seſſions, the *Cuſtos* doth not at the next Seſſions nominate one to be Clerk of the Peace, it takes for that turn from him the power of naming a Clerk, and transfers it to the Quarter Seſſions, who have power to make one for him.

So that although the *Cuſtos* be to be named, according as is appointed in the Statute of 37 Hen. 8. yet he is not to exerciſe the ſame power which that Statute gave him. For the great Queſtion now is, what alteration this latter Statute hath made, in relation to the Clerk of the Peace and his Office? And in that point whether the Statute of Hen. 8. and this of the firſt of this King and Queen, are conſiſtent together; and I take it they are not.

For the Statute of 37 Hen. 8. doth give the Clerk of the Peace but an Eſtate at Will in his Office. I do not mean at the Will of the Cuſtos, but at the King's Will and Pleaſure, for that Statute ſays expreſly he ſhall continue Clerk, as long as the Cuſtos continueth Cuſtos; ſo that though he was not removable by the Cuſtos Rotulorum at his Will, yet if the King named a new Cuſtos Rotulorum, the Clerk of the Peace was determined, and the addition of thoſe Words (if he ſhall ſo long well demean himſelf in the Office) ſignifie nothing, becauſe they are annext to an Eſtate that was originally but at Will.

But now the Statute of the firſt of this King and Queen, I take it to be a new Law, as to this particular, and that it relates not to the former Act; for I conceive that by this Act the Clerk of the Peace hath his Office for his Life, by theſe words, To have and enjoy ſo long as he ſhall well demean himſelf in the Office.

If theſe Words had been annext to a Grant of any other Office in Weſtminſter-Hall, without all queſtion the Grantee had been an Officer for Life: And I do not ſee but that the Clerk of the Peace being an Officer relating to the execution of the Law, his Office muſt be governed by thoſe Rules that govern other Officers of like nature. He is called 2 Hen. 7. Fo. 1. not only Clericus pacis, but Attornatus Domini Regis, and that is a proper Office for him, for he draws the iſſues upon Traverſes, and ſo acts as Attorney in that Court for the King.

When once the Cuſtos hath named him, he hath no further power by this Act over him, but he is in by virtue of the Statute;

and I take it, he is not removable by the Death, or removal of the Custos Rotulorum, any more than any other Officer here in Westminster-Hall is upon the Death or removal of the Judge that placed him in; for being once in his Office, the Law settles him there.

And for this word (only) that he shall hold the Office so long (only) as he well demeans himself in the Office: I cannot think that in that place it signifieth any thing more properly than to be determining of what Estate the Clerk should have in his Office, that he should be removable upon no other Cause. The word (only) in another Office would not have made any alteration as to the Law, and I cannot conceive why it should in this.

If the meaning of the Law makers had been otherwise, they would have referred this Clerk of the Peace to the order appointed by the Statute of 37 Hen. 8. as the other was. But this is a distinct enacting Clause, having no relation to it at all.

And that this should be the meaning of it, seems to me to appear by those subsequent Clauses that my Brother hath observed.

For in the next following Clause, which impowers the Sessions to remove the Clerk for Misdemeanor, and to name another in default of the Custos his nomination, the Act says, that he who is nominated by the Justices shall hold and enjoy the Office, speaking indefinitely, and that, I take it, would make an Estate for Life.

But the next ensuing Clause makes it more clear, that though there be no express Limitation in that foregoing Clause, yet it saith he shall be subject to the same Limitations, Forfeitures and Conditions as are before in the Act mentioned and expressed. Now there is no limitation of his Estate in his Office, but that of good Behaviour.

Therefore, I say, upon the whole Matter, I take it, that the Plaintiff being named Clerk of the Peace by the Earl of Clare, when he was Custos Rotulorum, had by that an Estate for Life in his Office; and I take it he is well intituled to the Fees of the Office, and that therefore in this Case the Plaintiff ought to have his Judgment.

Mr. J. Dolben.

And I am of the same opinion that the Plaintiff ought to have his Judgment.

I do agree, that which my Brother Eyres offered at first, that the Plaintiff must make himself a Title, or he can have no Judgment; he is not to depend upon the weakness of the Defendant's

Title,

Title. And I think the Plaintiff hath a good Title to this Office; and that notwithstanding the removal of the Earl of Clare from the Office of Custos Rotulorum, he yet continueth still Clerk of the Peace of this County.

The truth is in this Case, it cannot be expected that much should be said; all that is possible to be said, I think, my Brothers have spoken already; for it stands upon these two Acts of Parliament, and if you will take these two Acts of Parliament into consideration (upon reading of them, and weighing the several parts and clauses in them) I cannot but think any Man will agree with me that this is a plain Case, and truly I do not find any difficulty at all in it.

I did indeed expect the Counsel for the Defendant in their Arguments of this Case would have laid some stress upon the Word (only); for if any Office be granted to a Man to enjoy, so long as he shall behave himself well in it, no one will doubt but the Grantee hath an Estate for Life in the Office. Now whether the word (only) doth make any difference in the Case is the Question; and truly, I must say, I can see none.

Whatsoever the meaning of putting in that word was, I cannot tell, nor have heard any thing satisfactorily spoken to it. For if any one hath an Office granted to him to hold quam diu tantum se bene gesserit, would that make it not to be an Estate for Life?

But the reading of this Statute to me, gives me full satisfaction that the Law-makers intended that the Change or Death of the Custos Rotulorum should not avoid the Office of Clerk of the Peace: That it did so by the Statute of 37 Hen. 8. is plain; for there the words are, He shall be Clerk of the Peace so long as the other continueth Custos.

Then the Question is, whether there be any alteration made by this last Statute; and that the Statute of Hen. 8. was altered as to the Custos by that of Edw. 6. cannot be disputed, for it was the declared end of that Statute. But I think it as plain that it was not altered as to the Clerk of the Peace, for there is nothing of alteration appears. All that it doth is, whereas, before the King by Bill did appoint the Custos Rotulorum, the Statute of Edw. 6. hath restored it to the Great Seal.

But now this Statute of William and Mary doth not only make an alteration in returning the appointment of the Custos into the former Channel; but I take it is introductive of a new Law, as to the Clerk of the Peace; for I pray mind the words of it, how it is Penn'd.

Smith

Saith the Statute of Hen. 8. when the Cuſtos Rotulorum ſhall have named the Clerk of the Peace, he ſhall enjoy the ſame Office, and execute it by himſelf or Deputy, during ſuch time as the Cuſtos continueth Cuſtos, ſo as he behave himſelf well in it. And by that it is plain he had no other Title but what depended upon the continuance of the Cuſtos.

But now this latter Statute ſaith, that when-ever the Cuſtos ſhall find the place void, he ſhall have power to nominate and appoint a fit Perſon to be Clerk of the Peace, to execute the ſame by himſelf or his ſufficient Deputy, and to take the Fees for ſo long time only as he ſhall well demean himſelf.

Can any Man believe that (which is the only thing in the Queſtion, for they had nothing elſe to ſay) theſe Words make no alteration of the Clerk's Eſtate in his Office, from what it was by the Statute of Hen. 8. And they muſt ſay ſo, or the Law is clear for the Plaintiff. But when one Statute ſaith he ſhall have the Office, during the time that the Cuſtos continueth Cuſtos upon his good Behaviour; and the other ſaith, ſo long only as he ſhall well demean himſelf in the Office, that muſt needs make an alteration.

And truly it ſeems to me that thoſe words are not to be ſlighted (when he finds the place to be void) then he ſhall nominate ſo and ſo. There was no need of that by the Statute of Hen. 8. for there it was always void upon the removal of the Cuſtos, but here it is limitted as to his nomination whenſoever it is void, which ſheweth that the Parliament meant not that it ſhould be void upon every change of a Cuſtos.

I think, truly, that there is another thing that is very conſiderable, and it hath been obſerved already by both my Brothers, and that is, the great many Alterations that are made in this laſt Law concerning the Office of Clerk of the Peace, which were not in the other of 37 Hen. 8. For the Cuſtos now cannot name any Perſon but one reſident in the County. The Juſtices of the Peace have now a Power, if they find he doth not demean himſelf well in his Office, to ſuſpend or diſcharge him, which they had not before. And I take it to be very clear, that if the Cuſtos do not before the next Seſſions after ſuch Diſcharge nominate another, they may put in one; and who they put in ſhall hold the Office, not during the pleaſure of the Cuſtos, but ſo long time as he ſhall well demean himſelf in the Office.

My Brothers having ſo fully ſpoken to this Caſe, and it being only upon the conſtruction of ſhort words, in an Act of Parliament, I think there needs little to be ſaid, and all that can be hath been ſaid: And therefore I take it to be clear, that the Plaintiff ought to have his Judgment.

L. C.

L. C. J. Holt.

I will ſhortly put the Caſe, and it is no more than this.

The Earl of Clare is made Cuſtos Rotulorum of Middleſex, according to the Statute of 37 Hen. 8. which is revived by the Statute of the firſt of this King and Queen. He being ſo Cuſtos Rotulorum, did by his Deed, bearing Date the 19th of July, in the firſt year of the King and Queen, conſtitute the Plaintiff Mr. Harcourt to be Clerk of the Peace of that County, to have and execute that Office by himſelf or ſufficient Deputy, ſo long as he did well behave himſelf in it.

After this my Lord of Clare was removed from the place of Cuſtos, and my Lord of Bedford was duly made Cuſtos Rotulorum, and he being ſo made, doth by his Deed appoint the Defendant Mr. Fox to be Clerk of the Peace, for ſo long time as he ſhould continue Cuſtos Rotulorum, if the ſaid Mr. Fox the Defendant did well behave himſelf in the Office. And the Queſtion is,

Whether or no, by the Amotion of my Lord of Clare from the Office of Cuſtos Rotulorum, Mr. Harcourt the Plaintiff doth ceaſe to be Clerk of the Peace? For then the Law is for the Defendant, otherwiſe it is for the Plaintiff.

And I do concur in opinion with my Brothers, that Judgment ought to be given for the Plaintiff, and that he is ſtill Clerk of the Peace, notwithſtanding that he who made him ſo, is not ſtill Cuſtos Rotulorum.

And this Caſe indeed does depend altogether upon the Statute in the firſt Year of this King and Queen: But however, it may not be improper before I give the particular Reaſons that I rely upon, for the ground of my Opinion, a little to conſider how it comes to paſs, that there is ſuch an Office as *Cuſtos Rotulorum*, and how that *Cuſtos* comes to have the right to nominate and appoint the Clerk of the Peace.

That the *Cuſtos* is not an Officer time immemorial is moſt plain, becauſe the Commiſſion of the Peace, to which that Office relates is not ſo; but did commence in time of Memory; but that he is an ancient Officer, that doth appear. Whether he was before the firſt and fourteenth of Edward 3. I think is not certain, but that he is an ancient Officer may be ſeen in Lambert's Eirenarcha, fo. 371.

Now you know the Commiſſion of the Peace did commence in time of Memory, and that the Juſtices were appointed by the Crown, not before the firſt of Edw. 3. and then they were made in lieu of the Conſervators of the Peace, who were as an-

cient

cient Officers as the Law knew; ſo ſaith the Statute of 1 Edw. 3. 16. For the better keeping and maintenance of the Peace, the King wills that good Men in every County be aſſigned to keep the Peace.

In what manner they were to keep the Peace, and how they were to execute the Authority that was given them by this Act of Parliament, doth not appear; but no queſtion they were to take ſuch Methods for the keeping of the Peace, as the old Conſervators were. But that not appearing, I take not upon me to determine what method they were to take for keeping of the Peace, or whether they were more than High Conſtables.

But the Statute that makes them compleat Judges is, that of 34 Edw. 3. cap. 1. about what ſort of Perſons ſhall be Juſtices of the Peace, and what Authority they have. They were to have a Commiſſion, they had Authority to hold a Court, and thereby they were Judges of a Court of Record.

This did give occaſion to the commencement of the Office of *Cuſtos Rotulorum*, for they being Judges of Record, the Records of that Court muſt be in their Cuſtody. All Indictments and all Proceedings upon them, Pleas, Convictions, Acquittals and Judgments muſt be entred upon Record, and in legal Conſtruction all the Juſtices had them in their Cuſtody, and have them to this day, for all Certioraries are directed to the Juſtices in general, but in regard it might be inconvenient that the Records ſhould be diſperſed among them promiſcuouſly, and not kept together in one hand; I look upon it that it was in the power of the King to appoint ſome particular Perſon to have the Cuſtody and Charge of the Records, and that he ſhould be a Perſon reſponſible to the Subject for the ſafe keeping of them, and to whom he might have reſort upon all occaſions, when he had any uſe of them.

This was thought convenient; for the words at the end of the Commiſſion of the Peace are, We appoint you ſuch an one to be Kepeer of the Records and Rolls of the County: So that though legally as I ſaid, the Records are in the poſſeſſion of all the Juſtices of the Peace, all Certioraries and all Writs of Errors being directed to them, yet direcly they are in the Cuſtody of the *Cuſtos Rotulorum*, and if by negligence or miſdemeanour they happen to be loſt or miſcarry, he is reſponſible to the King, and to the Subject, for ſuch loſs or miſcarriage.

This ſeems to me to be the Commencement of this Office of *Cuſtos Rotulorum*; for no one being more in Commiſſion than another, it was in the power of the King by his Prerogative, to appoint one to keep the Records. But therefore it doth neceſſa-

rily follow, that no Person whatsoever could be *Custos*, that was not a Justice of Peace in Commission. The King could not name one that was not in Commission, for it would be an errant contradiction to make Judges of Record, to whom properly the Custody of those Records belongs, and by any Act to take from them that Custody, and put in another that was none of the Court, to keep the Records, when Writs are to be directed to the Judges of the Court, to certify those Records when there is occasion to remove them. And therefore by 3 Hen. 7. cap. 1. If a Recognisance for keeping of the Peace be returned to the Sessions, and the Party make default, it is to be certified into the Chancery or this Court, or the Exchequer, by that Justice who is *Custos Rotulorum*.

But then, since I have said that it is in the King's Power to appoint a particular Person, one in the Commission of the Peace, to have the Custody of the Rolls and Records of the County, how comes it to pass as the Statute of 37 Hen. 8. saith, that the Lord Chancellor did use to nominate and appoint the *Custos Rotulorum*?

I say, he named him virtute Officij; it belongs to him to grant out all Commissions of the Peace under the Great Seal, and that he doth without a particular Warrant legally notwithstanding that Statute; and yet he was named by the King in Construction of Law. For the Commission is in the King's name; but actually the Chancellor named him, for that is incident to his Office, on the behalf, and in the name and stile of the King.

So you see it was always done, ever since that Statute of 3 and 4 Edw. 6. before the Statute of 37 Hen. 8. was revived by the Statute of 1 of this King and Queen. Always the Custos Rotulorum was appointed in the name of the King, but the Chancellor or Keeper did always grant the Commission virtute Officij, and never had any Warrant for these things. But it is the Duty of him that hath the Custody of the Great Seal to take care for the ordinary and common Administration of the Government.

Now Justices of the Peace are (though in a subordinate nature) parts of that ordinary Administration, and therefore, though they now have a Judicature by 34 Edw. 3. yet it belongs to the same Office to issue out those Commissions of the Peace, as well as those of Oyer and Terminer, which are of course made out with a particular Warrant for so doing.

But then this Statute of 37 Hen. 8. acknowledging that the power of nominating the Custos Rotulorum, was in the Lord Chancellor for the time being, it doth look upon it that the taking of it out of the power of the Lord Chancellor, to do it

virtute Officij without Warrant was a better course, and therefore the Statute did not repeal that Incroachment, but appointed a middle way that the Custos should be nominated by Bill, signed with the King's own Hand. That is, my Lord Chancellor should appoint him by Commission, under the Great Seal, but this must be upon a Bill Signed with the King's Hand as his Warrant.

This was afterwards thought very inconvenient at every turn, to apply to the King for a Bill; and therefore the Statute of 3 and 4 Edw. 6. repealed the Statute of Hen. 8. as to this matter, and restored the Lord Chancellor to his ancient Power of nominating the Custos Rotulorum. So that it is plain that this Power which the Lord Chancellor had was incident to this Office; and for this you have the Judgment of the Parliament in both these Statutes.

But then in the next place it is to be considered how the Custos Rotulorum comes to make the Clerk of the Peace. For as my Brother Gregory observed, the Clerk of the Peace doth Act for the King as his Attorney, and at the Sessions doth joyn Issue for the King.

The Custos nameth him for this Reason, because the Rolls and Records of the Sessions being by the Commission put into the Custody of the Custos Rotulorum, the Clerk being the person that must be trusted with the Rolls to make entries upon, to draw Judgments, to Record Pleas, to joyn Issues, and enter Judgments; then of common Right, by the common Law of the Land, it belongs to him that hath the keeping of the Records, to nominate this Clerk, and not to any one else.

And it would be the most unreasonable thing in the World, that the Custos Rotulorum being intrusted with the Custody of the Records by his Commission, any other should be made Clerk of the Peace, for the actual possession of those Records, than such an one as he should appoint, when upon any loss or miscarriage, he is answerable for it himself, to the King and the Subject. I appeal to any one whether that be reasonable.

My Lord Coke, 2 Inst. 425. in his Comment upon the Statute of William 2. hath a large Discourse upon this Point, about the Judges of this Court and the Common Pleas, appointing their Clerks to Enrol Pleas before them in their Circuits: And he saith this is according to the Rule of the Common-Law, that it belongs to them who are Judges of Record to make their own Clerks, and that upon two Reasons.

First,

First, They are most concerned, their Acts are to be recorded, the mistaking of which is a dishonour to the Justices, and a Prejudice to the Party. And,

Secondly, The Law intrusteth in these Matters those that best understand who is most fit and proper to perform the Duty of the Place. And therefore for the benefit of the Subject, and the honour and safety of the Person trusted, he ought to have the Nomination of that Person who is thus to be intrusted under him.

And that was the Reason of the Judgment in Mitton's Case, Co. l. 4. fol. 32. about the Office of County Clerk, as it is likewise that which is complained of in the Statute of 37 Hen. 8. That several were made Clerks of the Peace by Grants for Life that were insufficient. But in Mitton's Case the Question was, whether the King's Grant of the Office of County Clerk was good? And it was held it was not good; for it was held to be inseparably incident to the Office of the Sheriff, and could not by any Law or Contrivance be taken away from him.

So that having as well as I can, given an account of the Nature of the Office of Custos Rotulorum, and the Reasonableness of his not having the Nomination of the Clerk of the Peace, I shall now give the particular Reasons upon which I ground my Judgment in this Case.

The Words of the Statute that make the Question have been read to you, and therefore I shall not trouble you with the Repetition of them. But the Reasons I go upon are these:

First, The Words themselves in their natural and proper Extent, do signifie an Estate for Life, the Clerk behaving himself well, as those are the Words, (for so long time only as he shall behave himself well in the Office.)

Truly, Though the Counsel at the Bar did not so much insist upon the Word (only) as I expected, yet I declare it was the only Scruple I had, and should not have doubted the thing at all upon reading the Words: And I believe few would have doubted, if the Words had been for so long time as he shall behave himself well without the Word (only.) Then it had been so indefinite a Limitation, that no Man, I think, would have doubted (for my part I should not have made the least question) but that it was an Estate for Life.

Then let us see whether there be any difference by the putting in this Word (only.) Is not that as long an Estate as the other? Is it less for that Word? Surely no. If so be then, for

ſo long time as he ſhall behave himſelf well, and for ſo long time only as he ſhall behave himſelf well, be of equal extent, then he hath an Eſtate for Life in the one Caſe, as well as in the other.

Secondly, My next Reaſon is this. Here is certainly ſome Power given to the Cuſtos Rotulorum. Now taking it to be a Power given by the Statute, then the Statute intended ſomething, and it being a Power to nominate the Clerk of the Peace, the Words that follow muſt intend a Limitation of his Eſtate in his Office. For he had a Power to nominate before, and here is a Power given him anew by this Statute.

Let us take then the Caſe of a Power given to a Man without reſpect to an Intereſt. Suppoſe a Tenant for Life by way of Uſe, and a Power is given to him to make Leaſes for 21 years only, is not this as much as for Twenty one Years abſolutely? And he doth make a Leaſe for 21 years, and then dyeth, is not this a good Leaſe.

Tenant for Life could have made a Leaſe for years before determinable upon his Death, and ſo could the Cuſtos Rotulorum have made a Clerk of the Peace determinable upon his Death or Removal before this Statute. But then when he hath ſuch a Power given him by a particular Statute, not in reſpect of this Intereſt, but only of his preſent Poſſeſſion, certainly this Nomination being an Execution of his Power, when he hath done that, he hath done with the Buſineſs, he hath no more to do with this Office, the Clerk of the Peace then being in under that Conſtitution which hath limited how the Clerk ſo nominated ſhall be eſtated in his Office.

Thirdly, If this Clauſe hath not this Conſtruction, it is put in to no manner of purpoſe at all. And I think we ſhould be very bold Men when we are intruſted with the Execution of the Law, and the Interpretation of Acts of Parliament to reject any Words that are ſenſible in an Act. And if we ſhould look upon this Office to be no otherwiſe ordered by this Act, than it was upon 37 Hen. 8. we do reject theſe Words that are thus put into the Act.

Now to what purpoſe did the Makers of this Statute put thoſe Words in? For the Act of 37 Hen. 8. ſaith, he ſhall be Clerk ſo long as the Cuſtos remains in his Office, if he behaved himſelf well. But theſe words in this Act ſay, he ſhall hold the Office for ſo long time only as he ſhall behave himſelf well in it, without ſaying if ſo be the Cuſtos remain Cuſtos. Therefore that is indefinite and abſolute.

Why

Why did the Makers of this Act omit these words, so long as the Custos remains Custos, and put in only these words, so long time as he shall behave himself well? Surely there was a Reason to omit some words, and put in others.

Then if the Act had omitted the words, during such time as the Custos remains in his Office, and hath mentioned those words, so long as he behaveth himself well, it is natural and proper to conclude their Meaning was, that he should have the Office without more ado upon good Behaviour. And we are surely to consider this as a new Limitation, and that it was made for some purpose or other.

Fourthly, The next thing, is this, it is plain as to the Clerk of the Peace, the Makers of this Act did design the Office should not go according as it was appointed by the 37th of Hen. 8. For,

First, Consider when it comes to the Appointment of the Custos, it mentions the very Title of the Act of 37 Hen. 8. A Bill for Custos Rotulorum and Clerkship of the Peace, which concerns both Offices, and takes notice of both. But then as to the Custos in express Terms it revives the Statute of Hen. 8. and saith, the Nomination shall be as is there directed.

Now if they had intended the same for the Clerk, there had need to have been added but a few words more, i. e. to have said, That his Nomination should be likewise as in that Statute. But not doing this, it is plain their Intent was, that the Clerk of the Peace should not be appointed in that manner, but the Custos should. And,

Secondly, It is plain, they did design and intend an Alteration, and to have quite another Method observed; for otherwise why did they make this new Provision about it that they have done? If they intended it should be as it was, they would either have been silent, and left it untouched, or they would have put it in such words as would have declared such an Intent. And therefore having put in these Clauses, it is plain an Alteration was intended, and that the Clerk of the Peace should be altogether according to a new model.

Fifthly, Their Intent that he should not depend upon the Custos, does seem plain too, which is another Reason, I go upon. The design of the Makers of this Act was, to take off much of that Dependance which the Clerk before had upon the Custos, and to make him more dependant on the Justices of the Peace.

For

For before this Act the Justices of the Peace could not remove him for Misdemeanour, but the Custos was to do it, because he put him in. It is true the Justices had an Interest in him as their Servant in Court, but he that put him in, could only turn him out; but now it is quite otherwise. I do not say the Custos cannot do it, but the Justices may, which they could not before, and the Statute hath made three Alterations in this Clause.

First, Before the Act the Custos might appoint any Person that lived any where else to be Clerk of the Peace; now it must be only one Resiant within the County, that is an Inhabitant, where his Work lyeth; so that the Power of the Custos is abridged in that.

Secondly, Before this Statute, when the Custos had appointed the Clerk, that Clerk could make no Deputy whatsoever, but such as the Custos approved of; but here the Clerk may make what Deputy he will, so as he be fit for it.

Thirdly, There is another sort of Limitation of his Estate in the Office, than is in 37 Hen. 8. So that it seems to design, that the Parliament would abridge the Power of the Custos, both in the Qualification of the Party to be appointed Clerk, and in enabling the Clerk to make what Deputy he would, and to execute the Office otherwise than he did before, and in making him a Person that should subsist upon other Limitations in the next place.

Sixthly, It seems to me upon the whole frame of the Act, to be the Intent of the Parliament to make such Provision, that the Sessions and Justices of the Peace should always be furnished with an able Clerk of the Peace, and to encourage him in the faithful Execution of the Office they settle the Estate, so as to put him out of fear of losing it for any thing but his own Misbehaviour in it. If he was a Man of approved Sufficiency, he was not so easily to be parted with, or upon such an accidental thing as the Amotion or Death of the Custos; and it seems the Publick Good was designed, for it was a great Mischief to have the Office so easily vacable.

Seventhly, In the last place as to this word (only) which was the only word that made me doubt, I think the Design of it was not to limit or lessen the Interest of the Clerk in his Office. But rather to lessen the Power of the Custos, and restrain him that it should be only in the Power of the Custos to nominate for so long

long time as the Clerk behaved well in the Office, that he himself should not make a Grant of it for a less Interest or Estate, than upon good Behaviour.

He is so confined up by this Act, that he shall not make him during pleasure, or for years, but when he hath nominated him, that is, all he hath to do, and then he is in by the Act that giveth him his Estate; and this seems to me to be the sense of the whole Act.

I compare it to the Case which my Lord Chief Justice Hobart puts of himself in his Book, Folio 153. in Colt and Glover's Case. Saith he, I cannot grant the Offices of my Gift as Chief Justice for less time than for Life, and he puts the Case there of a Man's assigning a Rent for Dower out of the Lands dowable, that it must be for no less Estate than Life; for the Estate was by Custom, and it cannot be granted for a lesser Estate than what the Custom appoints; and in that Case of the Chief Justice, his granting Offices in his Gift, all that he had to do, was to point out the Person that should have the Office, the Custom settled his Estate in it.

So here all that the Custos hath to do in reference to this Office of Clerk of the Peace, is to point out the Person that should have it; and as the other is in by Custom, so here he is in by Act of Parliament; the Custos when he hath named him, he hath executed his Authority, and cannot qualify the Interest which passeth by the Act.

I am the more inclined to be of this opinion, because I knew the Temper and Inclination of the Parliament, at the time when this Act was made; their Design was, That men should have Places not to hold precariously or determinable upon Will and Pleasue, but have a certain durable Estate, that they might act in them without fear of losing them; we all know it, and our Places as Judges are so settled, only determinable upon Misbehaviour.

Contemporaria expositio legis est optima, a contemporary Exposition of a Law; if there be any Question about it, as our Books tell us, is always the best, because the Temper of the Law-makers is then best known.

Therefore upon the whole Matter, I take it the Clerk of the Peace before the Statute of 37 Hen. 8. was removable at the pleasure of the Custos Rotulorum, because he was his Clerk; but then by that Statute he is transformed into an Officer, and hath a durable Estate in his Office, as long as the Custos continued Custos, and he behaved himself well in the Office: He hath by that Statute Fees and a Power to make

a De-

a Deputy, ſuch as the Cuſtos ſhould approve of; ſo that if he behaved himſelf well, the Cuſtos could not turn him out.

But now I think ſince the making of this laſt Statute in the firſt of this King and Queen, he hath abſolutely an Eſtate for Life in his Office independant upon the Cuſtos, and determinable only upon Misbehaviour. And for theſe Reaſons I do concur with my Brothers, that Judgment ought to be given for the Plaintiff.

DE

DE

Term. Sanct. Mich.

Anno IV Jacobi Secundi

IN

BANCO REGIS.

Die 6 November. Anno Dom. 1688.

Hitchins *verſus* Baſſet.

Mr. Serjeant Maynard.

May it pleaſe your Lordſhip, John Hitchins is Plaintiff, and Sir William Baſſet is the Defendant, in an Ejectment of the Mannor of Lanrake, &c. in the County of Cornwall. The Leſſor whoſe Title is in queſtion, is Mr. E. Noſworthy: his Title, as 'tis found by the Special Verdict, is this. Sir Henry Killigrew was ſeized of theſe Lands in Fee, and Anno 44. he makes his Will, which is found in Hæc Verba. He makes a deliberate Will (and ſhews his Reaſons why he made it) and thereby gives his Land to his Couſin Berkley for his Life; under whom a good Title, (if there be no Revocation of the Will,) is derived to the Leſſor of the Plaintiff. But they find further, That Anno 45. this Sir H. Killigrew made another Will. But what are the Contents? Theſe are the words of the Verdict; made al' Teſtatum in Writing. But quod fuit content', &c. Jur' ignorant. And conclude, If the Court adjudge the

last a Revocation of the first, then they find for the Defendant; if not, they find for the Plaintiff.

The Case is short, and is but this. A Man seized in Fee makes a Will in writing, and devises his Land, and that deliberately, and upon Reasons given; And he does a year after make another Will, but the Jury find not what was the Contents of it: And what the meaning and effect of it was, that they know not; and refer it to the Judgment of the Court, whether this be a Revocation or no.

My Lord, Under favour, it can upon no Reason in the world be said to be a Revocation, but the first Will does stand, and the last signifies nothing.

Before I enter into my Argument, I must observe the Case hath been argued before; And we know one another's Reasons. And I shall state to your Lordship where the difference is between us.

My Lord, We do not differ what the nature of a last Will is. A Will is a Publication of a Man's Mind, as to what he will have done with his Estate after his Death. And we do agree, every Will is revocable. And though a Man should have said he would not revoke it, yet at the time when this Will was made, he might have revoked it by parol. But that wherein we differ, is this. 'Tis said on their part, that any Will whatever it be that comes after another, is absolutely in Law a Revocation of the former; that my Lord, we do differ in. We say, a man may make a Will of several things at several times, and they both shall stand, and one not trip up the Heels of the other. As for the purpose, as to my Lands in the Province of Canterbury, and Goods there, I give them to J. S. I may afterwards say; As to my Lands in the Province of York, and Goods there, I give them to J. D. this Will does not revoke the other. If a Man settle his Land or Estate upon his Wife and Children, and 5 or 6 years after another Child is born; and he says, I give my last Child born 500l. this shall not undo what was done before. That they deny my Lord.

My Lord, If a man shall settle his Estate upon his Wife and Children, and afterwards being pleased with his Tender, says he, I give so much to my Tender; all is void, if what they say is true. But, my Lord, I affirm it, That a man may make two Wills, and both stand together where they are of two several things, and not contradictory one to the other. The Question upon the whole Case is, whether a deliberate Will being made, and after a Will that they know not what the Contents of it is; whether that be a Revocation of the former? The Question is

upon

upon the whole in complexo, as the Verdict is found. Upon that they do not know as well as that they do know.

First, My Lord, I ground my self first upon the nature of a Verdict. A Verdict when 'tis found, there can be nothing added to it, nor nothing taken from it; but as 'tis found, so the Court must judge of it.

Secondly, My Lord, I say this, That whatsoever is found in a Verdict, whereupon the Court can give any Judgment, must be positively found, not ambiguously: For if the Jury do doubt, the Court can never resolve the Matter of Fact. Nay, to go a degree further, If the Jury do find positively the matter of Argument, and do not make the Conclusion de facto, the Court shall reject the matter of Argument, and give Judgment to the contrary: The Reason is plain, because an Attaint lies upon a false Verdict, and a man cannot be attainted upon what he doubts. The Authorities are herein very plain in Croke Car. fol. 549. Crisp and Pratt's Case. Issue being joyned upon a Fraud; It was adjudged there, that though there be never so many Circumstances of a Fraud found, unless the Jury find it to be a Fraud, the Court shall adjudge it to be none

In the Earl of Lincoln and Lady Gorge's Case. A Man purchases Land and pays for it, and directs a Conveyance to his Daughter who knew nothing of it, but he kept the Possession, took the Profits of it, and declared that he was Owner of it. And when all this was done, he made a Mortgage of it. And the Question came between the Daughter and the Mortgagee. Says the Mortgagee 'tis a Fraud, and without doubt the Court would hold it so. But the Jury finding only the Evidence, and not that it was a Fraud, Judgment was given for the Daughter against the Mortgagee. 154. Noyes Report. The question was upon the Evidence, whether Resignation or no? The Jury find a Special Verdict, the Evidence thus; That he was the person that signed the Instrument of Resignation, and sealed and delivered as his Act and Deed to the Register, &c. And the question was, whether upon that Verdict the Court should adjudge it a Resignation, because they did not find the Bishop agreed. And the Jury being ignorant, certainly the Court must be more ignorant than they.

May the Court must know the contrary, for they can take no notice of what is dubiously found.

My Lord, This is not only a Precedent, but the conſtant and rational Judgment of Mankind, De non apparentibus & non exiſtentibus eadem eſt ratio & Judicium. 4 E. 1. 'Tis expreſſed in a Record of Darrein Preſentment againſt William Duras (where the Court in thoſe times did enter the Reaſon of their Judgment; the Reaſon is thus) Quotieſcunq; Juratores dubitant an aliquid ſit, perinde eſt ac ſi non eſſet Where can you find in all this Verdict, (nay the Jury ſay they do not know) what were the Contents of this Will? Pray, my Lord, where will you look to find the Contents when they find none? Where will you find the Revocation of a Will? Why, my Lord, I think, under Favour, if I had ſaid no more I had ſaid enough. But my Lord, there hath been much Earneſtneſs in this Caſe, and therefore I will not reſt here.

My Lord, They ſee the Objection, and therefore never go about to argue that Point that is found by the Jury, but have found out a way to leave out half the Verdict: And becauſe the Jury have found another Will, they have taken upon them an Invention of their own, that is, ſay they; when there is a ſecond Will found by the Verdict, the firſt is void.

But, my Lord, They go out of the Verdict and find a Will in the Clouds; and are like a Squirrel that is hunted from one Tree to another. But, my Lord, I will gratify them in it; take the Caſe. Here is a good Will, as appears upon the Reaſons ſet forth; and after the Teſtator makes another Will; what is given by this? Nothing. The Jury find there is none; and now they put you to hunt for it. Pray go to blind-man's buff, and let the Court find it out. I am ſure there can be but Conjecture, they cannot prophely at this Day. And if no body can ſay what the Will is, can they ſay 'tis a Revocation? My Lord, there was replied to them that made this Objection: But what if a man makes a latter Will the very ſame? Sir H. Killigrew (and a gallant Gentleman he was) left his Will with his Couſin, and then within a year, was feign to go into France without any occaſion of change at all given him of the one ſide or the other, and he makes another Will, and what that Will was is not known, what if the latter Will were a Confirmation of the former? How if it were expreſly the ſame with the former? What was the Anſwer to that? Ay, but that was not likely. Surely it was more likely he ſhould confirm his Will, than deſtroy it.

But, my Lord, To go no further, he might do it, and that is enough for me. And then the Preſumption is falſe they go upon. My Lord, If I did conclude here again, I ſay I need go no further. When a Judgment was antiently entred, they uſed to enter their Reaſons. Now they enter it only Quibus viſis lectis

lectis & auditis & per Cur. plene intellectis, &c. Now if this Judgment ſhould be entred, when was this read to the Court? where was it ſeen? what was it the Court underſtood? what Fact is here found for the Court to deliberate and conſider on? My Lord, 'Tis a ſtrange Caſe; but I will go further, and take upon me by Reaſon and full Authorities to prove againſt them, that they are miſtaken in the Law. I will give my Authorities and Reaſons, and anſwer their Authorities and Reaſons pretended.

For the Authorities of my part, I begin with a Judgment, a Book cited by themſelves, but ſo cautiouſly they would not put the Caſe at large. Peckham, 2 R. 3. fol. 3. An Action of Treſpaſs was brought for taking away Goods. The Defendant pleads the Teſtator was poſſeſſed of theſe Goods as his own Goods, and made the Defendant Executor, &c. And to this Bar the Plaintiff replyed, and confeſſed and avoided the Bar thus; Says he, 'tis true, he did make the Defendant Executor, but afterwards he made another Will, and thereby made me Executor; and thereupon I took the Goods and brought the Action. And it was queſtioned, whether it was good without a Traverſe; and it was adjudged good. I ſay, this is a Judgment for me. Their Affirmation is, If there be a Will, though no body knows what it ſhould be, 'tis a Revocation of any former Will. My Lord, In this Caſe they prove there was another Will, but reſt not there; but ſay, he made me Executor by it. What does the Court ſay to this? Quiſquis in vita ſua facit al' Teſtamentum, &c. Whoever makes another Will, and makes another Executor, the Law revokes the former pro hoc. Why does it? Pro hoc quod al' Executor nominatur. Et ſi, &c. 'Tis as full for me as a Man can ſpeak. Why was it a Revocation? becauſe by it he made another Executor. And why ſo? becauſe a Man never makes a Will, but if he does any thing afterwards by which the Court may underſtand the Will is changed, 'tis revoked. When the Reaſon is with me, the Judgment is with me. Now, the Reaſon was not the making the Will, but the naming another Executor.

15 H. 7. fol. 17. It is a Rule given by the Chief Juſtice: when a Will is made, the Court muſt look what the words are, and ſo judge. Now where are the words of this Will to judge by? If there be none, then you can judge it no Revocation.

My Lord, The next Book is in Anderſon's Reports, fol. 721. The Caſe is there thus (Placita) But I won't miſtake the Caſe. The Caſe was this. A man does deviſe to his Son his Lands to him and his Heirs. Afterwards he makes another Will, and thereby he did deviſe the ſame Lands to his Wife for Life, paying the

Son,

Son, &c. And the queſtion was, whether this laſt Will was a Revocation of the former? It was finely cited: They told you, Two Lawyers were of opinion it was none; they might have been pleaſed to have given due honour to them. It was the Chief Juſtice Anderſon, and Glanvill, a very learned Judge. And why was it no Revocation? Becauſe they may both ſtand together. This Caſe Anderſon reports as his own Opinion, as a Judgment upon the Bench by him and Glanvill, and it ſeems there was no other Judge upon the Bench.

My Lord, Next to this I ſhall cite Coke, fol. 23, 24. Hodgkinſon's Caſe. A man deviſes the Fee-ſimple of his Land; and afterwards makes a Leaſe of the ſame Lands to J. D. and it was for thirty years, to commence after the death of the Teſtator. It came in queſtion, whether it was a Deviſe of the Fee-ſimple or no? And in that Caſe both could not ſtand wholly. My Lord, they agree. If it had been a Leaſe for twenty one Years, it had been no Revocation; but being to commence after the death, it muſt be a Revocation; but of what? Not of the whole, but only de tanto. And the Caſe cited out of Anderſon, is cited there, and the Reaſon of the Caſe by which that has a double Authority.

I will cite you another Judgment and Reſolution too, in Croke, Car. fol. 51. A man makes his Will, and by his Will he deviſed Legacies to two Brothers that he had; and afterwards fell ſick, and then makes another Will. For he was asked by ſome then, who ſhould be his Executor? and he named his Wife. And being asked, what he would do for his Brothers, to whom in truth he had given each a Legacy? I will give them nothing, ſays he, but then he gave a Legacy to his God-Son, &c.

The Queſtion is not there, whether the latter Will was a Revocation of the former; but becauſe of theſe words I will give him nothing, it was doubted, whether it referred to the time of his Indiſpoſition then, I will give him nothing now: Or whether it was ſo general as it ſhould repeal the former Legacy by the former Will? The Reſolution upon hearing Counſel was, that it was no Revocation of the former Legacy. And the Reaſon is, becauſe in dubiis non præſumitur pro Teſtamento.

That there may be two Wills, is Cro. Car. Den's Caſe. 'tis fol. 114 and 115. There 'tis expreſly ſaid, If a man make one Will of Goods, and another of his Lands, and a Revocation is alledged of both, a Prohibition ſhall be granted for the one, and denyed for the other.

And

And, my Lord, I heard it, Cro. Car. fol. 595. Jones and Berkley put this very Case, If a Man makes two Wills, one of his Lands, and another of his Goods, that a Prohibition shall go only as touching his Lands, and not concerning his Goods. And where an intire Will is made of Lands and Goods, a Consultation shall go to the whole, because the examination of the whole will do no hurt.

My Lord, They cite Swinbourn and Godolphin; but you shall see how much to their purpose. In Godolphin, fo. 23. 'tis expresly said thus, That a Man cannot properly make two Wills, unless it be of several things: Then a Man of several things, may make several Wills, fol. 253. Swinbourn. And Perkins, folio. 179. He says expresly, if a Man makes two Wills, the latter shall stand; and the other not, nisi foit in special Cases.

My Lord, In this very Case, this point was in the Exchequer; and I think they rely very much upon it. A Bill was Exhibited on the behalf of the Wife of Seymour, by this Basset's Ancestor that is now Defendant and Heir to Sir Henry Killigrew, that made the Will. I have perused exactly the Proceedings: The Bill consisted of two parts, one impeaching the Will, the other was that Mr. Nosworthy had purchased in a Statute, which Statute (they made the usual suggestion) they said was satisfied. In the proceedings in this Case, the Court directed a special Issue, That was, whether this Will under which Mr. Nosworthy Claimed, was Revoked, yea or no? That was the Issue; and there was something led the Jury to find it, and it came back to the Court, and the Court disliked the Verdict. Says the Old Gentleman, how could they be of that Opinion? and he directed a new Tryal; (he was no ways satisfied with the former.) And then in effect upon the new Tryal, it was found as here, They find no Contents, but find a Second Will, but that it did not concern the Lands at all; and it came to be heard again in Court. My Lord, If it were a Revocation, then without all Question the Judgment of the Court ought to have been, to have an accompt upon the Extent, whether satisfied or not; but the Court was so far satisfied, that they dismissed their Bill out of Court.

My Lord, I speak this the rather, because it was the Judgment of my Lord Chief Baron Hales, of whom, as Virgil says, nec justior ullus, nec, &c.

Then came into Chancery a very learned Judge, my Lord Nottingham. He directs that we should prove ourselves a Purchaser, for if we did not, it was another Case. And what was the Consequence? He granted us a perpetual Injunction. But they

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go before the Maſter of the Rolls, and get a Diſcharge of the Extent, and then came to fence upon the Will.

My Lord, This Court was of opinion with us, and one ſaid, here was a great deal of ſtir to make ſomething of nothing.

My Lord, I have cited and gon over the Authorities of our Books, but I will mention one more. My Lord Coke in his Commentary upon Littleton, in Tenure by Burgage, does put this Caſe, If a Man makes two Wills and Deviſes, there the latter Will and Deviſe ſhall ſtand, the other not, that is a general Rule. My Lord Coke takes notice, and comments upon theſe Words, ſeveral Deviſes, there is the ſame Law of Chattels, as of Inheritances. A Man in France makes a Will, and gives ſeveral Legacies, and afterwards he makes a Will in England, but what he gave in the latter non conſtat, it was adjudged the laſt was no Revocation: It was ſaid indeed, it might be a Revocation; but it might alſo as well not be.

If a Man will ſay a latter Will revokes a former, he muſt prove it; for (ſay they) Ademptio non præſumitur niſi, &c. Another Expreſſion they have ſi deviſeris Codicello quæ præcedunt & quæ ſequuntur, idem eſt ut ſi in eodem Teſtamento continentur. A Codicel is a laſt Will, without an Executor. Now in this Caſe, whether it be contained in the Will before or after, 'tis the ſame thing. My Lord, I have gon a great way over all theſe Books, and I think upon theſe Authorities 'tis very plain.

My Lord, They cite Littleton, the Caſe that I cited before: If a Man makes ſeveral Wills and Deviſes, the laſt Will and Deviſe ſhall ſtand. My Lord, there can be no Deviſe where there is no Senſe; nothing to be underſtood at all, as in our Caſe. My Lord, 'tis a general Rule, and a Caſe put by Littleton Obiter by the way. My Lord, there are four Caſes put, and I agree every one of them to be good Law; as good Law as the Concluſion is bad.

A Man Deviſes his Lands in fee ſimple; then he makes a Feoffment in fee under Hand and Seal, and to the Deed of Feoffment he makes a Letter of Attorney, to give Livery and Sezin, and as 'tis in More's Reports, the Feoffment is void, but the Revocation is good. The other three Caſes were upon the Deviſing Lands to J. S. And after Deviſes them, 1ſt. to a Monk. 2dly. To a Corporation. 3dly. to a Pariſh, where all are uncapable to take, theſe Wills are void; and yet they are a Revocation, and here was a kind of an Huzza upon that; but here 'tis expreſſed another ſhall have it; and though the Party can't take, yet his mind is plain that the other ſhould not have it, ſo his mind was changed.

My

My Lord, I have here a Caſe, I would preſume to Read it, as 'tis in my Reports; I wrote it about 50 Years ago, and is as good as any has been Printed ſince. P. Dellore was ſeized of Lands in Black-Friers, &c. and made his Will, and by that, firſt Deviſed the Lands in Black-Fryers, to the Hoſpital of B-- in Smithfield, and afterwards makes another Will, and Deviſes Lands he had in another Pariſh to another. It was held by all the Judges, that this Darrein Will was not a Revocation of the former, for both Wills being of diverſe things, may well ſtand together.

L. C. Juſtice.

Whoſe Reports are they?

Mr. S. Maynard.

I did not take the name. I Copied it with my own Hand. I did not Copy the whole Book, but only ſome ſpecial Caſes. Now, my Lord, I come to my Reaſons that I ſhall give.

My Lord, The firſt Reaſon is from the nature of a Will: A Will is the Diſpoſition, (not the laſt Diſpoſition) but a Declaration of what a Man will have done with his Eſtate after his Death. My Lord, there are three Degrees or Steps of making it, the Conception, the Birth, and the Legitimation. The Conception is, when a Man is reſolved, I will do it; and ſo if he dies it becomes Embrio mortuus & ſignifies nothing. The Birth is when he Publiſhes it, but theſe are poſitive Laws; the Civil Laws require two, and our Law now three, to make it effectual. And if a Man does it without theſe, 'tis his Will, but 'tis mutua Lingua, it can't ſpeak in any Court on any behalf. But if he obſerve the ſolemnity of the Law, then it has its Legitimation. As for Inſtance, If a Man at this day makes his Will, and gives his Land and 1000 l. to J. S. and has 4 Witneſſes, but does not ſubſcribe his name in their preſence: This is a good Will for the Money, but for the Land 'tis void, yet 'tis in the very ſame Paper. Now what is the Eſſence of the Will? Is the Subſcribing or calling of Witneſſes an Eſſential part? 'tis not, it is Cauſa ſine qua non. 'Tis that without which the Court cannot take notice of it, but the eſſential part is the meaning of the Party; but what can be the meaning of this? Not one part of it appears; a Logician can make nothing of it; there is neither ſubjectum nor prædicatum.

My Lord, Another reaſon is from the Definition of a Will. Here is no Declaration of his mind whatſoever; a Will is made, but what does he Declare by it? Nothing. Another thing is Quodque diſſolvitur eo modo quo ligatur. When a Will is made, a Man diſcovers his mind as to the diſpoſition of his Eſtate. And if you will have a Revocation, there muſt appear his meaning to Revoke it; where is that?

A third thing is this, In Pleading: Suppoſe the now Defendant Baſſet ſhould bring Treſpaſs againſt Mr. Noſworthy, and he ſhould defend himſelf by this Will, were it a good Replication to ſay, he made another Will, and ſhew not what it was for? If the Replication and Barr may both be true, it can't be an avoidance of the Bar. My Lord, when a Man has made another Will, is it neceſſary? no, 'tis but Contingent, whether he will Revoke the former or no; when he has made another Will and keeps it to himſelf, can any one ſay 'tis neceſſarily a Revocation, or is it only a Contingent?

My Lord, Upon the whole Matter I muſt Conclude, and leave it to your Lordſhip, whether you ſhall think fit to take away a Man's Eſtate upon ſuch a Conjecture. I am ſure there is no Ground to conclude it a Revocation.

Mr. Serj. Pemberton.

May it pleaſe your Lordſhip, I am of Counſel for the Defendant. The ſpecial Verdict has found as my Brother has opened it. Sir Henry Killigrew makes a Will, Anno. 44. and gives this Eſtate to Mrs. Berkley for Life, and afterwards he comes and makes another Will in 45. which is found he made al' Teſtamentum; and then they derive a Title under Mrs. Berkley to the Leſſor of the Plaintiff, and find that Mrs. Berkley, whoſe the Eſtate was for Life, is alive, and find the Defendant Heir to Sir Henry Killigrew: And that is the ſubſtance of the Verdict.

Mr. Serj. Maynard.

You omit the latter part of it.

Mr. Serj. Pemberton.

That is, they find he made another Will, but it does not appear to them what are the Contents of it, and refer it to the Court, whether it be a Revocation of the former Will or not?

My

My Lord, The ſole Queſtion in this will be, whether the making of a latter Will do deſtroy the former Will or not? Here is a Will found, which Devises the Eſtate to Mrs. Berkley by Sir Henry Killigrew, under which the Leſſor is a Purchaſer; and it is alſo found that he made a latter Will a Year after: And if the latter Will has Revoked the former, there is an end of the Plaintiff's Title. That that really has, I hope to prove to your Lordſhip.

My Brother Maynard ſays, and 'tis a common Maxim, That a Will is Revokable ſo long as the Teſtator lives; and I thought it to be as plain a Rule too, that a latter Will Revokes all former. My Lord, I do not find it is denied in words, but they would by a diſtinction evade it. They ſay, 'Tis true, a latter Will Revokes a former, if it have words of Revocation, or the Matter is inconſiſtent with the former. This is the Diſtinction they of the other ſide have made, in the Caſe. But if it have no words of Revocation or contradictory, it ſhall not, that ſay they.

My Lord, Becauſe of this Diſtinction (which I think has no foundation in Authority or Reaſon, but becauſe of this Diſtinction) and that I may the more clearly Proceed, I will cite two or three Books that ſpeak of this Rule. Swinbourn he enumerates the ways by which a Will may be Revoked: And in the firſt place, He mentions by making a latter Will. His words are theſe, If a Man makes 1000 Wills, the laſt is the beſt, and makes void all the reſt, Swinbourn, 7 p. Sect. 14. And he puts the Caſe, to which my Brother Maynard does agree, That though there be an Oath, he will not, or a Clauſe in the former Will, he will not Revoke it; yet the laſt ſhall ſtand, becauſe the Law is ſo; the making the laſt Revokes all the reſt. And ſo in the very ſame Terms is the gloſs upon it, and I ſuppoſe Swinbourn had it from thence. Gloſſe 109. page 75. ch. of Teſtaments. He ſays Effectus voluntatis eſt quod ſecundum eam pronuntietur. What is contained in the laſt Will eo omnino ſtabitur. Office of Executor, p. 25. 'tis expreſly laid down as a Ground, That every making of a latter Will is a Countermand and Revocation of all former Wills. And upon this he collects and notes: Says he, A nuncupative Will Revokes a former Will, though never ſo formally made, and in Writing. And ſo Perkins, in the place my Brother has cited, is to the ſame effect. Then, my Lord, there is 2 Hen. 5. 8. Now, my Lord, Pray what does Linwood mean, and others mean, by ſaying, The making the latter Will makes the former void. Is their meaning, That the latter Will ſhall make void the former, if it contains words of Revocation? My Lord, If that was all, truly they might have

ſpared their Pains, for no body would Diſpute that, if there was a Clauſe of Revocation; for a Revocation without it by Parol would avoid it. My Lord, does he mean this, That a latter Will would Revoke a former, if it were contrary to it? Surely no, for a Deed will Revoke it where 'tis contrary to it, and ſo will a Codicel, and a void Will will Revoke it; for if a Man gives it to a Corporation, where there is none ſuch in the world, that will Revoke it, ſo he muſt mean ſomething further, and their meaning is this, They were diſcourſing of the nature of a Will, and ſomething that is particular to a Will, to that Inſtrument more than to any other Inſtrument: Now, whereas a Deed or any thing might Revoke it, if it were contrary, whereas by word a Man might Revoke it in terminis: Now, ſay they, by making a Will, the former are all Deſtroyed. My Lord, their words are plain, and I think there is no Ground to intend their meaning otherwiſe than their words import, That is, by making the laſt Will, all the reſt ſhall become void; not to put it upon the Contents of the Will, or any thing of that; and this ſeems to be agreeable to Reaſon, if your Lordſhip examines the reaſon of the thing. I take it why a latter Will Revokes a former, is not becauſe it contains words of Revocation, or Matters inconſiſtent; if that had been ſo, theſe Books would have ſaid ſo. But I take the Reaſon why a latter Will deſtroys the former, is this, from the very nature of a Will as ſuch an Inſtrument. For a Man having power of altering his Will, as long as he Lives, either in part or in the whole, when he makes and declares a new Will, that Will muſt be preſumed to contain his whole mind concerning the diſpoſition of his Eſtate, and therefore that alone ſhall Argue thus much. The words of declaring his Will import it, for the words are theſe, This is my laſt Will and Teſtament; That excludes all others, 'tis an excluſive Term. When a Man has made his Will, if a Man would alter part of it, there is a proper Inſtrument for that, which is a Codicel; but this is an Inſtrument as well known in Law, and as much uſe made of it almoſt, as there is of a Will; for moſt Wills of conſiderable Matters have Codicels now annexed, and this is ſo far from Revoking, that it confirms the other Will, and amounts to a new Publication. Now, when a Man has ſuch an eaſy way to Revoke part of it, or make alteration in his Will, and he makes and Declares a new Will, and will not go by way of Codicel, but makes a new Will, I think this is a ſign next to Demonſtration, that he deſigns none of his former Will ſhall ſtand

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My Lord, If your Lordship should intend this last Will to stand with the former, and to be but some slight alteration or confirmation of it, you would confound the use of Wills and Codicels wholly, whereas there is not more difference between any two Instruments in the Law, than there is between these of a Will and Codicel. My Lord, the very making of them does import such an absolute Difference. When a man Delivers his Will, he says, I deliver this as my last Will: When he comes to make a Codicel, that implies the contrary, that it shall not be his whole will; and therefore as to that he annexes it to his Will, to shew that, that as well as the other should stand.

'Tis said in the Civil Law, A man can dye but with one Will. (I will agree my Brother's distinction.) 'Tis true, he may have but one Will, but he may have 20 Codicels; the reason is, because a Will is presumed to contain the whole, and the Codicel the contrary; and so 'tis said in Swinbourn.

But, now my Lord, as my Brother says, I will agree, That a man may make partial Wills of as many things as he has. He may make a Will of his Goods and Chattels; and he may make a Will of the Mannor of Dale, and the Mannor of Sale, and all stand together; but then your Lordship will please to take it with this Consideration, they must be declared to be particular Wills at the same time. Now, if a man makes a Will of Dale, and afterwards of Sale, these are but pieces of one Will, though written in several Papers, and contain his whole Will; but then he must come and declare not generally, that he made Ultimam Voluntatem, but Ult' Voluntat. of such a Mannor, and I have seen it in Practise my self, where they have made a particular will of one thing alone; but when 'tis found generally that he made al' Testamentum that is, a general Testament, that is a Will of all.

My Brother Maynard cited a Case, 2 R. 3. fo. 3. and he takes it to be a Judgment in point for him. Under favour, I take it to be clear against him, for the Book is as he has cited it. There was an Action of Trespass brought for Goods, and the Defendant made Title to the Goods by Will of the Deceased, by which he had made him Executor. The Plaintiff replies and says, he made al' Testamentum and made him Executor, and so he claimed the Goods. The exception was taken: Ay, but you should have Traversed the first Will; No, say they (these the words are) Quia per ultimum Testamentum ut placitatur generaliter primum Testamentum revocaturin ommibus. Now if they had not taken it that the latter Will did Revoke the first, it had been necessary for them to have Traversed it. But then says my Brother Maynard, he sets himself forth Executor, and there was great Reason for it in that Case. He was Plaintiff, and it was not

enough

enough for him to avoid the others Title, unleſs he had intituled himſelf to the Goods as Executor. For if he had made himſelf no Title, he being out of Poſſeſſion, he ſhould have had no Judgment, and therefore the ſetting himſelf forth to be Executor, was not for avoiding the firſt Will, but to make himſelf a Title.

My Lord, Here is one Caſe will go a great way in the Proof of this. If a man makes 20 Codicels, they may all ſtand together. If a man makes 20 Codicels, and it does not appear what Date they are of, they ſhall all ſtand together; (Swinbourn 7. p.) But if he makes 2 Wills, and there is no Date to them, and you can't tell which is the firſt, and which is laſt, they ſhall be both void: What is the Reaſon? The reaſon is, becauſe by making the latter, the firſt is gon: And though they can't tell which of them is the latter, yet one of them muſt be the latter. Therefore, rather than this Rule ſhall be broke, that a latter Will ſhall not Revoke a former, they will adjudge both to be void.

My Lord, As to the Rule that Littleton gives, and my Brother has cited, where a man makes diverſe Deviſes, or diverſe Wills, the laſt Deviſe and Will ſhall ſtand, and the other void. Now this muſt be underſtood (ſays my Brother) that he makes diverſe Wills, and diverſe Deviſes in thoſe Wills. He is putting a Caſe of diverſe Wills and diverſe Deviſes. 'Tis not ſaid the laſt Will muſt have a Deviſe in it to Revoke the former. Then to examine our Caſe here with Littleton's Rule, which has always obtained; Sir Henry Killigrew makes a Will in 44, and afterwards (ſays the Verdict) he makes al' Teſtamentum in 45, which muſt by the way be intended a compleat Teſtament; for when they find he made ult Teſtamentum, it muſt be implied ſo (Swinbourn 1. p. Sect. 44.) that he made a compleat Will, and ſo the Pleading at all time is: Therefore, here they find, he made another Will, then according to the Rule in Littleton, that made in 45 muſt ſtand, that in 44 is void: Then what becomes of their Caſe? If Sir Henry Killigrew had made one or more Codicels, that would not have Revoked the Will. 'Tis plain he had a way to have made any alteration; but when he comes and makes an whole new Will, then the former is gon.

But ſays my Brother Maynard, This (may be) was the ſame Will over again. Then it was not al' Teſtamentum; for if a man writes the ſame Will over in other Paper, and does declare that to be his Will, that is not al' Teſtamentum, that is Idem Teſtamentum; for the Teſtamentum is the thing contained, and not the Paper. 'Tis juſt as if a man makes a duplicate of his Will, ſtill 'tis but one Will; ſo that that can't be intended in this Caſe.

Again,

Again, My Lord, How can this Case be brought within the Statute of Wills? At the Common Law 'tis plain, there could be no Devise of Lands. Now comes the Statute of 32 Hen. 8. chap. 1. That makes Lands Devisable; but how? By a Man's last Will and Testament. So is 34 Hen. 8. Now they would claim by a Devise made in the Will 44, and how can that be a last Will and Testament when he made al' Testamentum in 45? So the Case stands before your Lordship. Can any Man say, that this is a Devise contained in the last Will of Sir Henry Killigrew, when the Jury hath found he made a latter? My Lord, I take it, that the latter Will is the proper Instrument to convey this Land by. But, say they, where do they shew the Contents of it? And therefore they would have it signify nothing.

Under favour, my Lord, We do not need to shew the Contents of it. We are in Possession. If there be a Will Revokes the former, we are only to shew he made a Second Will; the Will does not belong to us; the Law never compels a man to shew what is impossible for him to shew.

My Lord, As to what my Brother says, That this may confirm or stand with the other Will. If the Law were so, that a second Will and a first might be coupled together, and stand together, which I do absolutely deny; but suppose it might be so, that they might stand and make but one Will: Say they, 'tis true, here are two Wills, but we will suppose that the first was confirmed by the last, or that the last contained no new matter, contrary to the first, and then we will lick it all well, now the matter is Salved. This would be a mighty pretty Devise to disinherit an Heir: But I hope this will not serve their turn. For it does appear by the Books cited to your Lordship, that the making of a second Will Revokes the former. Then if they would support it by any matter they would suggest, they ought to have shewed it to the Jury, that it might have been found. Here is the making of a Will found, but nothing of this appears. Would your Lordship presume it? And why should your Lordship presume this against us that are in Possession? 'Tis not by Law to be admitted.

We are now in the Case of a special Verdict, which (my Brother Maynard does admit) can have no matter of Fact added to it, and this they would have is plain matter of Fact. They would have you admit this last confirms the other Will, when it does not appear. They would have you presume that it contains matter that will stand wholly with the former Will, but how can you presume this? If there could be a presumption, it ought to be the best for us, we are Heirs, and your Lordship will not presume any thing to Disinherit an Heir; you will help him as much as you can. Then we are in Possession, you will not presume

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any thing to diſpoſſeſs us. We come before you to defend our Inheritance. 'Tis enough for us when you charge us with a former Will, to ſay, he made another after that; and it does not concern us to ſhew what the matter of it is.

My Lord, They might have made uſe of this with a great deal of more reaſon, to a Jury; they ought to have ſhewn the Contents of the Will to them, but they did not, and therefore you have no reaſon to preſume it. For now that it is found there is a Will, your Lordſhip is bound up to it, and muſt take it that there was a compleat Will made. My Lord, the Objection would have been more reaſonable for them to have made, If upon the face of the Will it appeared it did confirm the former, or his intention was the former ſhould have ſtood in part or in the whole, then there might have been more colour for them, as in the Caſe of Coward and Marſhal, the Caſe is in 3 Cro. p. 721. My Brother quotes the paſſage right, but not the Book. That was in an Action of Treſpaſs, a ſpecial Verdict was found that A. by his Will Deviſed Black Acre to his Son in Fee, and Marries, and by another Will Deviſes the Land to his Wife for Life, paying Annually to his Son and Heir 20 s. Then the Queſtion was, Whether the latter was a Revocation of the other in Toto or not; and it was the Opinion of Anderſon and Glanvil, that they might ſtand both together. But I take that to be another-gueſs Caſe than ours. It ſeems there, that it was not a formal Teſtament, but a Codicel. And 'tis ſaid to be by another writing, which I take was intended by them to be a Codicel; and then according to what I told your Lordſhip before, it does not Revoke the whole Will. But then, My Lord, there is that which took with thoſe Judges, and that is, that upon the matter that appeared before them, they took it, not only to ſtand with it, but to be a Confirmation of it, for there ſay they, his giving 20 s. a Year to his Son, to whom he had given the Reverſion in Fee before, ſeems that he intended his Son ſhould have the Revrſion in Fee; and ſo this would ſtand with his former Will, and be a Confirmation of it. How far that might rationally be collected, I won't Diſpute, but, however, they Collecting it ſo, it was a Reaſon to them, and they took it ſo; and that was the reaſon that ruled that Caſe: So I take it, the Caſe won't ſtand in our way at all.

My Lord, My Brother Maynard has made a great many Objections in this Caſe; but the chief I remark are theſe.

Pe

He ſays there may be a Will made of Lands in Yorkſhire, to one, and afterwards the Party may come and make a Will of his Land in Durham to another, and they ſhall both ſtand: And, it ſeems, the Caſe that he has put out of his own private Notes is ſo. My Lord, I agree the Caſe to be good Law, for that ſtands upon the Rule of particular Wills, and no body will deny but a particular Will may be made of one thing, and another of another thing, and one ſhall not Revoke the other; but it does not come within the general Rule, That a Second Will ſhall Revoke the former. Now if it had been found in our Caſe, that he had made another Will of this Land, there had been an end of the Cauſe.

My Lord, In the Caſe of 15 H. 7. 17. He cites theſe words, The Court muſt look upon the words of the Will; 'Tis true, they muſt if they are to give Judgment for a thing contained in the Will; but that comes nothing to our purpoſe, That the making of a ſecond Will revokes the former. His Caſe of Eyres, 1 Cro. p. 51. won't come to our Caſe at all. For there were Legacies given to the Brothers; and afterwards the Teſtator being demanded, whether he would give his Brothers any thing? No, ſays he, I will give them nothing. There the words were ambiguous; whether he meant he would give them nothing by the former Will, or give them nothing then.

My Lord, My Brother tells you, and he cites Godolphin 23. That a man can't make two Wills, unleſs it be of two things. I think this is againſt him, for then he can't make two general Wills, as theſe are found to be. 'Tis clear againſt him.

My Lord, In this Caſe my Brother tells you; That here is a kind of Uncertainty in this finding; And, ſays he, you won't take our Lands from us by an Uncertainty. My Lord, I muſt make him the ſame Objection again; The Lands are ours. If here be an Uncertainty, you won't take it from us, why ſhould your Lordſhip take it from us upon an Uncertainty to give it him? The Land is ours, you muſt take it away, or elſe we ſhall retain our Land.

My Lord, I take it, Theſe are the chief Objections my Brother has made. And, my Lord, you do now find an Heir in poſſeſſion. 'Tis found his Anceſtors made a Will, and gave away his Land; and 'tis found by the ſame Verdict, That this was not his laſt Will, unleſs a man can ſay, a Will made in (44) be af-

ter a Will made in (45,) but if not then, I am ſure 'tis found here was a latter Will.

Says my Brother, the Jury does not find, whether here be a Revocation in Terminis? I think they need not do that, but only ſhew a Will that makes a Revocation. All the finding of ſpecial Verdicts is ſo. Would he have a Jury find the Matter of Law? that muſt be left to your Lordſhip. You find us in poſſeſſion, and I hope you will not take away our Land from us.

L. C. Juſtice.

I have heard it argued before, but I can't tell whether my Brothers will ask for a ſecond Argument, I will not declare my Opinion yet. But as to what my Brother argues from Uncertainty and Poſſeſſion; They had Poſſeſſion for 20 Years upon the firſt Will. And for the Uncertainty there is nothing of it in that Will. He gives it to Mrs. Berkley for Life, and afterwards to ------ and they come and took the Poſſeſſion, and were in Poſſeſſion a great while: And then you came and contended it, and got a Verdict. And here they bring another Action, upon which this ſpecial Verdict is found, That Sir H. Killigrew made al' Teſtamentum.

Mr. Serjeant Pemberton.

They were in by Extents.

Mr. Serjeant Holt.

We could not come to it for that.

L. Ch. Juſtice.

And then the two Wills may ſtand together. There are other Caſes; there is one Caſe of Herne and Allen.

Mr. Ser-

Mr. Serjeant Pemberton.

I take it, The Queſtion will be, whether upon this general finding of al' Teſtamentum; whether your Lordſhip ſhall preſume it to be a Will that will ſtand with the former Will, or revoke it.

L. C. Juſtice.

We can neither fancy that it may ſtand with it, or is contrary to it; and therefore the al' muſt be thrown out.

Mr. Attorney General's

ARGUMENT

ON THE

CASE

OF A

CLERK of the PEACE.

ON

STATUTE 1 W. & M.

When a Clerk of the Peace is nominated and appointed by the Cuſtos Rotulorum, &c. he is to hold his Office quamdiu ſe bene geſſerit, that is, during Life, unleſs he forfeits it by Misdemeanour, and his Office is not determinable at the Will, or by the Death or diſplacing of the Cuſtos Rotulorum.

This appears,

1. From the Words of the Act.

It ſays the Cuſtos Rotulorum, or other, having Right to nominate a Clerk of the Peace, ſhall nominate and appoint a fit Perſon for the ſame. For what Time or Limitation? during his pleaſure or his continuing Cuſtos Rotulorum? No, but for ſo long time as ſuch Clerk of the Peace ſhall well demean himſelf in his Office, and in caſe he ſhall misdemean himſelf it provides a ſpecial way for diſcharging him, viz. by Examination and Proof before the Quarter Seſſions.

Now

Now all that is allowed to the Cuſtos Rotulorum, is the nominating the Perſon; The Intereſt or Eſtate he is to have in the Office, is limited and fixed by the Act of Parliament, viz. during his good Demeanour.

When an Office is granted quamdiu ſe bene geſſerit, it is a Free-hold, and to laſt during the Parties Life.

It is ſo, even in the Caſe of the King, whoſe Grant ſhall be taken moſt ſtrictly againſt himſelf.

If the King grant an Office quamdiu ſe bene geſſerit, it is a Freehold for Life. 3 Aſſ. 4. pl. 9.

2. From the Intent of the Act,

Which ſeems to be to eſtabliſh the Clerk ſo as that he ſhould depend for his Place on his own good Demeanour, and not on the Arbitrary Will of the Cuſtos Rotulorum. And this is the Condition, Limitation and Proviſion, which the Act ſpeaks of.

By this a Clerk of the Peace would be encouraged to perfect himſelf in the Skill and Buſineſs of his Place, and to do his Duty, and to recommend himſelf to the good Opinion of the Court of Seſſions to whom he is attendant; whereas otherwiſe his Care and Study might be to recommend himſelf to the Opinion of the Cuſtos Rotulorum upon whoſe Will his Place depended.

Alſo by depending on Will, it might be in the Power of the Cuſtos Rotulorum to keep the Clerk under conſtant Penſion.

And it would be a great temptation and occaſion upon the Change of every Cuſtos Rotulorum, or the Change of his mind, for the Clerk to buy his Place a-new, and be an occaſion of that Corruption which the Act chiefly intended to prevent.

The Act requires, That the Cuſtos Rotulorum ſhall not take any Money, Bond, Aſſurance, &c. for nominating and appointing the Clerk, and the Clerk is to ſwear that he has not paid, nor will pay any Money, nor has given Bond or Aſſurance for ſuch Nomination or Appointment.

By which it appears the Parliament intended that the Nomination or Appointment did confer a ſtable Intereſt in the Office during Life, and therefore their great Care was to prevent giving or promiſing any thing for the Nomination or Appointment.

Whereas

Whereas if the Clerk might be appointed to hold at will, this Care and Provision were vain; for the Cuſtos Rotulorum may take nothing for nominating and appointing, and the Clerk might ſwear he had not given or promiſed any thing, and the next day after the Cuſtos Rotulorum might turn him out, unleſs (for his continuing) he would give him ſuch Money, &c. and thereby the great Intent of the Act would be eluded.

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COPY

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PETITION

DEL

PRIOUR del LANTHON'.

Rot. Parl. Anno 8 Hen. 6. Memb. ult. num. 70. *A Petition concerning an Erroneous Judgment given in the Parliament of* Ireland, *upon a Writ of Error there brought certified into the King's Bench in* England, *which had no Power to receive it as the Petition ſuggeſted, and therefore pray'd it might be removed into the Parliament and Lord's Houſe in* England *to redreſs it.*

EX Rot. Parl. de Anno Regni Regis Hen. 6. 8°. N° 70. Au Roy noſtre treſoveraigne Seigneur & a les Seigneurs Eſpirituelx & Temporelx de ceſt preſent parlement', Supplie humblement John Penbrygge Priour de Lanthon' primes en Gales que come en les Record et proceſſe & en rendre de Juggement de le plee que fuiſt en votre parlement tenus a Develyn en votre terre Direland devant James Bottiler Counte de Urmond nadgairs votre Juſtice en meſme votre terre del aſſent des Seigneurs Eſpirituelx & Temporelx illeonqes adonqes eſteantz ſans Brief Bille ou petition Originall perentre le Priour de Meaſon Dieu de Mollynger & William nadgairs Priour de Lanthon' ſuſdit de le plee que fuiſt devant vous noſtre Soveraigne Seigneur en votre dite terre perentre le dit Priour de Meaſon Dieu de Mollynger & le dit nadgairs priour de Lanthon' per voſtre brief de Errour quel en Record & proceſſe & auxi en le rendre de Juggement de le plee que fuiſt devant John Fitz Adam & ſes Compaignons nadgairs Juſtic' de Ire,

Henry

Henry Nadgairs Roy D'engletterre votre Aiel de ſon Bank en meſme le terre per brief de meſme votre Aiel entre le dit nadgairs Priour du dit lieu de Lanthon' Predeceſſour du dit ore Priour de Lanthon' et le nadgairs Priours de dit Meaſon Dieu de Mollynger predeceſſour de dit ore Priour de Meaſon Dieu de Mollynger de xvi l. xvii l. les queux a dit nadgairs Priour de Lanthon' furent adereres d'un Annuel Rent xiii l. vi s. viii d. le quel le dit nadgairs Priour de Lanthon' de dit nadgairs Priour de Meaſon Dieu de Mollynger demaunda de la querell de meſme le Priour de Meaſon Dieu de Mollynger nadgairs recenſtes davoir intervenu ſi aſcun i fuſe a corrigere le quel Juggement devant les ditz nadgairs Juſtic' de Bank renduz devant Vouſon voſtre dite terre fuiſt affirme Errour Overte enterment a grand damage du dit ſuppliant : de quel plee en le dite veſtre Parlement eive le Record et proceſſe devant vous en votre Chancellar' D'engletterre pur certeins Cauſes nadgairs per veſtre brief que iſſiſt hors de veſtre Chancellar' D'englettere a veſtre Chancellar' Dyreland direct fiſtes Venir' et les queux ore en votre Court devant vous en votre Bank en Englettere remaignant al ſuite de dit ſuppliant a Cauſe que le Errour ſuſdit ne poet mye illonqes eſtre termine ne diſcuſſe a Cauſe que les Juſtices as plees a tenir devant Vous en veſtre dit Bank en Englettere nount my poiar de determiner ne de adjugger per la Loy ceo que fuiſt fait en votre dit Parlement Dyreland Pleſe a Votre hauteſſe de Commander *William Cheyne* Chivaller votre Chief Juſtice as plees devant vous treſſoveraigne Seigneur a tenir Aſſigne de faire venire en ceſt preſent Parlement les ditz Record et proceſs du dit plee ove toutz choſes eux touchantz devant vous treſſoveraigne Seigneur et les Seigneurs ſuſditz enſy que venez les ditz Recorde et proceſſe en meſme ceſt preſent Parlement droit ſoit fait en les premiſſes ſolonque la Ley et Cuſtom de votre Roialme D'englettere Et ceo pur Dieu et en overe de Charitee

THE

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1. *Formedon* in Remainder; the Tenant appears by Attorney, and pleads after Iſſue join'd the *Venire* is returnable; at the Return thereof the Tenant does not appear, but caſts an *Eſſoin*, which is adjourn'd to another Term, and adjudg'd ill. *Quære* if final Judgment on his not excuſing the firſt default can be given againſt him, or a *petit Cape* awarded 24, 67

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Pl. contented to it, agreed to be a plain ſettled point that the Sheriff cannot take him again *Ibid.*

5. But that Plea againſt the party Pl. 'tis no bar; and an Action of Debt lies, tho' perhaps not a *Scire facias* *Ibid.*

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Heriot.

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FINIS.