NARRATIONES MODERNÆ,

OR MODERN

REPORTS

Begun in the now

UPPER BENCH COURT

AT

VVESTMINSTER,

In the beginning of *Hillary* Term 21 *Caroli*, and continued to the end of *Michaelmas* Term 1655. as well on the Criminall, as on the Pleas side.

Most of which time the late Lord Chief Justice *Roll* gave the Rule there.

With necessary Tables for the ready finding out and making use of the matters contained in the whole Book.

And an Addition of the Number-Rolls to most of the remarkable Cases.

By William Style *of the Inner Temple* Esquire.

Ut singulis prosim, opto, precor.

Nam Genus et proavos & quæ non fecimus ipsi,
Vix ea nostra voco. Ovid: Metamorph. lib. 13.

LONDON,
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To the Honourable

IOHN PARKER

One of the

BARONS

Of his Highneſs the

LORD PROTECTORS

COVRT

OF THE

Publique Exchequer:

SIR,

IN purſuance of what I not long ſince intimated in the cloſe of the Epiſtle Dedicatory prefixed to my Practical Regiſter, and in hopes of as favourable an acceptance of this tender of my reſpectfull ſervice, as you then pleaſed to afford my weak endeavours, am I now encouraged to make this my ſecond humble

humble adreſs. Though this be but a yonger brother, in reſpect of its time of production, yet in reference to its firſt conception, growth, & parts, I may juſtly ſay, it far excels the elder birth, and is much more fit to do your Honour, and the Publique, ſervice, and may be (I conceive) capable of as large, if not of a greater meaſure of your favour and protection. I will not be troubleſome to you in relating the pains & time I have taken and ſpent in this Collection and Publication, but ſhal leave it to your judicious conſideration. How great ſoever they have been I repent me not, but am (in my ſelf) abundantly ſatisfied, and do think it reward enough, that I have thereby gained this opportunity to ſhew my continuing humble reſpects to your Honour, and my willingneſs to be ſome way ſerviceable to others, whatever I have been to my ſelf (in that Vocation God hath of his goodneſs been pleaſed to place me in) and to give an Accompt to the World (a thing which I hold every good Chriſtian, is bound to do) of the expence of my time.

It may be objected, that the Preſs hath been very fertile in thisour Age, and hath brought forth many, if not too many births of this nature. I muſt confeſs this Truth; but how legitimate moſt of them are, let the Learned judge: This I am ſure of, there is not

a father alive to own many of them, and they ſpeak ſo plain in the Language of *Aſhdod*, that a knowing-man cannot believe they ever ſprung from *Iſraelitiſh*-Parents, but by their pronouncing of *Siboleth* inſteed of *Shiboleth*, may eaſily collect of what extract they are. What I here preſent you with, is, (though a Homely, yet) a lawfull Iſſue, and I dare call it mine own, and that (I believe) I may do with as good a right as any ever might a work of the like nature, having had as little (if not leſs) aſsiſtance from others in the bringing it forth, as any that have travelled in this kind before me. I am not ſo blindly fond, or ſo opiniaſtre as to think it free from Errors and Miſpriſions, I fear there may too many be found in it, and no wonder, for *Humanum eſt errare, labi, decipi*; yet this I do knowingly aver, that I have not (herein) *ex propoſito* or willingly injured any; but have been as ſtudious and careſull in the penning of this my Collection to do right to every perſon concerned, and to make the Truth appear clearly in its native colours, as was poſsible at a throngued Bar to do. Nor have I been leſs wanting in my beſt endeavours, to prevent and correct the Errors of the Preſs, (though I muſt acknowledge my pains and care are not herein fully anſwered) that it might appear in pub-

Neh. 13. v. 23.

Jud. 12. v. 5.

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lick, though not in ſo rich a Dreſs as to be a Companion for the beſt, yet (at leaſt) be by your favour ſuffered to paſs (as tollerable) amidſt the crowd of a multitude of Editions, cloathed in as ill if not in a worſe and more unbeſeeming habit,

Inner Temple, May *the* 17*th.* 1658.

Sir, I am yours moſt obliged, reſpectively to ſerve you

WILLIAM STYLE.

To

To the Industrious, and Ingenuous Professors, and Students of the Common Laws of England; *but more particularly, and affectionately to the Associates of the honourable Society of the* Inner Temple.

GENTLEMEN.

FOr a more noble Epithite I know not how to give you (the greateſt & beſt of men on earth being in truth no more.) Theſe enſuing Reports were at firſt briefly taken by me in the Law-french, without any thought of making other uſe of them, then for my one privat ſatisfaction, And they did for ſome time after lye ſo confuſedly ſcattered in my Note-books, that as they then lay, they were altogether uſeleſſe to any but my ſelf, and that not without much expence of time and great trouble, ſo that what of them my unhappy memory could not retain,(which was not much) was in a manner loſt as wel to my ſelf, as unto others; to remedy this inconvenience,(if I may ſo call it,) of the loſſe of my conſtant attendance,& pains for ſo many years together taken at the now upper Bench Bar, with very litle profit either to others or my ſelf, than ſome ſmall improvement of my knowledge in the practical part of the law, and in purſuance of that antient Moral Axiome, *Omne agens agit propter aliquem finem*, I was encouraged to continue my travail, and expence of time in the gathering together, tranſcribing, and putting of them into that order, and method you now behold them, yet as then not having any intent or deſire to make them publique, but only more readily uſefull to my ſelf, and ſuch of my Friends and Acquaintance as ſhould at any time deſire to be ſatisfied in any thing I was able to impart unto them. But this not anſwering the expectation, and importunities of ſome of my neer relations, and many of my intimate Friends and Acquaintance, nor knowing into whoſe hands my papers might fall, nor how my ſelf and others be injured in the publiſhing of them after my deceaſe, which I was uncertain when it might happen, and did believe it could not be many years off, by reaſon of my declining years; but more eſpecially in reſpect of the weak and craſy conſtitution of my Body much macerated by ſharp, and tedious ſickneſſes, and being willing to leave ſome teſtimony behind me, that I have not ſlighted, or wholy neglected my calling, but have ever had an honourable eſteem of it, though I have hitherto reaped but little of that benefit, which too too many do ſo eagerly hunt after, but have been doing ſomething therein, and have not lived altogether a drone for ſo many years together in ſo famous a Society amidſt ſo many learned men, to the diſhonour thereof, and to my one reproach; I did at laſt reſolve (notwithſtanding the unavoidable cenſures, which I was confident I ſhould meet withal, what ever I have, or could ſay to avoid them,) to give way to this publicati-

on of them, even in this age, wherein moſt of the Caſes, and matters herein reported are yet freſh (I ſuppoſe) in the memories of many, who may eaſily trace me where ever I ſtep awry; But I hope to find them not only juſt in vindicating of me, in that which I have truely and faithfully reported, but alſo favourable in cenſuring, and paſſing by thoſe ſlips and miſpriſions they may herein meet withall, cauſed either by the Printers negligence, or my own miſapprehenſion of the ſenſe of the matters, and things delivered and ſpoken unto, and the rather, in regard that I have endeavoured as neer as I could to render things in the ſame expreſſions they were firſt uttered, that ſo I might as much as might be, avoid the danger of injuring of any herein concerned, by putting another ſenſe upon them, than what they intended; and this as it was the old way, ſo I conceive what ever may be objected to the contrary, that it is the beſt, and cleereſt way of reporting. For thoſe, that make it their buſineſſe to cenſure, and not to read or underſtand books, I ſhall ſay nothing to them, but leave them to abound in their one ſenſe if they have any, and to pleaſe themſelves with their own phanſies. I have made theſe Reports ſpeak Engliſh, not that I believe they will be thereby generally more uſefull, for I have been always, and yet am of opinion, that that part of the Common Law which is in Engliſh hath only occaſioned the making of unquiet ſpirits contentiouſly knowing, and more apt to offend others, than to defend themſelves; but I have done it in obedinece to authority, and to ſtop the mouths of ſuch of this Engliſh age, who though they be as confuſedly different in their Minds and Iudgements, as the builders of *Babel* were in their languages, yet do think it vain, if not impious to ſpeak or underſtand more than their own mother-tongue. Some may peradventure, Notwithſtanding the reaſons I have formerly offered for this my publication, be ready to object that it was vain, glory, and a too confident boldneſſe, and high conceipt of mine own abilities that makes me thus appear in publique; but thoſe that know me I believe are of another opinion, and dare clear me of this aſperſion, and well they may, for the truth is I have alwayes been, and yet am ſo naturally diſtruſtful of my own parts, that I fall far ſhort of that neceſſary boldneſſe which is requiſite for every man to be armed withall in the excerciſing of publique employments, and what loſſe I have ſuffered by the want of this, I my ſelf do beſt know, and is not unknown to many, ſome of whom have out of their well-wiſhes to me, and others to my diſparagement (as they thought)been pleaſed to take notice of it. If any of the Caſes and matters herein conteined ſeem common unto any, and are to inſipid to pleaſe their curious Palates, let them paſſe them over: It may be they may prove uſefull to others, and I doubt not but the moſt curious may find many things that may give them delight and ſatisfaction. And in the farther vindication of theſe Reports, I ſhall deſire all to take notice, that firſt, theſe were moſt of them)taken in unſetled times, wherein the Law was almoſt at a ſtand, and therefore

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it cannot be reaſonably expected they ſhould be ſo quick and full of matter, as thoſe that have been gathered when the Laws flowed in a more open, and uninterrupted Chanell, when the Courts of Iuſtice were full fraught with buſineſſe, and were in a more ſplendent and flouriſhing condition than in theſe latter times; and next, that this work is not a collection only of ſome choice Caſes taken by ſeveral hands in all the Courts of *Weſtminſter*; but is only a continued narrative of the Caſes, and proceedings of the new upper Bench Court for 10 years together, and taken by one only hand, without the help or aſſiſtance of any other, during which time I have omitted but little, ſaving when by reaſon of ſickneſſe, I was for a Term or two conſtrained to be abſent. And the more to encourage all to the peruſall of them, I dare affirm that there is much various matter contained in them, & different from what is to be found in other Reports taken in former years, occaſioned by the many alteration of the face of things, and the changes of government happing at this time, and alſo by reaſon of my conſtant obſerving, inſerting, and interweaving of all the remarkable paſſages tranſacted on the Criminal ſide, with thoſe hapning on the Pleas ſide, which in other Reports hath very ſparingly at any time, if at all been performed. I have alſo for the Readers greater eaſe and beneſit, added hereunto three Alphabetical Tables, the firſt containing the names of the ſeveral Caſes; a ſecond containing the ſeveral general Heads, or Titles under which the ſeveral matters diſperſed through the whole book, are properly digeſted; and the third, and laſt, being a large Table particularly directing to the Page and Caſe, wherein you may find the ſubject matter methodically ranged under thoſe Heads or Titles. And for your further and fuller ſatisfaction, and making the Caſes the cleerer proof, and more authentical authority to be cited and given credit unto, you have the number Rolles prefiixed to moſt of thoſe that are remarkable amongſt them. I might, and would if I had thought it neceſſary have much enlarged theſe Reports, and made the volume ſwell to a far greater bulk: But my aim and endeavours have generally been to take the chief points only, and ſubſtance of the matters ariſing and ſpoken unto, and the rational parts of the arguments and authorities uſed and urged, to inforce and prove what was ſurmiſed to be Law on either ſide, and the grounds and authorities upon which the opinions and reſolutions of the Court are framed and given, and to paſſe by all the luxuriant flouriſhes of wit, and the multiplying of Similary Caſes to the Caſes in queſtion, as ſerving more for the moſt part to prove the curious phanſy, & much readiug of the Arguer, than the proof of the points of the caſes in queſtiou, or the ſatisfaction, or information of the Auditors or Readers Iudgment; and I have ever (yet with ſubmiſſion to better Iudgements,) conceived this conciſe way of taking Reports to be farr more beneficial and delightful, not only to the Reporter, but alſo to thoſe that ſhall read them

them, then that long and tedious way, wherein the truth is ſo overſhadowed with multiplicity of words, that it is very difficult through thoſe Clowds to diſcover, and behold her perfect beauty ſo well, as when ſhe appears bare-faced in her true and natural complexion. I need not ſay any thing in commendation of the Common Laws, they do ſo ſufficiently, and clearly ſpeak their own worth, not only in our own land, but even through the Chriſtian, if I may not ſay the whole known world. The fruit that every one from him that ſits on the Throne, to her that grindeth at the Mill, throughout this nation in the tender preſervation of our Religion, Lives, Liberties, and Properties do lowdly proclaim their excellency, and do juſtly claim our reverent eſteem of them, and their ſweet influence which our Neighbour Nations do partake of from their light and heat, hath purchaſed an honourable name, and repute amongſt them. Though no doubt but other Kingdomes, and Republiques have many excellent written and eſtabliſhed Laws ſutable to the particular conſtitutions of the people, and to their ſeveral frames of government, and amongſt the reſt the Civil or imperial Laws, yet they all want many remarkable excellencies that are in the Common Laws of *England*, and the proceedings therein, and amongſt the reſt to inſtance in no more, they are very deficient in this way uſed in our Law for many ages paſt, of reporting, and leaving to poſterity the learned arguments of councel at the Bar, and of the grave and profound reſolutions of the reverend Iudges in the deciſion of Caſes ariſing, and controverted amongſt us; and this way how lightly ſoever it be now eſteemed of by many amongſt us, yet is by Strangers much valued, and was heretofore ſo much ſet by amongſt us, and thought ſo highly advantageous to the publique, that the wiſdome of this State did then think fit to appoint grave and judicious men, encouraged by an annual ſtipend, to attend and perform this task, and therefore I hope that he who hath undertaken this hard labour freely and voluntarily in relation to the publique good, without hope of reward, is ſo far from deſerving blame and reproof, that he is rather to be cheriſhed and countenanced in theſe his endeavours by thoſe in authority, and not to be raſhly and uncharitably calumnicated, or cenſured by any, but to be favourably interpreted, and received as one that makes it his aim to be accompted a true lover of the Common Laws, and really honoureth the profeſſion, and Profeſſors thereof.

Inner Temple, May
the 19th. 1658.

William Style.

An Alphabetical

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HILARY TERM

21 Car. Banc. Reg.

A Prohibition was prayed to the Admiralty, to stop proceedings there, upon a Contract between the parties suggested to be made upon the land within the body of a County, and not upon the high Sea; And the surmise was penned thus. If there was any Contract made between the parties (as the libel supposeth) it was made upon the land within the body of a County, and not upon the high Sea. The Court held this suggestion ill, for the uncertainty of it, and ordered that it should be amended and made absolute, viz. That the Contract was made upon the land, &c. And that the words, if there was any Contract made, should be put out, because they made it uncertain whether there was any Contract or no, and so by consequence did destroy the very ground of the surmise. Prohibition. Suggestion.

Barnaby against Goodale,

21 Car. Banc. reg.

Trin. 21 Car. rot. 201.

A Writ of Error was brought to reverse a judgement given in an Action upon the Case in the Court at Owse bridge in York, and the first Error assigned was in the Process, because it was by summons; whereas the action being an action upon the Case, which is in the nature of a Trespass; the Process should be by Attachment, and Distress infinite, and not by summons. But to this it was answered by Roll Justice, that since 10 Iacobi this manner of proceeding is no Error, and that that Court hath no power to award a Capias in an action upon the case by the Statute of 14 H. 7. two other light exceptions were taken to the venire, but not insisted upon. But the main exception was to the Judgement, which was entred thus, Ideo consideratum est per curiam dicti Domini Regis, whereas (as it was objected) it ought to have been, ideo consideratum est per eandem Error upon a Judgement in an action upon the Case. Error. Capias.

Curiam, or per Curiam prædictam. And at the firſt the Court ſeemed to encline, that this was a material exception, for theſe reaſons, viz. becauſe inferior Courts ought not to ſhew things only by implication; but they ought to ſhew them expreſly, and becauſe ſurpluſages in ſuch Courts are ill: And laſtly becauſe inferiour Courts ought to keep themſelves ſtrictly to their antient forms, and not to vary from them; yet afterward judgement was affirmed except better matter ſhould be ſhewn, nota.

Inferiour Courts.

Maſterman.

21 Car. Banc. Reg.

Error upon a judgement in an action of Debt upon an Obligation.

An action of Debt was brought in an inferiour Court, upon an Obligation, with a Condition, for the payment of a certain ſum of money at a certain time therein expreſſed; but no place was limited in the condition for the payment thereof. Judgement was given for the Plaintiff: The Defendant brings a writ of Error in this Court to reverſe this Judgement, and aſſigns for Error; That becauſe there appears no place of payment for the money in the Condition of the Bond; ſo that by that it cannot appear whether the cauſe of action lieth within the juriſdiction of the Court, where the action was brought or not; therefore it ſhould have been made appear by ſome part of the Record, that the money was to be paid within the Juriſdiction of the Court, which is not here done, and therefore the Judgement erronious: The Court held this for error, and ordered that the Judgement ſhould be reverſed, if cauſe were not ſhewn to the contrary before the end of the term.

Error.

Knights Caſe.

21 Car. Banc. Reg.

Error upon a Judgement given in an action of Debt for rent.

A Leaſe for years was made of certain houſes in York, reſerving a yearly rent payable in London, and for the rent behind an action of Debt was brought in the City of York, and judgement thereupon given for the Plaintif: The Defendant brings a writ of Error to reverſe this judgement, and aſſigns two Errors. 1. That the iſſue upon which the judgement was given was not tryable within the juriſdiction of the Court, where the judgement was given; for the iſſue was upon the payment of rent, which was payable at London, and not at York, and ſo payment or not payment ought to be tryed at London and not at York. The ſecond exception was to the Venire, which was de vicineto Civitatis generally, and names not any Pariſh in particular whence the jury ſhould come: And to prove this to be a good exception, the Book of 5 H. 5. was urged; but the Court denyed that Book to be Law, and cited Gavel and Gippoes caſe, 10 Jac. adjudged to the contrary; that de vicineto Civitatis generally, without naming a Pariſh in the City, is good: But upon the firſt exception the Court adviſed.

Venire.

Watſon

VVatſon againſt Norbury

21 Car. Banc. reg. Mich.

20 Car. rot. 156.

VVAtſon brought an Action upon the caſe againſt Norbury, for procuring a Commiſsion of Bankrupt againſt him, by virtue whereof he broke open his Shop, and took away his goods and Shop-books, whereby he was ſo diſcredited that he loſt his trade, to his damage, &c. To this the Defendant pleads, that the Plaintiff did heretofore bring his Action of treſpaſs for the breaking open of his Shop, and for the taking away of his goods, and had in that Action recovered damages againſt him, and demands if he ſhall not be thereby barred in this Action; And that he ſhould be barred the Defendants Councell alleged, that a recovery in one perſonal Action is a bar in all perſonal Actions touching the ſame thing, and that here the Action of treſpaſs formerly brought, and the Action of the caſe now brought were perſonal Actions, and that they were both brought for the ſame thing, and therefore the Plaintiff ought to be barred; It was alſo urged that an Action of the caſe lies not in this caſe, for that, to ground an Action upon the caſe, there muſt appear to be malice in the party that did the fact, and prejudice to the party to whom the fact is done, but there appears no malice here, for what was done is ſaid to be done, by virtue of a Commiſsion of Bankrupt which ſhall be intended a lawfull authority to warrant the fact, and not grounded upon malice, ſo that malice and prejudice do not both appear, but only damage, and that alone will not ſupport this Action, for neither for damage alone without malice, nor for malice without damage will an Action upon the caſe lie. But to this it was anſwered (to which the Court enclined) That this Action upon the caſe was not brought for the ſame cauſe that the Action of treſpaſs was formerly brought, for that was only for the breaking open of the Shop, and taking away his goods, and the damages he received thereby, but this Action is brought for the damage he ſuſtained, by the loſſe of his credit, and hindrance in his trade thereby, cauſed by the Defendants taking out a Commiſsion of Bankrupt againſt him, and by colour thereof breaking open his Shop and taking away his goods, and ſo diſparaging him in his reputation, whereby he loſt his trade; and though the breaking open of his Shop, and the taking away his goods be named in this Action, as it was in the former Action of treſpaſs, yet it is but by way of Inducement to this Action upon his caſe, and not to recover damages for that wrong, and here being two ſeverall wrongs done to the Plaintiff which do not one depend upon another, the Plaintiff muſt bring two ſeverall Actions for them, and not joyn them in one Action, becauſe the damages muſt be ſeveral which are to be recovered, but if they had depended one upon another he might have joyned them in one Action, and recovered joynt dammages for both: and beſides theſe two Actions differ in their nature one from the other, and the judgements given in them are ſeveral, for the Judgement in an Action of Treſpaſs vi et Armis, as the firſt Action was, is Capiatur, becauſe there is thereupon a fine due to the King, but the Judgement in an Action upon the caſe is ideo in miſericordia, and ſo though

Action upon the caſe.

Inducement.

Actions ſeverall.

Joynt Actions.

Joynt damages.

though the Plaintiff have Judgement here in his Action upon the caſe, it cannot be ſaid he hath had Judgement already; for that muſt beintended, at leaſt a Judgement of the ſame nature, which cannot be in this caſe. And to that which is objected, that if the Plaintiff ſhould recover damages in this Action, he ſhould recover damages twice for one and the ſame thing which is againſt Law; it is anſwered, that it is not for the ſame thing but cleerly for another, and if he ſhould not have this Action he were without remedy for the damage he ſuffred in the loſſe of his Credit, and the damage in his Trade; for in the former Action he recovered no damages for that, for the Jury never took that into their conſideration, for they had no power to take any damages into their conſideration which happened after the Treſpaſs done, for which the Action was brought, but only for the breaking open of the Shop, and the taking away of his Goods; and although he might at the firſt have brought his Action upon the caſe as he hath now done, yet he was not compellable thereto, but had his Election to bring either an Action upon his caſe, or an Action of Treſpaſs as ſhould moſt make for his advantage, for this Election of Action belongs to every ſubject as his birthright, and he is not to be hindred from it. Adjournatur.

Election of Actions

Remington and Kingerby.

Mich. 18 Car. rot. 72.

Error upon a Judgement in an Annuity in the Common pleas.

REmington grants a rent out of certain Lands to Fawne with a clauſe of diſtreſs, and a nomine pœnæ in the deed for the non payment thereof, according to the time lymited, the rent is behind after the time lymited by the nomine pœnæ. Fawne brings a writ of Annuity in the Common Pleas for the Arrerages of the Annuity, and for the moneys due upon the nomine pœnæ, and hath Judgement. Remington brings his writ of Error in this Court to reverſe this Judgement, and Aſsignes for Error, that the writ of Annuity did not lie for the nomine pœnæ, though it did for the rent, for though it was in the Power, and Election of Fawne to charge either the land out of which the rent was to iſſue with the rent behind by diſtreſs, and ſo to make it a rent charge, or elſe to bring his writ of Annuity for it againſt Remington, and ſo to charge his perſon; yet he had no ſuch Power for the nomine pœnæ, becauſe it was in the nature of a rent, and was neceſſarily to iſſue out of the Land, and not to be charged upon the Perſon; and it was further alleged that a nomine pœnæ was an uncertain thing and comes not within the Statute of 21 H. 8. touching Avowries as a rent charge doth which is certain. Another exception was, that it appears not in the Record, that Fawne did make a good demand of this nomine pœnæ upon the Land out of which the rent was iſſuing, as he ought to have done before he could bring an Action for it, for though there do appear to be a demand, yet if it appear not to be a legal demand it is Null, and the party ſhall take no benefit by it. Adjourned.

Nomine pœnæ.

Nuls

Nuls and Cheney

21 Car. B. R.

AN Action of the case was brought for these words, I do accuse you to be a Witch, and require you to be searched, and a verdict was given for the Plaintiff; the Defendant moves in Arrest of Judgement that the words are not actionable, because it is not averred that the party accused had done any hurt to Cattell or otherwise, or hath had any Communication with the Devill. And so the Court held, because the words spoken did not bring the Party of whom they were spoken within the Statute of 10 Jac. concerning Witch-Craft. Arrest of Judgement in an Action upon the case.

Wingfield and Sherwood.

WIngfield brings an Action of Covenant against Sherwood his Lessee for yeers, and declares that he had Covenanted by indenture that hee would not cut down more tymber growing upon the lands demised than sufficient for needful and necessary reparations of the houses and buildings let unto him; and for breach Assigns, that he had cut down tymber to the value of ten pounds, and had converted them to his proper use; and upon this hath a Verdict and a Judgement against him: Sherwood brings a writ of Error in this Court to reverse this Judgment, and Assigns for Error, that there was variance between the Covenant expressed in the lease, and the Covenant set forth in the declaration whereupon the breach was assigned, and so the Judgment was not given upon a breach of the Covenant expressed in the lease, viz. That he should not cut down more tymber than was necessary for reparations; for by this breach the Plaintiff supposeth that the Defendant had Covenanted not to cut down tymber to employ to his own use, which is not the Covenant expressed in the lease, but another: And though the Defendant had cut down tymber, and converted it to his own use, this was not a breach of the Covenant expressed in the Indenture, except it be averred that he cut down more than was necessary for reparations, and converted it to his own use; and for this Error the Judgement was reversed. Error upon a Judgement in an Action of Covenant. Covenant.

Whitwell and Short.

Trin. 21. Carl. rot. 227.

WHitwell brought an Action of Trespass for assaulting, beating, and wounding him, against four several persons: three of them plead not guilty, and are found guilty; and the fourth pleads not guilty to part, and justifies for the rest, viz. The wounding, and is found guilty as to the wounding only, yet the verdict was found generally for the Plaintiff, and intire damages assessed and Judgement given, and Arrest of Judgement in an Action of Trespasse.

a writ of Error was brought, and the Error assigned was that the damages ought not to be entire against all, because that the fourth person was only found guilty of part of the trespass, to wit, the wounding, and therefore as to him the damages ought to have been severed, in relation only to the wounding, and not as it is, for so damages should be given twice for the same thing. First against the three, and then against the fourth, which the Court granted, and reversed the Judgement.

Several damages.

VVard and Coggin.

Pasc. 22 Car. rot. 257.

Error upon an action of Debt.

VVArd brings an Action of debt in the Common pleas against Coggin, and declares that the Defendant in consideration that he the Plaintiff, at the request of the Defendant, had sold certain wares to J. S. did assume and promise to him the Plantiff, that he would pay such a sum of money for them; and for non payment accordingly he brings his Action, and hath a Verdict and Judgement. The Defendant brings his writ of Error in this Court to reverse this Judgement, and Assigns for Error, That an Action of debt lyes not in this case, because the debt which the Defendant promised to pay, and for which the Action is brought, was raised, and became a duty before the promise made for the payment of it, and so an Action of debt cannot be grounded for it on the promise. And the words in the declaration do sound meerly upon a promise, upon which a good consideration for an Action of the case may be grounded; but not to bring an Action of debt.

Case.

Hogg and Vaughan.

Arrest of Judgement in an action upon the Case.

HOgg brings an Action of the Case against Vaughan for these words spoken of him, viz. Thou art a perjured Priest, and hath a verdict. It was moved in Arrest of Judgement, that the words were not actionable, for they signified no more than that he was forsworn; But the Court held that they must be meant, that he was guilty of perjury, for which he might be endicted, and therefore were actionable.

Mich. 21 Car.

Action upon the case upon a promise.

I. Assumes and promiseth to B. that if B. will pay 50 l. to C. his son, who was maried to D. the Daughter of I. at such a time, that he will pay 100 l. to D. his Daughter at such a time; B. pays the 50 l. to C. at the time appointed, I. fails in payment of the 100 l. according as was agreed; B. dies intestate, and E. administers, and brings an Action upon the Case against I. upon this promise made to B. the Testator; and adjudged that the Action did well lie by the Administrator, though he should receive no benefit if he did recover.

Dickenson

Dickenſon and Preſton.

Mich. 22 Car. Banc. reg.

Ter. Paſc. 22 Car. rot. 251.

A Writ of Error was brought by Preſton, to reverſe a Judgement againſt him at York, and aſsigns for Error, that the Venire was de Balliva ſua, whereas it ought to have been de corpore Comitatus, and it cannot appear by the Venire to what place the Balywick extends; and the Balywick of the City may extend further than the City, and upon this the Court adjudged the Venire naught.

Error to reverſe a Judgement in York.

Venire

More againſt Savage.

22 Car. Banc. reg.

More Widow brings an appeal againſt Savage for the death of her Husband; Savage appears and demurs to the original writ, and ſhews for cauſe, that in one part of the writ, inſtead of the word tunc it was tuc, which made the Writ incertain To this the Council of the other part anſwered, That it ought to be amended by the Statute of 14 E. 3. and that the Writ ought not for ſo ſmall a fault to be abated; But to this it was replyed, that the Statute was only for the amendment of mean proceſs, and not of original Writs; for original writs were not amendable, becauſe the party might purchaſe a new writ if a former were naught. In juſtification of the writ it was further urged, that the word tunc in the writ was a mêr formal word, and not of the ſubſtance of the writ: and that the writ would be good enough without it; and therefore though it were miſtaken, it was not ſo material, as that the writ ſhould be thereby abated: But the Court anſwered, that an original writ, if it be defeative in form, is abatable, if it be not amendable by Statute, and conceived, that here it being in an appeal, where life is in queſtion, the writ is not amendable, though it be defective but in form, neither by the Common Law nor by any Statute Law, nor can the party purchaſe a new writ, adjournatur; but afterwards, viz. 9. Feb. 22 Car. the writ was quaſhed for the cauſe aforeſaid, and becauſe it did not appear that the feme who brought the appeal was wife to the party ſlain at the time when he was ſlain. It was thereupon moved that the Defendant might be arraigned upon the Count, though the writ was abated; but the Court held he could not, becauſe the Count was founded on the writ which was abated, and theſe books were cited, 4 H. 6. 14. and 18 E. 3. 35. upon view of preſidents he was afterwards diſcharged.

Demurrer upon an appeal

Luskins and Carver.

22 Car. Banc. reg.

The Caſe was this, Anne Carver made her laſt will and teſtament, and makes Luskins her Executor, having bona notabilia in divers Dioceſſes: Luskins proves the will in an inferiour Dioceſs, and not in the Prerogative

Prohibition to the Prærogative Court, and a Mandamus.

rogative Court, as he ought to have done, a ſtranger ſues for Letters of Adminiſtration in the Prerogative Court, Luskin deſires to prove the will there, and that he may adminiſter, the Court refuſeth to admit him to adminiſter the goods, except he will put in ſecurity to the Court to pay all the Legacies; but if he ſhall refuſe, will grant Letters of adminiſtration to the ſtranger. Luskins moves in this Court for a writ of a Mandamus, to compell the Prerogative Court to grant him the adminiſtration, according to the will. The Court ruled the other party to ſhew cauſe the next day why they ſhould not grant ſuch a writ; and were of clear opinion they might do it, and to prove it, the Counteſſe of Barkſhires caſe, Hill. 20 Iac. and the caſe of St. Burien in Cornwall was cited, and the ſame Term the writ was granted accordingly.

Mandamus.

Forteſcue and Brograve.

22 Car. Banc. Reg.

An action upon a breach of Covenant by deed.

The Plaintiff brings an action for breach of Covenant upon a Deed, The Defendant pleads a parol agreement afterwards, in diſcharge of the former Covenant; but the Court held the plea not good, and took theſe differences, That a parol agreement before a breach of it, may be diſcharged by parol, and ſo pleaded; after a breach it cannot be pleaded in diſcharge without ſatisfaction alſo pleaded; but a diſcharge may be pleaded by Deed be the Covenant by Parol or by Deed after a breach, and without ſatisfaction.

Plea

Concord.

Broome and Evering.

Hill. 22 Car. Banc. Reg.

Hill. 21 Car. rot. 354.

Error to reverſe a judgement given in a Scire facias to revive a judgement in debt.

A Judgement was given againſt the Teſtator of the Defendant, in an action of Debt for rent, and this judgement was revived by a ſcire facias againſt the Executor, and a verdict thereupon, and a judgement was given againſt him in the Common pleas; upon this a writ of Error was brought in the Kings Bench to reverſe this judgement, and the error aſsigned was, that the tryal was inſufficient, becauſe the Venire facias was not good, and is not helped by the Statute of Ieofails, and to prove this, Baynams caſe in the 5th. Report was cited. But Hales anſwered, that the Venire facias being awarded before it ought, was to be accompted as if no Venire had been awarded, and ſaid it was like to a dedimus to take a fine before the writ of Covenant iſſued forth to levy the fine, and ſo concluded, that it was helped by the Statute of Jeofails. But the Court took a difference, where in truth there was no Venire facias at all, and where there is an ill Venire facis as it is here, for though it be as bad as may be, yet being it is a Venire facias, it is not helped by the Statute of Jeofails; but if there had been none, the Statute had made the tryal good without it; and thereupon day was given to ſhew cauſe why the Judgement ſhould not be affirmed. Paſch. 23 Car. the Judgement was affirmed.

☞ Error Jeofails

Andrews

Andrews Caſe.

Hill. 22 Car. Banc. Reg.

A Recognizance was acknowledged at Serjeants Inne in Fleetſtreet, and delivered and enrolled at Weſtminſter. The Court held that it was at the election of the Recogniſee to bring his Scire facias either in London, where the Recognizance was acknowledged, or in Midleſex, where it was delivered and enrolled: But adjourned. Afterwards, viz. Paſc. 23 Car. the Court held that the Scire facias ought to be where the recognizance is taken, and not where it is recorded; for there it begins to be a Record; but this being in the Common Pleas, it was good both ways, and thereupon the party had his judgement.

Where a Scire facias upon a recognizance ſhall be brought.

Rooke and Knight.

22 Car. Mich.

Mich. 22 Car. rot. 381.

A Judgement given in the Court at Dym Church, a limb of one of the Cinque Ports was removed by a certiorari into the Kings Bench; and thereupon iſſued a Scire facias for the Defendant, to ſhew cauſe why the Plaintiff ſhould not have execution upon the judgement; to this the Defendant appears and demurs, and takes theſe exceptions, 1. That it is not expreſſed where Dim Church is. 2ly. In the return of the alias certiorari, it is ſaid, ſicut prius, and not ſicut alias. 3ly. the Sheriff in the return is not named Knight and Baronet; neither doth he name himſelf by his name of Baptiſm and Surname: But the Court did over-rule all theſe exceptions, and gave judgement for the Plaintiff.

Demurrer to a Scire facias upon a judgement removed out of the Cinque Ports by Certiorari in the Kings Bench.

A Action of the Caſe was brought for theſe words, Thou haſt ſtoll'n my wood, and the Court inclined the words were actionable, but not if he had ſaid, thou haſt ſtoll'n my Trees, and it was ſaid that a precipe will lie of a wood; for it ſhall be intended of woody ground; adjourned.

Action upon the Caſe for words.

Præcipe

Helliar and Grace his VVife.

Paſch. 23 Car. Banc. Reg.

A Action upon the Caſe was brought by Helliar and his wife, upon a promiſe made unto them, during the Coverture; and it was moved, (a verdict being given for the Plaintiffs) in arreſt of judgment, that the Action ought to have been brought in the name of the Husband only, and not by the husband and wife; and a caſe to prove it was cited out of Dyer, and upon this exception the judgement was arreſted till the other ſhould ſhew cauſe to the contrary; And in this caſe it was ſaid by the Court, that if an Obligation be made to baron and feme; that it is the better opinion, that the baron may bring an action upon this obligation in his own name only, and not name his wife, or elſe he may at his election bring the action in the name of himſelf and his wife joyntly.

Action upon the Caſe upon an Aſſumpſit.

Dyer 91.

Joynt action

Betſworth and Betſworth.

Paſch. 8 Maii 23 Car. Banc. Reg.

Prohibition to the Prærogative Court

IT was moved for a Prohibition to the Prerogative Court upon a ſurmiſe that the party did endeavour to baſtardiſe one that was legitimate. But the other party anſwered, that the ſurmiſe was not true, and urged, that the ſute in the Prærogative Court was only, whether Letters of adminiſtration were by them well granted, or no, and not concerning Baſtardy as the ſurmiſe ſets forth, and therefore deſires the Prohibition may not be granted; and for confirmation thereof the caſe was put, which was this: Betſworth had a wife called Bridget, who died; after he takes another wife called alſo Bridget, and dies inteſtate; Bridget the ſecond wife takes Letters of adminiſtration of the goods and chatels of her husband deceaſed; the ſon of Betſworth ſues in the Prærogative Court to repeal theſe Letters of Adminiſtration, upon pretence that Bridget the firſt wife of Betſworth was yet living. In this caſe the Court delivered theſe poſitions following. 1. That one ought not to ſue in the Eccleſiaſtical Court, to Baſtard an iſſue, but at the Common Law. 2. Where the Ordinary hath granted Letters of Adminiſtration to one that ought to have them, they ought not to be repealed by them. 3. Where a ſute is in the Eccleſiaſtical Court for lands and goods, a Prohibition may be granted as to the lands; and they may proceed there notwithſtanding, as to the goods. 4. That in this Caſe at the Bar, neither Baſtardy of the iſſue, nor mariage is in queſtion, as is ſurmiſed, but only the validity of the Letters of Adminiſtration, and that the other things are but as incident to the matter in queſtion. 5. That wife or not wife is triable at the Common Law; but whether lawfully maried or not, is tryable in the Spiritual Court. 6. Where a thing is tryable in the Spiritual Court, and there is alſo a matter incident to it, which is tryable at the Common Law, there a Prohibition ſhall not be granted. 7. That a thing concluded in the Eccleſiaſtical Court touching lands, cannot be given in evidence in a tryal at Law for Land. 8. If the Common Law differ from the Civil Law, touching the legality or non legality of a thing, if they will proceed according to their Law, a Prohibition lies, becauſe the Common Law is to be preferred. The rule of Court was, That a Prohibition ſhould be granted, and that the other ſhould demur upon it; and ſo it might be debated whether a Prohibition would lie or not, and to ſtay in the Spiritual Court in the mean time.

Jurisdiction, Ordinary

Prohibition

Incidents

Tryal

Prohibition Evidence

Prohibition

Paſch. 23 Car. Banc. Reg.

Arreſt of judgement in an action upon the caſe.

ONe brought an Action upon the Caſe againſt I. S. for preferring a bill of Endictment againſt him, for ſtealing of a Mare, and that the grand Jury found an ignoramus, whereby he was diſcharged; the Plaintiff obtains a Verdict againſt the Defendant. The Defendant takes theſe exceptions to the declaration in Arreſt of Judgement, 1. That it doth not appear thereby, that the Party who preferred the bill of Endictment gave any evidence to the grand Jury touching the bill. 2ly. It appears not that the Plaintiff was bound over to anſwer the Felony, and conſequently was not moleſted by it, and ſo he can have no Action: But the Court

ſtayed

ſtayed the Judgement to another day upon the exceptions taken, and ſayed that an Action upon the Caſe lies for procuring one to be Endicted, although the party himſelf do it not, and that one may exhibit a bill of Endictment to a grand Jury without Oath, and they may notwithſtanding find the bill, and although it be exhibited upon Oath, they are not bound to find it, if they ſee cauſe to the contrary, and that in the caſe at the barr the Action might be as well grounded upon the ſcandal, which grew to the party who was Endicted, as upon the trouble which might have befallen him by reaſon of the preferring the bill againſt him. Caſe. Endictment. grand Jury

Hellena,

Paſc. 23 Car. B. r.

AN Action upon the Caſe was brought for theſe words, Hellena is a great Witch, and a Verdict found for the Plaintiff; It was moved to ſtay Judgement, becauſe the words were not Actionable, for they did not ſhew that the Plaintiff had bewitched any thing, or done any thing that brought her within the compaſs of the Statute 1 Jac. againſt Witch-Craft: Judgement was hereupon ſtayed. Arreſt of Judgement in an Action upon the Caſe.

VVilliamſon againſt Henley.

Paſc. 23 Car. Banc. Reg.

Trin. 21 Car. rot. 362.

AN Action of Debt was brought upon an obligation, the condition was, that if the Defendant did ſell the tithes in Ranſom more that he ſhould pay the Plaintiff ſuch a ſum of money, but if he ſold them not, that then he ſhould deliver an obligation to the Plaintiff, for the payment of a certain ſum of money therein expreſſed at a certain day therein limited, and for non performance of the condition is the Action brought. The Plaintiff obtains a Verdict; the Defendant moves in Arreſt of Judgement, that he ought to have convenient time for doing of the things expreſſed in the condition, and that it appears not by the Record that he had convenient time, and ſo there is no breach of the condition. But the Court held, that the time between the date of the obligation, and the bringing of the Action was a convenient time, and that there being a ſecond thing to be performed in caſe the former were not done, that therefore that former thing ought to be done in ſome reaſonable time, elſe the party would be too much prejudiced by ſtaying to have the ſecond thing performed, and therefore ruled that Judgement ſhould be entred without better matter ſhould be ſhewed. Arreſt of Judgement in Debt upon an obligation. Time.

Savages Case,

Pasc. 23 Car. B. R.

Error upon a Judgement upon an Endictment.

SAvage was Endicted for forging, and publishing of Letters of credence to gather money, and was convicted, and Judgement given against him upon his own confession, and 100 l. fine set upon him, et quod capiatur. Exceptions were taken to this Judgement. 1. That it did not appear wher he received any money by virtue of these counterfeit Letters, nor at what time: But the Court answered, that the substance of the ofEndictment. fence for which he was Endicted was, the forging and publishing of the Letters, and not the collecting of the money; for though he had not collected a penny, yet the Endictment was good. A second exception was, that the Endictment did not say quod Counterfecit falso: But the Court held that the word Counterfecit necessarily implyed in it the word falso, and so not material whether falso were expressed or omitted. 3ly. It was objected, that the party was committed before he was convicted; But to Conviction. this the Court answered, that he was committed upon his own confession, which is a conviction in Law, and the Judgement was held good, and affirmed.

Needler and Guest.

Pasc. 23 Car. Banc. Reg.
Entred Trin. 1649. rot.

Arrest of Iudgement in a breach of Covenant.

NEedler brings an Action of Covenant against Guest, upon Articles, amongst which one was to allow such a sum of money to an under Clerk, in the fir Clerks Office by the sheet, for every quire of paper he should write in copying and engrossing of bills, answers, &c. as was expressed in the said Articles: and upon this Needler obtains a verdict against Guest. In Arrest of Judgement divers exceptions were taken and over-ruled, but one was insisted upon, which was this, that there was more found in the breach of the Covenant assigned then was contained in the Covenant it self, for it was found, that he had not payed for 72 sheets which was 5 quire and a half, and so damages were given for more than ought Breach. to be, for the Covenant was to pay so much the quire and mentions not Damages. any half, and for this the Judgement was stayed: for the Court said Supply. that the Law would not supply a casus omissus to bring it within the Covenant to ground a breach thereupon, what ever the intent of the partyes was that were parties to the Articles.

VVhitley and Fawsett.

Pasc. 23 Car. Banc. reg.

Action of Trover for distraining & selling his Cattel.

VVHitley brings an Action of Trover, and Conversion against Fawsett, for taking his Cattel by way of distress, and selling them by virtue of a warrant of Commissioners of Sewers for not paying

ing of a tax set by them towards the reparation of Sea walls: the Defendant pleads all the speciall matter, by way of justification, the Plaintiff demurrs to this Plea, and upon the demurrer takes these exceptions to it. 1. To the setting forth of the Commission, in that he shews not that three of the Commissioners were of the quorum. The 2d exception was, that in his Plea he had not set forth the Authority of the Commissioners; To that the Court answered it was not necessary. 3ly. That the Plea was but argumentative, which makes it naught. 4ly. It appears that there are 800. Acres of Land which are in the hands of the King, which are not taxed as by law they ought: and so the tax is unjust, because by the not taxing of them, a greater burden was laid upon the rest of the Land, than of right ought to be; and this the Court held a good exception, and said that the Kings Lands are taxable by the Statute. 5ly. The Statute is not pleaded as it ought to be. 6ly It doth not expresse, that Whitley in whose occupation the Lands are that are taxed, is the Assignee to Lynsee the owner of the Lands, but he may be a meer stranger, and so not taxable, nor his beasts to be sold. 7ly. It is not set forth, that he shewed his warrant, before he distrained, as he ought to do: In this case the Court first said that one may distrain, and sell the Cattel of the owner of the Land taxed, or his Assignee, for non payment thereof, but doubted whether a strangers Cattel might be distrained and sold: Roll Justice took these Exceptions to the Plea. 1. That the Plea did not set forth the limits of the Commission as it ought to do, and was therefore ill. 2ly. He said the Plea ought to have shewed, that three of the Commissioners were of the quorum. 3ly. That it did not appear by the Plea that the Lands taxed, where the distresse was made, are within the Level, to be taxed by the Commissioners. 4ly. The Tax is of the Land of such an one, and his Assignes, and this is too generally expressed, and cannot be levyed equally by such a tax. 5ly. The Plea sets not forth, that there was any notice given to Whitley of the tax made before the distresse taken, as there ought to have been, and for these reasons, he concluded that the Plea was not good. Bacon Justice held, first, that the Party had waived his benefit of the Plea given him by the Statute, by pleading specially, and he ought to make good his Plea, as he hath pleaded it at his own perill: He held likewise, that there ought to be notice given of the tax, and a demand of it, before any distresse might be taken, and that the Plea was defective in this. 3ly. That he cannot sell a strangers goods for the tax as Whitley is, for ought that appears in the Plea. 4ly. By the Plea it appears, that he hath distrayned one Acre of Land for all the tax, which ought not to be, and upon these exceptions the rule was for the Defendant to shew cause before the end of the Term, why the Plaintiff should not have Judgement.

Tax. Distresse. Sale. Plea. Waiver. Notice. Demand.

Sr Maurice Abbot.

Pasc. 23 Car. Banc. reg.

SIr Maurice Abbot had a Judgement against one and dies, and three years after Execution is taken out in his name, upon the Judgement the Court was moved to vacate this Judgement. but would not, for they said that there was no help in this case, but by bringing a writ of Error, except there can be any fraud proved in the proceedings

Motion to Vacate a Judgement. Error.

Fraud. dings, and then the Court will take order to help the Party grieved: And thereupon ruled to examine the Attorney, and the Partyes whether there was due proceedings or no.

Vill de Charleton in Kent.

Pasc. 23 Car. Banc. reg.

Motion to quash a presentment and take off Amercements.

A Man was killed at Charleton in Kent, upon which the Coroner takes an inquest, and returns it into the Crown Office: upon this a presentment was drawn up in the Crown Office against the Vill of Charleton, and found, and thereupon issues went out against the Vill: It was moved for the Vill to have them discharged, by reason that the presentment was not good, for it was grounded upon the Statute of 3 H. 7. chap. and sets forth that such a person was killed at Charleton, and that the murderer fled away in the night, by which it appears that the Vill is not lyable to be amerced within the Statute: for the murtherer ought to escape in the day by the Statute, and not in the night, and for this it was quashed, and the Amercements discharged.

Amercements

23 Car. Banc. reg.

For quashing an order of the Sessions of Peace, for keeping a Bastard.

The Court was moved to quash an order of sessions, made for the keeping of a Bastard Child, and these exceptions were taken to the order: First the order was, that the Party should pay a weekly sum for the keeping of the Child, whereas no such order could be made without the Parties consent, for by the Statute he is only compellable to secure the Parish, where the Child was born, that it should not be any charge to the Parish. Another exception was, that it appears not that the Justices had any power, to make any order at all in the case, for it appears not where the Child was born, and so it may be it was born in an other County, where these Justices have no authority to Act any thing concerning it. Upon these exceptions it was quashed.

For a certiorari to remove Indictments out of one of the Cinque-ports.

The Court was moved for a certiorari to the Court of Sandwitch, to remove four Endictments there for shooting in a Gun, and pulling up of a post, because the facts, for which the Party was Endicted, were not done within the Jurisdiction of the Court; But because Sandwitch was one of the Cinque-ports, and it had been a question heretofore whether this Court could send such a writ thither, The rule was only for cause to be shewn why a certiorari should not be granted.

Tory

Tory.

Paſc. 23 Car. Banc. Reg.

TOry brings an Action of Treſpaſs, and falſe impriſonment againſt I. S. ſimul cum aliis. &c. The Defendant pleads not guilty, and a Verdict is given againſt him for the Plaintiff; It was moved in Arreſt of Judgement, that the declaration was not good, becauſe it declares againſt I. S. by name ſolely, and it ought to have been joyntly againſt him with the others, naming them alſo, becauſe the treſpaſs was joynt, and not againſt I. S. alone; but the Court held that the declaration was good, becauſe it was with a ſimul cum, although the Perſons were not named, and ſaid that this was the conſtant courſe of the Common Pleas: And that an ejectione firmæ againſt one ſimul cum had been ruled to be good, and ſo uſed in the Common Pleas, although heretofore it hath been adjudged to the contrary: yet the Judgement was ſtayed till the other ſhould move.

Arreſt of Judgement in an Action of Treſpaſſe.

Declaration.

Ejectione firmæ.

poſt: 20

Jones againſt Young.

Paſc. 23 Car. Banc. Reg.

Hill. 22 Car. rot. 1857.

IOnes brings an Action of Aſſault and Battery againſt Young, Young juſtifies as ſervant to I. S. becauſe, that Jones came to fiſh in the ſeveral Piſcary of his Maſter. Judgement was given for the Defendant: A writ of Error was brought, and two exceptions taken. 1. That whereas Young, had in his Plea of Juſtification entitled his Maſter to the ſeveral Piſcary by the Kings Letters Patents, he had not ſhewn that the King was ſeiſed of this ſeveral Piſcary jure Coronæ, and ſo it might be the King had no power to grant it. 2ly. He doth not ſhew his Letters Patents, which he ought to do, becauſe he derives a title by them; The rule was to ſhew cauſe Saturday next why the Judgement ſhould not be reverſed.

Error to reverſe a Judgment againſt the Plaintiff in Treſpaſſe.

Title.

The Earl of Leceſter againſt Mrs. Samford.

Paſc. 23. Banc. Reg.

IN a Trover and Converſion, brought by the Earl of Leceſter againſt Mrs. Samford for certain Jewels, the Trover being laid to be in Kent, but the Offring the goods to ſell, being the Converſion of them being in London; It was doubted where the tryal ſhould be, and the Court ſayed, that generally a tranſitory Action is to be laid where the fact was done, yet the Party is not tyed to lay it there, but may lay it in another County, and in this caſe it was held by the Court, that the Plaintiff may bring his Action where the Jewels were ſold, and that was in London, as well as in Kent, where the Trover was laid, for part of the ground of the Action to wit the Converſion was in London, though part of it, namely the Trover, was laid to be in Kent.

For levying the venire in a Trover and Converſion.

Venire.

Trover.

Baſely

Basely and Baseley.

Pasc. 23 Car. Banc. Reg.

Error to reverse a Iudgment in Norwitch.

Tales.

A Writ of Error was brought to reverse a Judgement given in Norwitch, and the Error Assigned was, that there did but five of the Jury empanelled appear at the tryal, and yet a Verdict was given, and Judgement thereupon. The Court said that a Corporation cannot grant a tales, neither if they could, doth it here appear that there was a tales granted, and therefore reversed the Judgement.

Sir William Bronker.

Pasc. 23 Car. Banc. Reg.

Habeas corpus, for one committed by a Iustice of peace for refusing to find sureties for the good behaviour

Good behaviour.

Imprisonment

SIr William Bronker was brought before a Justice of Peace, upon an information made, that he had cheated one at play with false dice: the Justice requires him to find surettes for his good behaviour, and upon his refusal commits him to Prison. Sir William Bronker brings his habeas corpus in this Court, and upon the return this matter appear'd, the Prisoner prayes by his councell to be delivered, because there appeared no matter sufficient upon the return why he should be committed, but because the Gaoler desired time to amend the return, the Court granted it, and would not deliver the Prisoner, but took bail for his appearance, viz. the Earl of Dover, and Earl of Chesterfield. And the Court then said, that a Justice of Peace cannot bind one to the good behaviour upon a general information, or commit him to Prison for refusing to find suretyes for his good behaviour upon such information.

VVroath and Elseye.

Pasc. 23 Car. Banc. Reg.

Hill. 22 Car. rot. 1224.

Demurrer to a plea in Debt upon an obligation.

AN Action of Debt was brought against Elseye an under Sheriff, by Wroath the high Sheriff upon a bond given him to save him harmlesse, &c. the Defendant pleads that he hath saved him harmlesse, to this the Plaintiff demurs, and held a good demurrer, for he ought to have pleaded non damnificatus, and not generally that he hath saved him harmlesse, for that he may do in many things, and yet the Plaintiff may be damnified in some other things where in he was also bound to save him harmlesse. The rule was to shew cause why Judgment should not be given for the Plaintiff.

White

VVhite.

Paſc. 23 Car. Banc. Reg.

A Judgement was given in an Action on the Caſe brought by an Attorney for theſe words ſpoken of him; Thomas White is a perjured Knave, and a ſuborned Knave. A Writ of Error was brought, and divers exceptions taken, but the principal were two. 1. That the words are not well laid, for they are adjective words, and ſo not poſitive enough to ground an Action. 2. The words are not Actionable, becauſe it is not declared, that the party of whom they were ſpoken was of any Trade, or had any office: But Bacon Iuſtice over-ruled all the exceptions, and ordered cauſe to be ſhewn next day, why the Judgement ſhould not be affirmed. The Caſe of one Nicholas and Webb was afterward cited, where Judgement was given in the Common pleas for calling an Atturney Knave, which Judgement was ſaid to be afterwards affirmed in the Kings bench, 12 Car. Trin. rot. 102.

Error to reverſe a Iudgment in an Action on the Caſe for words.

Caſe.

Saunderſon and Martin.

Paſc. 23 Car. Banc. Reg.

Trin. 22 Car. rot. 867.

A Judgement was given in an Action of Debt upon an obligation, to perform ſuch a promiſe made by the Obligor, to the Obligee; and a Writ of Error was brought to reverſe this Judgement. The Error aſſigned was, that the breach of the promiſe was not well aſsigned, for it did not appear when this breach of promiſe was. Bacon Iuſtice The breach of promiſe is the ſole cauſe of the Action, and it appears not to the Court when that was, and for this he reverſed the Judgement.

Error to reverſe a Iudgment in Debt

Paine and Skeltrom.

Hill. 23 Car. rot. 740.

AN Action of Debt was brought upon an obligation, the condition was, that Skeltrom the Defendant with his Wife ſhould appear at the Marſhals Court, and for not appearing according to the condition was the Action brought: Skeltrom appears and pleads, that at the time of the obligation he was ſolus et innuptus. To this Plea the Plaintiff demurrs. Rolle Iuſtice ſaid, this Plea was not the ſame with ne unques loyalment accouple, for one extended to a feme de facto, and the other to a feme de jure. The Court then adviſed of the Plea, but Trin. 23 Car. ruled to ſhew cauſe tomorrow why Judgement ſhould not be given for the Plaintiff.

Demurrer to a Plea in Debt upon an Obligation.

Stoughton and Day.

Paſc 23 Car. Banc. Reg.

Demurrer upon a Declaration in Debt upon an Obligation.

STOughton an underſheriff brings an Action of Debt againſt Day one of his Bailiffs, upon an obligation with a condition to ſave the underſheriff harmleſſe in executing of proceſſes, and other things contained in the condition, and Aſsignes the breach of the condition to be, that the Bailiff had not Executed ſuch his warrant ſent to him upon a proceſſe to him directed out of the Exchequer to levy iſſues upon certain lands. To this declaration the Defendant demurs, and ſhews for cauſe, 1. That the warrant to him directed by the underſheriff, was made out of the County where he was underſheriff, and ſo could not be ſaid his warrant as underſheriff of that County. 2. It is not alleged, that the mannour of Addinſon, where he was by the warrant to levy the iſſues, is within the Hundred where the Bailiff hath Jurisdiction; And this the Court held to be a good exception, and ſaid, that the breach Aſsigned is not ſhewed to be within the Condition of the Obligation; becauſe the Baily cannot execute a precept out of the Hundred where he is Bailiff; and thereupon the rule was that the Plaintiff Nil capiat per billam, if cauſe were not ſhewn Tuesday following.

Warrant.

Cook and Fincham.

Paſc. 23 Car. Banc. Reg.

For vacating a Writ of Execution.

AJudgement was given for Cook, upon an information upon a Statute, exhibited by him on the behalf of the King and himſelf, where the King was to have ten pounds of the penalty recovered: Cook takes out an Execution upon this Judgement, to levy the whole ſum of money recovered to himſelf; as appeared to the Secondary upon examination of the matter referred to him. Upon this the Court held the writ of Execution to be ill; becauſe it was entire for the whole ſum recovered to the party, whereas 10 l. was due to the King, and ordered a new Writ of Execution, and to ſtay the money in Court, till further advice of the matter taken.

Execution.

Clark and Pew.

Paſc. 23 Car. Banc Reg.

Arreſt of Iudgement in an Action upon the Caſe.

AN Action of Trover and Converſion was brought by Clark, againſt Pew and his wife, and the Declaration was, that the goods were found by the Baron and Feme, and were converted ad uſum ſuum, whereas it ought to be in the plural number, to wit, ad uſum eorum, or ad uſum of Pew and his wife; for as it was, it ſuppoſed the Converſion to be made only by the Husband, which is contrary to the Action it ſelf, which is brought againſt both. Upon this Judgement was ſtayed till the other ſhould move.

Long

Long and Bennet.

23 Car. Banc. Reg.

LOng brings an Action upon the Case against Bennet, and declares, that he would not suffer him to take unum Acrum ligni which he had sold to him in such a place. After a Verdict for the Plaintiff, it was moved in Arrest of Judgement, that the Declaration ought to have been unum Acrum bosci, and not ligni, for that was uncertain. The Court said, they would Advise of the exception, because it was in an Action of the Case. The same Term Judgement was given, because Damages only were to be recovered, and the words used were but inducements to describe the thing for which Damages only were demanded, yet it might have been more properly expressed.

Arrest of Judgement in an Action upon the Case.

Declaration.

Barker and Martyn.

Pasc. 23 Car. Banc. Reg.

THe Plaintiff brings an Action of Trespasse, and declares against the Defendant for breaking his house, and taking away quinque Instrumenta ferrea, Anglice, Fetters: and a verdict was for the Plaintiff. It was moved in Arrest of Judgement, that the word Instrumentum is not a word that signifies Fetters; but that it is so general a word that it may expresse any other thing as well, and that the Anglice joyned with it, to interpret what it means, cannot help it, because there is a proper Latin word which might and ought to have been used to expresse Fetters by. Rolle Justice said, that by the Statute all pleadings ought to be in Latine, and every particular thing therein ought to be expressed by a Latin word, if there be a proper Latin word for it, as here there is, and therefore the proper Latin word being not used, but another which cannot signifie the thing, the Anglice doth no good; but part of the Declaration shall be judged to be in English, and so it cannot be good. And judgement thereupon was staye'd till the other should move.

Arrest of Judgement in an Action of Trespass.

Pleadings.

Curtice and Columbine.

Pasc. 23. Car. Banc. Reg.

Mich. 22 Car. rot 433.

CUrtice brings an Action upon the Case against Columbine upon an Assumpsit by paroll, to find meat, drink, lodging, &c. for the Plaintiff, and to teach him the trade of a mercer. This agreement was afterwards by consent of both partyes put into writing. Upon the tryal the Plaintiff obteins a Verdict upon the paroll agreement, and hath Judgement thereupon. The Defendant brings his Writ of Error in this Court, and Assignes for Error, that there was no Assumpsit declared upon, or proved sufficient, to warrant the Verdict and Judgement, because that by reducing the Agreement to writing, the paroll agreement became ipso facto void, and so no Action could be brought upon it; but it ought to have been

Error to reverse a Judgement in an Action upon an Assumpsit.

been brought upon the Agreement expressed in the deed, and the issue ought to have been joyned upon that, and not upon the verbail Agreement, which is void. The rule of Court was to shew cause why Judgement should not be reversed.

Barly
~~Barker~~ and Martin.

Pasc. 23 Car. B. R.

Arrest of Judgement in Trespasse.

Dec: 15.

BArker brings an Action of Trespass for an Assault and Battery against Martin, simul cum, &c. and hath a Verdict against him. It was moved in Arrest of Judgement, that the Action ought to have been brought particularly, against the other Trespassors together with the Defendant, and not against the Defendant in particular, with a general simul cum against the rest, which is uncertain, and signifies nothing against the rest, and the rather, because the Action is commenced by bill, and not by original; although it could not be good though it were by original: but it was said by Rolle Iustice, that it may be the Plaintiff could not Arrest the other Trespassors, and that he will do it when he can, and that he may well proceed against them at divers times as he can take them, but that whensoever he shall have had satisfaction for the Trespass done him from any one of them, he cannot proceed against any of the rest; and it was ruled that Judgement should be entred.

Trespasse.

Cook and Allen.

Pasc. 23 Car. Banc. Reg.

Iudgement reversed because the Venire was ill.

AIudgement given in an inferior Court was reversed in this Court, because the Venire was, Venire facias, &c. and did not shew from what place the Venire should bee, which, by Rolle Iustice, ought to have been expressed at large, it being in an inferior Court, and not with an, &c. although the use of the Common pleas be to make the Venire short, with an, &c.

inferior Court Common pleas.

The King and Holland.

Entred 16 Car.

Argued Pasc. 23 Car. Banc. Reg.

An argument upon a special Verdict.

THe case was in effect this. A Copyhold was surrendred to I. S. in trust, that Holland an Alien, should take the profits thereof to his own use, and benefit, upon this an inquisition was taken for the King, and this matter found: whereupon the lands were seised into the Kings hands, and upon a tryall concerning these lands, a special Verdict was found, comprising the aforesaid matter. The case was argued against the Kings Title, by Mountague of the Middle Temple, and for the Kings title, by Hales of Lincolnes Inn. The substance of Mountagues Argument was, 1. To consider the nature of the trust; 2. The nature of the land out of which the trust was raised: and for the first he held, because

cause it was a trust for an Alien to take the profits of the land, and in that the Alien had no estate in the land; therefore the King could not have it, as he might have had the land if the Alien had had any Estate in it: and is said that this trust was a thing only in Action, and lies in privity, and not to be seised upon by another; and said a Villein was a parallel Person in law to an Alien, in respect of purchasing of lands, and had a Copihold been surrendred thus in trust for a Villein, the Lord should not have seised it; and this is but a trust not Executed, which is in the nature of a use at the Common law, and not as it is now by the Statute: besides, this trust is raised out of Copyhold lands, and therefore the King cannot seise the lands which the Alien hath not, for if he should, the Lord of whom the land is held, would be prejudiced; and he cited Beverlyes case 4. rep. 126, and a case in 23 Eliz: Hales on the other side Argued, that the King shall have the trust, and laid these two grounds. 1. That there may be a trust raised upon the surrender of a Copyhold; and 2ly. that the surrender settles the trust in the Alien, and cited 11 H. 4. 26. and he said these things were considerable, 1. Whether the King shall have any thing, and what he shall have; 2. Whether he shall have a use for an Alien at the Common law, or a trust; 3. Whether he shall have a trust raised out of a use. And for the first, he said, that the trust was not a thing meerly in Action, but an hereditament; and partly in possession. and cited Cooks Institutes 469. and said, the reason why an Alien may not purchase lands is, because that this Kingdom might not be impoverished thereby, by transporting the revenues of the land into a forein Country, and putting a part of it under the subjection of a forein Prince, and the same reason comes to the case in question, and therefore is not to be suffered; and every Alien that purchaseth is said to purchase to the use of the King, and so shall it be in this case, and although a thing meerly in Action is not transferable to a Common person, yet is it transferrable to the King: but this case is stronger for the King, for here is not a thing meerly in Action but mixed with an interest, and it is no reason, but that the law which was made to meet with the subtility of such Alien purchasors, should take place here; and it cannot be said that that law was made to give remedy to the King for that he had before, and a Feoffment now made in trust for an Alien is all one with a use at the Common law; and he cited 19. Jac. that trusts made to St. John Daccombe of Annnstypes for the Lord Summerset attainted of Treason were adjudged to be forfeited: and he held, that there is no difference between a trust raised out of a Copyhold and other lands, and if he hath an interest here in the profits, the seisure is good, though he have no interest in the land, for the land may be seised by the profits; 5 H. 5. fol. 9. But Rolle Iustice demanded of Hales, how the King shall be intitled to the profits of the land, where he is not intitled to the land it self? and said, that the Chancery cannot compell one to Execute a trust for an Alien, and that a trust was invented only to avoid the Statute of uses, and said, that a trust is not a thing in Action, but may be an inheritance or a Chatell as the case falls out. Adjourned postea.

Daccombe. Title. Chancery. Trust.

White and Pynder.

Pasc. 23 Car. Banc. reg.

Mich. 22 Car. rot 540.

Demurrer upon an evidence.

IN an Action of Trover and Conversion, there was a demurrer joyned upon the evidence; and thereupon the Court directed the Jury to find damages for the Plaintiff, if upon the argument of the demurrer the law should be adjudged for him, and then the parties desired the Jury might be discharged, and referred the matter to the Judges, to determine the law upon the evidence. In this case Rolle Justice took this difference, to wit

Record.

Plea.

Evidence.

between pleading of a Record, and giving a Record in evidence to a Jury. If it be pleaded it must be sub pede sigilli, or else the Judges cannot judge of it. But if it be given in evidence, though it be not sub pede sigilli, the Jury may find it, if they have other good matter of inducement to prove it. And the partyes in this case were advised by the Court for their own expedition, to let there to be issued a venire facias de novo, and to waive the demurrer upon the evidence, because it was not good, nor could bring the matter in question before them that they might determine it, for one party saith there is a writ, and the other saith there is not a writ, which is bare matter of fact, and not for us to determine but for a Jury, and the demurrer ought to have been whether the writ be good or whether it be bad, and should have admitted that there was a writ tyel quel, and then had the whole matter come legally before us, to wit, whether the evidence given to the Jury be sufficient for them to find a verdict for the Plaintiff upon the issue joyned or not. But the Court will advise.

Hamond and Kingsmill.

Pasc. 23 Car. Banc. Reg.

Arrest of Judgement in an Action of the Case for words.

HAmond brings an Action upon the case against Kingsmill for these words, spoken of him in relation as he is a Justice of peace, to wit Mr. Hamond did put in of his own head these words in an examination taken by him, viz. I. S. did steal twenty sheep of such a mans, and for speaking these other words of him; Hamond was a debauched man, and is not fit to be a Justice of peace, and hath a verdict against the defendant, who moves in Arrest of Judgement that neither the former nor the latter words were actionable, for for the former words, that he did of his own head put in words into the examination, are words uncertain, and dubious what is meant by them, whether that he added any thing of his own invention, to the examination which was not confessed by the examinant, or that he only put the substance of the matter confessed into words of his own endicting, and if he did no more that was justifiable, and so it shall be taken here rather

ther than in a worſe, and ſtrained conſtruction to ground an Action upon: and for the ſecond words, to ſay that he was a debauched man, and not worthy to be a Juſtice of peace, they cannot be ſcandalous, for they are ſpoken of him in relation to what he was in time paſt, before he was a Juſtice of peace, and not as he was at the time of the ſpeaking, and it is no ſcandall to ſay, a man hath been debauched, for it may be he is now otherwayes. But for the firſt words it was anſwered by the Conncell on the other ſide, that they were actionable, for they muſt be taken according to Common conſtruction, viz. that he had added not only words of his own invention to the examination, but the matter it ſelf expreſſed in thoſe words which was not confeſſed by the examinant. And as to the latter words, it was anſwered they were alſo Actionable: and a Caſe was cited where Judgement was given againſt the Defendant for ſaying of one, that he was a corrupt Judge. Rolle Iuſtice was of opinion, that the firſt words were Actionable, but not the ſecond for words ſaith he ought to be taken according to uſuall, and Common conſtruction, though they are not to be ſtrained, for otherwiſe a man may be abuſed by ſubtility, and ſhall have no remedy, and Judgement may be given here for the firſt words, and not for the ſecond, the Damages being ſeverall, but if the Damages had been intire there if Judgement could not be given for both the words, it cannot be given at all. Bacon Iuſtice much to the ſame purpoſe as Rolle, and ſaid, that the firſt words ſhall be meant, that he added words of his own invention without any inſtruction of the party, for oftentimes dubious words ſhall be taken in the worſe ſenſe upon conſideration of the Circumſtances that accompany them, and he was alſo of opinion that the ſecond words were actionable, and are as ſcandalous as the former. Judgement was given for the former words, and for the latter the Court would adviſe.

Caſe.

Iudgement.

Barrett.

23 Car. Banc. Reg.

AN Action of Treſpaſſe was brought for digging in his land, and carrying away a certain number of loads of earth, and a Verdict was for the Plaintiff. It was moved in arreſt of Judgement that the declaration was incertain, for the Treſpaſſe is laid to be done in land, lying in divers Towns. 2ly. It is not ſhewed what kind of ſoil the earth was that was caryed away: but both the exceptions were over-ruled, and Judgement ruled to be entred niſi cauſa, &c.

Arreſt of Iudgement in Treſpaſs.

Conisby and Fairfax.

Paſc. 23 Car. Banc. Reg.

A Judgement was given in an Action of Treſpaſs in the Court of Owſebridge in York, & a writ of Error was brought in this court to reverſe the Judgement, many exceptions not material at all were taken, and many o-

Error to reverſe a Iudgement in Treſpaſſe.

others that were helped by the Verdict; but the three chief Exceptions were. 1. The Damages were declared to be ad valentiam quingint. librar. instead of quingent. for there is no such word as quingint, to express any number, for if it be meant to express Fifty, it ought to be quinquagint. but quingent. signifies 500. 2ly. The Venire was directed Balivis de Wapentagio, whereas there is no such word, for the word to express a Wapentake is Wapentachium, so that it ought to be de Wapentachio, and not Wapentagio. 3ly. The Venire is, Venire facias de baliva, and sayes not what Baliwick, which is uncertain, and it cannot be known, whither it extends, and upon these Exceptions the Judgement was ruled to be reversed, except better matter shewn Saturday following.

Venire.

Pasc. 23 Car. Banc Reg.

For quashing an Endictment for using the Trade of a Baker.

Upon a motion for quashing an Endictment against a Baker, these Exceptions were taken. 1. He is indicted for using facultatem pistoris, and doth not say panis humani. 2ly. It is for baking panis tritici, Anglice, Houshold bread, whereas it signifies only bread made of Wheat, and not Houshold bread, for that may be made of other corn. 3ly. For baking panis Assis without a dash for panis Asisæ. Upon these Exceptions it was quashed.

Pasc. 23 Car. Banc. Reg.

For quashing an Endictment for arresting and imprisoning one.

Upon a motion for quashing an Endictment against one for apprehending I S. & unprisoning him, these Exceptions were taken to it. 1. It sayes that he apprehended & imprisoned the party without a Warrant, wheras it ought to have been absque aliqua rationabili causa, for in some Cases a man may be apprehended and imprisoned without a Warrant, but in no Case without a reasonable cause. 2ly. The Endictment is, that he did not shew him the cause why he apprehended and imprisoned the party, and that he is not bound to do, and yet the party may be lawfully imprisoned. 3ly. The Endictment doth not say, that he apprehended and imprisoned the party falsely, as it ought to have done. Upon these Exceptions it was quashed.

Drake and Whitacre.

23 Car. Banc. Reg.

Hil. 22 Car. Rot. 1318.

Arest of Judgment in an Action upon the Case for words.

An Action upon the Case was brought, and a Verdict found for the Plaintiff for these words, Margaret Whitacre (viz. meaning the Plaintiff) did steal my Wood, and I will send her to Bridewell. It was moved in arrest of Judgement that the words were not actionable, for doubtfull words as these are ought to be taken in mitiori sensu, and Wood here may be understood standing Wood, and not Wood cut down, and so it could not be Theft but a Trespass: on the other side it was answered, that Wood shall here be understood Wood cut down, and not standing, and being coupled with the words Margaret Whitacre is a Thief, which are scandalous words, they shall be interpreted equally scandalous, Ayre & Higgins his

Case

Caſe was cited to prove it, where it was adjudged that theſe words, He is a thief and hath ſtollen my Corn, ſhall be underſtood of Corn cut down, and not ſtanding, and therefore are actionable. Roll Juſtice ſaid, it was a ſtrong Caſe that the action will lye. Notwithſtanding Judgement was areſted till the other ſhould move. This was again moved Trin. 23 Car. and the Court held, that the firſt words alone were actionable, but whether coupled with the other they were actionable, the Court was divided, viz. Bacon a gain the Action, and Rolls for it. Caſe.

Paſc. 23 Car. Banc. Reg.

IN an Action of Trover and Converſion, and a verdict for the Plaintiff, it was moved in arreſt of Judgement that the Plaintiff did declare for Books & for Stockings found & converted, and doth not ſhew what Books, viz. whether Engliſh, or Latine, or what other Language, nor whether Law books, Divinity, Phyſick, or of any other Subject, and becauſe he doth not declare what ſort of Stockings they were, whether woollen, wooſted, or ſilk, &c. But the Court over-ruled the Exceptions and ſaid, that Books were not things of divers ſpecies, be they of what Language or ſubject they may be of, neither the Stockings, for were they ſilk, or woollen, or wooſted, they were but Stockings, and ſo ruled Judgement to be entred. Areſt of Judgment in Trover and Converſion. Species.

The King and Place.

Paſc. 23 Car. B. R.

PLace was endicted before the Lord Finch and Juſtice Crawley for ſpeaking words againſt the Queen Mother of France, the words were theſe, The Queen Mother is the Whore of Babylon, ſhe is a Whore and hath had a Baſtard; upon this Endictment judgement was given againſt the Defendant. A Writ of Error was brought in this Court to reverſe the judgement; The Errors aſsigned were, 1. That the proceedings upon this Endictment were too ſpeedy, and ſo illegal; for the whole proceedings upon it were acted in one day. 2ly. The Endictment lyes not, for it is founded upon the Statute of Scandalum magnatum, and here can be no ſuch great Scandal, for that is for words ſpoken of a Peer of the Realm, and the Queen Mother is not ſo. 3ly. There is no Capiatur upon the Roll, as it ought to have been, the Defendant being not in Priſon at the time of the judgement given. 4ly. The judgement is that the Defendant ſhall be impriſoned for a year without bail or mainprize, whereas he ought to be delivered upon paying his Fine. Adjourned to the next Term. Error upon a Judgement given upon an Endictment for words. Scandalum magnatum.

Paſc. 23 Car. Banc. Reg.

AN action of Debt was brought upon a Bill penall, and a verdict for the Plaintiff. It was moved in arreſt of judgement, That the Plaintiff hath not ſhewed, that the Defendant did not pay the mony at the day limited in the Bill, but only ſays, non ſolvit, &c. 2ly. He declares, that the Defendant was bound to pay ſuch a ſum Legalis monetæ, and doth not ſay Angliæ, but the Court over-ruled both the exceptions, and ruled the Plaintiff to take his Judgement. Areſt of Judgment in Debt upon a Bill penal.

Pasc. 23 Car. Banc. Reg.

For a Writ against a vill to make them keep their Fences. Scire facias. Plea.

A Motion was made by one Town against another neighbour bordering Town, for a Writ to make them repair their fences; And it was granted, but it was said by the Court, that the Writ so granted should be but in the nature of a Scire facias returnable in this Court, to enable them to plead to it, and not to compell them to do it without being admitted to plead. Notwithstanding the opinion of Noy Attorny General, and the old Record of Ed. the 2ds. time produced heretofore by him to strengthen it Nota.

Trin. 23 Car. Banc. Reg.

To stay Proces for a Deodand. Certificate. Notice.

A Motion was made upon an Affidavit to stay Proces out of this Court against the party for a Deodand, because he had payed three pound for it to the Kings use to Sub-Deputy Almoner upon a composition made with him, Bacon Iustice, procure the General Deputy Almoner to acknowledge it, and procure his Certificate to the Court, for of the Sub-Deputy we can take no notice.

Trin. 23 Car. Banc. Reg

To quash an Endictment of forcible Entry. Addition.

THe Court was moved to quash a Endictment of forcible entry upon these Exceptions. 1. There is no addition of the County where the party dwells that made the forcible entry, as there ought to be by the Statute of 1 H. 5. and without this addition no Proces can be awarded to out-law the party, for it must be directed unto the County where he dwells. 2ly There is no County expressed where the vill lies in which the force was committed. Upon these Exceptions it was quashed.

Trin. 23 Car. Banc Reg

To discharge one endicted for Recusancy. Certificate. Conformity.

AN Endictment was preferred 5 years before, against Count Arundel for recusancy. It was now moved that he would plead Conformity, but in regard that he must plead it by a Certificate under the hand and seal of the Bishop of the Dioces, and Bishops were now taken away by the Parliament, he was disabled to do it, but had a Certificate under the hands and seals of the Minister and Church-wardens of the Parish where he dwelt, upon Oath testifying his Conformity, and thereupon it was prayed he might be discharged. But the Court answered, that there is another remedy given by the Statute, which he might have followed, though the former was taken away, to wit, to conform at the Sessions, and it was his own fault that he hath lost that advantage by removing the Endictment hither by Certiorari, and therefore we will not at present deliver him, but will consider of the Statute, and stay the Proces in the mean time.

Trin. 23 Car. Banc. Reg.

IT was moved to the Court that there was an Execution duly issued out of this Court and returnable here this Term, and that since it issued forth, the Defendant had obtained an Injunction out of the Chancery to stop the execution. The Court answered, that all the Judges were agreed that an Injunction out of the Chancery lyes not after a Judgement, be the Bill put in before or after the Judgment it matters not, but if after a Judgement there be a Writ of Error brought to reverse it, and pending the Writ an Injunction be obtained, Q. whether it lye or no by the Reporter.

Against an Injunction out of the Chancery to stay execution.

Injunction.

Bruer and Sowthwell.

Trin. 23 Carol.

BRuer brought an action upon the Case upon an Assumpsit to pay so much mony for Currance sold unto him discomputando for four Months. The Defendant demurs to the Declaration for the incertainty of it, because it is discomputando for four Months, and expresseth not for how much he should discount, and so there can be no certain dammages given, and upon this it was stayed till the other party move.

Arrest of Judgment in an action upon the Case.

Whiteacre and Hillwell.

Trin. 23 Car. Banc. Reg.

Hill. 22 Car. rot. 1318.

VPon a Verdict had for the Plaintiff in an action upon the Case for these words Magaret Whitacre is a thief & hath stollen my Wood, and *I* will send her to Bridewell, It was again by the Plaintiff moved for Judgement, because the words were actionable, and shall be meant of Wood cut down & not standing; and it was said, though the first words should in themselves be doubtfull, yet are they made certain by the words that are coupled with them. But Bacon Iustice denied it and said, that Bridewell is a Prison for Correction, and not the Sheriffs Prison for felons, and that one may be sent thither although the offence be not felony, and that the cutting of Wood standing is to be punished with whipping, and so the party may be sent to Bridewell for that offence, and said, that the last words are explanatory of the former, that he meant not the fact charged upon the Plaintiff to be felony, but had not the later words been added to explain his meaning, the former alone are clearly actionable. But Roll Iustice held the words as they are laid to be actionable, and cited Hysords and Stamps Case, Trin. 11 Iac. & Doleman and Youngs case, 5 Car. and Smith and Wards Case, 21 Iac. and said that in the Case at Bar, that the latter words were cumulative and not interpretative, and that where there are expresse precedent words to make one a Thief, there ought to be violent words subsequent to give them another interpretation, and not words which may be taken by implication, as they are in this Case. Adjourned.

Action on the Case for words.

VVatſon and VVatſon.

Trin. 23. Car. Banc. Reg.

Hill. 22 Car. rot. 1687.

Action of Debt for not performing an award.

AN Action of Debt was brought upon an Obligation with condition to ſtand to an award. The Defendant pleads no Arbitrement made: The Plaintiff replyes, and ſets forth the award, and aſsigns a breach; the Defendant demurs, and for cauſe ſhews that the award is uncertain and not finall, for it is, that one of the parties ſhall pay ſo much money to the other as ſhall be due in conſcience, and that cannot be known how much it may be, and conſequently there is no award, but both parties are at liberty to go to law as they were before, and ſo no end is made between them by the award according to the intent thereof, and theſe books were cited againſt the award, 20 Ed. 4. fol. 1. et 4. 9 H. 7. fol. 14. 8 Ed. 4. fol. 20. It was ruled by the Court to ſhew cauſe why Judgement ſhould not be againſt the Plaintiff per nil capiat per billam.

An incertain award not good.

The King and Place.

Trin 23 Car. Banc. Reg.

Error to reverſe a Judgment upon an Endictment upon the Statute Scandalum Magnatum.

THe Caſe between the King and Place adjourned, Paſc. 23 Car. was again moved, which was this: Place was indicted before Finch and Crawley Juſtices of Oyer and Terminer, for theſe words ſpoken againſt the Queen mother of France, viz. the Queen mother is the Whore of Babylon, and is a Whore, and hath had a Baſtard, and all the Noblemen that will not joyn with me againſt her, are Rogues and Raſcalls. To this endictment the Defendant pleaded, and was found guilty by the Jury, and Judgement given againſt him: Whereupon he brings his Writ of Error in this Court to reverſe the Judgement, and aſsigns theſe Errors. 1. againſt the body of the Endictment it ſelf, and that he ought not to be Endicted for the words, becauſe they are neither ſpoken againſt the Common law nor againſt any Statute law. 2. Againſt the proceedings upon the Endictment, which were againſt law, being too ſpeedy, for he was Endicted before Juſtices of Oyer and Terminer, and tryed in one day, whereas there ought to have been 15. days betwixt the preferring of the Endictment, and the tryal. 3. The Venire is againſt law, for the Court did chuſe, try, and ſwore the Jury, which ought not to be. 4. Part of the Judgement is, that the Defendant ſhall be bound to his good behaviour, which cannot be upon ſuch an Endictment as was before them. 5. The Endictment doth not ſay, that the words were ſpoken contra pacem. 6. Part of the Judgement is, that he ſhall be ſet upon the Pillory, and loſe his eares, which no law warrants, but only to be ſet there to the view of the people, with a paper on his head. 7. The Judgement is that he ſhall be imprisoned for a year without bail, which ought not to be. To this laſt exception the Court anſwered, the party might be ſo committed; But they ſaid, that the Juſtices of Oyer and Terminer cannot try an Endictment the

Imprisonment

ſame

ſame day, noꝛ Juſtices of peace at the ſame Seſsions in which it was pꝛe- Tryall.
ferred; and they cited one Barnabyes Caſe 13 Car. and Pridians Caſe, 6 Car. & 22 E. 4. et Plow. 44. But they ſaid Juſtices of Eyꝛ, may try an Endict-
ment the ſame day; Roll Juſtice ſaid, the Kings Bench is a Court of Eyꝛ in Eyr.
the County where it ſits, and thereforꝛe they may try an endictment remo-
ved here out of the ſame County the ſame day, but not if it be removed hi-
ther out of another County, foꝛ in that caſe it is only a Court of Oyer and Terminer. But Bacon denied it, and ſaid ſo was my Loꝛd Cooks opini-
on, and it was alſo ſaid that Juſtices of Oyer and Terminer cannot pꝛo-
ceed upon an Endictment which is not taken beforꝛe themſelves, but Juſt-
ices of Gaol delivery may; and the Court alſo held, that the juratores electi Iury.
tryati et jurati by the Court, as it muſt neceſſarily be here underſtood, was
illegal, foꝛ the Jury ought to be electi by the Sheriff out of the County;
and laſtly the Court held, that legally there ought to have been 15 dayes
between the Endictment, and the tryal, and foꝛ theſe reaſons oꝛdered to
give notice to the Kings Sollicitour, oꝛ Serjeant, to ſhew cauſe why the
Judgement ſhould not be reverſed.

Hill and Farmer.

Trin. 23 Car. Banc. Reg.

Hill. 17 Car. rot. 674.

AN Action of Debt was bꝛought in the Common pleas upon an obligae- Error in Debt upon an obli-
tion, and a Judgement upon a demurrer was given foꝛ the Plaintiff; gation
the Plaintiff bꝛings a Writ of erꝛoꝛ in this Court to reverſe the Judge-
ment, and Aſsignes foꝛ Erꝛoꝛ that the Obligation upon which the Action
was bꝛought, and Judgement was given, is a void obligation by the Sta-
tute of quinto and ſexto of Ed. 6. made againſt buying of Offices. But Roll
Juſtice anſwered, that the Judgement in the Common pleas was given
upon a miſpleader there, and thereforꝛe you ſhould make that good firſt
beforꝛe you move new matter. And there is another Erꝛoꝛ alſo in the
pleading, which was not touched upon in the Common pleas, which is this,
firſt the plea is of the Office of the delivery, within the Office of the Armo-
ry, and after he referrs the plea to the Office of the Armoꝛy which is Declaration.
another Office, and ſo the Declaration is double. Another exception was
that the woꝛd Armentarius was uſed foꝛ Armamentarius. Monday following
was given to ſhew cauſe why Judgement ſhould not be reverſed.

The King and Marſhall.

Trin. 23 Car. Banc. Reg.

MArſhall bꝛings a Writ of Erꝛoꝛ to reverſe a Judgement given a- Error upon
gainſt him upon an Endictment of barratry, and takes theſe excep- an Endict-
tions. 1. That it doth not appear in the Endictment, beforꝛe what Com- ment.
miſsioners the Endictment was taken, upon which the Judgement was

given, and ſo the Endictment is not good for the incertainty of it, and conſequently the Judgement is erroneous that is given upon it, for it ought to appear by the Endictment that it was taken before the Juſtices of Aſſiſe, or Juſtices of Peace, or of the Gaol-delivery. 2. The Judgement is, quod ſolvat tantam denariorum ſummam, and ſhall find ſureties for the good behaviour, and this is rather an award than a Judgement. To this exception Roll Iuſtice anſwered, if it be a good order it is a good Iudgement, and the order is part of the Iudgement, yet let the Kings Councell have notice, and the Proſecutor ſhew cauſe why the Iudgement ſhould not be reverſed.

Iudgement.

Trin. 23 Car. Banc. Reg.

Arreſt of Iudgement in an ejectione firmæ.

UPon a verdict given in an ejectione firmæ it was moved in Arreſt of Judgement, and the exception was, that the Plaintiff was ejected de uno Croſto, which was ſaid to be of an uncertain ſignification; and becauſe the Plaintiff conceived the Court doubted whether an ejectione firmæ lay of a Croſt, he durſt not defend it, but moves for a ſpecial Judgement for the reſt of the land contained in the Declaration, and prayed that he might releaſe the damages as to the Croſt. Rolle Iuſtice doubted whether an ejectione firmæ lyes de uno Croſto, and ſaid that a Formedon lyes not of a Croſt, but that an Aſsiſe doth, becauſe it is put in view to the recognitors, but a Præcipe lyes not of it. The rule of Court was, that the Plaintiff ſhould take a ſpecial Judgement as he deſired, and releaſe the Croſt, and the damages to all, and that he ſhould have his Coſtes.

Ejectione firmæ. Formedon, Aſſiſe.

Lere and Cholwitch.

Paſc. 23 Car. Banc. Reg.

Arreſt of Iudgement in Debt upon an Obligation.

LEre brings an Action of Debt upon an Obligation againſt Cholwitch; the condition of the Obligation was, that a certain ſum of money ſhould be paid to the Plaintiff 40 dayes after he ſhould return with his Ship to ſuch a Port of diſcharge for fraight for his Ship, and for non payment accordingly is the Action brought; The Plaintiff hath a Verdict, The Defendant moves in Arreſt of Judgement, and takes theſe exceptions. 1. That the averment of the breach of the condition of the Obligation is not certain, and therfore not good, for it doth not aver that the Ship was diſcharged of his Goods, or that the 40 dayes were expired before the money demanded; To this Rolle Juſtice ſaid, it is not uſual to pay fraight for a Ship, till the owners have their goods delivered, but here the condition of the bond is, to pay the moneys within 40 dayes after his return to ſuch a port of diſcharge, and it is not intended, that the money ſhall not be paid till the 40 dayes be paſt. The 2d. Exception was, that he doth not ſay where the Ship was unloaden; To this Rolle anſwered, that it ſhall be intended that it was unladen at the port where ſhe arrived, if the contrary be not ſhewn on the other ſide. 3ly. There is no notice expreſſed to be given of the unloading of the Ship, and this being a collaterall thing, and penall to the Defendant, he ought to have notice of it; To this Rolle ſaid, that one party might as well take notice of this as the other, for the thing to be done is not

Fraight.

Intendment.

Notice.

not to be done either by the Plaintiff, or Defendant, and the iſſue is found againſt the Defendant, therefore let him ſhew cauſe Tuesday next why Judgement ſhould not be given for the Plaintiff. Afterwards the ſame Term Iudgement was given accordingly.

Segar and Dyer.

Trin. 23 Car. Banc. Reg.

Mich. 22 Car. rot. 125. or 135

DYer brings an Action of Trover and Converſion, in the Court at Briſtow againſt Segar, and hath a Verdict, and a Judgement againſt him; Segar brings his Writ of Error in this Court to reverſe this Iudgement, and Aſsignes theſe Errors. 1. To the Declaration which was of the Trover, and Converſion, de uno pullo, Anglice a Colt, whereas Pullus ſignifies not a Colt, but properly a young Hen, and hence we had the word pullet but in a general acception of the word it may ſignifie alſo other young things, but then it muſt have an adjective of the ſpecies which it is to ſignifie, or a ſubſtantive of the genitive caſe joined with it, as pullus equinus, pullus Aſininus or Aſini and the like, and ought not to be uſed alone to ſignifie a colt, with an Anglice joyned to it, as it is here. The 2d. Exception was, that it is not well ſet forth, how the Court was held where the Judgement was given, for he doth not ſhew that the Court was held either by letters patents, or by præſcription, but ſaith ad curiam tentam tali die coram A. D. I. H. &c. a tempore cujus contrarium memoria hominum non exiſtit, &c. which cannot be a good præſcription, for a Court cannot be held at ſuch a day, and before ſuch particular perſons, if it be not expreſſed to be ſecundum conſuetudinem. The rule of Court was to ſhew cauſe Tuesday following why the judgement ſhould not be reverſed.

Error to reverſe a Iudgement in Trover and Converſion.

præſcription.

Trin. 23 Car. Banc. Reg.

THe Plaintiff declares that the Defendant had covenanted with him, to pay him ſo much money as he ſhould expend for repairing, and victualling a Ship for him, and averrs that he had expended 300 l. in repairing and victualling it, and that he gave the Defendant notice of it at ſuch a day, and for non payment he brings his Action of breach of Covenant. The Defendant proteſtando that the Plaintiff had not laid out 300 l. in maner and form as he had declared, demurs to the Declaration upon theſe exceptions. 1. That that the Declaration was not good, becauſe he had not averred a ſpeciall breach of Covenant: But to this Roll Iuſtice ſaid, that this exception had been often over-ruled. 2ly. It was objected, that in this caſe the Plaintiff ſhould have brought an Action of Debt, and not of Covenant. But to this alſo Roll anſwered, that it was well enough, for it is in the election of the Plaintiff to bring either an Action of Debt, or an Action of Covenant, and that it hath been heretofore queſtioned, whether an Action of Debt did lye in this caſe, but it was never doubted but that an Action of Covenant did very well lie. A third exception was, that there is no

Demurrer upon a Declaration in an Action of Covenant.

Election of Action.

Debt.

Demand. no request alleged to pay the mony, and without request he was not bound to pay it. To this Roll answered, that the Plaintiffs Action was not an Action of Debt where a Demand is necessary, but it is an Action of Covenant, and there it is not needfull to allege a Demand.

Boomer and Payte.

Trin. 23 Car. Banc. reg.

Demurrer upon a Declaration in Debt. PAyte the Administrator of the Goods and Chattels of I. S. brings an action of Debt against Boomer, and declares, that the Intestate brought an action of Debt in the Common Pleas against three, and had a Judgement against them, and a Capias ad satisfaciendum against two of them was directed to Boomer the Defendant, being then Sheriff of the County where the parties lived, to execute, and that accordingly he did execute it by taking the parties, and afterwards did suffer them to escape, and for this the Plaintiff brings his Action. To this Declaration the Plaintiff demurs. But Roll Justice said, he saw no cause for it, for an Administrator may have an action of Debt against a Sheriff upon an Escape suffered of a Prisoner of the Intestate in his life time, and ordered the Defendant to shew cause Tuesday next why the Plaintiff should not have Judgement.

Debt.

The City of London and Estwick.

Trin. 23 Car. Banc. Reg.

For restitution to the place of a Common-Councel-man of London. STephen Estwick prays a Writ of Restitution to be restored to the place of a Common-Councel-man of the City of London, being put out of it by the Lord Maior and Court of Aldermen, and also committed to Newgate; the Writ is granted and directed to the Lord Maior and Court of Aldermen, who thereupon make a long return, setting forth at large the causes why he was deprived and committed, and why he ought not to be restored, which in brief was for carrying himself in a tumultuous way at an election of Common-Councell-men, and disturbing the election; this Return was read and filed, and the Councel thereupon prayed he might be restored, because there was not sufficient matter shewed in the Return why he should not be restored, and these exceptions were taken to the Return. 1. That it was too general, and shews not what manner of disturbance Estwick made at the Court where the election was. 2ly. Part of his misdemeanour is set forth to be clamando & vociferando, which are words very uncertain and not proper to set forth a disturbance. 3ly. It was said he was bidden to withdraw, and refused, and it is not shewn why he should withdraw. 4ly. The custom set forth for the Lord Maior and Court of Aldermen to imprison ad placitum is not good, but they should have shewn that such imprisonment belonged to them per consuetudinem, or by the Common-law. 5ly. They say, that they had used to imprison for such causes, and do not shew where the custom is used. 6ly. They say quædam quæstio orta est touching the election of one to be a Common-Councel-man, and shew not

his

his ability for the place. 7ly. By the incertainty of the Return the Plaintiff cannot plead to it. 8ly. It is said, that when he was commanded to go forth, he said he would not, but it is not said that he did not go forth. 9ly. It is said that the Court of Common-Council tendred the Covenant, whereas they have no power by Ordinance of Parliament to do it. The Recorder of Councell with the City desired time to amend the Return in matter of form only. And said, that the Plaintiff was removed from his place by a Court of Record, and therefore hoped he should not be this way restored, and that he had no loss by being removed, and therefore the Case was the less considerable; and whereas it was objected against his amending of the Return, that it was filed, & so too late to move for it, He said, that it was not filed by order of Court, but only ordered that Copies might be taken of it for Council to peruse, and if so then it is not too late to pray it may be amended, but though it were filed he conceived that in a case of this importance it might be amended in matter of form as some Returns had been formerly in this Court. Roll Justice answered the Recorder to this effect, You ought to shew some cause upon which the party may have remedy by a Writ of Error, or otherwise, if Judgement be wrongfully given against him, which you have not done; and as to the filing of the Return, a Return may be filed either upon motion of the party, or by the rules of the Court, and it were good, you consider how this was filed; and as touching the suspension of the party from his place, it ought not to be perpetual but for a time only, and said, that after filing of a Return, be it upon motion or by the rules of the Court, it cannot be amended. Tuesday next following was given by the Court to hear Councel on both parts.

Return.

Filing.

Suspension.

Amendme.

Chadly and Stinch.

Trin. 23 Car. Banc. Reg.

Mich. 22 Car. rot. 556.

STinch brought an Action upon the Case upon an Assumpsit in the Common Pleas against Chadly, and hath a Verdict and a Judgement. Stinch brings a Writ of Error here to reverse this Judgement, and assigns for Error, 1. That there were 18 returned upon the Jury, and but two of them tryed the issue. 2ly. Part of Declaration to ground the Assumpsit was in another County, and not within the Jurisdiction of the Court where the issue was tryed; and for these Errors the Judgement was reversed except cause should be shewn to the contrary Thursday next.

Error to reverse a Judgment in an Action upon an Assumpsit.

Trin. 23 Car. Banc. Reg.

IT was moved to quash an Endictment for erecting of a Cottage contrary to the Statute; the exception taken to it was, that he erected a Cottage for habitation, but did not say it was used or inhabited as a Cottage. But Bacon Justice answered, that the very erection of it is an offence against the Statute, and therefore the Endictment did very well pursue the words of the Statute, and therefore would not quash it.

To quash an Endictment for erecting a Cottage.

VVright and Pynder.

Trin. 23 Car. Banc. Reg.

Mich. 22 Car. rot. 440 antea.

Opinion of the Court on a Demurrer upon an evidence.

Pleading.

Evidence.

Venire de novo.

Iudgement.

Iury.

THe Case of Wright and Pynder was moved again to have the Judgement of the Court. Roll Iustice said, that matter of fact ought to be agreed in a Demurrer to an Evidence, otherwise the Court cannot proceed upon the Demurrer, for the Iudges cannot try the matter in fact, for that were for the Iudges to give the verdict, which belongs to the Iury to do, and to waive the matter in Law, which they should determine, and he said, that if a Deed be pleaded the party must shew it in Court, but if it be given in evidence it is not necessary to shew it if it can otherwaies be proved to the Iury, and so is it of a Record given in evidence, and cited one Worsleys Case 17 Iac. Rolls Iustice took also two other Exceptions to the pleading, 1. That the Goods mentioned in the Schedule appear not to be the same contained in the Declaration. 2ly. No Title is made to the Indenture by him who brings the Action, and concluded upon the whole matter that the Demurrer was not good, and that there ought to be a Venire facias de novo to try the matter again. Bacon Iustice much to the same effect, but differ'd in this, that there ought not to be a Venire facias de novo but said, that Iudgement ought to be given against one party, to wit the Defendant, for ill joyning in Demurrer, to the intent the party that is not in fault may be dismissed, and the parties here have waived the Tryal per pays by joyning in Demurrer. But Roll answered that no Iudgement at all could be given, for both parttes be in fault, one by tendring the Demurrer, the other by joyning in it, and the Defendant might have chosen whether he would have joyned or no, but might have prayed the Iudgement of the Court whether he ought to joyn. The Court advised to search presidents for a Venire facias de novo after a Demurrer upon an evidence, and if there be any, they held that the same Iury ought to come again, and not another. Roll said, if a special verdict be found insufficient, a new Venire facias ought to issue, and he saw no difference between that and this Case.

King and Summerland.

Trin. 23 Car. Banc. Reg.

Opinion of the Court touching pleading of an Enrollment.

IN the Case of King and Summerland again moved, the Court held that the pleading of a bargain and sale to be debito modo irrotulatum secundum formam statuti is good enough, though it be not pleaded to be inrolled within six months, yet ruled it should be moved again. The same term Iudgement was given, that the Plaintiff nil capiat per billam, because the Deed was not said to be enrolled, neither secundum formam statuti, nor within six months, but only debito modo, which may be an Enrollment at the Common law, and not according to the Statute.

The

The City of London and Eſtwick.

Trin. 23 Car. Banc. Reg.

The Court was again moved in the Caſe between the City of London and Eſtwick, that the return of the City might be amended although it were filed, becauſe there are Preſidents where it hath been done. Roll Iuſtice anſwered, there was never any amended after the filing before H. 7ths. time. It was replyed by the Councel, that the return being of this Term it might be amended, for it reſted in the breaſt of the Judges. But Roll Iuſtice anſwered to this, that Acts of the Court remain in the breaſt of the Court the ſame Term, but not acts of others, and therefore this being ſo was not amendable, and ſaid, that inferiour Courts cannot amend a preſentment in matter of fact, for that were to alter the cuſtom of the courts; and it was then ſaid, that Endictments had been amended after the filing of them. And Alderman Langhams Caſe was alſo urged, where a return of the City was amended after it was filed, yet this was ruled not amendable. Twiſden of Councel with the City argued that Eſtwick ought not to be reſtored to his place of a Common-Councel-man for theſe reaſons. 1. Becauſe it was not a place of profit, and ſo it was no damage to him to be removed, and therefore his ſute was to no purpoſe. 2ly. It is not a place of Government, and ſo no dignity in it, but it was a place meerly of ſervice and trouble. But Roll Iuſtice anſwered, that a writ of reſtitution had been adjudged good to reſtore a Conſtable to his place, which was more a place of ſervice and trouble than this. 3ly. There is a judgement againſt Eſtwick in a Court of Record, and it muſt be avoided either by error or attaint, as the Statute directs, and the partie cannot be reſtored by a Writ of Reſtitution; and for the objection that the Return is too general, he anſwered, that Faith is to be given, that there was a diſturbance made by him as is ſuggeſted, though it be not ſo plainly expreſſed as it might have been. 2ly. Here appears a contempt to the Court, and for this he may be ſuſpended. 3ly. The Cuſtome is well purſued upon the whole matter taken together. 4ly. The Cuſtome is well laid for the commitment ad placitum, for it refers to the words ſuſpendere vel amovere, that is, either one or the other. 5ly. The word require amounts to a command being ſpoken in a Court of Record, and the diſobeying it was a contempt. Hales of Councel on the ſame ſide argued much as Twiſden had done, and added to it as followeth. 1. That there appears a reaſonable cauſe precedent why he ſhould be ſuſpended, and then it follows they may ſuſpend him ad libitum. 2ly. The alleging of the diſturbance is not material, for that is not the ground of his amotion from his place, but only the inducement to it. 3ly. Requiſitus ſhall be underſtood requiſitus per curiam, it being alleged to be in Court. 4ly. Recuſavit is more than denegavit, and implies he did not the thing enjoyned him, and ſo might well be committed. 5ly. There may be cauſe to grant a Writ of reſtitution, though no cauſe for the reſtitution: For a common-Councel-man of Coventry had a Writ of reſtitution out of this Court, and yet upon his ſute was not reſtored. The Recorder moved for a longer day to be heard for the City, becauſe it was a weighty cauſe, and ſaid that no reſtitution could be made, for the Writ was not well directed, and ſo is not well executed. The Plaintiffs Councel deſired expedition in the Cauſe; Whereupon Roll ſaid, here hath been no delay in the buſineſs, but the rule is againſt you, and

Argument concerning the Writ of Reſtitution to a common-Councel-mans place. Amendment.

Reſtitution.

he took these exceptions to the Return. 1. It appears not by the return that the Plaintiff is removed from his place, but only that he is suspended, and then he may well be restored, and it is not said for how long time he is suspended. 2ly. It is not said that he is suspended for a reasonable cause. 3ly. It is not said what the disturbance was that he made for which he is suspended. And further said, that the Court of the Common-Councel is not a Court of Record, for no Writ of Error lies there, but is a Court only of Advise. Bacon Iustice as Roll, and said, that Estwick had only remedy to be restored by a Writ of Restitution, and not by a Writ of Error or an Attaint. Adjourned till Saturday to hear Councel for the City.

Error. Restitution.

Rawson and Bargue.

Trin. 23 Car. Banc. Reg.

Hil. 17 Car. rot. 904.

Argument upon a special Verdict for Tithes in action of Debt upon the Statute of 2 Ed. 6.

RAwson brought an Action of Debt against Bargue for 15 l. upon the Statute of 2 Ed. 6. for setting forth of Tithes. And upon the Tryal a special verdict was found, wherein the Question was, whether the Church by reason whereof the Tithes were claimed were a free Chappel, and given to Ed. the 6th. by the Statute of 1 Ed. 6. and so discharged of Tithes or not. Walker of Councel with the Plaintiff argued, that it was not a free Chappel, because there was a cure of Souls, and so could not be free but presentative, and said that the word free was a word of distinction to distinguish things of different nature one from another, as liber homo is to distinguish a free man from a villein, Franckfold, Franckfenement, and the like, and cited Bracton lib. 4. C. 3. 241. He likewise distinguished Chappels into three sorts. 1. Donative. 2ly. Presentative. 3ly. Without cure of Souls, and said, that Chappels presentative were not given to the King by the Statute of 2 Ed. 6. and cited Nat. brev. 48. and 13 E. 4. f. 4. and 6 H. 7. c. 14. and 5 H. 7. f. 37. and said, that it is not within the meaning of the Statute of 1 Ed. 6. to give Chappels presentative, because it is not within the mischief which the Statute was made to prevent, and so intends not to give Chappels with cure of Souls, and the word free is but nominal, and doth not make it free if it be not so otherwise. Hales for the Defendant argued, that it was a free Chappell within the Statute of 1 Ed. 6. For first it is called so, and it shall be presumed it is rightly named so. 2ly It is so found to be by the Jury, and to prove that it is a free Chappell it is not presentative, and 2ly. It appears not to be within the Jurisdiction of the Ordinary. 3ly. The Act of 1 Ed. 6. is an Act which is general and gives all free Chappels, and extends as well to Chappels which are only reputative free Chapbels as well as to them which are so indeed, even as it is of a Chauntery, College, and an impropriation, as the Books are, and it is a free Chappell nevertheless it be presentative and with the cure of Souls, for a free Chappel may now be with the cure of Souls, although by the old Canon law it could not, as was held in Childs case, 1 Iac. The Chappel within the Tower is a free Chappell donative, and yet it is presentative and hath cure of Souls, so saith Lynwood of the free Chappel of St. Martins. It is also the intent of the Statute, that it should be so, for a College

lege and a Chauntery with cure are within the Statute, as may appear by the Exceptions of the Statute of the Free Chappel with cure of Souls in the Isle of Eely called the Chappel of the Sea, and the being presentative with cure hinders not, but that it may be within the Statute, for the presentation might arise at the first by special composition, as it is 13 E. 4. f. 4. and Register f. 307. and it was instanced in the free Chappel of Hastings in Sussex, and it may be a Chappel donative by prescription, and yet presentative. Adjornatur ad proximum terminum to be argued again. Vid. postea.

Barker and Martyn.

Trin. 23 Car. Banc. Reg.

The case between Barker and Martyn was again moved, which was briefly this, An action of Trespass was brought by Barker against Martin, wherein he declares, that the Defendant had broken his House, and had taken away quinque instrumenta ferrea, Anglice fetters. In arrest of Judgement exception was taken to the Declaration, that Instrumenta ferrea, Anglice fetters, was not a good expression in Latin (as it ought to be) of Fetters, because there was a proper Latin word for Fetters, namely Compes, so that it ought to have been quinque Compedes, or quinque paria Compedum, and not as it is, for the word Instrumentum is uncertain, and may be used to signifie any thing else with an Anglice added to it as well as Fetters, and as it is the pleading is not all in Latin as the Statute directs to avoid Barbarism, and the word Anglice when it is properly used in a Declaration is to help words of art, which cannot be expressed without an Anglice, and is not to be used where there is a proper Latin word to signifie the thing, as in this Case there is. On the other side it was said, that general words might be good in a Declaration, and barbarous words sometimes, and cited Hobarts Reports, 267. and Ward and Smiths Case, Trin. 4 Iac. rot. 2305. Roll Iustice, It is a hard thing to maintain this Declaration, for if it should be admitted good it would bring in all Barbarism in pleadings, and any senseless word might be used with an Anglice joyned with it, and he said one was endicted for using quandam artem Anglice of a Draper, and it was adjudged naught, and in the case between Tailour and Taylour 9 Car. Trespass was brought pro Decem caponibus, Anglice Capons, & avibus domesticis, Anglice powltry, and adjudged not good. Yet the rule of the Court was to argue it again Saturday next following.

Arrest of judgment in Trespass.

Declaration.

Pleading.

Eeles and Lambert.

Trin. 23 Car. Banc. Reg.

Pasc. 22 Car. rot. 1646.

5455.

Eeles brought an Action of Covenant against Lambert the Executor of Sir Molton Lambert, and declares that Sir Molton Lambert did in his life

An Action of Covenant against an Executor.

life time by his indenture let certain lands unto him for years, and covenanted thereby for himself, his Executors, Administrators, and Assigns, that the Lessee should not be put out of possession of the lands let by him during the said Term, and that since the death of Sir Molton Lambert his Lessor, he was put out of possession by such an one, and upon this he brings his Action of Covenant against the Executor. The Defendant pleads, no Assets, upon this an issue was joyned, and a special Verdict was found, To this effect, That Sir Molton Lambert did let the lands mentioned in the Declaration to Eeles prout, that there was such a Covenant in the Deed prout, and that the Plaintiff was put out of possession of the lands prout. They find likewise, that Sir Molton Lambert made his Will, and made the Defendant his Executor, and died; that Sir Molton Lambert by his will gave many legacies of goods, and that the Defendant before the Plaintiff was put out of possession, did pay all the Legacies in kind, and that besides those Legacies he had not Assets to discharge the Covenant. Upon this Verdict the matter in Law was this, whether the Executor ought to have forborn the payment of the Legacies, and to have expected till the end of the Term let to the Plaintiff, or till the Covenant had been broken, and for doing otherwise should not be charged with the Covenant de bonis propriis; or whether the Covenant not being broken in the life of the Testator, nor before the Legacies paid, he had not paid the Legacies as he ought, and should not be freed from being charged with the Covenant de bonis propriis. Upon opening of the Case Rolle Iustice said, that a decree in Chancery against an Executor, shall not be satisfied before an Obligation made by the Testator, and become due after his death. Saturday following was set to here Councell again.

Decree in Chancery.

Jones and Stanley.

Trin. 23 Car. Banc. Reg.

Arest of Judgment in an Action of Debt.

IOnes brought an Action of Debt upon an Obligation to perform Covenants of an Indenture against Stanley, and hath a Verdict against him; Stanley moves in Arrest of Judgement, and takes these exceptions; 1. That the Goods valued in the Declaration, are not within the condition of the Obligation; 2. The goods are not certainly set forth what they are, for the Declaration is of divers parcells of old stuff; 3. Some of the things mentioned in the Declaration are not goods, and so not to be valued, for the Declaration is of partitions within the house, and of a shed, which are part of the free hold, and not goods; upon these exceptions the Iudgement was arrested till the other should move it.

VVhite and Thomas.

Trin. 23 Car. Banc. Reg.

Trin. 18 Car. rot. 1400.

Error to reverse a Judgment in Debt brought by an Heir.

VVHite binds himself, his Heirs, Executors, and Administrators, in an Obligation to Thomas for the payment of a certain summ of mo-

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mony at a certain day, the mony is not paid, a Judgement is obtained against White for the mony, White makes his will, and makes his Heir at law his Executor, and dyes leaving lands to descend. White as Heir brings a Writ of Error to reverse this Judgement; It was argued by the Councell of the Plaintiff in the Writ of Error, that the Writ did lye, because although the Action in the former Judgement was but a personal Action, yet in this Case, the Land of the Heir may be charged by the Judgement, for an elegit may be thereupon taken out to charge his Lands, and therefore the Judgement concerns him as Heir as well as Executor, and therefore it is reason he should bring a Writ of Error to reverse the Judgement, because he may be prejudiced by it. And a Case in Trin. 29 Eliz. rot. 631. Banc. Reg. was cited, that the Heir is privy to the Judgement, and therefore shall have a Writ of Error, and he is not meerly terr-Tenant 13 E. 4. 2. Roll Iustice, the terr-Tenant sole shall not have a Writ of Error upon an extent; And in the Case at the barr the Heir is not privy to the Judgement, and the extent is only upon him as terr-Tenant, and he is not made privy to the Judgement by the extent, but after Execution he may have a Writ of Error, and he said, the Bail cannot bring a Writ of Error upon the Judgement given against the Principal, and the same reason is here, and it will be very hard to maintain this Writ of Error. Adjourned to the next term.

Heir. Elegit. Executor. Error. Error. Bail.

Terry and Baxter.

Trin. 23 Car. Banc. Reg.

Pasc. 23 Car. rot. 394.

TErry brings an Action of Debt upon an Assumpsit against Baxter, to stand to an Award. The Defendant pleads nul arbitrement; the Plaintiff sets forth the award, and assigns a breach; The Defendant demurs, and for cause shews that part of the award was to pay 5 l. to the poor of the Parish of D. which was not within the submission, and so the award was not good. Rolle Iustice answered, if the award be void to the 5 l. awarded to be paid to the poor, yet it is good to the rest, for it is perfect as to the ending of all differences between them which are submitted, and therefore shew cause on Monday next, why judgement should not be given for the Plaintiff.

Demurrer upon an Declaration in Assumpsit to stand to an award. Award good in part is a good award.

Morefield and VVebb.

Trin. 23 Car. Banc. Reg.

Pasc. 23 Car. rot. 50.

VVEbb brings an Action upon the Case against Morefield in the palace Court at Westminster, and hath a Judgement; Morefield brings a Writ of Error in this Court to reverse the Judgment, and Assigns these Errors. 1. It is not shewed in the Declaration that the cause of Action was infra jurisdictionem palatii. But Rolle Iustice answered, that it

Error to reverse a Iudgement in an Action upon the Case. Iurisdiction.

Return. it was ſhewed to be infra jurisdictionem Curiæ, and that was good enough, for the Court is alleged to be held by Letters patents. A 2d. Exception was, that there was not fifteen dayes for the return of the Venire facias as there ought to be; But to this Rolle Iuſtice alſo anſwered, that the Court is held by Letters patents, and therefore it may be returnable within fifteen dayes, though by the uſual courſe of the Common law it cannot. And therefore ordered the Plaintiff in the Writ of Error to ſhew better matter, otherwiſe Iudgement ſhould be affirmed againſt him.

The King and Holland.

Trin. 23 Car. Banc. Reg.

For quaſhing an inquiſition for the King. Inquiſition. THe Caſe between the King and Holland was moved again, and the Councell againſt the King, moved that the inquiſition found for the King to entitle him to the uſe of the Copyhold might be quaſhed, becauſe the King cannot be intitled to ſuch a uſe, becauſe it is a thing in privity only, and cited the Statute of 27 H. 8. of uſes, and Cooks 1. rep. 123, and ſaid, that the King cannot be intitled to Copyhold lands of an Alien much leſſe to the uſe of Copyhold lands; if he ſhould, 1. The Lord would be wronged, which the King ought not to do, but to protect his ſubjects, for the protection of the ſubject, is not only matter of honour to the King, but alſo of truſt in the Crown; 2ly. A ſtranger is wronged by it; 3ly. The Copyholder of the Manor cannot have remedy for the injury done him, for he ought to ſue in the Lords Court, and not elſe where, and here he cannot do it, and the rule in law is de minimis non curat lex, and it is much leſſe for the honnour of the King to have a Copyhold eſtate, which is a baſe tenure. But it may be objected, that if the King ſhall not have this uſe, he ſhall be in a worſe condition than a ſubject. To this it is anſwered, that he ſhall be ſo in caſes which touch his royalty, and may be a diſparagement to him, which indeed doth not make him in a worſe condition though it may ſeem ſo, but it is more for his honor, and a Copyhold is an eſtate at the will of the Lord, and ought to be protected by the Lord; and the King cannot be Tenant at will to any, and therefore cannot have a Copyhold eſtate; and an Alien is not capable of a truſt, becauſe it is a thing in Action which an Alien cannot have, and therefore he cannot derive it from him. Twisden for the King in his Argument conſidered, 1. Whether the King can have a uſe at the Common law which is for an Alien. 2. Whether a truſt differs from a uſe; for the firſt he ſaid, that an Alien may purchaſe lands, and a uſe at the Common law, but he cannot retain them, therefore the King ſhall have them by his Prærogative, and a uſe is not a thing in privity, but is an Antient inheritance at the Common law. 2ly. There is no confidence annexed to ceſtui que uſe, or to the Feoffor, but may be diſpoſed of. 3ly. Things in privity in Action may be given to the King, and a uſe is an inheritance in the nature of a Chattell. 4ly. A uſe is grantable over, and therefore may be given to the King, and the meaning of the word loſt, in the Statute, is to be intended that it may be loſt for the difficulty of finding ſuch ſubtile conveyances, and not that the right was really loſt: And for a truſt it is but a new name given to a uſe, and invented to Defraud the Statute of uſes, and a truſt of a Copyhold is all one with another truſt, for it is the taking of the profits of the land, and not the Eſtate in the land, and the King ſhall have it; And to that which is ſaid that

Vic. Copyhold. King. Wrong. Protection. Truſt. Sute. Honour. Copyhold. Alien. Truſt. Alien. Prærogative. Privity. Truſt.

that the King cannot be a Copyholder, it is not so clear; for I conceive the contrary: for a surrender of a Copyhold to him is good, and of a use too: and he cited these books, 9 H. 6. fol. 25. 20 E. 3. f. 3. 11. rep. 91. Rolle Iustice said, that a Trustee or cestuy que trust cannot take the profits of the land, but hath only his remedy in Equity, for the Estate in the land is only in the party trusted; and the King shall not have the profits of the land upon an Outlawry against the cestuy que use, or cestuy que trust. And Law and Equity ought not to be confounded; therefore if the King hath equity for a thing, he ought not to sue for it at the Common law, so is it in this case at the bar. Adjourned.

Cestuy que trust. Equity. Outlawry. Law & Equity.

Chapel and Drew.

23 Car. Banc. Reg.

Hill. 11 Car. rot. 921.

IN this case the party being attainted of felony, pleaded his Charter of Pardon and Claims, thereby to be restored to his Goods and Chattels forfeited to the King by the felony; and the Question was, whether as the Pardon was penned he should be restored or no? the words of the Pardon upon which the Question grew, were these, pardonavit, remisit, & relaxavit, and it was held, that he was not by these words to be restored to his Goods and Chattels; for the words do not amount to a Surrender in case of a common person, much less in case of the King, and there ought to have been the word restituit. Roll Iustice said, this Pardon was drawn by Noy, Attorny General, and was too short, and it was said by him that if one be committed to the Gaol for one felony, the Iustices may enquire and try the party for another felony for which he was not committed.

Exception to a pardon for Felony. Pardon.

Felony. Tryal.

Tylers Case.

Trin. 23 Car. Banc. Reg.

AN action of Debt was brought against Tyler upon an Obligation to stand to an Award, and the Plaintiff declares of an Arbitrement made the 28th. day of May in such a year, ready to be delivered up the nine and twentyeth day of May in the same year; The Defendant pleads nullum Arbitrium, The Plaintiff replies, that the Award was made by the Umpire the 28th. of May ready to be delivered up upon the same 28th. day of May, and to this replication the Defendant demurs, and shews for cause, that the Plaintiff had set forth double matter, one in his Declaration, and the other in his Replication; for the Award set forth in the Declaration, and that set forth in the Replication cannot be intended to be one and the same. But Roll Iustice answered, that the Issue to be tryed, is not to be taken upon the day of the Award made, and therefore it requires no answer, and so cannot be double, and one ought not to demur for the doubleness of the matter upon a thing upon which no Issue can be taken, and ruled better matter should be shewn, or else Iudgement should be given for the Plaintiff.

Demurrer to a Replication

Demmurrer.

Eſtwick and the City of London.

Trin. 23 Car. Banc. Reg.

Dor. 32 35.

Argument in the Caſe of the VVrit of Reſtitution to a Common-Councel-mans place.

Reſtitution.

Cuſtome.

THe Caſe of Eſtwick and the City of London was again argued by Serjeant Glynn for the City; in his Argument he inſiſted upon three particulars why Eſtwick could not be reſtored to his place of a common-Councel-man. 1. That a common-Councel-man may be removed or ſuſpended from his place at pleaſure by the cuſtome of the City. 2ly. That he cannot be reſtored by Law. 3ly. No reſtitution can be in this caſe as it now ſtands. Firſt, the cuſtom to remove a common-Councel-man is good, for it firſt began by agreement, and ſuch a cuſtome is good at the common law, much more here, and it is not an unreaſonable cuſtome, although it may ſeem ſo prima facie, like as it is in the caſe of a Lord that ſeiſeth the Lands of his Villein, and in the caſe of a Copyholder that forfeiteth his Eſtate by the felling of Timber. A ſecond reaſon is, it agrees well with the nature and condition of the office of a common-Councel-man to be ſubject to this

Tryal.

Cuſtome, and we know that many things ſhall be tryed by Cuſtome, contrary to the courſe of the common law. 3ly. We ſee that the order of the Parliament is a rule to try matters concerning their Members, and ſo it is here in the Citie to try their Members. 4ly. If it ſhould not be ſo, it would prove deſtructive to the City, by waiting till ſuch an offender might be removed by a courſe in Law, which is far more tedious than this cuſtomary way. To the ſecond point, he ſaid, that by Law there can be no reſtitution to this office, and this is proved by the very nature of the Writ of Reſtitution, which is to reſtore the party to a freehold or ſome other matter of profit, neither of which can be in our caſe, and a writ of Reſtitution is to reſtore one to a poſſeſsion, where one may not be reſtored by an ordinary way, neither doth the Statute of Magna charta extend to our caſe: for a common-Councel-mans place is merely grounded upon the cuſtome of the City, and not upon the Common law: and he ſaid there are three grounds for a Writ of Reſtitution. 1. A contempt to the King. 2ly. A hurt to the Common-wealth. 3ly. Particular dammage to the party; but none of theſe is in our cauſe, and therefore there is no cauſe for a Writ of Reſtitution. The caſe of Sir Iames Baggs having a Writ of Reſtitution was, becauſe he was deprived of his Trade and

Conſtable. Church warden.

Freedom, & free-hold, and our caſe differs from the caſe of a Conſtable, or a Church warden, or any caſe that can be cited; for a Church warden is an officer in relation to the Common wealth for the execution of Juſtice, wherof the Common law takes notice, and likewiſe a Conſtable is a known Officer to

Recorder.

miniſter Juſtice in relation to the publique: ſo is it of a Recorder of a Corporation, and ſo they all differ from our caſe. For authority to this point in 17 Iac. but moved firſt 16 Iac. Warren a common-Councel-man of Coventry was denyed upon the return of his Writ to be reſtored, and our caſe and return is more ſtrong againſt the Plaintiff; and Burman a Gentleman of one of the Inns of Court, being expelled, could not be reſtored by a Writ of Reſtitution, and lately a common-Councel-man was removed for not taking the Proteſtation. For the third point, whether upon the Writ it ſelf, as this caſe is, there can be any reſtitution made? I conceive not, becauſe it is directed to the Maior and Commonalty, and Citizens of the City of London, and ſo there is in it a falſe recital of the ſuſpenſion; for he was not removed by the Citizens, and ſo the Writ is directed to parties who did not

Recital.

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the wrong, and so it is ill directed, and it differs from the direction of the Writ in Sir James Bags case, and it ought to have been directed to the Sheriffs or Ministers who have authority to restore him, as they did remove him, for the party that hath done no wrong ought not to be punished or molested; and for the ill direction of the Writ could not Warren the common-Councel-man of Coventry be restored, and the Corporation of London is responsable for all particular Misdemeanours done within any Courts of Justice within the City, or other general Misdemeanours there committed. Misdemeanours.
Maynard on the other side argued, that the case was mistaken as it is stated in the Return, for it supposeth that the party is removed at pleasure, and yet supposeth also, that there is a cause to remove him, to wit his refusing to go out, and expresseth not that he did not go out, nor that he was commanded to go out, but that he was requested. And whereas it is said a common-Councel-mans place is no more but to advise, here is more than to advise, for he hath a privilege for his own good, and the good of the City. 3ly. The Writ is well directed, and cannot be otherwise for the party to have remedy, and all the Presidents are as this is, and Alderman Harris his Presidents.
case is the same in point with this, where it was by three Judges resolved, that he should be restored to his Aldermans place, because it was a place of Honour as well as of Burthen. Roll Justice said, 1. That the Writ was well directed. 2ly. That the custom was ill recited. 3ly. If it were well recited, yet it is a void custom. 4ly. The Return is not good, for the incertainties of it, viz. in the causes shewed, why the party was removed, and therefore that he ought to be restored to his place. Bacon Justice to the same intent, and said, that whersoever a Commissioner or other person hath power given to do a thing at his discretion, it is to be understood of sound discretion, and according to Law, and that this Court Discretion.
hath power to redress things otherwise done by them. The rule was, that Iurisdiction.
the party be restored, if better matter be not shewn Tuesday following.

Trin. 23 Car. Banc. Reg.

IN an Action of Trespass for digging in his Ground, and carrying away 200 load of soyl, It was moved in arrest of Judgement, that it should have been of soyl inde provenient. and that an intendment cannot make it good. Roll Iustice said, it seems a good Exception, for as it is it is too generallie laid. Arrest of Iudgement in Trespass.

Vincent and Fursy.

Trin. 23 Car. Banc. Reg.

Hil. 22 Car. Rot. Q.

VIncent brought an Action of Trespass against Fursy for breaking open 2 Chests, and taking away certain Cloaths, and 3 l. in mony, and had Arrest of Iudgement in Trespass.

a Verdict for him. The Defendant moves in Arreſt of Judgement, and takes theſe exceptions. 1. That the Declaration is too general, for it ſets not forth what the cloths were which were taken away, and ſo the value of them cannot be known as it ought to be, that Damages may be rightly given. 2. In this one Declaration there is an Action of Treſpaſſe, joyned with an Action upon the Caſe, viz. the Treſpaſſe for breaking open the Cheſts, and the Action of the Caſe for taking away the cloathes, and mony, which ought not to be, for two ſeveral Actions ought not to be laid in one Declaration. Wadham Windham of Councell with the Plaintiff ſaid it was well enough, and could not be otherwiſe, and the thing is certainly enough ſet forth, and ſhall be interpreted reddendo ſingula ſingulis, viz. the ſpoliavit in the Declaration ſhall have reference to the cloaths, and the cepit to the mony. Rolle Iuſtice ſaid, that an Action of Trover, and Converſion for divers ſorts of linnen had been adjudged good. and 29. E. 3. An Action of Treſpaſſe lyes for beating of his ſervant, and in Cletheroes caſe, an Action of Treſpaſſe was held good for reſcuing a priſoner from him whom he had Arreſted, and the Cook of Grayes Inn brought an Action of Treſpaſſe for taking away his wife, per quod conſortium amiſit, and it was held to be well brought, but if the cloaths in the caſe at the bar had not been in the cheſt, the Action would not have lain; and he took another exception, namely that the Declaration was for the breaking of 2 cheſts, and ſo it appears not where the cloaths were when they were taken, whether in one or in both of them. The rule was to ſtay Iudgement till they had ſeen the Record.

Trover and Converſion.

Treſpaſſe.

Incertainty.

Capell and Allen.

Trin. 23 Car. Banc. Reg.

Hill. 22 Car. rot. 639.

CApell brought an Action Debt upon an Aſſumpſit to ſtand to an award, the Defendant pleaded Nul Arbitrement, the Plaintiff replyes, and ſets forth the Arbitrement, and the breach, the Defendant demurs, and for cauſe ſhews that the award was not good, becauſe it was made but of one part, for it was, that one of the parties ſhould do ſuch things expreſſed, and that the other party ſhould pay for the making the Bonds of Submiſſion, which cannot be awarded, and ſo nothing is awarded for him to do, and the Arbitrators cannot award this, becauſe it is not within the ſubmiſsion. Rolle Iuſtice held this a good exception, and ſaid the Charge for making the writings is not within the Submiſsion, for the bonds were made before the Submiſsion, and it was held 13 Jac. that the words ſuper præmiſſis in the award will not help an award made but of one part.

Demurrer upon an award.

Award.

Submiſſion.

Trin. 23 Car. Banc. Reg.

AN Action of Debt was brought upon a Bond, to perform the Covenants of an Indenture of a Demiſe for years. The Plaintiff declares that he made the Leaſe to the Defendant the 28. day of May, and that afterwards ſcilicet the 27, of the ſame Month of May, the Defendant broke the Covenant. To this Declaration the Defendant did demurr, becauſe it appears that the breach is ſet forth to be before the leaſe began, which could not be, and ſo there is no cauſe of Action. But to this Bacon Iuſtice ſaid, where the poſtea and the ſcilicet are repugnant in a deed, as here they are, the poſtea ſhall be good to ſignifie the time of the Covenant broken, and the ſcilicet ſhall be void. Therefore ſhew cauſe why the Plaintiff ſhould not have Iudgement. Nota.

Demurrer to a Declaration in Debt upon a bond to perform Covenants of an Indenture. Breach. Interpretations.

Trin 23 Car. Banc Reg.

A Prohibition was prayed to the Corporation of Lincoln upon a ſuggeſtion made, and ſworn in this Court, that the cauſe of Action if any were arole in the body of the County of Lincoln, and not within the Iuriſdiction of the City of Lincoln. Hales on the other ſide ſaid, they had admitted the Iuriſdiction of the Court in that they had not pleaded to it. But Roll Iuſtice ſaid, inferiour Courts are limitted in their Iuriſdictions, and ought to be kept in order by Prohibitions if they exceed, and if they proceed in matters not within their Iuriſdiction their proceedings are void. Adjourned to the next Term.

For a prohibition to the corporation of Lincoln. Admiſſion. Iuriſdiction. Prohibition. Proceedings.

Trin. 23 Car. Banc. Reg.

THe Court was moved for a Prohibition to an inferior Court, but on the contrary part it was ſaid, that they moved too late, for they had admitted the Iuriſdiction of the Court by pleading, and cited 9 H. 7. 12. and Fitz. Iuriſdict. 19. Bacon Iuſtice ſaid, it is here in a Court of Common Law, and not in the ſpiritual Court or Admiralty, and therefore a Prohibition may be here granted notwithſtanding the pleading there, but had it been the ſpiritual Court or the Admiralty, it had been otherwiſe. But Rolle Iuſtice ſaid, it was all one in the ſpiritual Court, or Admiralty as it is in this caſe, if they exceed their Iuriſdiction. Yet it is miſchievous to grant a prohibition in this caſe, for thereby many Iudgements will be ſtopped. Therefore the Court would adviſe to the next Term, but ſtayed nothing.

For a prohibition to an inferior Court. Admiſſion. Prohibition. Iuriſdiction.

Trin. 23 Car. Banc Reg.

For the undersheriff to return a Jury. Return. Surmise. Petigree. Attorney.

THe Court was moved that the undersheriff might return a Jury, because the Sheriff, and Coroner were of kinn to the Plaintiff, the Court thereupon demanded whether they had brought in the surmise, and proved the petigree, to which they answered, They had, thereupon they were bid to name some Atturneys of the Country, which was done, and thereupon a rule made that they should return the Jury. Nota.

Trin. 23. Car. Banc Reg.

To stay proceedings at the Court at Maydston. Supersedeas

Writs. Rules.

THe Court was moved for a rule to stay proceedings in the Court at Maidston in Kent, because a supersedeas could not be granted, for that nothing erroneous issued out of this Court. But the Court answered, that a supersedeas might well be granted, and so said Hodsden the Secondary, although nothing erroneous be issuing out of this Court, and Bacon Iustice said that the Writs of the Court are as good, and of as much force as the rules of Court, and therefore we will make no rule to stay their proceedings, but you shall have a supersedeas if you will.

Person and Dawson.

Mich. 23 Car. Banc. Reg.

Arrest of iudgment in an Act on for words

Case. VVords.

AN Action of the Case was brought by Person against Dawson for these words, your Son innuendo your Son William, stole a horse, and soldhim for ten pounds; The Plaintiff hath a Verdict, the Defendant moved in Arrest of Iudgement that the words are not actionable, because uncertain, and the innuendo cannot help them; and the Iudgement was stayed till the other should move. It was afterwards moved again. and the Iudgement stayed, and this Term Iudgement given for the Plaintiff.

Mich. 23. Car. Banc. Reg.

To quash an Endictment upon the Statute of usury. Pursuance.

THe Court was moved to quash an Endictment upon the Statute of usury. The exception taken was, that it is not said corrupte agreavit nec accepit, and so the Statute is not pursued; Roll Iustice said, that it is the corrupt receiving, and the corrupt contract, upon which Endictments are framed upon the old Statute, viz. 3. Jac. &c. but if the Endictment be framed upon the Statute of 21 Iac. there it ought to be upon the corrupt contract, and because this Endictment is framed upon the Statute of 21 Jac. and mentions not the corrupt contract, it is not good, and therefore let it be quashed.

Yates

Yates againſt Lyndon.

Mich. 23 Car. Banc. Reg.

MAry Yates brought an Action upon the Caſe for ſpeaking theſe words of her, Mary Yates is a Sorcerer, and a Witch, and a white Witch, ſhe can witch and unwitch! and hath a Verdict. The Defendant moved in Arreſt of Judgement that the words are not actionable, becauſe the Plaintiff is not by the ſpeaking of them brought within the Statute of 21. Jac. againſt Witch-craft: But Roll Iuſtice doubted, whether the word Sorcerer did not bring the Plaintiff within the Statute. Yet Judgement was ſtayed till the Plaintiff ſhould move. Hill. the ſame year it was moved again, and the Court adjudged Nil capiat per billam, for they held the words not actionable.

Arreſt of judgment in an Act on for words. Caſe. Statute. Witchcraft.

Turner and his VVife.

Mich. 23 Car. Banc. Reg.

TUrner and his Wife brought an Action upon the Caſe for theſe words, ſpoken of the Wife, ſhe is a Witch, and I will take my oath of it; The Plaintiffs had a Verdict: The Defendant moves in Arreſt of Judgement that the words were not actionable; for to ſay one is a Witch, and to ſay no more, is not actionable, and the laſt words, I will take my oath of it, do not enlarge the former words. The Court arreſted Iudgement till the Plaintiff ſhould move.

Arreſt of Iudgement in an Action for words. VVords.

Paradine and Jane.

Mich. 23 Car. Banc. Reg.

Hill. 22 Car. rot. 1178.

PAradine brought an Action of Debt for rent due for lands, let for years unto Jane the Defendant, and declares particularly how much rent was due, and for what time. The Defendant pleads a ſpecial Plea to this effect; as to part of the rent for which the Action is brought, he confeſſeth the Action: As to the reſt he pleads, that Prince Rupert an Alien, and an Enemy of the King invaded the land with an Army, and with divers armed men did enter upon him, and did drive away his Cattell, and expelled him from the lands let unto him by the Plaintiff, and kept him out that he could not enjoy the lands for ſuch a time; and demands judgement if for the rent incurred during that time the Plaintiff ought to have his Action? To this Plea the Plaintiff demurrs, and for cauſe ſaith, that it is neither good in matter nor form. The 1. queſtion was, whether a Leſſee for years ouſted by an Army of Aliens, can plead it in Barr, in an Action of Debt brought for rent due upon the Leaſe? And to this it was ſaid, that this is an Action of Debt, and lyes meerly upon the contract between the partyes and ſo this collaterall matter pleaded is nothing to the purpoſe, but had it been an Action of Waſt, if the Waſt had been done by Pr. Rupert, and his Soldiers, it may be it might have been pleaded to bar the Plaintiff, 19. E. 2. Brook

Argument in debt for rent upon a leaſe for years. Demurrer. Plea. Debt. contract. VVaſt.

Cove-

Covenant 4. was cited. Next the Plea doth not say, that the Armed men with Prince Rupert were Aliens or Enemies of the King, but only that Prince Rupert was so. But to this exception Roll Iustice answered, that they shall be so intended if they be his Army with which he invaded the Land. Another exception was taken, that the Plea gives no answer at all for one Quarters rent demanded, which incurred after the time that he was kept out by Prince Rupert. The Councel for the Defendant in defence of the Plea, urged that it was not necessary to aver, that the Army with Prince Rupert were Aliens, and cited 3 H. 6. 61. and the Councel took a difference between an Enemy and a Rebel; and though in the case of a Rebellion this might not be a good Plea, yet in case of an Invasion he conceived it was, because he could have no remedy against the party, and resembled this case to cases of like nature cited out of 9 E. 3. 7. 40 E. 3 6. & 33 H. 6. 1. and said, that where waste is done in the Lands let for years by one, again whom the Lessee can have no remedy over, there the Lessee for years is not chargeable for the waste, except he be bound by a particular Covenant to keep the Lands let without waste. Also by the Law of Reason it seems the Defendant in our case ought not to be charged with the rent, because he could not enjoy that that was let to him, and it was no fault of his own that he could not, and the Civil law, and Canon-law, and Moral Authors do confirm this, and Dyer 56. & 11 Ass. 13. were cited; and it was said, there is no difference between an innundation and this invasion, and had the Lands been surrounded by water, the Lessee should not have been chargeable for the rent during that time, neither as I conceive shall he be here. Next consider the nature of the reservation, 10. Rep. 128. A rent is not to be paid untill it may be intended that the Lessee might have received the profit of the thing for which the rent is to be paid, 27 E. 3. 81. 8 H. 4. 6. Fitzh. Execution 146. 9 E. 3. 16. neither by the Martial law is the Defendant chargeable, and that Law is the Law of Nature as well as of Nations. But Roll Iustice answered, that the Plea was not good, for he hath not pleaded that the Army were Aliens and unknown, as he ought to have done, and the pleading that it was hostilis exercitus, makes not the Plea more certain than before, and if the Tenant for years covenant to pay rent, though the Lands let him be surrounded with water, yet he is chargeable with the rent, much more here. Therefore let the Plaintiff take his Iudgement.

Alien. Enemy. Plea. Rebel. Remedy. Waste. Civil law. Canon. Moral. Innundation. Rent. Payment. Martial Law. Law of Nature. Covenant.

Fremling and Clutherbook.

Mich. 23 Car. Banc. Reg.

FRemling and his Wife, Executrix of A. B. bring an Action of Trover and Conversion against Clutherbook, for Goods of the Testators found, and converted by the Defendant, and obtained a verdict against him. The Defendant moved in arrest of Iudgement, and took these Exceptions. 1. That the Declaration was of a joynt possession of Goods of the Husband and Wife, and dammages are given to the Husband and Wife, whereas the Goods properly belong to the Wife only as an Executrix, and not to the Husband and Wife. 2ly. It doth not set forth how the Feme came to the possession of the Goods. But to this Roll Iustice answered, that the possession of the Wife, as Executrix, was also the possession of her Husband, and that the dammages recovered shall be to the estate of the Testatour, and so may concern them both. And for the second exception, this being a possessary

Arrest of Iudgment in Trover and Conversion. Possession. Dammages.

sary Action only, it is not necessary to shew how the possession of the Goods was gained. Stayed till the other should move.

Parmiter and Cressy.

Mich. 23 Car. Banc. Reg.

PArmiter brings an Action upon the case upon an Assumpsit, and declares, that the Defendant in consideration that the Plaintiff had sold and delivered unto him such a number of pieces of Stuffs, the Defendant did assume and promise to the Plaintiff to deliver unto him the value of the Stuffs in such Pipes of Wine, lying in Bradgates Cellar in London as the Plaintiff should make choise of; and for not performing the same brings this Action. The Plaintiff obtains a verdict. The Defendant moves in arrest of Judgement and shews these causes. 1. That the Plaintiff doth not aver in his Declaration, that he made any election of the Pipes of Wine, and before such election the Defendant was not bound to deliver them, nay it was impossible for him to perform the agreement before the election. 2ly. The Plaintiff doth not set forth, that he made his election where the Wine was, which he ought to have done, because of the insupportableness of the commodity to be brought to him to make his choice. The Court held, that here ought to be a special request made to deliver the Wines, because it is upon a Contract, and an Action of Debt lies not for them, and thereupon arrested the Judgement till the Plaintiff should move. The same Term Judgement was given against the Plaintiff. Quod nil capiat per billam.

Arest of Judgment in an Indebitatus Assumpsit.

Averment.

Election.

Request special.

Mich. 23 Car. Banc. Reg.

Ll. 63. rot.

THe Plaintiff brings an Action of the Case against the Defendant, for speaking these words against him being a Minister, He is an Adulterer, Whoremaster, Drunkard, a common Swearer, and a Preacher of false Doctrine. The Plaintiff hath a Verdict. The Defendant moved in arrest of Judgement that the words were not actionable, because the matter expressed by them is merely Ecclesiastical, and not tryable at the Common law; and it was said, that a man may preach false Doctrine, and not be punished for it, if he be not a beneficed man, and it doth not appear here, that the Plaintiff had any living, and besides, it is not said he was a Preacher of heretical Doctrine, but of false Doctrine, which words are more ambiguous. The judgement was stayed till the Plaintiff should move.

Arest of Judgment in an action upon the Case for words.

Words.

Tryal.

False Doctrine.

Heresie.

Mack and Cubitt.

Mich. 23 Car. Banc. Reg.

Pasc. 23 Car. rot. Q.

MAck brought an Action upon the case against Cubitt for speaking these words of him, You are a branded Rogue, and have held up your hand

Arest of Judgment in an action upon the Case for words.

Words. hand at the Bar, and deserve to be hanged, and shall be hanged. The Plaintiff hath a Verdict. The Defendant moves in arrest of Judgement that the words were not actionable, for they are all but words of Infamy and disgrace, and not of dammage to the Plaintiff. But it was said, that it had been adjudged that an Action did lye for saying one had been endicted of Barratry, where the party that was endicted was acquitted, and for saying one was a Banckrupt Rogue. But because Panel of Councel with the Defendant said, he could shew Presidents that the words are not actionable, the Court forbore to give Judgement, but desired to see them, and gave him time to bring them in another day. Panel cited two Presidents, but no Judgement in either. Whereupon Iudgement was given for the Pl intiff.

Presidents.

Blackwell and Ashton.

Trin. 23 Car. Banc. Reg.

Demurrer to a Scire facias upon a Judgement. Demurrer. Abatement.

FOwer several persons were bound conjuctim and divisim in an Obligation to Blackwell, Blackwell hath a Judgment against them, one of the Defendants dies, Blackwell sues out a Scire facias against the 4. and it was demurred to the Scire facias, because one of the Defendants against whom the Judgement upon which the Scire facias was granted, was dead when the Scire facias issued forth. In this case it was said, if two be bound joyntly in an Obligation, and an Action be brought against one of them only, upon this Obligation the Defendant cannot demur, but may plead in Abatement of the Writ. And if two be bound joyntly in an Obligation, and one of them dye, and the Obligee brings an Action of Debt against the other that survives, he must in his Declaration set forth that the other is dead. The Plaintiff in the case at the Bar, perceiving the inclination of the Court to be that the Scire facias was not good, moved for his own expedition to have it quashed, which was granted.

Scire facias.

Lodg and Weeden.

Mich. 23 Car. Banc. Reg.

Arest of Judgment in an action upon the Case.

THe Plaintiff brings his Action upon the Case against the Defendant, and declares, that the Defendant had killed divers infected Cattel, and had thrown out the inwards or offall of those Cattel upon the Close of the Plaintiff, whereby divers of the Plaintiffs Cattel were infected with the murrain, and did dye thereof, and shews how many, and declares to his dammage so much, and hath a verdict against the Defendant. The Defendant moved in arrest of Judgement, and offers these exceptions, 1. The Declaration is, that the Plaintiffs Cattel were infected morbo mortali, Anglice with the murrain, whereas there is a proper Latin word to express the Murrain, namely Lues, which ought to have been used, and not to be expressed by such uncertain words as morbus mortalis is, which signifies only a mortal disease, and so might be any other Disease as well as that. 2ly. The Declaration says that the Defendant did cast interioria, Anglice the inwards or offall of the Cattel, whereas that is not the proper Latin word

Words.

for

for them, but Inteſtina. 3ly. The Declaration doth not ſet forth what Cattel they were, nor how many they were, that the Defendant had killed, and thrown their inwards or offall on the Plaintiffs Cloſe. But the Court over-ruled all the exceptions, and ordered the Defendant to ſhew better cauſe why the Plaintiff ſhould not have judgement.

Rawſon and Bargue.

Trin. 23 Car. Banc. Reg. Vid. antea.

The caſe between Rawſon and Bargue upon the ſpecial Verdict found in an Action upon the Statute of 2 Ed. 6. for not ſetting forth of Tithes, wherein the Queſtion was whether the Chapel was a free Chapel, and given by the Statute of 2 Ed. 6. to the King or no, was moved again, and argued by Maynard that it was a free Chapel given to Edward the 6th. by the Statute, and ſaid, the firſt reaſon was taken from the words of the Statute. A ſecond reaſon from the preamble of the Statute. A third from the reaſon of the Statute. And a fourth from the meaning of the Statute. Firſt the intent of the Statute was to change Chapels of ſuperſtition to pious uſes, and doth intend reformation, and not to take away the Chapels themſelves, and for this cauſe it being for ſo great a good, the Statute ſhall be generally interpreted, 11 Rep. f. 17. and the words All mannour in the Statute, &c. do more oppoſe a diſtinction than the word all can do, for they are more emphatically uſed. 2ly Though it be parochial and with cure of Souls, yet it is not exempted out of the Statute, and this Statute differs from the Statute of 37 H. 8. And in caſe of free Chapels, all are veſted in the King (be they ſuperſtitious or not) by the Statute. 3ly. It is not within the exceptions in the Statute, and therefore is within the Statute, and he took this difference, that Donors of Churches are, where Churches are donative; and Patrons of Churches are, where they are preſentative. 2ly. The proof of the contemporary expoſition of the Statute is here to be conſidered, 6 H. 7. 14. Free Chapels are of two ſorts, 7 Ed. 3. 18. 17 Ed. 3. 12. Cooks Lit. 144. A Free Chapel may be preſentative, and a Pariſh-Church donative; and they are ſo according to the foundation of them at the firſt. A Pariſh-Church cannot be a Free-Chapel, but a Free-Chapel may be a Pariſh-Church, 47 E. 3. 5. 9 E. 3. f. 10. 50 Ed. 3. and a Church is not a Church if it have not Baptiſm, and Burial belonging unto it, Bract. lib. 3. C. 4. 17 E. 3. 5 E. 3. A Chapel may be within a Church, and a Church within a Chapel; and Capella is derived by Rhenanus the Civilian, from a Cap or Covering, and ſo is to be accompted more ſuperſtitious than Churches are, becauſe their very name ſhews their derivation to be ſuperſtitious. Twiſden argued on the contrary, that it was not within the Statute of 2 Ed. 6. nor given thereby to the King: and that it is not a Free-Chapel, neither by the words, nor within the intent of the Statute. 2ly. If it be a Free-Chapel, yet it is preſentative, and within the juriſdiction of the Ordinary, and ſo not a Free-Chapel: for it hath no immunity either in regard of Juriſdiction or otherwiſe, and cited Cooks Littleton, f. 94. The Chapels of the King are all Free-Chapels, becauſe they they are exempt from all Juriſdiction of the Ordinary, Regiſter, 40, 41. Thre are two ſorts of Chapels, to wit, Free-donatives, 6 H. 7. f. 19. 2ly. Preſentatives. Nat. Br. 35. A Chapel may be preſentative by the foundation of it, or by matter ex poſt facto, 22 H. 6. f. 26. A ſecond reaſon to prove it to be preſentative may be from the finding of the Jury who

Arguments whether a Free Chapel or not within the Statute of 2 Ed. 6.
Statute.
Free Chapel.
Veſting.
Difference.
Diviſion.
Donative.
Pariſh-Church.
Derivation.
Matter ex poſt facto.
Preſentation

Institution. Cure of souls. VVords. Special verdict.

have found it so, and the calling of it otherwayes is to no purpose to alter it, Dyer 81. Next if it be a free Chapel it is presentative, 11. rep. 150. Cowel Tit. free Chapel, Lynwood 149, 150. Grendous Case 4. rep. Institution gives cure of soules, 13 E. 4. f. 4. There may be a benefice with cure not presentative, and if it be with cure then it was not for a superstitious use, and cannot then be within the intent of the Statute, 1. rep. 23. And for the word all, it is not alwayes taken generally. but restrictively. 2 H. 6. To the objection made to the Verdict, that it is not found by whom it is presentative, I answer: This is a special verdict, and it is the expression of the lay gens, and shall be interpreted according to common acceptation. The rule of Court was, to argue it again the Next Term, because it is a cause of great consequence.

Mich. 23 Car. Banc. Reg.

Arrest of Judgement in assault and battery Joyning in an Action.

BAron and Feme bring an Action of Trespass of Assault and Battery, and declare of an assaulting, and beating of the Feme, and have a verdict; the Defendant moves in arrest of Judgement, and for cause shews that the Baron and Feme ought not to joyn in this Action, though the Assault and Battery was done to the Feme particularly, but that the Baron ought to have brought the Action alone, because what ever damages should be recovered would go to the Baron only, and cited 9 E. 4. fol. 51. The Judgement was arrested till the Plaintiff should move.

Vandicoote.

Mich. 23 Car. Banc. Reg.

Arrest of Judgement in Debt for rent against an Executor. Debt in the detinet and debet. Executors. VVaiver.

THe Plaintiff brings an Action of Debt against Vandicoote, the Executor of I. D. for rent due unto him by the Testator in his life time, and hath a verdict. The Defendant moves in arrest of Judgement, and for cause shews that the Plaintiff had declared that the Defendant detinet et debet which ought not to be, but in the detinet only, the Action being brought against him as an Executor for rent due in the Testators life, and cited Smith and Nichols case 7 Car. But Wild of Councell with the Plaintiff said, it was good enough in the detinet and debet, though it might have been in the Detinet only: Hales on the contrary part said it was not good, for it could not be the Debt of the Executor, though he be to be charged, and so he cannot be said debere, but it is the proper debt of the Testator, and the Executor may be said detinere because he ought to pay it, and doth not. Roll Iustice said, that it had been adjudged good both wayes, and said, that Executors cannot waive a Term come to them, and yet they cannot be charged in the debet and detinet. And prima facie in the case at the bar, the Action may be brought in the debet and detinet. Yet put the cause in the paper, and argue it again.

Tanner

Tanner and Laurence.

Mich. 23 Car. Banc. Reg.

TAnner brings an Action upon the Case against Lawrence, upon an indebitatus Assumpsit to pay unto him two shillings a piece for every cloath he should buy for the Defendant, and declares for so much money due unto him, and hath a verdict; the Defendant moves in arrest of Judgement, and shews for cause, 1. That it is not averred by the Plaintiff, that he gave any notice to the Defendant how many cloaths he had bought for him, and so it is not certain what is due to him. To this it was answered, that the cloaths were bought for the Defendant himself, and he may very well take notice of the number of them, without any notice given him. A second answer was, that here is a request set forth for the payment of the mony, and this implyes a notice. But Roll Iustice to this answer replyed, that the request doth nor imply a notice, and so is Twists Case, and besides the notice ought not to be by implication, but must be averred certainly. Yet let it be moved again.

Arrest of Iudgement in an indebitatus assumpsit.

Averment.

Notice.

Implication.

Mich. 23 Car. Banc. Reg.

THe Plaintiff in an Action upon the Case upon an indebitatus declares that the Defendant in consideration of a certain sum of mony, due to the Plaintiff by the Defendant, for rent behind upon a lease for years, did assume, and promise to pay the same unto him at a certain day, and had not done it, and for this he brings his Action, and hath a verdict, the Defendant moved in arrest of Judgement, and for cause shews that there is no consideration declared to ground an Action of the Case upon, for rent is a reall thing, and an Action of Debt ought to have been brought for it, and not this Action. Roll Iustice said, that here is only a consideration in law set forth, which is not good to warrant this Action: But it may be there was some new consideration that sprung from the being of the rent behind that did ground this Action, but no such thing doth appear in the Declaration. Therefore the Plaintiff nil capiat per billam, if cause be not shewn within 14 dayes why he should have his Iudgement.

Arrest of Iudgement in an indebitatus assumpsit.

Consideration

Debt.

Wood and Salter.

Mich. 23 Car. Banc. Reg.

IN an arrest of Judgement in an Action of Trespasse for carrying away 24 load of tymber, The exception was, that the Tymber is not said to be the Tymber ipsius querentis, and so no cause of Action. Vpon this Iudgement was arrested.

Arrest of Iudgement in Trespasse.

Burnet and Bird.

Mich. 23 Car. Banc. Reg.

Arreſt of Iudgment in an Action upon the Caſe upon a promiſe.

BUrnet the Adminiſtrator of I. S. brings an Action upon the Caſe againſt Bird, and declares againſt him upon an Aſſumpſit made by the Defendant to the inteſtate, for the payment of a certain ſum of mony for a mariage portion, at 2 ſeverall dayes of payment equally, and that for not performing the ſame in the life time of the inteſtate, he brings this Action. The Plaintiff hath a Verdict: The Defendant moves in arreſt of Iudgement, and ſhews for cauſe, that the Plaintiff doth not well ſet forth the granting of the letters of Adminiſtration to him, for he ſayes, they were granted unto him by the Arch-deacon of ſuch a place, and doth not ſay loci illius ordinarium nor cui adminiſtratio pertinuit. 2ly. It is ſaid, that the mony was to be paid at 2 ſeverall payments, which amounts to two ſeveral promiſes, viz. a promiſe to pay the firſt ten pound on ſuch a day, and a promiſe to pay the other ſum at another day to come, and doth not allege any particular requeſt made by the inteſtate for the firſt ten pound. But Bacon Iuſtice over-ruled both the exceptions, and ſaid to the firſt; That the law doth take notice of an Arch-deacon being a publique Ordinary, and therefore it is not needfull to expreſſe, that the letters were granted per Archidiaconum of ſuch a place, Ordinarium illius loci or cui adminiſtratio pertinuit, but otherwiſe it were if they were granted within a peculiar jurisdiction. Therefore he ordered to ſhew better matter or elce Iudgement ſhould be given for the Plaintiff.

Notice. Ordinary. Letters of adminiſtration. Peculiar.

Eeles and Lambert.

Mich. 23 Car. Banc. Reg.

vid. antea.

15 73 74.

Argument upon a ſpeciall verdict.

THe Caſe between Eeles and Lambert was again moved, which upon a ſpeciall verdict found was this; Sir Molton Lambert makes a leaſe of certain lands to Eeles for 21 years by deed, and Covenants for himſelf, his Executors, Adminiſtrators, and Aſſigns, that the leſſee ſhall peaceably, and quietly enjoy the lands let, during all the Term, the Leſſor makes his Will, and thereby makes Lambert the Defendant his Executor, and dyes, and by the Will divers goods in ſpecie are deviſed to ſundry perſons, Lambert the Executor delivers the goods bequeathed to the Legatees, Eeles is ouſted of the lands by I. S. and thereupon brings an Action of Covenant againſt Lambert the Executor, who pleads fully adminiſtred. The queſtion was, whether the paying of theſe legacies by the Executor were a devaſtavit, and ſo the Executor to be charged de bonis propriis to ſatisfie the Covenant broken or no, Green of Council with the Plaintiff, argues that it was a devaſtavit notwithſtanding that the deviſe was of goods in ſpecie, and that the Executor had only delivered them, becauſe that the Legatees had no property in the goods bequeathed them, before the Executor had delivered them, no more than if they had never been deviſed, and cited 2 H. 6. f. 16.

Devaſtavit.

Property.

16. and Cooks Lit. 111. and he ſaid the finding of the Covenant broken was nothing to the purpoſe, and he ſaid, it was a Devaſtavit, becauſe it ſhall be intended, that the Executor might know of the Covenant made by the Teſtator, which he was bound alſo to keep, or elſe to ſatisfie for the breach of it, and the contingency whether the Covenant would be broken or no makes no difference in the Caſe, for if it ſhould it would prove miſchievous in deſtruction of Covenants, which are to be accompted of as Debts, Doct. & Stud. lib. 2. C. 10. Dyer f. 324. Hob. f. 363, 397. But it may be objected, that if this ſhould be a Devaſtavit then Legacies could not be paid, which would be dangerous to Executors, by reaſon of being lyable to ſutes for them, 21 E. 4 f. 21. Brook Tit. Proces, S. 10. To this I anſwer, It may be dangerous, yet it is not to the purpoſe, for an Executor ſhould conſider of ſuch dangers, when he takes upon him an Executorſhip, and take notice of them, and he is not compellable to pay Legacies, and the Law will not protect him, if he pay them againſt Law, Hob. 246. and if the Court Chriſtian endeavour to compel him he may have a Prohibition. 3ly. The Executor peradventure might conceive that there would be Aſſets afterwards, and in that conſideration did pay the Legacies, and if the 5 Rep. Green and Hariſons caſe, and 15 Iac. Robſons caſe be objected, I anſwer, this Caſe differs from them: for here the Queſtion is between Legacies and Debts, and there between one Debt and another, to wit, between a Debt of a higher nature, and a Debt of a lower nature. Hales for the Defendant argued, that it was no Devaſtavit. 1. He agrées, that the Legatees have no property in the Goods, by the deviſe. 2ly. If the Covenant had been broken when the Legacies were paid, it would have been a Devaſtavit. 3ly. He held, that the matter is as well found in the ſpecial verdict, as it might have been pleaded, and not put at all to the Jury to find. The Queſtion here is, whether the adminiſtration of the Goods, before the Covenant broken, be good after it is broken, and there is good matter before the Court found in the ſpecial verdict, though it might have been found better. The firſt Argument I will draw from the nature of that, upon which the Action is founded, namely, the Covenant. The Action depends partly upon the Deed of Covenant, partly upon the breach of it, and here is no ground of Action at the time when the adminiſtration of the Goods was made; and Hariſons caſe cannot be avoided: for a Statute is a preſent duty, and ought to be paid before an Obligation. Robſons caſe 14, & 15 Iac. And it is as agréable to Law, to pay a Legacy as a Debt upon a Covenant; and the miſchief to the Leſſee in our caſe is not ſo material, as the miſchief may be on the Executors part, & it is not materially objected, that he might take ſecurity, for he cannot compel it. For the Objection that our Law takes notice of a Legacy, I anſwer, that the Law takes notice of a Legacy, as to give an intereſt in it to the Legatee, although he may not take it without the Executors conſent. 2ly. It takes notice of it as remediable by the Law of the Kingdom, though not by the Common-law: and therefore conſider the Statute 21 H. 8. of Adminiſtrations; and the Common-law is Judge of the Statute, concerning Adminiſtration, and not the Spiritual-law, Hill. 17 Iac. Hinſon & Buttons Caſe. The Common-law gives not a remedy for a Legacy, but the Spiritual-Court is ſupported by the Common-law to do it: and by the antient Common-law there was remedy to recover a Legacy, 2 Rich. 3. f. 14. Glanv. lib 6, 7. C. 6, 7. and the power of the Eccleſiaſtical Court is derived from the Common-law, and the Common-law will take notice of a compulſary way in the Eccleſiaſtical-Court to pay a Legacy. And the payment in our caſe is executed, and now the Law takes notice of it, becauſe the Defendant was compellable to it. If an Executor promiſe to pay a Legacy, an Action upon the caſe will lye againſt him, if he do not

Covenant. Executors. Prohibition. Property. Duty. Star. Obligation. Security. Intereſt. Common law. Civil law. Legacy. Promiſe.

pay

pay it. Roll Iuſtice, the Teſtator may defeat all Covenants by this means; and Greens reaſon is not anſwered, which is the great doubt in the caſe. It was Necton & Sharps caſe, 38 Eliz. that Legacies ought to be paid conditionally, viz. to be reſtored, if the Covenant ſhould be broken. When you argue again, argue to this point. Bacon Iuſtice cited a Caſe, 32 Eliz. in the Exchequer, againſt the opinion of Roll, and ſaid, if the Legacies ſhould not be paid, it might be a loſs to the Common-wealth: for it may be the Goods will periſh with keeping them, and the keeping of them may be a charge to the Executor, and no body ſhall have any benefit of them for they may coſt more to keep, than they are worth, and a Devaſtavit lies not againſt an Executor of an Executor, for the Devaſtavit of the firſt Executor. Roll Iuſtice, the Eccleſiaſtical-law ought to make a proviſion againſt theſe miſchiefs, otherwiſe a Prohibition lyes againſt them. Appointed to be argued again Tueſday ſevennight.

Prohibition.

VVatſon and VVatſon.

Mich. 23 Car. Banc. Reg.

Hill. 22 Car. rot. 1687.

Areſt of Judgment in Debt upon an Obligation to ſtand to an award. Award.

VVAtſon brought an Action of Debt upon an Obligation againſt Watſon, the Condition was, to ſtand to the Award of two Arbitrators, or of the Umpire. The Defendant pleads nullum Arbitrium. The Plaintiff replies, that the Umpire made the Award. The Defendant demurs, and ſhews for cauſe, that the Award was not good: for it was incertain, and not final on both parts, for one party was awarded to pay ſo much mony to the other, as in conſcience ſhould be due, and no man can ſay, what that is. The Court ſaid, the Award was inſenſible. And Bacon Iuſtice ſaid, it was a Vicars Award. Puliſton of Councel with the Plaintiff cited theſe Books to prove the Award good, 8 Ed. 4. f. 2. 20 Ed. 4. f. 1. 4. 18 Ed. 4. f. 2. Paſc. 4 Iac. Goſnolls caſe, & 9 H. 7. and ſaid, theſe caſes proved, that where an incertainty in an Award may be made certain, there the Award is good, and ſo it is in our Caſe. 2ly. He ſaid, that the Award here is good, notwithſtanding it be to pay ſo much mony as ſhall be due in Conſcience: for it ſhall be meant as is due in Law: for Law and Conſcience are one and the ſame. But Roll Iuſtice ſaid, that the Award doth not make a finall determination of the matters in controverſy between the parties, and ſo it is no Award. And Bacon Iuſtice cited 5 Rep. That an Arbitriment ought to be certain, and final, and this Award wants both theſe properties; and therefore is not good.

Conſcience.

Fitchet againſt Wolſton.

Mich. 23 Car.

Demurrer to a Plea upon a Scire facias, againſt an Adminiſtrator. Scire facias with a Fieri facias.

FItchet had a Iudgement againſt I. S. in an action of Debt, I. S. dies inteſtate. Wolſton takes out Letters of Adminiſtration of the Goods and Chattels of I. S. Fitchet takes out a Scire facias, with a Fieri facias to enquire what Goods of I. S. are in the hands of the Adminiſtrator, and to take them in execution upon the Iudgement. Wolſton, the Defendant, appears to the

Scire

Scire facias, and pleads, fully administred. The Plaintiff demurs to this Plea, and shews for cause, that in this Case he should have pleaded non Devastavit, and not fully administred. 2ly. The plea answers not the Writ. The Court answered, all such processes are only to make the Executors, or Administrators to answer, and therefore fully administred is a good Plea, for it is a good answer, and it would be dangerous to plead other waies. And Roll Justice said, that this being a Scire facias with a Fieri facias, according to the new manner of making the Writ, it would be dangerous to plead non Devastavit, and it hath been adjudged a good plea, to say fully administred in a Scire facias against an Executor, but it is better to plead nulla bona devenerunt ad manus, with which he could satisfie the Debt since the Scire facias brought. But this being a new case it is fit to be argued. Therefore let us have Books.

Fully administred.

Non Devastavit.

Nulla bona.

Finer and Jeffry.

Mich. 23 Car. Banc. Reg.

FIner brings an Action upon the Case against Jeffry, and declares, that the Defendant did assume and promise unto him, that if he would forbear to sue one who had assaulted him and beaten him, that he the Defendant would pay the Plaintiff as much mony as he was damnified by the Assault and Battery; The Plaintiff hath a verdict. The Defendant moved in arrest of Judgement, and shewed for cause, 1. That it doth not appear by the Declaration, that the Plaintiff had any intention to sue the party for the Assault and Battery, and so the Assumpsit in consideration, that he would forbear to sue for it is no consideration. 2ly. He doth not set forth, that he gave any notice to the Defendant, what damages he had sustained by the Battery. But the Court held, that the Plaintiff needed not to allege, that he had an intent to sue the party, for that the Defendant took notice of, when the Assumpsit was made: and for the notice what dammages the Plaintiff had sustained, the request to perform the Assumpsit implies that sufficiently, and so gave judgement for the Plaintiff.

Arrest of Judgement in an Assumpsit.

Consideration.

Notice.

Dersly and Dersly.

Mich. 23 Car. Banc. Reg.

THree are indicted of Conspiracy and forgery, and one of them only is found guilty by the Jury. The party found guilty moved in arrest of judgement, and offered these Exceptions. 1. The endictment is for a joynt forgery, and so one only cannot be guilty: but if one be acquitted, all must be acquitted. 2ly. The endictment is for forgery, and causing to forge, which are two several and different Acts. But to these the Court said nothing; But took another Exception, namely, that the Conspiracy is not found upon which the Endictment is grounded, according to the Statute, for 2 are acquitted, and so there cannot be a Conspiracy in the third person, nor in any of them, for one cannot conspire alone.

Arrest of Judgement upon an Endictment of Forgery.

Conspiracy.

Bruer and Sowthwell.

Mich. 23 Car. Banc. Reg.

Arreſt of Iudgement in an Action upon an Aſſumpſit.

Nudum pactum.

Conſideration.

IN this caſe it was moved again in arreſt of Judgement, upon the exception formerly taken, namely, that the words in the Declaration diſcounting for four Months were uncertain, and ſo there is no conſideration for the Aſſumpſit, and then it is but nudum pactum. Roll Iuſtice ſaid, the Declaration is inſufficient for the incertainty: for it cannot be known what is meant by the word diſcounting. Yet he ſaid, that though part of the Conſideration, upon which the Aſſumpſit is grounded, be againſt Law; yet if the other part be good, and it may be divided, the Aſſumpſit is good notwithſtanding. Yet we will hear Councel on both parts, before the Plaintiff ſhall have Iudgement. Antea.

Colſon and Bedloe.

Mich. 23 Car. Banc. Reg.

Entred Mich. 22 Car. rot. 434.

Arreſt of Iudgment in an action upon the Caſe upon an Aſſumſit.

Iuriſdiction.

Intendment. Requeſt.

Diſcontinuance. Verdict.

Pleading.

COlſon brought an Action upon the Caſe upon an Aſſumpſit againſt Bedlore, and declares, that in conſideration of ſo much monys, paid by the Plaintiff to the Defendant, the Defendant did aſſume and promiſe to deliver ſo many loads of Hay unto him at ſuch a place, and for not performing his promiſe he brings his Action. The Plaintiff hath a Verdict; The Defendant moved in arreſt of Iudgement upon theſe Exceptions. 1. The Declaration doth not ſet forth, that the place where the promiſe was made was within the Iuriſdiction of the Court, which ought to have been, becauſe it is the ground of the Action. To this Roll Iuſtice anſwered, that it doth not appear, that it is out of the Iuriſdiction of the Court, and it ſhall not be intended to be ſo, if it be not alleged by the other party. A ſecond exception was, that there is not a ſpecial Requeſt ſet forth for the Defendant to carry and lay the Hay in the place alleged. 3ly. The pleading is out of Court, for want of a continuance to the Court, for the continuance is not to the Court, but to ſuch a day only. 4ly. The Verdict is informal, and ſhews no cauſe why dammages are given. Roll Iuſtice to the firſt exception ſaid, that the party ought to have taken advantage in pleading, that the cauſe of Action was out of the Iuriſdiction of the Court, and not to move ſuch matter in arreſt of Judgement, for it is improper. But the Court ruled the Plaintiff to ſhew cauſe why Judgement ſhould not be arreſted upon the third exception. Afterward the ſame Term judgement was given nil capiat per billam againſt the Plaintiff for the diſcontinuance in the Proceſs.

Tentch

Tentch and Cletheroe.

Mich. 23 Car. Banc. Reg.

Paſc. 22 Car. rot. 332.

TEntch brings an Action of Covenant againſt Cletheroe, & declares, that the Defendant had covenanted with him to pay ſuch a ſum of mony into the Exchequer at ſuch a time, and for not perfoꝛming this Covenant he brings his Action. The Plaintiff hath a Verdict, & a Judgment. The Defendant brings his Writt of Erroꝛ, & aſsigns for erroꝛ, that the Plaintiff had not ſet forth in what County the Exchequer is, and cites Hobs his caſe, Paſc. 8 Car. and a caſe 22 Car. C. Banc. That the County is material to be alleged, by reaſon of the Venue, 1 E. 4. 3. Cooks inſtitut. 210. 21 H. 6. f. 4. The Court held that the County where the Exchequer was ought to be alleged, becauſe the Exchequer is tranſitoꝛy, and not fixt to one place, and ſo there can be no Venue, becauſe it appears not in what County it is. And for this cauſe the Iudgment was reverſed.

Error to reverſe a Judgement in an Action of Covenant.

County.

Exchequer.

Venue.

Sawyer and Ruſſell.

Mich. 23 Car. Banc. Reg.

SAwyer brought an Action upon the Caſe for ſpeaking theſe woꝛds of him, Thou art a Witch, and haſt bewitched my Cow. The Plaintiff hath a Verdict. The Defendant moved in arreſt of Iudgement for theſe reaſons. 1. Such bewitching as is mentioned in the Declaration is not puniſhable by the Statute of 1 Iac. for it comes not within any of the branches of that Statute, neither that which ſpeaks of death by Witchcraft, nor of the other branch: for it is not averred, that the Cow was hurt or deſtroyed by the bewitching, and ſo the party is not puniſhable. And it ſhall not be intended to be ſo, for the party ſhall not be puniſhed by an Endictment by an intention, neither ſhall he be here in this Caſe. And 2ly. woꝛds ambiguous of this nature, ſhall be taken in mitiori ſenſu. Roll Iuſtice ſaid, that theſe woꝛds, Thou haſt bewitched my Mothers Milk and Drink have been adjudged actionable, and here is a ſcandal of the party of whom the woꝛds are ſpoken; and the woꝛds thou haſt bewitched, implies hurt done to the thing bewitched; and this caſe differs from an Endictment: for an Endictment muſt be moꝛe certain, than theſe woꝛds need to be. And a violent intendment as here is, may bring one within the compaſs of an Action. Therefore let the Plaintiff have his Iudgement, if better matter be not ſhewn Monday next.

Arreſt of Iudgment in an Action upon the Caſe for words.

Witch-craft.

Intendment.

Words.

Nevill and Mott.

Mich. 23 Car. Banc. Reg.

NEvill brought an Action upon the Caſe againſt Mott, and declared, that the Defendant being in company with him with a Conſtable, did ſpeak thus of the Plaintiff to the Conſtable, There he is, take him, for I charge him

Areſt of Iudgment in an action upon the Caſe for words.

him with flat felony, and after ſpoke theſe words of him alſo, Mr. Nevill hath taken my Sheep with a felonious intent. The Plaintiff hath a verdict; The Defendant moved in arreſt of Judgement, that the words are not actionable, and cited Poland and Maſons caſe, Hob, Rep. and alleged theſe reaſons alſo. 1. Becauſe the words were ſpoken to a Conſtable in proſecution of Juſtice, which ſhall not be taken hold of by a private perſon as a particular injury meant to him. 2ly. It is not ſaid the words were ſpoken falſo & malitioſe, as it ought to have been. But to the ſecond Exception, Roll Juſtice ſaid, It is not neceſſary to ſay, they were ſpoken falſo & malitioſe, where they appear to be ſcandalous, for there the Action lies well, though it be not ſo expreſſed, and if one charge another with ſuſpition of Felony, and ſpeak ſuch words of him, if they appear to be maliciouſly ſpoken, an Action very well lies. The rule was for the Plaintiff to take his Judgement, if better cauſe be not ſhewed to the contrary.

Averment.

The King and Hide.

Mich. 23 Car. Banc. Reg.

For quaſhing an Endictment before Commiſſioners of Sewers.

Sewers.

Nuſance.

Hide moved for the quaſhing of an Endictment taken before Commiſſioners of Sewers, wherein he was endicted for a nuſance made in the high way by reaſon of penning of water in the River, at his Mill, whereby the water over-flowing the Banks did annoy the way, and he took this exception to the Endictment, that it did not ſay it was a navigable River. But to this Roll Juſtice anſwered, it was not neceſſary to ſay it was navigable: for if it be a common paſſage for water it is ſufficient, and lies within the conuſance of the Commiſſioners. But Roll Juſtice took another exception to the Endictment; That it ſets forth this overflowing of the water to be a nuſance to the high way, and for this the party is endicted, whereas Commiſſioners of Sewers have no power to meddle with ſuch nuſances in the way, but only with paſſages by Water. And for this cauſe the Endictment was quaſhed.

Monger and Shaterton.

Mich. 23 Car. Banc. Reg.

Trin. 23 Car. rot. 569.

Error to reverſe a Judgement given in the Burrow-Court of Southwark.

Verdict.

A Writ of Error was brought in this Court to reverſe a Judgement given in the Burrow-Court of Southwark, and the Error aſsigned was, that in the Venire facias one of the Jury is called Richardon, and in the Habeas Corpora he is called Richardſon, which are two ſeveral names, and ſo it is incertain what the proper name is. To this the Councel on the other ſide ſaid, that this fault is helped by the Statute, it being after a Verdict. But Bacon Juſtice ſaid, he doubted whether it could be helped now in this Court, though it might have been helped in the inferior Court, where the Action was brought by examination of it, and therefore ruled to ſhew cauſe

cauſe why Judgement ſhall not be reverſed on Friday next. It was this Term reverſed at the Defendants motion for his own expedition.

Brooke and Brook.

Mich. 23 Car. Banc. Reg.

Trin. 23 Car. rot. 580.

BRooke brings an Action of Debt upon an Obligation againſt Brook, the condition was, that the Obligor ſhould make an Eſtate of inheritance to the Obligee in ſuch lands at ſuch a day, and place, and for not doing it, he brings his Action. The Defendant pleads that he was ready at the day, and place, to make the Plaintiff an eſtate of inheritance in the lands; The Plaintiff demurs to the plea, and for cauſe ſhews that the Defendant doth not ſhew that he gave notice to the Plaintiff of his being there. To this Roll Iuſtice ſaid, it is not neceſſary to give notice of the day or place. A ſecond exception was that he had not ſhewed that he gave the Plaintiff notice what eſtate of inheritance he would make him. To this Roll Iuſtice ſaid, he ought to have ſhewn, that he gave notice what eſtate he would make him, and therefore let the Defendant ſhew cauſe why the Plaintiff ſhould not have Iudgement.

Demurrer to a plea in debt upon an Obligation.
Notice.
Time.
Place.

Kale and Iocelyne.

Mich. 23 Car. Banc. Reg.

Trin. 23 Car. rot. 1282.

KAle brings an Action of Debt againſt Iocelyne an Executor, and declares for rent grown due ſince the death of the Teſtator, by virtue of a leaſe for years made of certain lands by the Plaintiff unto the Teſtator which yet continues, and declares, that the Executor debet & detinet, &c. The Defendant pleads fully adminiſtred, the Plaintiff demurs upon the plea; For pleading in the debet and the detinet: Bacon Iuſtice ſaid, it was good, and ſo had been adjudged. To which Roll Iuſtice anſwered it had been adjudged pro & con, to be good and to be bad, and he ſaid, that an Executor cannot waive a Term let to the Teſtator, for he is bound by Covenant to hold it, and ſaid that the Declaration was good in the debet and detinet prima facie; for it ſhall be intended that the land let to the Teſtator is worth as much by the year, as the rent that is paid for it, till the contrary be ſhewn, and then it is reaſon that the Executor be charged; Bacon Iuſtice ſaid, that the Executor may waive the poſſeſsion, if he find that the rent is more than the land is worth, otherwiſe it may be miſchievous to him. Roll Iuſtice ſaid, that the Declaration muſt be in the detinet and debet, otherwiſe it will be miſchievous to the Plaintiff, and ſaid, that a ſpecialty ſhall be ſatisfied before a rent reſerved upon a leaſe by deed, which Bacon denied, and it was ſaid, that a leaſe for years ſhall be aſſets in the hands of an Executor, although the rent reſerved be the full value of the Lands let by the leaſe. The Defendant was ordered to ſhew cauſe why Iudgement ſhould not be given againſt him.

Demurrer to a plea by an Executor in Debt for rent brought againſt him.
Plea.
Executor.
Waiver.
Covenant.
Aſſets.

Baker againſt Edmonds.

Mich. 23 Car. B. Reg.

Hill. 22 Car. rot. 222.

Special verdict in an Action upon the Caſe whether a verdict maintains the iſſue joyned.

BAker brings an Action upon the Caſe againſt Edmonds, and declares, that whereas I. S. was indebted unto the Plaintiff in a certain ſum of mony, and afterwards being ſo indebted became a Bankrupt, and that a Comiſsion upon the Statute of Bankrupt was taken out by him, and other creditors againſt him, and that it was found that the Defendant was indebted to the Bankrupt, the Commiſsioners of the ſaid Commiſsion did aſsign over the Debt of the Defendant mentioned in a certain ſchedule, amounting to ſuch a ſum, unto the Plaintiff, in part of ſatisfaction of the Debt owing unto him by the Bankrupt, by virtue whereof he demands the ſaid Debt of the Defendant, who did aſſume, & promiſe to pay the ſame, and for not performing his promiſe, he brings his Action, the Defendant pleads non Aſſumpſit, and thereupon an iſſue was joyned, and a ſpeciall verdict was found to the effect, as the Plaintiff had declared, but they further find that the Debts mentioned in the ſchedule, and aſsigned over to the Plaintiff amounted to ſuch a ſum, whereas they find that the Defendant did not owe unto the Bankrupt ſo much as that Debt aſsigned is, but a leſſe ſum. And upon this verdict the queſtion was, whether the verdict did maintain the iſſue, which was non Aſſumpſit, if it did, then they find for the Defendant, if not, then for the Plaintiff. In the breaking of the Caſe it was moved whether the Aſsignment were good or no, in regard that the Commiſsioners had miſtaken the Debt, for the Debt aſsigned by them was greater than the Debt found by the Jury, and ſo might be another Debt. But to this Roll Iuſtice ſaid, that the aſsignment was not judicially before them in queſtion, for if it were, it would be judged an ill aſsignment, but here it comes not in iſſue but only whether the Defendant did aſſume, and promiſe or no, and the ſpeciall verdict concludes not upon the aſsignment, but whether the ſpeciall matter found do maintain the iſſue or no, & therefore he was of opinion that the Plaintiff ought to have his Judgment. Bacon Iuſtice differed in opinion, & ſaid, that it is dangerous for Commiſsioners of Bankrupt, to aſsign Debts particularly. The rule then was to argue it the next Term: At which time Ward of Councel for the Defendant argued, that the verdict was for the Defendant for this reaſon, viz. Becauſe the Debt laid in the Declaration, and the Debt found by the verdict are not the ſame, and ſo the Defendant did not aſſume, and promiſe that which is laid in the Declaration, for there is no ſuch Debt found, and if he ſhould be charged with that, he might be doubly charged, for he may be again charged for the debt found by the verdict, and circumſtances of quantity, time and place are averred in a Declaration to make things certain, and if they fail the Declaration is not good, 18 E. 3. fol. 25. 1. rep. 74. Palmers Caſe. 2ly. The Declaration is inſufficient, for it expreſſeth not what the ſum is, but ſaith, a ſum mentioned in a ſchedule of Debts, which is uncertain: Roll Iuſtice interrupted Ward, and ſaid, all that you have argued is out of doores, but the laſt matter touching the Declaration, and to that Hales of Councell with the Plaintiff ſaid, the Declaration is good, and certain enough, for there appears no other ſum in the ſchedule than is mentioned in the Declaration.

Verdict. Iſſue. Aſsignment.

Commiſsioners.

Averment.

Bacon

Bacon Iuſtice, The aſsignment is of the debt of this man due to the Bankrupt, be it more or be it leſſe, and hath no reference to the accompt, and reckoning between them, & ſo the Aſsignment is good, though it agree not in the ſum with what is juſtly due, and the iſſue is upon the Aſſumpſit, and not upon the Aſsignment, for the Aſsignment is admitted by the Defendant, and ſo not materiall whether it be an Aſsignment of the true ſum or not. Iudgement was given for the Plaintiff. Iſſue. Admittance.

Bruer and Sowthwell.

Mich. 23 Car. Banc. Reg.

THe Plaintiff in this Caſe moved again for iudgement, notwithſtanding what had been formerly ſpoken to arreſt it, for though the word diſcomputando in the Declaration be inſenſible, yet there is enough in the declaration to ground the Action, and that is the breach of the Aſſumpſit aſsigned to deliver the Currants bought of the Defendant, and the word diſcounting ſhall not hurt it. Bacon Iuſtice was of the ſame opinion. But Roll Iuſtice ſaid, all the bargain is here ſet forth upon which the Aſſumpſit was made, and if the bargain be ill, the Aſſumpſit is not good. Hales of Councell with the Plaintiff ſaid, if part of the bargain be inſenſible, and part not yet a good Aſſumpſit may be grounded upon that part which is good, But Roll ſaid the bargain here is intire, and if part of it be not good it is all naught: yet he ſaid if part of a bargain be good, and part void, yet an Action may be brought upon it. The rule was, That it ſhould be argued again on both parts. Arreſt of Iudgement in an Action upon the caſe upon an Aſſumpſit. Aſſumpſit. Contract.

Seaman againſt Edwards.

Mich. 23 Car. Banc. Reg.

Trin. 23 Car. rot. 920.

SEaman brings an Action againſt Edwards, and declares againſt him as Executor of I. S. (whereas the truth was, that I. S. made 3 others Executors, and not the Defendant.) The Defendant pleads that he is not the ſame perſon named in the Will. To this plea the Plaintiff demurs, and for cauſe ſhews that he may be an Executor de ſon tort demeſne, though he be not named in the Will, and ſo may be chargeable, and therefore he ought to have pleaded ne unques Adminiſtred come Executor, and of this opinion was the Court, and ordered the Defendant to ſhew cauſe why Iudgement ſhould not be given againſt him. Iudgement was given for the Plaintiff. Demurrer to a plea pleaded by an Executor. Plea. Executor.

Dod againſt Eaton.

Mich. 23 Car. Banc. Reg.

DOd brings an Action upon the Caſe againſt Eaton for ſpeaking theſe words of him, thou haſt the French Pox, the Defendant pleads not guilty Exception to a ſpecial verdict.

guilty, the Jury upon this iſſue find a ſpeciall verdict, viz. That the Defendant had ſaid, thou haſt had the French Pox, whereupon the Defendants Councell ſaid, that the Verdict doth not maintain the words laid in the Declaration, and that the words that are found in the verdict are not actionable, and ſo the Plaintiff can have no Judgement, and cited 15 Jac. Nutcombes Caſe, and the words found are not iſſuable, and ſo the verdict is imperfect, 40 Aſſ. 41. Kelway 6. 18 Ed. 3. fol. 19. Paſc. 33 Eliz. Banc. Reg. Dame Ratcliffs Caſe. Dyer Sr. Iohn Burges Caſe prove that the verdict is too ſhort. Roll Iuſtice ſaid, if the verdict be imperfect, there may be a new venire facias, and ſo it is againſt the Plaintiff, for he cannot have Judgement. Panell of Councell with the Plaintiff cited Osborn, and Brooks Caſe that the verdict was for the Plaintiff. But Roll Iuſtice ſaid, that the Jury cannot find a thing that is not within the Declaration to maintain the Declaration, for they ought to hold themſelves to the iſſue, and that they have not here done, and therefore the verdict is imperfect, and there muſt be a new venire facias to try the iſſue again, for Judgement cannot be given upon this verdict, for they do not find that he ſpake not the words in the Declaration which are the moſt material, ſo that the matter is not found fully enough for us to proceed to Judgement one way or other. Adjourned.

Verdict.

Venire de novo.

Verdict.

Poole againſt Coply.

Mich. 23. Ca. Banc. Reg.

Arreſt of Iudgement in Treſpaſſe.

POole brings an Action of Treſpaſſe againſt Coply, and hath a verdict againſt the Defendant. It was moved in arreſt of Judgement that the Declaration is incertain, for the Plaintiff declares that the Defendant cepit et aſportavit decem coria, anglice hides, and the word Coria is uncertain, for it may be coria equorum, or coria ovium, or of any other Cattel. To this Roll Iuſtice ſaid, that it is well enough, for the Anglice had made the word certain, and it is the uſual maner to plead it thus. The Court ordered the Plaintiff ſhould have his Iudgement, if better matter were not ſhewn to the contrary.

Anglice.

Hull againſt Gurnet.

Mich. 23 Car. Banc. Reg.

Demurrer upon a ſpecial plea in falſe imprisonment.

HUll brings an Action of falſe imprisoument againſt Gurnet, the Defendant pleads a ſpeciall juſtification, that he took, and impriſoned the Plaintiff by virtue of a Commiſsion granted out of the Court of the Admiralty, to examine the taking away of certain goods which were wracked by the Sea. To this plea the Plaintiff demurred, and ſhewed for cauſe; That the Defendant hath not ſet forth the Cuſtom of the Admirall Court, that the firſt proceſſe thereof is a Capias, and ſo it appears not, whether he have proceeded right or no. 2ly. It doth not appear that the matter for which the Commiſsion was granted is Maritime, and other matter they ought not to medle withall. The Rule of Court was to ſhew cauſe why Iudgement ſhould not be given againſt the Defendant upon this plea.

Cuſtom.

Admiralty.

Smith

Smith againſt Stone.

Mich. 23 Car. Banc. Reg.

SMith brought an Action of Treſpaſſe againſt Stone pedibus ambulando, the Defendant pleads this ſpeciall plea in juſtification, viz. That he was carryed upon the land of the Plaintiff by force, and violence of others, and was not there voluntarily, which is the ſame treſpaſſe, for which the Plaintif brings his Action. The Plaintiff demurs to this plea: In this caſe Roll Iuſtice ſaid, that it is the Treſpaſſe of the party that carryed the Defendant upon the land, and not the Treſpaſſe of the Defendant: as he that drives my Cattel into another mans land is the Treſpaſſor againſt him, and not I who am owner of the Cattell.

Special juſtification in treſpaſſe pedibus ambulando.

Treſpaſs.

Mathew againſt Herle.

Mich. 23 Car. Banc. Reg.

Trin. 23 Car. rot. 1554.

MAthew brought an Action of treſpaſſe againſt Herle for breaking his Fence, and entring into his Cloſe, &c. The Defendant pleads that I. S. was ſeiſed of this land, wherein the Treſpaſſe is ſuppoſed to be done, in fee, and ſo ſeiſed did demiſe the ſame for years by deed to the Plaintiff reſerving rent, in which deed was a clauſe of reentry for non payment of the rent, and afterwards made his laſt Will in writing, and dyed; by which will he gave the ſaid land in qua, &c. to the Defendant, and that after the rent was behind, and that he for the non payment of the rent according to the Covenant in the deed, by virtue of the clauſe of reentry did enter into the lands, which is the ſame breaking of the Fence, and entry for which the Plaintiff brings his Action, and demands Judgement if the Plaintiff ought to have his Action. To this Plea the Plaintiff demurs, and ſhews for cauſe: That it doth not ſhew that the leaſe made to the Plaintiff is a leaſe of the land, in which the Treſpaſſe is ſuppoſed to be done. 2ly. The Defendant doth not ſhew that he did enter into the land by leave of the Executor, which he ought to have done; for though the land was deviſed to him by will, yet he cannot enter into the land without leave of the Executor. The Court ordered the Defendant to ſhew cauſe why Iudgement ſhould not be given againſt him upon his plea.

Demurrer to a plea in treſpaſs quare clauſum fregit

Licence.

Entry.

and Long.

Mich. 23 Car. Banc. Reg.

THe Plaintiff brought an Action upon the Caſe for theſe words ſpoken of him, Long is a murtherer, and hath bewitched my Child, and was the death of my Child, and obteins a verdict. The Defendant moves in

Areſt of Iudgment in an action for words.

arreſt of Judgement, and takes theſe exceptions to the Declaration. 1. That it is not ſaid, that the Child was bewitched to death. 2ly. It doth not expreſs whether the Child bewitched was born alive or not. To this
Felony. the Court ſaid, that the bewitching of the Child is Felony, though it do not dye by it. And to the ſecond exception, That the Court doth not take notice of a Child if it be dead-born, and they will intend it was born alive; and Roll Iuſtice ſaid, that theſe words Thou didſt kill my Ma-
Averment. ſters Cook, have been adjudged actionable, although the Plaintiff did not aver, that his Maſter had a Cook. Therefore let the Plaintiff take his Iudgement, if better matter be not ſhewn Saturday next.

Carver againſt Pierce.

23 Car. Banc. Reg.

Arreſt of Iudgement in an action for VVords. CArver brings an Action upon the Caſe againſt Pierce for ſpeaking theſe words of him, Thou art a Thief, for thou haſt ſtollen my Dung, and hath a Verdict. The Defendant moved in arreſt of Judgement, that the words were not actionable: for it is not certain whether the Dung be a Chattel,
Chattel. or part of the Free-hold, and if ſo, it cannot be Theft to take it, but a Treſpaſs, and then the Action will not lye. Bacon Iuſtice, Dung is a Chattel, and may be ſtollen. But Roll Iuſtice anſwered, Dung may be a Chattel, and it may not be a Chattel; for a heap of Dung is a Chattel,
Felony. but if it be ſpread upon the Land it is not, and ſaid, the word Thief here is actionable alone, and there are no ſubſequent words to mitigate the former words: for the ſtealing of Dung is Felony if it be a Chattel. Bacon Iuſtice ſaid, It doth not appear in this Caſe of what value the Dung was, and how ſhall it then be known, whether it be Felony or pety Larceny? To this Roll anſwered, the words are ſcandalous notwithſtanding and actionable, though the ſtealing of the Dung be not Felony. The rule was, to move it again Tueſday next.

Mich. 23 Car. Banc. Reg.

Error to reverſe a Iudgment, for diſcontinuance in the Proceſs. Diſcontinuance. A Writ of Error was brought in this Court to reverſe a Judgement given in the Marſhals Court, and the exception taken was, that there was a diſcontinuance in the proceſs, and ſo there ought to have been no Judgement, and therefore the Judgement given is erroneous; and that there was a Diſcontinuance it thus appears. The Continuance was ad proximam Curiam, and it appears upon the return of the Venire facias, that that was no Court day, for it was the three and twentyeth day of the Month, whereas Friday, on which day the Court was held, was not the 23 day, and ſo there is Error in the continuance. Roll Iuſtice ſaid, the former Continuance
Iudgement. was to the 9th. day, and from thence to the 15th. and that is but ſix daies, and ſo wants of the time. Bacon Iuſtice, Where there is a Diſcontinuance the Court hath no power to give Judgement, and ſo the Judgment is here erroneous, and therefore let it be reverſed, niſi cauſa, &c.

Mich.

Mich. 23 Car. Banc. Reg.

LEssee for years of Lands by Deed, brings an Action of Covenant against the Lessor, and declares, that the Lessor had covenanted, that he should peaceably and quietly enjoy the Lands let during the Term, and that a Stranger entred upon him, and ousted him within the Term. To this Declaration the Defendant demurs. Roll Iustice said, that the Covenant in this Case is broken, though it be a Stranger that entered and ousted the Lessee. Walker of Councel with the Defendant took this difference, where a Stranger enters upon the Lessee and doth a Trespass, and where he enters and outs the Lessee; in the former Case he said, the Covenant is not broken: but in latter it is broken. Iudgement was given for the Plaintiff except cause should be shewn Monday next. Demurrer to a Plea in an action of Covenant. Hob. 39. cont. Covenant.

Thynn against Thynn.

Mich. 23 Car. Banc. Reg.

Hill. 23 Car. rot. 1658.

Cro. 91. 99.

THynn brought an Action of Dower against Thynn, and hath a Iudgement by default, and thereupon a Writ of Enquiry issued out to the Sheriff, who delivered seisin of the Dower recovered, and returned the Writ; upon this Iudgement, The Defendant brings a Writ of Error, and assigns these Errors in the Record. 1. The original Writ appears not to be returned according to the Statute: for the year doth not appear when it was returned. 2ly. The Proclamation made by the Sheriff appears not to be where the Land lyes. 3ly. The return doth not mention that the Proclamation was after the Summons, as it ought to be, as it is Hob. Reports, in Allens Case. 4ly. It is not said that he did make Proclamation upon the Land. 5ly. It appears not that the Proclamation was in the Parish where the Summons was, as the Statute directs. To these exceptions Hales of Councel on the other side, answered. To the first, that the return of the original Writ shall be intended to be in the year of the Reign, and not of the Age of the King, though the word Reign be omitted. To the second, the Lands lye in divers Parishes, and Proclamation at the Church of any of the Parishes is good enough. 2ly. It doth not appear, that there are divers Churches in New-Sarum where the Proclamation was made. To the third exception, the Proclamation is said to be made prout breve postulat, and that shall be supposed duly done, and implies all requisite circumstances, and he cannot make another return, and it is impossible to be otherwise To the fourth, it is not necessary to return the place of the Summons, and it is said that it was made secundum formam Statuti, which supplies the rest. And to this the Court said, that the words secundum formam Statuti extend far. And Roll Iustice said, that Proclamation in one place was good in all. Holhead of Councel with the Plaintiff, in the Writ of Error proceeded, and took these exceptions in the demand of the Dower. 1. The demand is generally de rectoria, which is not good, for the incertainty of it: for there may be a Rector of a College, of a Province, & of a Bi- Error to revese a Iudgement in Dower. Return. Proclamation. Summons. Return. Demand. Rector.

ſhopzick, as well as of a Pariſh-Church, and therefoze it ought to have been de Rectoria Eccleſiæ parochialis de &c. 12 H. 4. f. 29. pl. 1. 2ly. The demand decimarum is too general, and not good, and it ought to have been decimarum granorum, ſœni, &c. foz the demand de omnimodis decimis quibuſcunque is too general, 11 Rep. Herberts caſe. 1. To theſe exceptions Hales anſwered, that a demand in a Writ of Dower need not to be ſo exact as in other oziginal Writs: foz oziginal Writs are not alterable, but ought to anſwer the fozms in the Regiſter. To the ſecond he ſaid, that rectoria ſhall be intended the Rectory of a Church, and the Statute extends not to this: beſides the place of the Rectozy is deſcribed, which makes it certain enough. To the third, it is not neceſſary to expzeſs the Tithes particularly, and the demand being of the Rectozy it compziſeth all the Tithes, alſo the demand is de omnimodis decimis which is a general demand, and compziſeth all, and is not de decimis only, foz that might be incertain. Holhead, The demand is de rectoria & de omnimodis decimis, which is a demand of one thing twice, and that is not convenient, foz by this means the party may recover dammages twice, and the Court will be alſo inveagled by this means, and it matters not though we have not pleaded to this: foz the Court ought to take notice of it, becauſe it is in the oziginal Writ. Next there is no fozm in the Count, foz cum pertinentiis is infozmal, foz it refers to the Pariſh, and not to the Mannour, 27 E. 3. f. 86. Pl. 3. Hales, This is but a variance in fozm, and is not material, and alſo it ſhall be intended to refer to the Mannour, and not to the Pariſh. Holhead, The demand is not warranted by the Writ, foz the Mill and Pariſh are not named in the Writ, but are named in the demand, 11 Rep. Arondels caſe. Hales, The demand is not de rectoria in Tymsbury, but de Tymsbury, and is the denomination of the thing demanded, and not of the Mill where it lyes. Holhead, It is not ſaid, where the Tithes extend, and they may extend to divers Mills, as a Pariſh may, 19 E. 3. f. 9. Hales, Here is one demand, and it includes all the Tithes. Roll Iuſtice, You have demanded the Rectozy in Tymber, and not the Rectozy of Tymber, and by the grant of ones Mannour in Dale, no mozz of it paſſeth than what doth lye in Dale, and here it ſhall be intended ſo much of the Tithes as are in Tymber. Holhead, Here is a demand of Dower of ſuch things whereof Dower lyes not, viz. of a quarry of Stones, and it appears not that the Quarry was open in the life of her Husband; and if it were, yet it is impzoper to demand it by the name of a Quarry. Hales, the wozd Quarry is a good wozd, & well-known what it means: foz Quarrera is an old wel-known Latine wozd foz it, and ſhe is as well dowable of it as of a Mine of Coles, and it ſhall be intended to be open, becauſe ſhe demands it by that name of a Quarry. Holhead, The demand of the Dower is alſo of a Hundzed, of which a Woman is not dowable, becauſe it is an entire thing, and cannot be divided, and the demand ſhould have been de tertia parte proficuorum hundredi. To this Roll Iuſtice anſwered, then by your reaſon ſhe ſhall never keep a Court. Hales, It is well enough demanded, foz a demand ſhall be of the thing it ſelf, and not of the pzofits of it, foz the pzofits were not in the Husband, but he was ſeiſed of the Hundzed, and the pzofits are a thing incertain. Holhead, The execution of the Habere facias ſeſinam is not well executed, foz by it two third parts are aſsigned foz Dower, and that is mozz than the demand. Hales, That is but a repetition of the thing demanded. Holhead, A thing not demanded at all is aſsigned foz Dower, viz. view of Frank pledge. Hales, That is but an incident to another thing that is demanded, viz. the Hundzed, and by the demand of the Hundzed the view of Frank-pledge is demanded, and all other incidents to the Hundzed. Holhead Here is an aſsignment alſo of all tenures, and ſhe cannot have Homage, becauſe ſhe is a Woman. Hales, She ſhall have all te-

Notice.

Tithes. Pariſh.

Grant.

Dower.

nures

nures which ſhe is capable of, and ſo all ſhall be underſtood in this place, and no other ſhe ſhall have. Holhead, The Judgement is alſo of 15 Copiholds & Tenements which lately were Copiholds. Roll Iuſtice, This is good enough, and what loſs have you by it? Holhead, The Aſsignment is alſo of the 3d. part de Copicia & de Structuris, and other words there are which are alſo incertain. And there is error in the aſsignment of dammages: for the dammages are aſsigned ultra valorem terræ, which is againſt the Statute. Roll Iuſtice, the Statute is an addition of the value and dammages, for the Judgement is perfect without returning the Writ of the dammages, and ſo hath been adjudged in the Common pleas. Holhead, Here is an ill ſuggeſtion of the Feme, for ſhe ſuggeſteth, that her Husband dyed ſeiſed in fee of all the Lands out of which ſhe demands her Dower, and that is not true, for he dyed ſeiſed of part of them in tayl. To this the Court ſaid, that is not material if he dyed ſo ſeiſed, that ſhe ought to have Dower. Holhead, Dammages are given ultra valorem, which I conceive is not good. Roll Iuſtice, It is well enough: for dammages are given, and the value by the Statute. Holhead, The return of the Elegit is not good. Hales, That is another Record, and appears not now in the Court. Roll Iuſtice, The Elegit hath no reference to the former Record. Holhead, There is one error in fact, and that is confeſſed by your joyning in demurrer. Roll Iuſtice, You might have demurred for this doubleneſs, for one cannot aſsign an error in fact, and another error in Law in a Writ of Error, for this is double. Hales, It is true, but we have loſt that advantage. Adjourned to be argued again the next Term.

Dammages, Judgement.

Doubleneſs.

Robinſon againſt

Mich. 23 Car. Banc. Reg.

RObinſon brought an Action of Trover and Converſion againſt T. B. and hath a verdict. The Defendant moved in arreſt of Judgement, and ſhewed for cauſe, that the Declaration was not good, for the Plaintiff amongſt other things declares, that the Plaintiff had found and converted to his own uſe unum veſtigium, Anglice a Footſtool, whereas it ſignifies a Footſtep, or a print of the foot, and not a Footſtool. 2ly. The Plaintiff declares pro decem ponderibus Aeris, meaning ten pound of Braſs, whereas it ſhould be æris with a Dipthong, for Aeris is of Ayr, and not Braſs. But this exception was over-ruled by the Court, becauſe in the writing of Court-hand, in which hand Declarations are written, there are no Dipthongs uſed, and ſo the word Aeris might as well ſignifie Braſs as Ayre. But for the other exception, judgement was ſtayed till the Plaintiff ſhould move.

Arreſt of Judgement in Treſpaſs.

No Dipthongs in Court-hand.

Izack againſt Green.

Mich. 23 Car. Banc. Reg.

IZack brings an Action upon the Caſe in London againſt Green, for calling her Whore. Green removes the cauſe by a Habeas corpus into this Court, and hath a Superſedeas to ſtay the Plaintiffs proceedings in London. The Plaintiffs Counſel moved for a Procedendo, that he might proceed in London, becauſe that in London, by a ſpecial Cuſtom there an Action doth lye for

For a Procedendo to try an action in London.

for calling a woman Whore, though out of London it lyes not, and cited Pascal and Barbars Case 21 Iac. to prove it. Bacon Iustice, The custom of London is to be certifyed that we may Iudge of the reasonablenesse of it, and we are not to take notice of it upon a surmise, and it seems that a procedendo should not here be granted, because the matter with which she is charged by the words belong to the Conisance of the Civill law to try it, and not to our Law, as it is 2 H. 4. Roll Iustice, One may in some Cases have an Action at the Common law, where he may have remedy also in the Ecclesiasticall Court; for the Common law is to be preferred, and by a special custom as the Case here is, an Action may be maintained where it lyes not at the Common law, and so was it held 8 Car. and 13 Car. And if there should not be a procedendo granted in this Case, the Plaintiff would be tyed up by the habeas corpus, but if it be granted the matter may be tryed, and upon that if the Iudgement be erroneous a writ of Error may be brought in the Hustings in London, and so all the matter may come in question to be argued, and he said that a Charter cannot give an Action, which the Common law allows not. But let the matter rest as it is till we can agree.

Procedendo. Notice.

Action.

Mich. 23 Car. Banc. Reg.

Arrest of Iudgement in an action upon the case.

THe Plaintiff brought his Action upon the Case, for these words, thou mutton-monger theef bring home my stolen hay. The Defendant makes a special justification, that the Plaintiff had stollen a sheep, and upon this was an issue joyned, and a verdict for the Plaintiff. The Defendant moves in arrest of Iudgement that the Declaration was not good; for it only chargeth the Defendant with speaking of the words, and doth not say dixit de querente, and though those words be in the replication, yet that makes not the Declaration good. Roll Iustice, The Declaration is not good, for the words may be spoken of any other body, as well as of the Plaintiff. Bacon Iustice agrees with Roll, and said that the word dixit was not in the Declaration, and so it appears not whether the Defendant spoke, or writ, or thought the words, and which is more it is not said, that the words were spoken in the presence of any body, and then they cannot be scandalous; Roll Iustice said, one cannot rejoyn upon words, which are not in the Declaration nor in the plea; for if the Declaration, and the plea be naught, the replication cannot make them good. The rule of Court was nil capiat per billam, except cause shewn Saturday following.

Replication.

Kinpe against Iohnson.

Mich 23 Car. Banc. Reg.

Pasc. 23 Car. rot. 154.

Error upon a Iudgement in Hull. Continuance

A Writ of Error was brought to reverse a Iudgement given in Hull, for these Errors assigned. 1. That one of the continuances was to a certain day of the month, where it ought to be ad proximam curiam; 2. The Declaration was pro se decem bestiis, Anglice Cows or Whyes, which is too general; for the word bestia may signifie any beast whatsoever as well

well as a Cow. The Iudgement was reverſed except cauſe ſhewn to the contrary.

More againſt Clipſam.

Mich. 23 Car. Banc. Reg.

MOre brings a Replevin againſt Clipſam, and declares of a hundred oves Matrices et vervices diſtrained by Clipſam. Clipſam demurs to the Replevin for the incertainty of it; for it appears not how many of the hundred ſheep diſtrayned, and replevied, were Matrices, or ewes, and how many were vervices, or weathers; Maynard moves for Iudgement in the Replevin for the Plaintiff, and held that centum oves alone was good, and certain, and the addition Matrices, and vervices, ſhall not make an incertainty, and the writ of Replevin doth not ſhew the cattell diſtrained particularly, but the help of the party, and the view of the Sheriff muſt concurr to ſhew what Cattel are to be delivered by the writ. 2ly. Here is a good iſſue argumentative, although it be not ſo formal. 3ly. There is no more in the iſſue at the Bar, than in the avowry, for all the Term is but one day, & ther is no diviſion of time in it, & it is dangerous to make fractions, & a Statute acknowledged in the Term relates to the firſt day of the Term. Hales on the other ſide agreed that centum oves without ſaying any more had been certain enough, but as they are here diſtinguiſhed into Matrices, & vervices, there is no certainty at all; for the Cattel in kind are demanded, and ought to be delivered as they are demanded, ſo that if the demand be incertain there can be no certain delivery. 2ly. The iſſue is ill, and is not helped by the verdict; for 1. the title made is not anſwered. 2. The traverſe is only to the concluſion, and ſo is but by way of inference, and is not helped after a verdict; for the plea is not anſwered: for the words fuit et adhuc eſt ſeiſitus is not good, for it is not material whether he were ſeiſed at the time of the diſtreſſe or no, but whether he were ſeiſed at the time of the replevin, and there is a diſtance between the replevin, and the avowry, and there is a prius and a poſterius in it. Roll Iuſtice ſaid, it is made up in the return, and there is no diſtinction of time, and if one plead an ill plea, and the iſſue upon it be found againſt him, he ſhall not take advantage of his own ill plea, and if there be a negative, and an affirmative, though the iſſue be not well joyned, it is helped by the Statute of Ieofailes, otherwiſe, if there be not an affirmative, and a negative; for then there is no iſſue at all joyned to be helped. Bacon Iuſtice, Oves matrices et vervices is ill; for the Sheriff knowes not what return to make; Roll accords, and ſaid, you have made that which was certain, to be incertain by the ſpecification you have made, and a replevin is a demand, and ought to be as certain as a precipe. Iudgement was given againſt the Plaintiff in the caſe at the bar, becauſe the Declaration was ill, and uncertain.

Argument upon a Replevin.

Incertainty.

Iſſue.

Term.

Statute.

Relation.

Traverſe.

Advantage.

Plea.

Gilbert

Gilbert againſt Stone.

Mich. 23 Car. Banc. Reg.

Trin. 23 Car. rot. 1703.

Demurrer upan a plea in Treſpaſſe.

GIlbert brought an Action of Treſpaſſe quare clauſum fregit, and taking of a gelding, againſt Stone. The Defendant pleads that he for fear of his life, and wounding of twelve armed men, who threatned to kill him if he did not the fact, went into the houſe of the Plaintiff, and took the gelding. The Plaintiff demurred to this plea; Roll Iuſtice, This is no plea to juſtifie the Defendant; for I may not do a Treſpaſſe to one for fear of threatnings of another, for by this means the party injured ſhall have no ſatisfaction, for he cannot have it of the party that threatned. Therefore let the Plaintiff have his Iudgement.

Treſpaſſe.

Symons and Low.

Mich. 23 Car. Banc. Reg.

Trin. 23 Car. rot. 650.

Error upon a Iudgement for words. Plaint.

SYmons brings an Action upon the Caſe againſt Low for ſpeaking theſe words of him, She, innuendo the Plaintiff, is perjured, and hath a verdict, and a Iudgement; the Defendant brings a Writ of Error to reverſe this Iudgement, and aſsigns for Error that the plaint was entred the ſame day that the words were ſpoken, which was ſaid ought not to be, becauſe the Action ſhould be brought after the words ſpoken, which ſhall not be intended to be if it be the ſame day, becauſe the Law admits of no fractions of time, which will be, if a day be divided into ſeveral parts, as it here muſt be, for there muſt be one hour ſuppoſed when the words were ſpoken, and another hour when the plaint was entred. But Roll Iuſtice ſaid, it was well enough, and ordered the Plaintiff to take her Iudgement, if cauſe were not ſhewn before the end of the Term.

Fractions.

Cheevers againſt

Mich. 23 Car. Banc. Reg.

To quaſh a ſcire facias.

VPon a rule of Court to ſhew cauſe why a ſcire facias to revive a Iudgment was not good, This was offred for cauſe, that it doth not ſhew before whom the Iudgement was given, which was to be revived by the ſcire facias, and conſequently there appears no Iudgement to warrant the ſcire facias. To this Roll Iuſtice anſwered, that in the Common pleas the courſe is to ſet forth before whom the Iudgement is given, but in this Court the courſe is not ſo: But how comes the Record hither? The Councell anſwered, That there was a Iudgement in Canterbury, and upon that a Writ of Error was brought in this Court, and the Iudgement affirmed upon that Writ of Error, and then a Scire facias iſſued out here upon the Iudgement againſt the bail, and upon this the bail moves upon the record, that there is error in the ſcire facias. Roll Iuſtice, The Record is well enough; In a ſcire facias it is not requiſite to ſay Conſideratum eſt per curiam. Therefore let the ſcire facias ſtand.

Scire facias.

Carver

Carver and Pierce.

Mich. 23 Car. Banc. Reg.

THe Case between Carver and Pierce was again moved by Hales, wher- Arrest of Judgement for words.
in it was moved formerly in arrest of Judgement that these words Thou art a theef, and hast stolen my dung are not actionable: That the words are actionable for these reasons. 1. The first words are actionable, and the second words are accumulative, and aggravate the former words, and do not mitigate them. 2. It may be felony to steal dung, and the violence of the words do enforce it to be so intended. Bacon Iustice, I hold that Judgement is to be given for the Plaintiff, and so it was for these words, thou art a theef, and hast stolen my Corn. Roll Iustice was of the same opinion, and said that the second words are not violent enough to allay the first words, and are not explanatory, and by way of mitigation; for the words are not, for thou hast, but they are, and thou hast stollen my dung. Iudgement was given for the Plaintiff. antea.

Eeles and Lambert.

antè. 54.

Mich. 23 Car. Banc. Reg.

THe Case between Eeles and Lambert was again argued by Latch for the Plaintiff, and by Twisden for the Defendant, Latch argued to this effect, That the Legatee hath no right in the legacy, untill it be delivered unto him by the Executor, 2 E. 4. fol. 13. but if a legacy be given in this manner, if I dye let my Cosen have such a thing, there the Legatee may take the legacy without the delivery of the Executor, and a thing which cannot be devised cannot be administred. Bracton lib. 2. C. 26. 7 H. 6. A devise is void if there be not sufficient goods besides to satisfie the Debts of the Testator. 2. The disposition of the Testator ought to agree with the law of God, the law of nature, and the Law of the Land; and whereas it is objected that there will be an inconvenience, if the legacies shall not be paid, I answer, the Law regards not this inconvenience; But 2ly. this inconvenience is none in respect of the inconvenience will be on the other side if the legacies be paid, namely the breaking of the Law of God, the Law of Nature, and of the Land, and the inconveniences supposed are helped by the Civill Law, for it takes caution in paying of legacies to repay them in such accidents as are in our Case. Twisden for the Defendant argued, that it was a good administration of the goods, and that there is no assets in the hands of the Executors, and he agrees that a devise of goods in specie, and a devise of mony is all one; but this is not a Debt, and so is not to be paid; for in Judgement of Law, it is presumed that the Covenant shall not be broken, and that it shall not be respected in regard of the incertainty whether it shall be broken or no, but the Law takes notice of the Will, and it is of temporal conusans, 2 Rich. 3. 11 H. 7. f. 12. and it takes notice of a legacie to try the right of it, and to discharge it, and the Executor here is compellable to pay the legacies, and cannot refuse it neither by the Common law, nor by the Spiritual law; but it is objected that it is inconvenient that one shall avoid his own Covenant by his own devise. To this I answer, he might have done it in his life by giving away all his goods; and 2ly. There shall not be intended to be fraud in the Will, and there are more inconveniences of our

2 Arguments upon a plea by an Executor. Legacy. Administration. Devise. Caution. Covenant.

455. part in not paying the Legacies, than on their part by paying them: for by this means, men shall have no power to dispose of their own Goods by Will, by reason of Covenants in Leases and Deeds made by them; and Security. the Spiritual Court cannot compell a Legatee to put in security for his Legacy, as is surmised. Adjourned to the next Term to give Judgement.

967. [illegible]

Mich. 23 Car. Banc. Reg.

VWhether an Attornment good or not. THe Court was moved to deliver their opinion in a Case formerly moved, wherein the Question was, whether an Attornment made by a Lessee for years the same day that the rent was due to be paid upon his Lease to him that had purchased the reversion of the Land let unto him, and for which the Attornment. Purchaser had brought his Action, be a good Attornment. Roll Justice said, that it is a good Attornment by the averment made, and by the finding of the Jury, and that Judgement ought to be for the Plaintiff. Bacon Justice agrees, and said, the Attornment shall be intended to be before Sun set, and not afterwards. Therefore let the Plaintiff take his Judgement.

Parmiter against Cressey.

Mich. 23 Car. Banc Reg.

Cause why Judgement should not be given in an Action upon an Assumpsit. Averment. Notice. Request. THe Defendants Councel upon a former rule of Court to shew cause, offered for cause why the Plaintiff should not have Judgement. 1. Because the Plaintiff had not averred that he did make any election of the Wines that the Defendant was to deliver unto him. 2ly. He doth not aver, that he gave the Defendant any notice of his election, and there being a Condition precedent to be performed on the Plaintiffs part, implyed, the Defendant cannot perform the Bargain, without notice of that performance. 2ly. Here is no good request expressed either in substance or circumstance, for for the circumstance there is but two dates to do it, in which it cannot be well intended it could be done. 2ly. It is said, he did not deliver vinum prædictum, which is an incertain implication of a Request: for the word deliberare is not a proper term to express the Request, and the verdict doth not help it. Bacon Justice, There ought to be an election by the Plaintiff, but the Defendant ought first to shew the Wines, and it was of his part to have appointed the time when he would shew them. Roll Justice, The Promise and Request was at Norwitch, and it was sufficient for the Plaintiff to make the Request there: but the Defendant ought to shew the Election. Plaintiff the Wines, without which the Plaintiff can make no election, and the substance of the Declaration is to this intent. Judgement was given for the Plaintiff.

Mich. 23 Car. Banc. Reg.

VWhy a Prohibition should not be granted. BY the rule of the Court, this day cause was offered to be shewn why a Prohibition should not be granted to the Ecclesiastical Court, for granting Letters of Administration to a Sister of the half-blood, when there was a Brother of the whole-blood who sued for them, and was denyed. The cause shewed

ſhewed was, that it is in the power of the Ordinary to grant Adminiſtration, either to the Brother of the whole-blood, or to the Siſter of the half-blood, at his election, becauſe they are in equal degree of kin to the Inteſtate. And to this the Court agreed. But Bacon Juſtice ſaid, that in the Caſe at the Bar, Letters of Adminiſtration are granted to the Husband and his Wife, and ſo to one, viz. the Husband, who is no kin at all to the Inteſtate, but a Stranger, and if he ſurvive his Wife, he ſhall have all the Goods, and all the kindred will be defrauded, which is not reaſonable, and therefore the Adminiſtration is not good. And for this reaſon a Prohibition was granted.

Mich. 23 Car. Banc. Reg

IT was moved in arreſt of Judgement, that the Plaintiff had declared of the Trover & Converſion, of a certain number expreſſed in the Declaration of pieces panni lanii, Anglice, of red, yellow, and black Coath, which is uncertain, and cannot be uſed, as it is here, to expreſſe Cloaths of divers colours, for panni lanii ſignifies only woollen Cloaths. But Bacon Iuſtice ſaid, all is but woollen Coath, though they be of divers colours, and therefore it is good enough. Hodſden the Secondary ſaid, ſometimes the colours are uſed to be expreſſed, and ſometimes not. Bacon, It is better to expreſs the Colours than not, yet it is good enough without the expreſsing of them. Therefore let the Plaintiff take his Iudgement. Arreſt of Iudgement in Trover and Converſion.

Williſon and Crow.

Mich. 23 Car. Banc. Reg.

WIlliſon brought an Action upon the Caſe againſt Crow, for ſpeaking theſe words of him, You are a bankrupt Skrub and hath a verdict; it was moved in arreſt of Judgement, that the words are not actionable, becauſe they are Adjective words, and ſo are not poſitive enough to ground an Action. But the Court held, they were actionable, for the word Banckrupt in it ſelf was not an Adjective, and the joyning of it with Skrub made it not ſo, but it ſhould be underſtood as much as to ſay, You are a Skrub, and alſo a Banckrupt. And judgement was given accordingly. Arreſt of Iudgement in an action for words.

The King againſt Holland.

Hill. 23 Car. Banc. Reg.

vid. All. 14.

THe Court delivered their opinions in the Caſe between the King and Holland formerly argued; And firſt Bacon Iuſtice ſaid, that there can be no Iudgement, for there is a miſ-tryal in it; for firſt, there is no Venire facias: and ſecondly, there is a diſcontinuance, becauſe the Venire ſhould be to return duodecem probos & legales homines quorum quilibet habet 40 s. lands by the year at the leaſt, & it is every of whom, having 4 l. lands by the year, which is contrary to the direction of the Statute. To this Roll anſwered, that he held the Venire to be good, and ſo the tryal good, for if the Jury hath every of them 4 l. a year in Lands, he hath 40 s. a year in Lands at leaſt, Iudgement given in the Caſe between the King and Holland.

and more, and therefore it is a better Jury, and more ſufficient; and by this the verdict ſhall not be vitiated, though the Venire be not quorum quilibet habet 40s. per annum ad minus, as the Statute directs, and he cited 21 Iac. Philpot and Fielders Caſe to be ſo adjudged; and he ſaid, that Lands in the hands of a Truſtee may be extended for the Kings debt, but that he did not conceive how the King can have Copyhold-lands that are in truſt for an Alien. Bacon Iuſtice, The Commiſsioners that found this inquiſition for the King had no power by their Commiſsion to ſeize the Lands into the Kings hands, but only to enquire what Lands the Alien had. The Court ordered, that cauſe ſhould be ſhewn Tueſday following, why the party ſhall not be reſtored to his Lands, which were ſeiſed into the Kings hands by vertue of the Inquiſition. Poſtea.

Extent.

Seiſure.

Hill. 23 Car. Banc. Reg.

Error upon a Iudgement in an Action upon the Caſe. Incertainty. Tryal.

A Writ of Error was brought to reverſe a Iudgement given in an Action upon the Caſe, upon an Aſſumpſit, brought by two at Maydſton in Kent, and the Error aſsigned was, that the Plaintiffs in their Declaration do ſay unde dixerunt quod deteriorati ſunt, &c. whereas it ſhould be unde deteriorati ſunt, and not dixerunt, &c. for that is poſitive, and the other not, for they may ſay they are damnified, and be not, and there can be no tryal upon ſuch uncertain words. Roll Iuſtice ſaid, the words are not well laid; yet if there were other words ſufficient to expreſſe the dammage the Plaintiff had received it would be good enough, but theſe words here govern the whole ſentence; Therefore let the Defendant in the Writ of Error conſider how he can make the Declaration good.

The King againſt Savage.

Hill. 23 Car. Banc. Reg.

For quaſhing an Endictment for Felony. Incertainty. Iniquiſition.

One Savage was arraigned in this Court upon an Endictment of Felony, for killing of a Woman within the Verge. The truth of the Caſe was, he beat and wounded the Woman at Leſne Abby in Kent, which is within the Verge, but the Woman dyed at Sevenock in Kent, which is out of the Verge. The Priſoner prayed the Court he might have Walker of the Inner-Temple aſsigned him for Councel, for matter in Law, which the Court granted. Walker for the Priſoner, prays the Endictment may be read, which was done accordingly; Whereupon he took theſe exceptions to it, 1. That the Endictment doth not ſhew upon what part of the body particularly the Woman was wounded, but it ſaith only generally, that it was upon the hinder parts of her Body. 2ly. It ſayes the Woman dyed de diverſis plagis, but it doth not ſhew of what length and breadth the wounds were, as it ought to do, nor doth it ſay of which of the wounds ſhe dyed, and ſo it is uncertain, and cannot be known whether the Wounds were mortal or no. 3ly. By the Statute de Articulis ſuper Chartas, in this Caſe where the party was wounded within the Verge, and dyed without the Verge, the Coroner of the Verge, and of the County ought to joyn in taking the Inquiſition ſuper viſum Corporis, which is not here done; but the Inquiſition is taken by the Coroner of the Verge only. Bacon Iuſtice ſaid, the party is ſaid to be ſlain where he dies, not where he was wounded. The Court ordered the Priſoner to appear a week after, and in the mean time

to

to give notice to the Kings Councel of the Exceptions taken to the Endictment, and know whether they will maintain the Endictment; the ſame Term the Endictment was adjudged not good, and the party was bayled. Bail.

Thyn againſt Thyn.

Hill. 23 Car. Banc. Reg.

Hill. 22 Car. rot. 1638.

DAme Katherine Thyn brings a Writ of Dower in the Common-pleas againſt Sir James Thyn, and hath a Verdict, and a Judgement; the Defendant brings a Writ of Error to reverſe this Judgement in this Court, and aſsigns for Error; 1. In the Return made by the Sheriff, for he doth not ſay, that the Proclamation was made at the Church of the Town, where the Summons was made, and a Summons upon any one part of the Land, as hath been objected on the other ſide, is not good, neither by the words, nor the intent of the Statute: for then the words in the Statute ſhould be ſurpluſage and idle, that particularly directs how it ſhould be. And as to the Objection, That a Summons upon one part of the Land is good in fiction of Law, for the reſt of the Land, I anſwer, That this is not ſo where the Statute directs the Summons, and the words ſecundum formam Statuti cannot help where the Statute is not ſhewed to be purſued, and ſo ſaith Dyer, That ſubſtantial words ought to be mentioned, Hill. 24 Iac. Hob. Pl. 179. Allen and Walkers Caſe. 2ly. There is Error in the Demand of the Dower: for the certainty of the Tithes demanded ought to appear, and it doth not ſo here, 11 Rep. Harpers Caſe, f. 25. And for that which is ſaid in anſwer unto this, That a Demand of Dower is different from other Demands, I agree it to be true. 8. H. 6. 3. Yet the things demanded in Dower muſt be certainly demanded, 11 H. 7. f. 25. as it is in an Aſsiſe, for an Aſsiſe de uno tenemento is not good for the incertainty, 4 E. 2. Fitzh. Aſsiſe, 451. Eſſovers demanded ought to be ſhewed particularly; ſo is it of a Corrody, 11 E. 3. Fitzh. Dower, 85. Dyer, f. 84. 7 E. 6. Paſc. 5 Iac. the Counteſs of Oxfords Caſe; and whereas there hath this difference been taken between a Demand of Tithes in groſs, and of Tithes appendant, and that Tithes in groſs muſt be particularly demanded, but it is not neceſſary to demand Tithes appendant particularly, I anſwer, This is not ſo, for their appendancy doth not make them not to be demanded particularly, no more than if they were in groſs, 18 E. 2. Aſsiſe, 377. A Corrody muſt be particularly demanded, and all the Preſidents prove it, and it was ſo held, Paſc. 8 Car. rot. 271. in Bruer and Drakes caſe in a writ of Error in this Court, upon a judgement given in Dower in the Common-pleas. A 2d. exception to the Demand of the Dower is this, the Writ of Dower is de manerio de Imber, and the Demand is of Dower in parochia de Imber, and ſo it is larger than the Writ: for a Pariſh may comprehend many Mills. Stat. 1 H. 5. C. 5. 22 E. 4. C. 2. Mich. 34 Eliz. rot. 1537. Brad and Biſhops Caſe in the Exchequer, Paſc. 38 Eliz. Bedel and Scarborows Caſe in an Ejectione firmæ in this Court. It is true, that generally a Pariſh ſhall not be intended larger than a Mill, if the contrary do not appear: but here the contrary doth appear by the words of the Demand, which are de rectoria de Imber & Tymesbury infra parochia de Imber, 3, & 4 Philip & Mary, Dyer,

Error in a Writ of Error. Return. Summons. Fiction of Law. Statute. Demand. Aſsiſe. Pariſh.

er, 142. and the different penning and expreſsion of the Demand is to be obſerved: for by that it appears there is a difference betwéen Imber, and the Pariſh of Imber, Grants, Fitzh. 87. by granting a Mannour with the appurtenances, an Advowſon will paſs, 19 E. 2. Tit. brief, the Writ abated, for variance betwéen the Writ and the Count. A 4th. Error is to avoid the execution, becauſe of the Error in fait: for the Hundred of Warmiſter doth extend to Sutton parva which is not named in the Writ, and ſo the dammages are given for more than is demanded, and it ſhall not be interpreted by Intendment, and the Hundred is not demanded: for the Will relates to the Land and not to the Hundred, 6 E. 3. 12. 8 Rep. 119. Bonhams Caſe, and prays Judgement for the Plaintiff in the Writ of Error. Maynard of Councel with the Defendant deſired time to argue, and it was granted. Poſtea.

Grant. Abatement. Variance.

Dammages. Intendment.

Chambers againſt VVollaſton,

Hill. 23 Car. Banc. Reg.

Mich. 22 Car. rot. 21.

CHambers brought an Action of Aſſault and Battery, and falſe impriſonment againſt Wollaſton, Wollaſton pleads a ſpecial Plea of Juſtification, by vertue of a Cuſtom in the City of London, whereby he had authority to take and impriſon him for diſturbing an Election of Wardens of a Company, and untill he would promiſe not to diſturb ſuch Elections afterwards. To this Plea the Plaintiff demurs, and takes theſe Exceptions, 1. The Cuſtom pleaded is againſt Law, for it appears not that there was any ſute depending either by Bill, or Endictment, or otherwiſe, and ſo the Cuſtome is againſt Law, Stat. 25 E. 3. C. 5. 25 E. 3. C. 3. and ſo was the Petition of Right, 3 Car. And though the Cuſtoms of the City of London are confirmed by Statute-law, yet illegal Cuſtoms are not confirmed. 2ly. The Judgement is againſt Law, for by the Judgement no remedy is given for the offence committed to the party againſt whom it is commited, but only that the offendor ſhall be impriſoned untill he promiſe not to diſturb Elections again. 3ly. The party committed is not within the Cuſtom by the Defendants own ſhewing. 4ly. The Cuſtome ſet forth is not proſecuted: for the commitment is not for the Diſturbance, but becauſe the party will not promiſe not to diſturb again. 5ly. The detenſion of the party in priſon is againſt Law. Hales of Councel with the Defendant, deſired time to argue, and the Court deſired to have Books.

Demurrer upon the Cuſtom of London pleaded.

Cuſtome.

Iudgement.

Holdigh againſt Chace.

Hill. 23 Car. Banc. Reg.

Paſc. 23 Car. rot. 326.

HOldigh brought an Action of Debt againſt Chace, as an Executor, upon an Obligation made to the Teſtator. The Defendant pleaded non eſt factum, and upon this Plea an Iſſue was joyned, and a ſpecial Verdict found; upon which Verdict the Caſe appeared to be this, The Defendant Chace was

A ſpecial Verdict upon Non eſt factum, pleaded to a Bond.

was bound in an obligation for the payment of a certain sum of mony unto A. B. and to I. S. joyntly. I. S. dyes, A. B. survives, and makes Holdigh his Executor, and dyes, Holdigh brings an Action of Debt in his own name against Chace the Defendant, and declares upon this obligation made to the Testator, and to I. S. and doth not aver that the Testator did survive I. S. The Defendant pleads non est factum, and the question was whether this be a good plea or no, and to prove that it is no good plea, but that it was the deed of the Defendant, the Councel for the Plaintiff cited these books, 36 H. 6. 4. 35 H. 6. fol. 39. 46 E. 3. 7. 14 E. 1. fol. 4. 18 E. 2. 2. and put this case. Two enfants joyntenants alien, and one dies; The survivor brings a dum fuit infra ætatem, and counts of the Feofment of one of them, and there the right was adjudged not to be severed by the Feoffement, and so the writ good, and in our case the matter of variance alleged goes to the writ, and not the Action, and it is now too late for the Defendant to take advantage of it, and prayes Judgement for the Plaintiff. Roll Iustice said, the issue is whether it be the Defendants deed or not, and without doubt it is his deed, and therefore let him shew cause why the Plaintiff should not have Iudgement. Plea.

Boone against Sheers.

Hill. 23. Ba. Reg.

Trin. 23 Car. rot. 288.

BOone brought an Action of Debt upon an obligation of 400 l. against Sheers, and declares that the condition of the obligation was, that the Defendant should make such a voyage with a Ship, and pay certain monyes at his return, and other conditions mentioned, and for not performing the conditions he brings his Action. The Defendant pleads in bar that the Ship was taken in the voyage per homines bellicosos, and demands Iudgement of the Action: To this plea the Plaintiff demurred, and shewed for cause that the Plea did not give answer to all the Declaration. Yard of Councell with the Defendant said, the plea was good; for the plea answers the whole condition of the Bond, which was first to make the voyage with the Ship, and then at his return to perform the other conditions, and being hindred in the one, he was not bound to perform the other. Bacon Iustice, Let us see a book to consider of. Demurrer to a Plea. Plea. Demurrer.

Royston against Mees.

Hill 23 Car. Banc. Reg.

ROyston makes a lease for years of certain lands to I. S rendring rent, the lessee makes his will, and makes Mees the Defendant his Executor, and dyes, the Executor possesseth himself of the remainder of the term of the lands let, and after the rent is behind. Royston brings an Action of Debt against the Defendant, and declares against him for the rent so behind in the debet and detinet, and upon this an issue is joyned, and a verdict for the Plaintiff. The Defendant moves in arrest of Iudgement, and shews for cause that the Declaration is not good, because the Action being an Action of Debt brought against the Defendant, as an Executor, it ought to have been in the detinet, and not in the debet and detinet. But Wild of Councell Arrest of Iudgement in Debt. Declaration.

cell with the Plaintif argued that the Declaration was good, and the Action well brought in the debet and detinet, and cited Brook title extinguishment 34. and the comment: 526. and said it is an Action founded upon a lease by deed which was made by the Testator, and cited 20 H. 6. 10 H. 7. fol. 50. And that it is the constant form of charging Executors in such cases, 14 H. 4. fol. 29. Fitzh. Tit. responder, 7 E. 6. Dyer 81. 10. rep. 128. And said the verdict hath found it in the debet and detinet which shall be intended to be true, 9 Ed. 4. 41. 17 Jac. Paul and Mordyes Case in the Common pleas, and 7 Iac. Smith and Nicholas Case, and prayes Judgement for the Plaintiff. Hales for the Defendant argued that the Declaration is not good. 1. He said, the Action is good in the detinet, because the profits of the land let, which are over and above the rent to be paid for it, reserved upon the lease, shall be only assets in the Executors hands. 2. It cannot be good both wayes, and the Term is in him as Executor, not the rent, and there is a difference between contracts Executory, and contracts Executed; but it may be said, the rent to be paid may be more than the profits of the land is worth, I answer, this shall not be presumed in law if it be not so shewed. 43 Ass. pl. 23. 16 H 7. fol. 2. The Action is brought for all the rent incurred; therefore it shall not be presumed that the land is not worth the rent that is paid for it: and as for the verdict it shall help nothing; for a verdict shall not supply a necessary part of a Declaration omitted, and if he owes then he detains, and I conceive Hargraves Case to be good Law, though denyed by the Councell on the other side, and here the privity of the contract is not determined, and so prayes Judgement for the Defendant. Roll Iustice, It is for the advantage of the Executor to bring the Action in the detinet; for then he shall be charged only for the goods of the Testator, and not for his proper goods, and it may be the land is lesse worth than the rent, and that the partyes have consented the Action should be brought in this maner. Bacon Iustice cited Pawls Case Mich. 17 Iac. But entred Pasc. rot. 346. That the Action may be brought in the debet and detinet, and if the Plaintiff will bring his Action here in the detinet it is not for your disadvantage, and he may at his election bring it either way. Roll Iustice, Here the verdict answers the point of the issue, and therefore is good. The Court ruled the Plaintif to take his Iudgement, except better cause shewn to the contrary.

Difference. Contracts.

Verdict.

William against Tyrer.

Hill. 23 Car. Banc. Reg.

Pasc. 23 Car. rot. 224.

Arrest of Iudgement in Covenant.

WIlliam brought an Action of Trover and Conversion against Tyrer for certain goods of the Plaintiff the Plaintiff hath a verdict, The Defendant moved in arrest of Iudgement, and took these exceptions to the Declaration. 1. The Plaintiff declares pro tribus duodenis fili, Anglice dosens of thread, which is incertain; for it may be three dosen pound of thread, or skenes of thread, or ounces of thread. To this it was answered, that it cannot be otherwise expressed, and the words dosens of thread is used amongst Merchants, and well known unto them what is meant by them. 2ly. He declares for so many pounds Muscat. in stead of Nucum Muscatarum, Anglice Nutmegs. But this exception was mistaken, for the record was otherwise, and besides it was with an Anglice which makes it certain. The Court ruled Iudgement to be entred except cause shewed for the Plaintif.

Declaration,

Raw-

Rawſon againſt Bargue.

Hill. 23 Car. Banc. Reg.

The Caſe between Rawſon and Bargue being an Action of Debt upon the Statute of 2 E. 6. for not ſetting forth of Tithes, wherein upon a ſpeciall verdict, the queſtion was whether the Church were a free Chapel given to the King, within the Statute of 1 Ed. 6, was again argued by Latch for the Plaintiff, and by Brown for the Defendant, Latches argument was to this effect. 1. He ſaid, that the Law ſayes it is preſentative although it be not; and 2ly. It is ſufficiently found to be a parochial Church, yet it is not material whether it be found ſo or no. Next the words of the Statute do not extend to give donatives to the King. 3ly. It is not given to the Crown, and although the Declaration and verdict be that it is a free Chapell, yet it is not comprehended as a Chapel preſentative. Lit. 94. The word free makes a diſtinction of things, and the party ought not to confound things, and a free Chapel is alwayes interpreted for a Church donative, and not preſentative. The right inveſtiture of Churches was challenged from the foundation of them, untill within this 400 years it was altered by the Common law; Seldens Hiſtory of Tithes, fol. 392. and upon that alteration the name of a free Chapel came. Reg. 41. It is ſaid to be free from eccleſiaſticall juriſdiction. Fitz. tit. Brief 600. 3 Ed. 3. Fitz. Tit: Ayde du roy 33. 14 H. 4. 11. 22 H. 6. 25. 22 H. 6. 27. by Danbye 26 H. 6. Fitz. grants. 12 Nat. brev. 33 E. 34. f. 27 E. 3. 84. Cowels interpretor, Tit. free Chapel. And in all Statutes the word free Chapel is meant of donatives. Stat. 26 H. 8. cap. 3. Stat. 37 H. 8. cap. 4. Stat. 1 Ed. 6. cap. 14. Regiſt. 307. But it is objected that free Chapels extend to preſentatives, becauſe they are with cure, Lit. Com. 344. a donative may be parochial, 7 E. 3. f. 4. To this I anſwer, Churches had cure of ſouls, when they were donatives. To the 2d. point, by the meaning of the Statute it appears, that only donatives were intended, as the preamble of it doth declare; And all Chapels are held in Frank almoigne as well as donatives, and ſo all may be given to the King by the ſame reaſon. Another objection is that the word Capella is ſuperſtitious, and therefore being of a ſuperſtitious foundation it is given to the King, and Cowels Interpretor is urged to prove the word to be ſo derived, To this I anſwer, that Sir Henry Spelman as learned an Author as Cowell, in his gloſſary rejects Cowells derivation of the word Capella, and ſaith that Capella is uſed promiſcuouſly for any upper covering; And though the name were ſuperſtitious, yet that makes not the Chapel to be ſo; for ſo the Church of St. Andrew, or St. Dunſtan, ſhould be ſuperſtitious, and given to the King by the Statute. There is a double preamble of the Statute, 1. A recitall of another Statute, and the taking away of other ſuperſtitious uſes. Preamble of the Statute, 37 H. 8. 22 Ed 4. cap. 7. 8. rep. 137. beaſts of the Foreſt are not Cattel, 3. rep. The marques of Winchesters Caſe, Com. 204. That ſome generals may be taken in a reſtrained ſence, 9 H. 6. 36. Words of a Statute ought not to be interpreted to deſtroy naturall Juſtice. The ſtile alſo of the Act doth not ſhew that donatives are only intended, and the Crown hath not granted this away, 37 H. 8. and ſo not deſtroyed them. Donatives uſually paſſe as lay fees, and the paſsing of them as lay fees alters not the nature of the Chapells, and the Statute gives it to the King as the incumbent had it, and there

2 Arguments whether a free Chapel or no, and the Iudges opinions.

Free Chapel.

Preſentation. Donative.

Tenure. Frank-almoigne.

Preamble.

Interpretation.

Lay fee.

there is a saving of the nature of it in the Statute. It is objected, that he hath not been presented ratione lapsus. To this Hob. 337. in Greens Case gives an answer, and Potters Case 9 Car. in the Common pleas, and it is well found here in the verdict for the Plaintiff, That it is not within the Statute. Brown for the Defendant in his argument said, the question is whether it be a free Chapel, given by the Statute of 1 Ed. 6. and 1. It is within the words of the Statute; and 2ly. It is within the meaning of the Statute; for the words they are simplicitur generalia, and so large as can be, and all Chapels are given by them, and none excepted. And here 1. The nature of a free Chapell is to be considered; For Cowel he is not fit to be cited, for his book was condemned by Parliament, and burnt as erroneous, and scandalous, in 4 E. 3. 28. Peeter Corbets Case, a Chapel is part of a Church, 8 H. 6. 32. 37. Bracton 241. 17 Ed. 3. 58. 9 Ed. 3. 11. these are not within the Statute of 1 Ed. 6. 2ly. There is Capella parochialis which is subject to the jurisdiction of the Ordinary, 14 E. 3. Fitz. quare impedit 183. Lynwood 142. 8 Ed. 3. 60. The book of entryes 542. Long quinto 26. 3ly. A Chauntry is taken for a Chapel. 4ly. A free Chapel is nomen comprehensivum, and comprehends much, 13 Ass. pl. 2. 15. Ass. pl. 8. The essential matter of a free Chapel is to be free from ordinary jurisdiction, and not to be visited by the Ordinary, and one comes regularly to a free Chapel by donation, but being in, he is free from ordinary jurisdiction, 18 E. 3. Fitz. scire fac. 11. 17 E. 3. f. 45. Brook præmun. 21. It hath been objected that it is presentative, and so it is not free; I answer it may be free though it be presentative, and so the verdict finds it to be in the foundation of it. 2ly. The Plaintiff brings the Action as Rector of a free Chapel, and now he shall not be suffered to deny his own Declaration. 3ly. The admission, institution, and induction implyes jurisdiction till the contrary appear, viz. that it is a free Chapel notwithstanding it be presentative, 16 E. 3. Fitz. brief 660. None but the King can found a free Chapel, and although it be free by prescription, yet it shall be intended to be at first so founded. Institut. 44. 9 H. 6. f. 17. 20 E. 3. 56. The King by foundation of a free Chapel, may grant that it shall be presentative, and yet when the party is in, that it shall be free from the jurisdiction of the Ordinary. Fitz. nat. br. 48. C. The dean of Battel in Sussex is presentative to the Vicarage of Battel by the Bishop of Chichester; but when he is in, he is free from the jurisdiction of the Ordinary, Davyes Rep. fo. 72. Cooks instit. 344. A lapse may incur of a free Chapel by the foundation of a free Chapel, 33 E. 3. fol. 3. 17 E. 3. fol. 51. 17 E. 3. fol 12. The foundation of a thing may alter the law, 7 E. 3. fo. 18. The old book 316. The essential difference of a free Chapel from another, is to be free and exempt from the jurisdiction of the Ordinary, 17 E. 3. close roll in the Tower. Seldens book of tithes 441. regist. 40, 41. Pasc. 3. Jac. in this Court Fachell and Gaires Case. There are divers writs in our books to discharge free Chapels from visitations, and therefore it appears they are exempt from the Ordinaries jurisdiction. But it is objected that the presentation makes it presentative, though it were not so before. This is answered, 14 E. Fitz. 9 E. 31. 27 E. 3. 34. It is not the presentation made by the party, but the foundation that makes it presentative. 2ly. It is objected that it is parochial, and therefore is not free; I answer, it is not so found although it be so claimed, and though it be so claimed it makes nothing to the purpose. The parish Church of St. Maryes in Shrewsbury was parochial, and yet given to the King by this Statute, 13 H. 4. Fitz. brev. 807. Hil. 17. Iac. in this Court in Grubbam and Gales Case adjudged, that a Chapel may be founded in a parish Church, and such are given to the King, Dyer 267. 10 Car. Pasc. in the Common pleas Rawlins and Yaxlyes Case. 2ly. For the words of the Statute this is not one of the free Chapels excepted in the Statute, and therefore it is within

Cowels Book.

Divers sorts of Chapels.

Foundation.

Iurisdiction.

in

in the Statute, and there appears no viſitation in the verdict found, and exceptio in non exceptis format regulam. For the meaning of the Stat. Brook prebend. 2 d. 10. rep. 128. All parts of a Statute ought to ſtand together if it may be, and one part of it ought not to deſtroy another part, generale dictum generaliter eſt intelligendum; The exceptions of the Statute ſhew the meaning of it. It is objected, that the being a free Chapel makes it not to be ſuperſtitious, I anſwer, if it be a free Chapel by Common intendment it is ſuperſtitious, but though if it be not, yet it is given by the name of a free Chapel. By the verdict it was taken for a free Chapel, and that it was ſeiſed into the Kings hands. There is much light to be had in interpretation of laws, by conſulting with thoſe that made them, and to know how they had interpreted them; for expoſitio contemporanea eſt optima. Plow. 466. Paſc. 35 El. Clark and Mark in the Common pleas. If it be not a free Chapel, yet being found ſo, it ſhall be taken to be ſo in reputation, and enough to give it to the Crown: And the preſentation to it is ad rectoriam ſive liberam capellam, and ſo not certain, and ſo it is not a good preſentation, becauſe the King was not rightly enformed what it was he preſented to, Regiſt. fol. 203. 19 E. 3 Fitz. quar. imped. 360. and ſo prayes Judgement for the Plaintiff. Roll Iuſtice, There is a difference where a Chapell is founded within a Church, and where the Chapel is Parochial. Bacon Iuſtice held, that it was given to the King by the Statute; for it is found to be a Chapel paying tenthes, and this Statute looks backward to the Statute of 37 H. 8. and to things in being, and the Chapel was within that Statute, and by it he might have ſeiſed it, and it is within the words, and intent alſo of the Statute of 1 Ed. 6. and the proviſo of the Statute ſhews the meaning of it, and Capellæ dependentes, or Chapels of eaſe are not given by the Statute. Roll Iuſtice to the ſame effect, and ſaid, This Statute of 1 Ed. 6. was made to ſupply ſomething omitted in the Statute of 37 H. 8. and it is plain, that it is within the words, and we have no warrant to interpret it otherwiſe, ſince it doth not appear that it is excepted; alſo it is not found to be a Pariſh Church, but that they claim it to be ſo, and if it were it would not help. 2ly. It may be preſentative, and yet a free Chapel according to the foundation, and endowment of it, and a free Chapel, may become a Church by preſentation of the Patron, but it appears not to be ſo to us. The proviſo of the Statute ſhews that it was not the intent of the Statute, to exempt all free Chapels, but thoſe only which are named, and no more: And the intent of the Statute was that the King ſhall have it as a lay thing, and he was not compelled to preſent. and here the Patron hath taken the profits, and there are no inhabitants within the Pariſh, for the ſeignory compriſeth all the pariſh, and if the King preſents by lapſe where he ought to do it pleno jure, the preſentation is not good. For theſe reaſons, The Iudgement was given for the Defendant, if better matter be not ſhewn before the end of the Term.

Interpretation

Reputation.

Preſentation

Fulham.

Hill 23 Car. Banc. Reg.

For Execution notwithſtanding a writ of Error brought in parliament.

Fulham had a Judgement in this Court againſt 3 Defendants, two of the Defendants bring a writ of Error in Parliament. Fulham that had the judgment moves the Court, he may have Execution upon his judgment not-with-

withſtanding the Writ of Error brought in Parliament, becauſe the Record is not well removed, for the Writ of Error is not good, for the Judgement is againſt three, and the Writ of Error mentions but two of them. Roll Iuſtice, I doubt you cannot have execution, but the Writ of Error muſt be abated in Parliament, and then you may come here and move for execution, for now it is not ſafe to grant it. Move it in Parliament to have it abated, or move here again at your own adventure.

Abatement.
Execution.

The King and Holland.

Hill. 23 Car. Banc. Reg.

In this Caſe between the King and Holland, after divers arguments at the Bar, and the opinion of the Court delivered, The Court was moved for an Amoveas manum to the Chancery, that the party may have his Land out of the Kings hand. The Court anſwered, The Judgement is to be given here, if there be cauſe for the King, if not againſt him, and you ought not to go to the Chaucery. And all that we can ſay is, that the King ſhall not have Iudgement.

For an Amoveas manum to the Chancery.
Amoveas manum.
Iudgement.

Hill. 23 Car. Banc. Reg.

The Court was moved to quaſh an Endictment of forcible Entry upon theſe Exceptions. 1. That it did not ſay, that the forcible Entry was contra Coronam & dignitatem, but this the Court over-ruled. A ſecond exception was, That it doth not ſhew that the party was ſeiſed at the time untill the Defended entred by force upon him. 3ly. The Endictment concludes, contra formam Statuti, and it ought to be ſtatutorum, for the Statute of 8 H. 6. upon which this Endictment is framed, relates to other Statutes. To this the Court ſaid, if the Endictment be ſo it is ill. 4ly. The Endictment ſaith, he entred peaceably and detained with force, and ſuch an Endictment hath relation to two Statutes. To this it was anſwered, that the Statute of 8 H. 6. is ſufficient to found the Endictment without relation to other Statutes, for this clauſe upon which this Endictment is framed, is a new Law, and hath no relation to precedent Statutes, for it is here only for a forcible deteyner. Roll Juſtice doubted of this, for it is ſaid, that the Statute of 8 H. 6 ſhall be added to the new Statute. Bacon Iuſtice differed in opinion and ſaid, the Statute of 8 H. 6. was not made to piece up the other Statute, but is a new Law as a to this clauſe. The Court will adviſe further.

For quaſhing an Endictment.
Endictment.

Chambers againſt VVollaſton.

Hill. 23 Car. Banc. Reg.

79.

This Caſe was again moved and argued by Ward of Councel with the Plaintiff. The Action was an Action of Aſſault and Battery, and falſe impriſonment, The Defendant pleaded a ſpecial Juſtification by vertue of the Cuſtom of the City; To which Plea the Plaintiff demurred, ſive

Argument upon a ſpecial Plea.

five points were ſpoken by the Plaintiffs Councel in his Argument. 1. He ſaid, the proceedings againſt Chambers were neither agreeable to the Common law, nor to Magna Charta, and therefore illegal, and not warrantable, notwithſtanding the Cuſtome pleaded to back them. 2ly. The Cuſtome it ſelf is not well purſued, Bracton, 55. 5 Rep. 64. The King cannot grant power to a Court to commit againſt the Common-law, or Statute-law, Magna Charta, 54. 42 Aſſ. Pl. 5. and though one ſubmit himſelf to be committed, for a thing for which he is not committable by Law, this ſubmiſſion is void. 3ly. The Cuſtom pleaded is againſt Magna Charta, and divers other Statutes, Stat. 9 H. 6. cap. 5. 8 E. 3. Cooks Magn. Chart. f. 16. Bracton, 334, 335. 43 E. 3. f. 32. and it appears not the pleadings were in Latin, as they ought to be, 36 E. 3. neither was the Confeſſion legal, nor entred upon Record. 3ly. The Judgement varies from all other Judgements in Law: for the Commitment was, that he ſhould ſtand committed untill he would promiſe that he will diſturb no more; And 2ly. untill the Court ſhould take further order, and this is againſt Law, 8 Rep. f. 59. 2 Inſtit. 52. 4ly. The Statute of Rich. 3d. confirms not the Cuſtom, for if it before Magna Charta it is taken away by that Statute, for it is not excepted in it, Magna Charta cap. 19, 29. Miror of Iuſtice, cap. 5. Long Quint. 40, 41. 5ly. The Cuſtom is not well purſued in the Return, for the Oath extends to be obedient to the Bayliff, &c. for the time being, but the Return is not ſo: but it ſaid, that he be obedient to good Laws, and this is not in the Oath. And the Return is againſt their Cuſtom, and Judgement for the Commitment, and ſo he prayd Judgement for the Plaintiff. Roll Iuſtice ſaid, That the Judgement and the Return are contrary: for the Judgement was, that he ſhall be committed, becauſe he would not promiſe, not to diſturb: and the Return is, that he promiſe that he will not diſturb. Cauſe was to be ſhewn why the Plaintiff ſhould not have Iudgement.

Cuſtome. Submiſſion. Pleadings. Iudgement Return.

The King and Apſley.

Hill. 23 Car. Banc. Rep.

APſley removed certain orders made againſt him by the Commiſſioners of Sewers for Weſtminſter, by a Certiorari into this Court. And upon the Return made theſe exceptions were taken. 1. That it doth not ſay the Commiſſion of Sewers was under the Great Seal, as it ought to expreſs, 7 Car. Allen and Carter, & 5 Car. Rayl and Mannings Caſe, and Paſc. 14 Car. Hungates Caſe, and becauſe it is not ſo ſet forth there can no Iſſue be taken, whether they be Commiſsioners or not. 2ly. The Commiſsion is not well pleaded, for it appears not that three of them were of the quorum, as the Statute appoints there ſhould be. 3ly. The Return is in Engliſh, and it ought to be in Latin. But to this Roll Iuſtice anſwered, That the Return is good notwithſtanding, for the Commiſsion is in Engliſh. 4ly. It doth not appear, that Harts-horn lane, touching which their orders were made is within Weſtminſter, and ſo it cannot be well known, whether it was within their power, by vertue of their Commiſsion to make any orders touching that place. Hales of Councel for the Commiſsioners moved, the Return might be amended. But the Court anſwered, It could not be, becauſe the Return was made the Term before. And it was ordered, that cauſe ſhould be ſhewn Tueſday following, why the Return and Proceedings ſhould not be quaſhed.

To quaſh orders of Commiſsioners of Sewers. Return. Amendment.

The King againſt Page and Harwood.

Hill. 23 Car Banc. Reg.

Quſtion upon the Statute of Stabbing, whether Principle or Acceſſory. Principle. Acceſſory.

THree men were endicted at an Aſsiſes in the Country for Felony, for killing of a man, the Endictment was framed upon the Statute of 1 Iac. made againſt Stabbing; They were all found guilty. He that did the fact was condemned, and executed: but becauſe the Juſtice of Aſsiſe doubted whether the other two were Principles within that Statute, or but Acceſſories, they would not proceed to Judgement againſt them; Whereupon they were brought to this Bar to be proceeded againſt for the Felony, and the doubt was, in regard they were only preſent, and abetting the perſon that did the fact, and uſed no Action towards the death of the party, whether they were Principles within the Statute, or but Acceſſories. Roll Iuſtice ſaid, They are not Principles, but Acceſſories, and ought to have their Clergy: for the Statute of Stabbing being a penal Law, it ſhall be taken ſtrictly and not extended to equity, and in Swinertons caſe Bramſton, Barkley, and Iones, three of the Judges of this Court directed the Jury, the Caſe being of the ſame nature with this, to find the parties only acceſſory. But the Jury in our Caſe have found them guilty as Principles, and I doubt upon that, whether the Tryal be good or no. Walker of Councel againſt the Priſoners ſaid, the Statute of Stabbing makes no new offence, and therefore it is doubtfull, wheher it be neceſſary for the Endictment to conclude contra formam Statuti. Roll Iuſtice ſaid, it ought to be ſo. But Bacon Iuſtice doubted. The Court admitted the Priſoners to their Clergy, and they were burnt in the hand in view of the Court by the Hangman of London, and the Priſoners bound each for the other to their good behaviours, and to appear in Court the next Term.

Clergy.

Tryal.

End.ctment.

Hales againſt More.

Hill. 23 Car. Banc. Reg.

Mich. 23 Car. rot. 582.

Error upon a Iudgement in Deb. Demand. Venire.

A Iudgement was given in an inferiour Court in an Action of Debt, and a Writ of Error brought in this Court to reverſe it. The Errors aſsigned were, 1. The plaint is entred generally de placito debiti, which is uncertain, ſo that the Defendant cannot know what is demanded. 2ly. In the awarding of the Venire, it is duodecim, &c. and doth not ſay probos & legales homines. Bacon Iuſtice, Duodecim in the Venire, with an &c. is not good in an Inferiour Court, but this is in the awarding of the Venire, and therefore well enough, but the firſt is a good Exception in my Judgement. Therefore let the judgement be reverſed, except cauſe ſhewn to the contrary.

The King and Corye.

To be reſtored to a Recorders place.

A Writ of Reſtitution iſſued out of this Court for one Corye to be reſtored to the Recorders place of the City of Norwitch, which was returned and filed. Hales of his Councel opened the Return and cited

Stroods

Stroods Caſe, that one ought not to be removed from any office without ſhewing good cauſe why he is removed, which is not here done, but only a Cuſtom ſet forth, whereby they ſhew they had authority to elect a Recorder for a year only, and at the end of the year to elect another, and that by vertue of this Cuſtom, they had choſen another Recorder in the parties place, he having been in a whole year, which he conceived to be an ill Cuſtom. Roll Iuſtice ſaid, If this be a void Cuſtom, none of the two Recorders were well elected, and ſo Cory cannot be reſtored. And Bacon Iuſtice did alſo doubt, whether any of them were well choſen. It was ſaid, that the Retorn is not traverſable, but ſhall be taken to be true. Bacon Iuſtice held, That the Retorn was not good, and you muſt have an Alias, that we may have a better Anſwer before us: for nothing can be done upon this. But the Court enclined, that a Recorder may be elected for one year. It was ſaid, If a Cuſtom be entire you cannot make one part of it good, and another part of it ill. The rule was, for the party to take an Alias, becauſe this Retorn is not good, and it is too late to amend it, becauſe it is filed.

Cuſtome. Traverſe. Retorn. Amendment.

The King and Symmons.

IN an Endictment of forcible Entry upon the Statute of 8 H. 6. divers Exceptions were formerly taken. Roll Iuſtice anſwered to that, that the Endictment did not ſay, contra Coronam & dignitatem, it was well enough without thoſe words. Another exception was now taken, that the Endictment is ad tunc & ibidem, which is repugnant. This Roll Iuſtice over-ruled, but he doubted whether the Endictment ought to be contra formam Statutorum, or contra formam Statuti as it is, becauſe this Endictment is framed upon divers Statutes. Bacon Iuſtice cited the 4th. Rep. the Caſe of Appeals, and ſaid, it is good as it is contra formam Statuti, and ſaid, that a forcible Entry and Deteyner is puniſhable at the Common-law. The Court deſired to ſee Preſidents. Antea.

To quaſh an Endictment upon the Statute of 8 H. 6. Common law.

Hill. 23 Car. Banc. Reg.

MAynard ſhews for cauſe why a Prohibition ſhould not be granted to the Admiralty, That the parties have moved this matter in the Common-pleas, and did there joyn iſſue upon the ſame, and a verdict paſſed againſt the Prohibition, and a conſultation was thereupon granted. The Councel on the other ſide makes another ſuggeſtion, viz. that the ſentence in the Court of Admiralty, was againſt a perſon that was dead, and that one of the parties who had the ſentence had releaſed. To this the Court ſaid, you might have pleaded this in the Admiral Court. Hill of Councel for the Prohibition ſaid, it is not material what the parties have done in the Common-pleas, for this Court is not bound by it. Roll Iuſtice, If the matter of your ſurmiſe here be tryed already in the Common-pleas, why ſhould you move here upon the ſame ſurmiſe. But it is not arbitrary to grant a Prohibition or not to grant it, if there be cauſe to grant it, and the Tryal in the Common-pleas is no concluſion to us, and if it be miſchievous as is objected, to grant a Prohibition after a Conſultation granted, the Parliament may make a Law to prevent that miſchief, for as the Law now is it may be done; Yet we will adviſe

For a Prohibition notwithſtanding a Conſultation granted. Surmiſe. Arbitrary. Concluſion. Prohibition.

Gawdy

Gaudy againſt Ingham.

Hill. 23 Car. Banc. Reg.

Error upon a Iudgement againſt an adminiſtrator. Iudgement.

IUdgement was given againſt an Adminiſtrator in an Action of Debt brought againſt him, in the Common pleas, upon fully adminiſtred pleaded, and a writ of Error was here brought to reverſe the Judgment. The Error aſsigned was, that Judgement was given for the whole Debt, whereas the verdict found that the Defendant had aſſets only to diſcharge a part of it. To this the Court ſaid, if it be found he have any aſſets, Judgement muſt be given againſt him, for the whole debt upon his falſe plea, but if he have no aſſets it is otherwiſe

Allen againſt Reeve

Hill. 23 Car. Banc. Reg.

Mich. 23 Car. rot. 88.

Arreſt of Iudgement in an Action of Covenant.

ALlen brings an Action of Covenant againſt Reeve, and his wife, upon a leaſe expired made of certain houſes by deed unto the wife dum ſola fuit, wherein was a Covenant to keep the houſes in repair during the term, & for breach of this Covenant is the Action brought, and declares as to one of the houſes that it was burnt by negligence. The Defendants plead a ſpecial plea to this effect; That the houſe which was burnt was not burnt by negligence, nor with Common fire as the Plaintiff hath declared, and as to the reſt they plead the general iſſue, that they were in good repair at the expiration of the term; the Plaintiff hath a verdict. Nicholas of Counſel with the Plaintiff ſaid, it conteins a negative preignans; for there are two matters offred in iſſue, one that the houſe was not burned by common fire. 2ly. That it was not burned by the negligence of the party. Roll Iuſtice, If it be a negative preignans, as you ſay it is, you ought to have demurred unto it as to a double plea. But let us ſee the book, and ſtay in the mean time.

In arreſt of Iudgement.

Negative preignans. Demurrer.

Hobſon againſt Heywood.

Hill. 23 Car. Banc. Reg.

Trin. rot. 791.

Error to reverſe a Judgement in Briſtow in an action of Debt. Error.

HObſon brings a writ of Error in this Court to reverſe a Judgement given againſt him at Briſtow in an Action of Debt for rent, and aſſigns for errors, that the ſum demanded to be due for rent was in figures, and not in words, as it ought to be. 2ly. It is ſaid, that the Jury Aſſideint damna for Aſſident damna. The Court held they were both material exceptions, and reverſed the Judgement, except cauſe ſhould be ſhewn to the contrary Saturday following.

Cham-

Chambers againſt Floyd.

Hill. 23 Car. Banc. Reg.

VPon a rule on the Crown ſide to ſhew cauſe why an Attatchment ſhould not iſſue out againſt two Juſtices of peace for not allowing a certiorar. directed to them out of this Court to remove an endictment of forceible entry taken at a private Seſſions before them. The Councel for the Juſtices urged, that they had not contemned the Proceſſe of this Court as is surmiſed; for the certiorari ought to have been delivered in open Seſſions of the peace, and there allowed; but this was delivered at a privat Seſſions, and ſo they were not to allow it. 2ly. The party who procures the certiorari, ought according to the Statute, to put in ſecurity, at the delivery thereof, to proſecute, or elſe it is not to be allowed, but that was not done here, and therefore they were not bound to allow it: And the certiorari is to remove an Endictment of forcible entry; but the return is that it was a peaceable entry, and a forcible deteyner, ſo that there being no ſuch Endictment before them as the certiorari mentions, they could not make a return according to the writ, and therefore it is no contempt in the Juſtices not to make a return. The Court, anſwered, that it is the uſual courſe of the Court to make certioraries in this form, and therefore this is no excuſe; The Councel againſt the Juſtices urged, that this caſe is within the Statute, though it were at a privat Seſſions of the peace, and therefore the Juſtices are in contempt. Roll Iuſtice ſaid, I conceive that this is caſus omiſſus not provided for by the Statute, and if ſo, then are they not in contempt, and if ſome Juſtices take an Endictment of forcible entry, other Juſtices cannot give reſtitution upon this Endictment. Bacon Iuſtice, The Statute is a remedial Law, and made for the eaſe of the ſubject, and ought not to be conſtrued ſtrictly: And ſaid, that a privat Seſſions is a Seſſions; but ſecurity ough to be put in at the quarter Seſſions, for it ſhall be intended that all the Juſtices of the County are there. Roll Iuſtice ſaid, that a privat Seſſions ought to take ſecurity, and the Endictment ought to be returned there; but the certiorari is not good, for it mentions not the title of the Act, yet the generall practice of the Court ſeems to warrant it as it is. The Court ordered the party to have reſtitution, and the contempt to be ſpared by conſent of partyes, if cauſe not ſhewn to the contrary before the end of the Term.

Cauſe againſt iſſuing of an attatchment.
Allowance.
Certiorari.
Return.
Contempt.
Caſus omiſſus.
Reſtitution.
Conſtruction.
Security.

Hill. 23 Car. Banc. Reg.

THe Court was moved upon an Affidavit for a prohibition to the Court at Doncaſter, and for an attatchment againſt the Major for refuſing to allow of a forein plea, tendred by the Defendant in an Action of Debt brought againſt him for rent for lands, that lye out of the juriſdiction of the Court, and for proceeding againſt him notwithſtanding the tender of the plea. The prohibition and attatchment were granted if cauſe not ſhewn to the contrary before the end of the Term.

For a prohibition to the court at Doncaſter.
Prohibition.
Attatchment.

David againſt Lyſter.

Hill. 23 Car. Benc. Reg.

For the Defendant ro plead an iſſuable plea.

THe Court was moved by the Plaintiff that the Defendant might be ordered to plead an iſſuable plea, which he had not done, for the Action is an Action of ejectione firmæ in which the Plaintiff hath declared, and the Defendant hath emparled, and after emparlance he pleads that the lands are antient demean, which is a dilatory plea. Roll Iuſtice, It is a good plea after imparlance, for it goes in bar of the Action it ſelf, and not, in abatement of the Writ.

Plea.

The King and Holland.

Hill. 23 Car. Banc. Reg.

Opinion of the Court for reſtitution in this Court & not in Chancery.

Iudgement. Reſtitution.

ROll Iuſtice ſaid, that in this caſe formerly argued, reſtitution ought to be given to the party, for the ſame Iudgement ſhall be given here which ſhould be given in Chancery, and all the Record is here before us, and they in Chancery cannot do any thing in the cauſe, for they have nothing before them. And it appears to us that the Declaration was inſufficient, and ſo we cannot give Iudgement for the Plaintiff; but againſt him, notwithſtanding the inquiſition found for the King. Therefore let the party have reſtitution, except cauſe ſhewed the firſt Friday in the next Term.

Hill. 23 Car. Banc Reg.

For diſcharge of a priſoner.

THe Court was moved to diſcharge a priſoner brought to the Bar, by a habeas Corpus committed by the Committee of plundred Miniſters, and theſe exceptions were taken to the return. 1. There is no time expreſſed how long the party ſhall ſtand committed, ſo he is committed without limitation of time, which is not legall. 2ly. He is committed by the name of Mr. Smith, and his name of baptiſm is omitted, which ought not to be. Vpon theſe exceptions the Court held the commitment illegal, and diſcharged the party.

Commitment.

Weekes and VVeekes.

Hill. 23 Car. Banc. Reg.

Againſt a return of orders of commiſſioners of Sewers

Return. Notice.

VPon the return of a certiorari to remove orders made by Commiſſioners of Sewers, It was moved that the return was not good, becauſe it was not made by the partyes to whom the certiorari was directed, for it was directed to the Commiſsioners, and the return is made by the Clark of the Sewers. But the Court ſaid the return was good enough, for all the returns are ſo, and the Clark is an officer of whom the Law takes notice of, and it belongs to him to do it.

Paſc.

Paſc. 24 Car. Banc. Reg.

A Writ of Error was brought to reverſe a Judgement given in an inferiour court in an Action upon the caſe, and the Error aſsigned was that the habeas corpus was not well returned, for it is not returned to be in omnibus ſervitum et executum as it ought to be, and as the uſual form is. Maynard of Councel againſt the Writ of Error argued, that it was well returned notwithſtanding thoſe words were omitted, becauſe the Jury did appear full, and no iſſues were loſt, and the Jury have day by the roll, 3 H. 7. 14. per Huſſey, and 9 E. 4. 14. it is made a queſtion but not reſolved. 2ly. Though it be a Slip yet it is within the Statute of 21. Iac. and is helped by it, for that Statute extends to more than Writs, as may appear by the Statute, and the Statute of 18 Eliz. touching original Writs extends to faults of bills, although original Writs are only named, for a bill is the ſame in ſubſtance with a Writ, ſo here the Writ, and precept are of the ſame ſubſtance. 3ly. it is the intent of the Statute, and the Statute ſhall be taken by equity, Hill. 13. Iac. in this Court in Gregory and Brookes caſe, this queſtion was ſtirred but not reſolved, and Hobart denyes the 5th. report f. 61. to be Law, and there is no proceedings properly in ſuperiour Courts by plaint. Roll Iuſtice, The Statute extends not to point of equity in inferior Courts, for their proceedings are not ſo regular, as the proceedings in the high Courts here at Weſtminſter, but they are by ſhort notes. Bring us books and move it again.

Error to reverſe a Judgement in an inferior court in an Action upon the caſe.
Return.
Day in court.
Bill.
Original writ.
receipt.

Creſwell againſt Ventryes.

Paſc. 24 Car. Banc. Reg.

CReſwell brought an Action upon the caſe againſt Ventryes for ſpeaking theſe words of him; Thou didſt, and doſt receive thief ſtollen goods, witneſſe a feather bed tick in thy houſe, and the cloath which thy mans ſuit was made of, and thou kneweſt they were ſtollen. The Plaintiff hath a verdict, the Defendant moves in arreſt of Judgement that the words are not actionable, for one may receive ſtollen goods, and yet not be guilty of Felony. Bacon Juſtice, The receiving of ſtollen goods is not felony; but the receiving, and comforting of the Felon is Felony. The Iudgement was ſtayed till the other ſhould move.

Arreſt of Judgment in an action upon the Caſe for words.
Felony.

Thynn againſt Thynn.

Paſc. 24 Car. Banc. Reg.

Doc. 67. a pl. 99

THynn brings an Action againſt Thynn to reverſe a Judgement given in the Common pleas in a writ of Dowr; Hales of Councel with the Defendant in the Writ of Dowr in anſwer to the exceptions formerly taken ſaid, that the ſummons was well enough returned as it is, becauſe it was made upon ſome part of the land within the Vil, Long quint. E. 4. 2 H. 4. 13. 39. E. 3. 7. 2ly. It is not neceſſary to make the Proclamation, where the ſummons is, for the Statute intends not to alter the courſe of the ſummons.

Error to reverſe a Judgement in Dowr
Summans.
Proclamation

mons. 2ly. The words of the Statute are satisfied, for the actual summons in one Mill is a summons in the other Mills. 3ly. The meaning of the Statute is satisfied, and the mischef intended to be satisfied by the Statute,

Demand. Hob. 173. Allen and Walkers Case. For the 2d. exception to the Demand he held it good enough, for in a Writ of Dower a Demand needeth not to be so particular as in other Writs, so is it in an Assise, 11 E. 3. 18. 43 E. 3. 6. 3 Ed. 2. Dower, 161. and the reason is, because the Wife demands not the whole Land, nor can have the Charters which concern the Land to enable her to make so precise a Demand as may be in other Writs. And as to Harpers Case that is objected, I answer, it agrees not with our Case, Regist. f. 36. 16 E. 3. Fitzh. Quar. Imp. 147. and it is certain enough, because it is of a Rectory, and not of Tithes in gross. 3ly. The demand of Tithes is surplusage, and it is all one as to say, the Rectory cum pertinentiis. Then as to the Objection that one thing is twice demanded, I answer,

Abatement. Dammages. it is not so, but demanded as part of a thing demanded in the Writ, and a Demand in a Writ of Dower shall not abate the Writ, though one thing be twice demanded, for dammages shall not be twice recovered, 4 E. 3. f. 52. Mich. 9 Iac. in the Common-pleas agreed so by the whole Court; In Bluets Case, 8 Car. one thing was twice demanded, and yet the Writ was not abated. To the 3d. exception, That the Demand is more large than the Writ, because a Parish may be larger than a Mill, and the Demand is the Parish of Imber; I answer, That the Mill and Parish shall be intended to be of the same extent, if the contrary do not appear, Cooks lit. f. 125. 2ly. Although the Parish may be larger than the Mill, yet it may lye in the Mill, and the contrary doth not here appear, and the Case is so, that it is impossible that the Parish should extend into another Mill, 1. The office of the Writ is to restrain the Demand, and the Writ ascertains the Demand, 19 E. 3. Fitz. Dower, 95. 9 E. 4. f. 16. by Chock. 2ly. There is a restriction within the body of the Demand, for the Demand refers to the Writ, and is bounded by it, 42 Eliz. Wook and Godins Case, a small im-

Implication. plication will make a Mill and Parish to be all one, and so it is here, 42, 43 Eliz. Com. Banc. Hob. 12. Case Brook and Spencer, Trin. 16 Iac. in this Court, rot. 504. Marks and Marks. And as to the Exception taken to the

Execution. execution, that dammages are given for more than is demanded, 1. Here is no confession as it is supposed on the other side, that the Hundred in demand doth lye in another Mill. 2ly. It is impossible for dammages to be given for more of the Hundred than lyes within the Mills mentioned in the Writ, and so are there no dammages given for that part of the Hundred which lyes in Sutton parva, as is objected on the other side: for no more shall be recovered than is contained in the Writ, 9 E. 4. 6, 16, 17. The Question there was, whether it were a Plea to the Writ, 17 E. 3. f. 44. The Court desired to hear another Argument.

Castle against Dinely,

Pasc. 24 Car. Banc. Reg.

Trin. 23 Car. rot. 1078.

Error to reverse a Judgment in an action upon the Case. CAstle brings a Writ of Error to reverse a Judgement given against him in the Court at Owse-bridge in York, in an Action upon the Case upon an Assumpsit; The Error assigned was, that the day of the Month in which the promise was made is in Figures. To this the Councel on the other

other side said, that heretofore it had been held to be Error, but now since the Statute of Ieofailes after a verdict is no Error. But I. Turner of Councel with the Plaintiff in the Writ of Error said, That it is a material exception now: for the Assumpsit is the ground of the Action, and therefore the day must needs be material. Another exception was, that the Venire was Venire facias duodecem, &c. de Baliva tua, and the Venu was in the City of York. But to this exception it was answered, that the Record is de Civitate Eborum in Baliva tua, and so it is well enough: and of this opinion was the Court. But the Court held the first Exception to be good; Whereupon the Councel for the Defendant in the Writ of Error prayed, the Iudgement might be reversed for his Clyents dispatch, and so it was. Error.

The King against Andrews.

Pasc. 24 Car. Banc. Reg.

ANdrews was endicted for Murther, and out-lawed upon the Endictment, and taken upon the Out lawry, and brought to the Bar, and demanded what he could say, why Iudgement should not be given against him; The Prisoner said, he had brought his Writ of Error to reverse the Outlawry, and prayed it might be allowed, which was granted, and the Writ read by Broughton the Secondary on the Crown-side. The Prisoner desired he might have Walker, Hales, and Pepes, assigned him for his Councel, which the Court granted. The Councel prayed they might have a Copy of the Record. Roll Iustice said, that the Prisoner himself ought to shew matter in Law for Error, which the Councel doubted. But the Court overruled it, yet agreed, that the Record should be read unto them, which was done; Upon the reading Walker took these exceptions. 1. The Process is not well awarded, for the Capias is not prædict. Andrews, and so it appears not who was out-lawed, whether the Prisoner or another of the same name. 2ly. It is not said, that the Process is awarded by the Court, nor at what Sessions it was awarded. Roll Iustice, It is not necessary, for it is recorded there. 3ly. It appears not what party is dead, whether he that was struck or another. 4ly. It doth not appear in what part of the body the Wound was given, nor with what weapon. The Court said, that they will hear the Kings Councel before they would conclude any thing. The Councel moved, that the Prisoner might be bayled, because it was fourteen years ago since he was endicted. The Court answered, till you are assigned of Councel upon Record, we cannot bayl him at your prayer. Then the Councel desired a Copy of the Record, ad quod non fuit responsum, but the Court said to the Councel take more time to consider of other Exceptions, for if these shall be over-ruled your Clyent is gone, viz. must be hanged. At another day he was bayled by four persons, and bound to prosecute his Writ of Error with effect. Arraignment upon an Outlawry for Murder. Error. Bayl.

Pasc. 24 Car. Banc. Reg.

AN Action of Debt was brought upon an Obligation for 3000 l. the Defendant pleads that he had paid the mony on such a day, whereas the truth of the Case was, that there was two dates of payment limited in the Obligation, and the Defendant had paid part of the monies upon one of the Arrest of Iudgement in Debt upon an Obligation.

dates of payment, and the reſt upon the other day, and not all at one day. The Plaintiff replies that the Defendant did not pay the mony upon the day alleged by the Defendant in his Plea, and upon this an Iſſue is joyned, and a verdict found for the Plaintiff; the Defendant moves in arreſt of Judgement, and ſhews for cauſe, That the Verdict is imperfect, becauſe it doth not find that the Defendant had two dates of payment, but concludes that he did not pay the mony upon one of the dates. Roll Iuſtice, If you have two dates of payment to plead, and you rely upon one day in your pleading, and iſſue is joyned upon that, and it be found againſt you, you muſt be barred by it. Hales urged, That here was a champertous agreement, for there was no conſideration for the aſsignment of this Obligation and Indentnre to the Plaintiff, upon which the Action is brought by him. The Iudgement was ſtayed till the other part ſhould move.

Verdict.

Champerty.

More againſt Stone.

Paſc. 24 Car. Banc. Reg.

AN Action of Treſpaſs of Aſſault and Battery, was brought by the Plaintiff for aſſaulting and beating, and taking his Servant for two Months, per quod ſervitium amiſit; The Defendant pleads not guilty, and thereupon is an Iſſue joyned, and a verdict for the Plaintiff. The Defendant moves in an arreſt of Iudgement, and for cauſe ſhews, that the Plaintiff hath not ſet forth how the party was his Servant, whether as an Apprentiſe, or by retainer, as he ought to have done. But the Court ſaid, that the Record implies that he was his Servant at the time when the Treſpaſs was done, and that is enough, and this is the uſual form of declaring in this Action in the Common-pleas, and in this Court alſo (and ſo many of the Councel at the Bar affirmed) and therefore let the Plaintiff take his Iudgement.

Arreſt of Iudgement in Treſpaſs by Aſſault and Battery, and taking away his Servant, Retainer.

The King againſt Holland.

Paſc. 24 Car, Banc. Reg.

HAles offered to the Court theſe reaſons why Iudgement ſhould not be given here in this Caſe between the King and Holland formerly ſpoken to. 1. That the Record is not here in this Court, but only an extract of the Record out of the Record which is in Chancery, and therefore judgement cannot be given here: for a judgement muſt be given upon the Record it ſelf. 2ly. It would be inconvenient if it ſhould be otherwiſe, for the Chancery is Iudge of the Inquiſition, and ſo there may be judgement one way in Chancery, and another way here, if the Record be not removed hither. And there is difference where a tranſcript of a Record is removed out of a Court which cannot proceed upon the Record it ſelf, and where it is a tranſcript of a Record, upon which Record the Court may proceed, as it is in our Caſe, 39 H. 6. 6. 14 E. 4. 1. & 7. 3ly. It appears not to this Court how the Commiſsion and Inquiſition are executed, whether well or not, and therefore it cannot judge of it. Maynard on the other ſide prayes, that judgement may be given here, upon the memorandum of the Record ſent hither out of the Chancery for theſe reaſons, 1. Every Court ought to give judgement on the one ſide or other; therefore if the King may have judgement here, the party may alſo have judgement. 2ly. The Record is here

To ſtay Iudgement upon a Memorandum of a Record out of the Chancery. Iudgement.

Tranſcript.

in

in this Court virtually by ſending of the Memorandum of it hither, and that is enough to give Judgement upon. 3ly. The Chancery and this Court as to the giving of judgement here, are as it were one Court, 24 E. 3. f. 77. 4ly. There is a ground for judgement to be given here, and it cannot be given elſewhere, for an Award in Chancery is no Judgement, and ſo there cannot be two ſeveral Judgements, one in Chancery, and another here, as Hales ſuppoſeth; and in Lathams caſe, the Record was removed as it is here, and Judgement given upon it in this Court. 5ly. The Chancery is not to be Judge: for the Traverſe was there, and the cauſe removed hither, and we cannot go back thither again: for if we ſhould do ſo, we ſhould have Judgement in no Court; If it had been upon a Demurrer in Chancery, then there might have been a Judgement there, but not now the Cauſe is removed by Traverſe, and a Patent ſhall not be corrected by the Enrolment, but the Enrollment by the Patent under Seal. Hales on the other ſide ſaid, That it is the Record of the plea that is tranſmitted out of the Chancery hither, but not the Record of the Inquiſition or Commiſsion upon which it is found, and how then can there be any Judgement? Roll Iuſtice ſaid, That the Amoveas manum is but a conſequence of the judgement, and not the Judgement it ſelf, and we may give Judgement without the Inquiſition againſt the King, And the Record is tranſmitted hither to determine whether the King or the party hath right, and the Chancery cannot intermeddle: for by this means the Courts will clath, which would be inconvenient. Bacon Iuſtice ſpoke to the ſame effect. Roll Iuſtice added this, If an Office be found to entitle the King in the Chancery, and it be tranſmitted hither, and it appears to this Court that the office is not good, ſhall not we give Judgement againſt the King? certainly we ſhall. But the Court would adviſe, and deſired to hear the Kings Councel what they could ſay for the King.

Award.

Amoveas manum.

Paſc. 24 Car. Banc. Reg.

AN Action of Treſpaſs was brought for taking away divers parcels of Houſhold-ſtuff, and upon non Culp. pleaded, the Plaintiff had a verdict, The Defendant moved in arreſt of Judgement, and ſhewed for cauſe, that the Declaration was not good, becauſe divers words in it were inſenſible, as 1. The Plaintiff declares, for taking away unum Lenat, Anglice, a Mat, whereas Lenat is no word in any Language to ſignifie any thing, and therefore the Anglice cannot help it. To this the Court anſwered, That it is all one as if it were left out of the Declaration, becauſe it ſignifies nothing in it, and ſo there is no dammages given for that thing which it ſhould ſignifie. 2ly. He declares for taking away tria ſuſpendia, Anglice, Pot-hooks, or Hakes, But the Court held this good enough. 3ly. He declares for taking away unum Aduſtum ferreum, which are two Adjectives and ſignifie nothing. To this the Court ſaid, if they ſignifie nothing, then no dammages are given for it, and therefore let the Plaintiff take his Judgement.

Arreſt of Judgement in Treſpaſs for taking away Goods.

Dammages.

Paſc.

Pasc. 24 Car. Banc. Reg.

For an alias habeas corpus with pain.

Alias.

Retorn.

Fine.

UPon reading of the retorn of Collonel Tichborne Lieutenant of the Tower of London upon an habeas corpus directed to him, on the behalf of John Lilborn committed by order of both houses of Parliament for his contempt to them, Cook of Councell with the Prisoner moved for an Alias habeas corpus with a pain, because the Lieutenant had only retorned the Writ; but not brought the body of the Prisoner. Bacon Iustice, If there be sufficient matter expressed in the retorn to detein the Prisoner, to what purpose should we grant an Alias, therefore if the retorn be insufficient, move your matter against it. But Roll Iustice said, the Lieutenant ought to make his retorn either against the jurisdiction of this Court, or else he must bring the body of the Prisoner hither, and it is in our power to set a fine upon him, for making an insufficient retorn. Therefore the Court ordered that he should amend his retorn, or else they would grant an Alias with a pain.

Hocker against Lamb.

24 Car. Banc. Reg.

Trin. 23 Car. rot. 1592.

Error to reverse a Iudgment for error in the venire.

Lieu conus.

Hundred.

VVard.

HOcker brought a Writ of Error in this Court against Lamb to reverse a Iudgement given against him, in the Court at Colchester in Essex; and assigns for Error, 1. That the venire is awarded larger than the Declaration. To this Roll Iustice said, the Ward within Colchester mentioned in the Declaration is but a lieu conus; but in London the Ward is in the nature of a Hundred, and so differs from this Case; a second exception was, that the time of the Assumpsit, upon which the Action in which the Iudgement was given was founded is expressed in figures, viz. the time for the delivery of the goods promised to be delivered, as also the time of the request for the delivery of them, as also the costs, and damages adjudged. Vpon these exceptions the Court ordered the Iudgement to be reversed except very good cause should be shewen to the contrary.

Pasc. 24 Car. Banc. Reg

For discharge of 2 prisoners at the bar by habeas corpus

Discharge.

Bail.

THe Court was moved to discharge two prisoners committed for suspition of murther, and brought to the bar by a habeas corpus returned for the insufficiency of the retorn, and upon two certificates offred to the Court, That the partyes who did the murther, for which these prisoners were committed, were Executed for the same, and had confessed that they did it. But Roll Iustice answered, if the retorn be touching Felony, though it be insufficient we cannot discharge the partyes. The Court thereupon was moved, that they might be bailed, which was granted, and they were bailed

bailed by four in 200 l. a piece that the priſoners ſhall appear at the next aſſiſes at Berry in Suffolk.

Pay againſt Paxted.

Paſc. 24 Car. Banc. Reg.

A Writ of Error was brought to reverſe a Judgement given in an inferiour Court; And the Error aſsigned was in a continuance, which was ad proximam curiam, ſcil. 16. die, whereas the Court was not held that day, but 26. die. Roll Iuſtice ſaid, peradventure the ſcilicet may be void. Yet the Iudgement was reverſed, antea

Error to reverſe a judgement for a diſ. continuance. Diſcontinuance.

Keniſton againſt Jones.

Paſc. 24 Car. Banc. Reg.

Mich. 23. Car. rot. 587.

AN Action of Debt was brought upon an obligation with condition to ſtand to an award; the Defendant pleads nullum arbitrium; the Plaintiff ſets forth the award, and aſsigns a breach, and upon that an iſſue is joyned, and a ſpecial verdict is found, and upon the ſpecial verdict 2 queſtions aroſe, one upon the ſubmiſsion, another upon the award. The 1. queſtion was, whether a miſrecital of the date of one of the obligations of ſubmiſsion by the Arbitrators in their award, ſhall avoid the award. Philips of Councell with the Plaintiff argued that it ſhould not, becauſe that now the parties are concluded by the plea, and the verdict found upon it. 2ly. Whether the Arbitrators have exceeded the ſubmiſsion; he held they had not; for the firſt point he ſaid, 1. That the ſubmiſsion was the ſubmiſsion of the parties, and the miſtaking of the Arbitrators of the time when it was made is not material, nor ſhall hurt it, for the bond of ſubmiſsion is not in the cuſtody of the Arbitrators, and ſo they might eaſily miſtake the date, becauſe they had it not to view, Plow. Com. 79. Crokers caſe. 2ly. The date of the obligation is not an eſſential part of the obligation, for an obligation may be good though it have no date, & therfore the miſtaking of the date is not much material; 3ly. There is ſufficient certainty of the bond expreſſed in the award, though the date be miſtaken, & a void additional deſcription of it ſhall not avoid a good deſcription of it ſet forth in the award. Doughtyes caſe Cook 3. rep. & Dyer 292. 4ly. The miſrecital is not in words affirmative; but meerly in words relative. 5ly. The clauſe of miſrecital refers to the deed recited by the prout, which is certain enough, and the law rejects the miſrecital as a thing impertinent, 6. rep. 36. Dyer 116. For the ſecond poynt, although the ſubmiſsion ſhould be void, yet by the iſſue joyned the ſubmiſsion is confeſſed, and it is now contrary to the ſubmiſsion to plead nul award, Dyer 32. 28, 29 H. 8. 2. rep. 4. and the parties in our caſe do differ only whether there be an award or not, and not whether there be a ſubmiſsion or no. And as touching the award it ſelf, I hold that the ſubmiſsion is not exceeded, for all matters in difference between the parties are ſubmitted; but not the bonds of the ſubmiſsion. 2ly. It ſhall not be taken to be alleged expreſly

Argument upon a ſpecial verdict in debt upon obligation to ſtand to an award. Recital. Concluſion. Acc. 85. (m)

Date.

Award.

of the matters only ſubmitted, and not of others, if the contrary do not appear either by the Plaintiffs allegation or doubt of the Jury. 3ly. All the award is perfoꝛmed before the diſcharge of the obligations of ſubmiſſion. 4ly. The award is at leaſt good in part, and it being not perfoꝛmed in this part that is good, the obligation is foꝛfeited, Cook 10. rep. Kel. 43.45 Hob. pag. 267. Nabys caſe, and ſo pꝛayes Judgement foꝛ the Plaintiff. Latch foꝛ the Defendant. 1. The verdict is not contrary to the iſſue, noꝛ admiſſion in pleading, noꝛ out of the iſſue, but within it, foꝛ the iſſue is whether the award be good modo et forma, and the ſubmiſſion is an eſſential part of the Award, and ought not to be alleged in the Award, otherwiſe the Award is not good, and it is here alleaged in the iſſue alſo, Dyer 216. 9 H. 7. 3 and the negative here implies nothing. Another queſtion is, whether the Jury have found the Award ſet foꝛth in the replication, oꝛ whether they have found any Award at all, and if any Award be found, it is ſuch an Award which is not in iſſue in the replication, and ſo the verdict is foꝛ the Defendant. And as to the award it ſelf, I hold it void, foꝛ the parties have not ſubmitted to the award that is made, foꝛ there is no ſubmiſſion to the determination of matters ariſing between the time of the ſealing of one Bond, and of the other Bond, and ſo the Arbitratoꝛs have exceeded the ſubmiſſion, foꝛ they have awarded to make releaſes at the ſealing of the laſt Bond, which compꝛiſeth all the time between the ſealing of one Bond, and of the other. Next, part of the Award is not good by exceeding the ſubmiſſion, and this makes all the Award naught, foꝛ all the parts of this Award do ſo depend one upon another, that if one be naught all is naught. And the laſt part of the Award is naught, and ſo the Award is made but on the one part (which cannot be good,) foꝛ if the releaſe be not made, all Actions between the parties cannot ceaſe accoꝛding to the Award, and ſo the Award is not final; And there is no verdict here foꝛ the Plaintiff, although the verdict ſhould not be foꝛ the Defendant, foꝛ it appears not whether the 15th. of April be before oꝛ after Eaſter, and ſo pꝛayes Judgement foꝛ the Defendant. Roll Iuſtice ſaid, if there appears a material variance between the Award ſet foꝛth, and the Award pleaded, it is ill: And it is a queſtion whether we be bound to take notice of the Almanack, and the feaſt dayes there ſet down oꝛ no. It was adjourned to be argued again the next Term.

Notice.

Thynn againſt Thynn.

Paſc. 24 Car. Banc. Reg.

Sav. 67. 92

Opinion of the Court concerning a retorn.

IN this Caſe wherein exceptions were foꝛmerly taken to the Writ of Erroꝛ, and argued, Bacon Iuſtice ſaid, he had read over the book, and doubted whether many of the Erroꝛs foꝛmerly aſsigned are not out of doꝛes, becauſe the certiorari is not well retoꝛned beforе us, foꝛ the certiorari is directed to the Recoꝛder, and it is retoꝛned by the Debuty Recoꝛder in his own name. Roll Iuſtice doubted alſo, foꝛ he ſaid, all the old pꝛeſidents were againſt this retoꝛn. But if the Writ be directed to a recorder, who is cuſtos brevium, or to a recorder, and his Deputy, then the retorn as it is will be good.

Retorn.

Twiſden

Dow. 67. 92.

TWiſden of Councel with the Plaintiff in the Writ of Error in the Wiltſhire cauſe took theſe exceptions. The firſt exception taken was, that the demand of the Dowr, is larger than the originall Writ, for that the demand is of the Parish of Timesbury, and the Writ is of the Vill of Timesbury, which is not ſo large by intendment as a parish, becauſe there may be divers Vills in one parish; and he ſaid, that in ſome caſe a Writ ſhall reſtrain a demand; in other caſes it ſhall not, namely where they cannot ſtand together, and ſo is it here, 21 E. 4. f. 24. 3 E. 3. f. 56. A ſecond exception was, that the nature of the tithes demanded are not ſet forth, although they be not in groſs, but appendant as they ought to be, and a feme was not dowable at all of tithes before the Statute of 32 H. 8. and a feme is dowable of Common appendant, but not of Common in groſs. A third exception was, that Dowr is recovered of a thing not dowable, viz. of a quarry of ſtones, for if ſhe ſhould be dowable of a quarry of ſtones, this would be to the deſtruction of the inheritance, and indeed it is impoſsible, for a quarry of ſtones cannot be divided by metes and bounds, which muſt be if ſhe ſhould be endowed of it. And alſo if the mine, and quarry ſhould be divided, the Tenant of the Land would be prejudiced; and that a quarry cannot be divided, ſee Cooks Lit. 164. and ſo was it adjudged 2 Iac. upon a reference to the Judges. Next, there is alſo Error in fact, for the Hundred of Warminſter extends into the Hundred of Sutton parva, and ſo if ſhe be endowed of the Hundred of Warminſter, ſhe will be endowed of the third part of two Hundreds, which is more than ſhe demands by her Writ of Dowr. Maynard of Councell with the Defendant in the Writ of Error ſaid, as to the ſummons he held there is a good ſummons, and cited Hob. 137 Dalt. f. 86. And there may be divers pariſhes in one Vill, as well as divers Vills in one pariſh; And to the exception that the demand of the Dowr in the Writ is generall, whereas it ought to be a ſpecial demand; he anſwered, the demand in Dowr differs from other demands, and is more favoured in Law; for as Dowr it ſelf is favoured in Law, ſo are the proceedings in Law to recover it, 6 E. 3. 45. 16. E. 2. 7. 8 H. 3. 11 Ed. 3. 85. 25 Ed. 3. brev. 412. Fitz. Dowr 8 E. 3. Sect. 434. Reg. 39. And as to the ſurpluſage in the demand, this ſhall not abate the Writ 4 E. 3. 52. Fitz. brev. 714. And that the pariſh ſhould extend out of the Vill, is a forein intendment, and ſhall not be ſo taken againſt an Averment, and when a Vill, and a pariſh are named by one name, one of them ſhall not be intended larger than the other, if the contrary be not ſhewn. Long quint. Ed. 4. f. 20. And he argued that a feme is dowable of a quarry, and that it may be divided by metes and bounds, for it may be divided by the profits, although it cannot be divided by the quantity of the thing. Roll Iuſtice ſaid, By no manner of pleading can one abate a Writ after Judgement, and how ſhould it be ſo here? And 2 Caſes were cited by the Councell that bis petita ſhall not abate a Writ. Mich. 9 Iac. Bolſtrod and Brooks caſe, and Eaſton and Styles caſe in a Writ of Dowr.

Error and exceptions offered to a Iudgement in Dowr.

Demand.

Dowr.

Error in fact

Abatement.

Paſc. 24 Car. Banc. Reg.

THe Plaintiff brought an Action of Treſpaſſe quare vi et armis for reſcuing of a Priſoner out of his poſſeſsion, and hath a verdict againſt the Defendant. The Defendant moves in arreſt of Judgement, for that the Plain-

Arreſt of Iudgement in an action of Treſpaſs vi et armis, for reſcous.

Plaintiff ought to have brought his Action of Treſpaſs upon the Caſe, and not an Action of Treſpaſs quare vi & armis. But Roll Iuſtice anſwered, that he might have an Action upon the Caſe, or a Treſpaſs vi & armis at his election, and therefore the exception is null. Another exception was taken, that there was 4 years between the time of the Treſpaſs done, and the time of bringing the Action. Roll Iuſtice anſwered, you ſhould have pleaded this matter if you would have had advantage by it, but it is to no purpoſe to urge it. Another exception was taken, that the Declaration ſays that he took him in his poſſeſsion out of his poſſeſsion. But the Court over-ruled this alſo, and ordered the Defendant to ſhew better matter why Iudgement ſhould not be given againſt him.

Election of Action.

King againſt

Paſc. 24 Car. Banc. Reg.

For a Procedendo in an action upon the Caſe removed out of London. Cuſtome.

KIng brought an Action of the Caſe in London againſt the Defendant, for ſpeaking theſe words of her, Thou art a Whore, and Cantrels Whore, and haſt been ſo this forty years. The Defendant removed the Cauſe into this Court by a Certiorari; the Plaintiff moved for a Procedendo. But nothing was done in it, for the Court was divided: for Bacon Iuſtice held the words not actionable. But Roll Iuſtice held, that by the Cuſtome of London they were, though not at the Common-law.

Aylett againſt Stellam.

Paſc. 24 Car. Banc. Reg.

Cauſe why no new Tryal. Challenge. Advantage. Entry.

TWiſden upon a rule of Court to ſhew cauſe why there ſhould not be a new Tryal, ſaid, that two things were alleged on the other ſide that there ought to be a new Tryal. 1. That two of the Jurors were of kin to the Plaintiff. And 2ly. That there was notice given to the Defendant of a ſecond Venire facias. To the firſt of which he anſwered, that the Jurors were not of kin, and produced an Affidavit for proof. Roll Iuſtice interrupted him, and ſaid, it is not now material whether they be of kin or no, for the Defendant ſhould have taken advantage of that upon his challenge at the Tryal. And for the ſecond, it matters not whether he gave notice of the ſecond Venire or no: for the rules of the Court do not enjoyn him to give notice. Maynard of Councel with the Defendant urged, that two of the Jurors were of kin, and produceth an Affidavit to prove it, and ſaid, that the Defendant was alſo ſurpriſed for want of notice of the ſecond Venire. Roll Iuſtice ſaid, the ſecond Venire ought to be entred here, and if it were not entred, how can the Defendant know whether it be altered or no? Yet here is no breach of the rules of the Court, and ſo the proceedings are fair: for the Venire may be entred, or it may not be entred, and if it be not entred, the party may go to the Attorny, and procure a Copy of it before the Tryal: and though the Venire be not entred till after the Aſsiſes, it is well enough. Therefore let the Plaintiff take his Iudgement.

Thyn

Thyn againſt Thyn.

Paſc. 24 Car. Banc. Reg.

LAtch of Councel with the Plaintiff in the Writ of Erroꝛ argued again, and held, 1. That the nature of the Tithes demanded in the Writ of Dower ought to have been expreſſed, foꝛ the demand may peradventure be of ſuch Tithes, whereof the Feme is not dowable. 2ly. Where the thing it ſelf is demanded of which the Sheriff is to give poſſeſſion, there the Demand of it ought to be certain: foꝛ as it is in a Demand in an Ejectione firmæ, oꝛ an Aſſiſe, ſo ought it to be in a Demand in a Writ of Dower, Dyer, f. 116. & 258. 11 Rep. Harpers Caſe, Dyer, 83. the Sergeants Caſe, 44 E. 3. 5. Cooks Entries, tit. Dower plac. 2d. and though the Demand be of all Tithes, yet they ought to be ſpecified, as it is in Harpers Caſe; and ſo it is of Tithes in groſs, 11 Rep. Savills Caſe, Mich. 12 Iac. Bales and Hamond in this Court. And as to the Retoꝛn, a Chapel is demanded, and Judgement given foꝛ it, and yet the Retoꝛn doth not mention it; and it is not enough to compꝛiſe it in other woꝛds, and it is doubtfull whether a Chapel be a Tenement oꝛ no: foꝛ it is not a tempoꝛal Inheritance, as an Advowſon is, Dyer, 83. In ſome Caſe the Writ may be general, and the Count ſpecial: but that is where there is not a ſpecial foꝛm of Writ. 2ly. a Chapel is not conveyed in Fines and Recoveries, oꝛ Entries, by the name of a Tenement, noꝛ in any judicial pꝛoceedings, but Tenementa in a Gꝛant may contain a Chapel. 3ly. The particular enumeration of other things, and the omitting of the Chapel makes it ill; and ſo would it be in a Gꝛant by ſuch an enumeration, Dyer 161. The Caſe of the Hamlets, 36 Eliz. Ewer & Heydon, 21 & 22 Eliz. the Biſhop of Norwitches caſe, 8 Rep. 18. Doctoꝛ Bonhams Caſe, 12 Ed. 1. Grants 87. Other exceptions he took to the Judgement and execution. Firſt to the Judgement, that a Hundꝛed cannot be delive-red by metes and bounds: foꝛ a Hundꝛed is but a Juriſdiction, and is entire. 2ly. The execution is ill: foꝛ a Court of Frank-pledge cannot be divided by metes and bounds, Cooks Inſtit. 32. and Dower is aſsignable either by metes and bounds, oꝛ in common oꝛ in ſpecial manner. lib. Intrat. 18. He took alſo Exceptions to the ſecond Judgement, that dammages of the value of the Tithes are not to be given in Dower; next the Inquiſi-tion doth not find, that the Husband dyed ſeiſed of the Tithes, and then there can be no Judgement given foꝛ them. And the dying ſeiſed of the Rectoꝛy, is no dying ſeiſed of the Tithes, noꝛ is the dying ſeiſed of the Chapel, a dying ſeiſed of the Tithes appurtenant to it, foꝛ the Chapel is but the Chapel-Houſe, oꝛ Oꝛatoꝛy, 11 Rep. Harpers Caſe. Then foꝛ the Erroꝛ in fact, the demand is of the Manner of Lullington, and this extends out of Lullington, and it is not repugnant to the Recoꝛd to aſsign this Er-roꝛ in fact, and it could not have been pleaded in abatement of the Writ, 8 E. 3. 68. A Nuper obiit reſembles a Writ of Dower, 7 E. 3. 28. 7 E. 3. pl. 5. 12 Aſſ. 20. 26 E. 3. 72. 29 Aſſ. 55. 10 E. 4, 11. 9 E. 4. 3. 9 E. 4. 17. And ſo pꝛayed the Judgement might be reverſed. It was adjourned to be argued again the next Term.

Argument in Dower. Demand. Retorn. Tenement. VVrit. Hundred. Dammages. Nuper obiit.

Hill againſt Bird.

Paſc. 24 Car. Banc. Reg.

Cauſe why no Prohibition to the Prerogative Court.

Upon a rule of Court to ſhew cauſe why a Prohibition ſhould not be granted to the Prerogative. Latch ſtated the Caſe to be this: A man dyed inteſtate, the Daughter of the Brother of the Intestate (her Father being dead) procures Letters of Adminiſtration, and a Son of the Siſter of the Intestate ſues in the Prerogative to revoke the adminiſtration, or to have diſtribution of the Goods; the Adminiſtrator prays a Prohibition; and hereupon he prays, that either no Prohibition at all is to be granted, or elſe it

Prohibition.

must be ſpecial. Roll Iuſtice, The Daughter of the Brother, and the Brother of the Siſter of the Intestate are in equal degree of kindred, and the Ordinary

Adminiſtration.

may grant adminiſtration to which he pleaſeth. Latch urged, that the adminiſtration was not yet ſetled: for it was granted upon Condition, and if the Ad-

Inventory.

miniſtrator will not bring in an inventory, the Ordinary may alter the adminiſtration. Hales on the other ſide prays, there may be a general Prohibition cuilibet, &c. Roll Iuſtice, The Prohibition muſt be againſt ſome certain perſon; but if divers have appeared to ſue, there a Prohibition ſhall be againſt all of them, and the Juriſdiction of the Court cannot be enlarged by the agreement of the parties, Hob. Tucker and Bones Caſe. And an admi-

Revocation.

niſtration cannot be revoked, for the not bringing in of the Inventory and Accompt by the Adminiſtrator. The libel was afterwards read, which was, to have diſtribution of the Goods, or elſe to reverſe the Letters of adminiſtration, and upon this the Court granted to a Prohibition, if cauſe be not ſhewn upon notice to the contrary, as to the Diſtribution, but not generally.

Leving againſt Gamble.

Paſc. 24 Car. Banc. Reg.

Arreſt of Indgement in Treſpaſs.

In arreſt of Judgement it was urged, that the Declaration was incertain; for the Plaintiff had declared pro quinque pecias ſtanni, anglice Pewter-diſhes, whereas pecias ſtanni did not ſignifie Pewter-diſhes; for it might be Spoons, Pots, or any other ſort of Pewter as well as Diſhes.

Anglice void.

But the Councel on the other ſide ſaid, it was well enough, and prayed for Judgement. Roll Iuſtice ſaid, the Anglice ſhall be void, and then the Latin is good, for it is five pieces of Pewter, and it matters not what pieces they be: For it is ad valentiam, which makes the value certain enough to the Jury. Therefore let the Plaintiff take his Judgement.

Scoble againſt Tolye.

Paſc. 24 Car. Banc Reg.

Demurrer upon a Replication in Treſpaſs.

Scoble brings an Action of Treſpaſs againſt Tolye, for taking away his Cattel. The Defendant pleads that the Plaintiff was poſſeſſed of the Cattel joyntly with another not named in the Writ, and demands Judgement of the Writ. The Plaintiff replies, that the other with whom he was joyntly poſſeſſed was dead at the time of the Action brought; The Defendant

dant demurs for delay. The Court ruled a reſpondes ouſter. Maynard of Councel with the Plaintiff ſaid, it was peremptory; But the Court was againſt him, and ordered the Defendant to plead in chief Saturday following. Peremptory.

Hart againſt Buckminſter.

Paſc. 24 Car. Banc. Reg.

Hill. 23 Car. rot. 225.

HArt brought an Action of Debt upon an Obligation of 200 l. againſt Buckminſter, and ſets forth that the condition of the Obligation was to this effect, That whereas Hart had carryed ſo many thouſand of Billets and delivered them at Dartford in Kent, for the uſe of Buckminſter, amounting at ſo much by the thouſand, to a hundred pound in the whole, if therefore the Defendant ſhould pay the ſaid hundred pound at ſuch a time and place, that then the Obligation to be void, or elſe to be in force; and for non-payment was the Action brought. The Defendant ſayes that the Plaintiff did not carry and deliver ſo many thouſand of Billets to Dartford (as the Plaintiff had declared, and demands Judgement of the Action. The Plaintiff by way of replication demands Judgement if the Defendant ſhall be admitted to plead his Plea, which is contrary to the averment of the Obligation, which is his own Deed, and ſhall not be eſtopped thereby. To this the Defendant demurs. And the Court held that this recital in the Obligation is an Eſtople to the Defendant to plead the contrary; and the rule was, for him to ſhew cauſe why Iudgement ſhould not be given againſt him upon his Demurrer. Iudgement demanded a Plea. Eſtople.

Southcott againſt Southcott.

Paſc. 24 Car. Banc. Reg.

Poſtea

SOuthcott brought an Action upon the Statute of 2 Ed. 6. for not ſetting forth of Tithes againſt Southcott, and hath a verdict The Defendant moves in arreſt of Iudgement, and ſhews that the Declaration was too general and incertain: for it is for ſuch a quantity of Grain, and doth not ſet forth what ſort of Grain, and ſo it may be for Grain not titheable. Maynard of Councel with the Plaintiff held, that in this Caſe the Declaration was well enough, although it would not have been ſo in an Action of treſpaſs, for that Action requires more certainty. A 2d. Exception was, that it is not ſaid whether the Corn was in Garbs or Sheaves. To this Maynard ſaid, it is well enough notwithſtanding, for it ſhall be intended only of ſuch Grain as is uſually put in Garbs. Hales of Councel with the Defendant ſaid, the word Grain was too general a word to be uſed, and no certainty in it, for it extends to Muſtard-ſeed, Cole-ſeed, Rape-ſeed, &c. and the genus ought to be expreſſed, and it ſhall not be intended of Corn put in Garbs. The Court would adviſe, but enclined the Declaration was too general, and not good. Arreſt of Iudgement in an Action for upon the Stat of 2 Ed. 6. Incertainty.

Paſc.

Pasc. 24 Car. Banc. Reg.

Proceeding against a Prisoner for high Treason.

Sir John Stowell endicted in the Country for high Treason was brought to the Bar by a Habeas corpus to be tryed, and desired to hold up his hand, which he refused. But the Court admonished him to do it, because that before he did so he could not plead, and if he were to plead a pardon for Treason, he could not do it, till he were first charged with the Endicament. And Doctor Stories case, 32 Eliz. was cited, and it was said, that though in an Endictment for Felony, if the Prisoner refuse to plead he is to be pressed; Yet in Treason it is not so, for if the Prisoner indicted of Treason will not put himself upon his Tryal, or answer impertinently, which is not answering, but nugation, judgement shall be given against him as taken pro confesso that he is guilty.

Pressing.

Iudgement. Pro confesso.

Pasc. 24 Car. Banc. Reg.

Arrest of Iudgment in an action upon the Case.

An Action of the Case was brought against one for causing the Plaintif to be endicted of Rebellion and Felony. The Defendant moves in arrest of Judgement, and shews, that the Declaration was incertain, for it sets forth an Endictment in quo crimen rebellionis ei imposuit & felonii, which words are so incertain, that it appears not what the Plaintiff was charged with in the Endictment, and so there could never have been any Judgment given against him. Maynard on the other side said, it was well expressed, and could not well be otherwise expressed than it is. Bacon Iustice said, there may be Rebellion which is not capital, as Rebellion in Chancery. But Roll differed in opinion, and said, the intent of the words spoken is to be considered. The rule was, to bring Books to the Iudges.

Rebellion. Intention.

Mayhue and Baspool.

Trin. 24 Car Banc. Reg.

Error upon a Iudgement in an Action upon the Case.

Baspool brought an Action upon the Case upon a promise against Mayhue, and hath a Judgement against him. The Defendant brings a Writ of Error in this Court to reverse the Judgement, and assigns for Error, 1 It is not said in the Declaration, that the promise was made within the Jurisdiction of the Court. But Roll Iustice answered, that it was, that the Defendant was indebted tunc & ibidem, which shews, that he became indebted within the jurisdiction of the Court, and the being indebted there is an Assumpsit in Law, that he will pay the Debt, and therefore it is not needfull to shew expresly that he did promise there to pay it, 2ly. The Venire is duodecim probos & legales homines, whereas it should be liberos, &c. But the Court over-ruled this exception also, and affirmed the Iudgement except better matter should be shewn.

Iurisdiction. Assumpsit.

Win

VVinn againſt Stebbins

Trin. 24 Car. Banc. Reg.

VPon a rule of Court for a reference to the Secondary, whether the party, and the Sheriff were in contempt to the Court for taking out of Execution, and executing it after a Writ of Error brought upon a Judgment, it was moved that he might make his report, who thereupon reported to this effect; That there was a writ of Error brought upon the Judgement before Execution taken forth; but there was no notice thereof given to the party, nor any ſuperſedeas taken forth to ſtay Execution, and therefore the Plaintif might take out Execution, notwithſtanding the writ of Error brought, and that thereby he is not in contempt to the Court. Roll Iuſtice ſaid, Then is the Execution now well executed, and the Sheriff is in no fault. Maynard of Councel with the Plaintif in the writ of Error, moved that the Execution was awarded improvide, and therefore the Court may reſtore the party to his goods taken in Execution, although the Sheriff be not in fault. Roll Iuſtice, The party ought to take notice of a recipitur upon the Record if it be entred, and if the party take out Execution after the writ of Error is allowed, he is in contempt to the Court, elſe not, and the Attorny is not bound to view the Record whether a writ of Error be brought; but may take out Execution if there be not a ſuperſedeas, or notice given to the party. Therefore there is no help here, for the proceedings have been according to the courſe of the Court, for by the delivery of the writ of Error to the Officer of the Court, the hands of the Court are cloſed. Yet let us ſee the Preſident that Woodward hath to ſhew, and let the Secondary examine it again.

Whether a contempt to the Court or not.

Notice.

Contempt.

Execution.

Superſedeas.

Trin. 24 Car. Banc. Reg.

AN Action of accompt was brought touching the fraight of a Ship, and a Iudgement that the Defendant ſhall accompt, and Auditors aſsigned, and Manucaptors found to appear before the Auditors, the Court was moved for a ſcire facias againſt the Manucaptors, becauſe that the Defendant did not appear at the day before the Auditors aſsigned, and ſecondly it was moved that the Court would aſsigne a day peremptory, for the party to appear before the Auditors. But Roll Iuſtice ſaid, a day cannot be aſsigned untill a certificate be made to us from the Auditors, for they are truſted, and are Judges of the cauſe, and have power to excuſe the non-appearance of the party at the day, if they ſee cauſe, and to give longer day or ſhorter, for the party to appear as they think good, and therefore till they certifie, neither can you have a day aſsigned, nor a ſcire facias againſt the Manucaptors.

For a ſcire facias againſt manucaptors.

Certificate. Auditors.

Scire facias.

Clementſon againſt Montford

Trin. 24 Car. Banc. Reg.

Hill. 23 Car. rot. 1493.

Error to reverſe a Judgement in an action upon the caſe.

A Writ of Error was brought to reverſe a Judgement in an Action upon the Caſe brought by an Adminiſtrator in the Court at Eſham; The Errors aſsigned were, 1. The Plaintiff doth not declare that the adminiſtration was granted unto him per loci illius ordinarium. 2ly. The Plaintiff ſaith in his Declaration, producit litteras Adminiſtratorias inteſtati, whereas it ſhould be ordinarii, and not inteſtati. 3ly. The Court cannot by its privilege being an inferiour Court, and that but newly erected, award a Capias upon entring the plaint, as it is here done. 4ly. The Court began firſt to be a Court, but 9 Iac. and yet it is ſaid to be held per uſum et conſuetudinem curiæ. Twiſden to the 1. exception ſaid, that it is helped by the verdict. Roll Iuſtice asked how doth it appear that Eaſham is within the Dioceſs of the Biſhop that granted the Letters of Adminiſtration, for if it be not, the Letters are not well granted; And ſaid, that in a Declaration it is not neceſſary to ſay that Letters of Adminiſtration are granted per loci illius ordinarium, aut cui pertinuit, although they ought to be ſo pleaded in a plea in Bar. To the ſecond exception, Twiſden anſwered, that the words mentioned are not neceſſary, and the Declaration would be good enough without them, and therefore they ſhall not hurt it, though they be miſtaken, and if it ſhould be otherwiſe, yet they are helped by the verdict; and to the firſt exception he ſaid, that the words ſecundum uſum et conſuetudinem ſhall be intended to be meant according to the Law, and not according to ancient uſage, as is urged by the Councell on the other ſide. The rule was that Iudgement be affirmed except better matter ſhould be ſhewn Monday next.

Capias.

Adminiſtration Declaration. Plea.

Read againſt Palmer.

Trin. 24 Car. Banc. Reg.

Arreſt of Iudgement in an action upon the caſe.

Read brings an Action upon the Caſe upon an Aſſumpſit to ſtand to an award againſt Palmer, and hath a verdict. The Defendant moves in arreſt of Iudgement, and ſhews that there was an amendment in the conſideration, and the promiſe after the iſſue joyned. Twiſden anſwered, it is not material, though it be ſo, for the matter of the Aſſumpſit is implyed, and the words altered are idle, and cited 37 El. Heydons Caſe, for it is de et ſuper præmiſſis, which implyes all the matter. Roll Iuſtice ſaid, that the words de et ſuper præmiſſis goe not to the time, but to the matter ſubmitted, and ſaid that the words poſtea, ſcilicet eodem die, upon a contract in Law ſhall be intended the time of the contract, but here is a ſpeciall contract and collateral, and it ought to be otherwiſe intended, and deſired to ſee a book.

Anverement.

Contract in a ſpecial law.

Free-

Freeborn againſt Purchaſe.

Trin. 24 Car. Banc. Reg.

Hill. 23 Car. rot. 1575.

FReeborn brought an Action upon the Caſe againſt Purchaſe, and declares that the Defendant in conſideration that the Plaintiff had paid unto him ſuch a ſum of money, did aſſume, and promiſe to joyn in the ſurrender of certain Copyhold Lands, and that for not performing this promiſe he brings his Action. The Defendant demurs upon the Declaration, and ſhews that the Plaintiff doth not allege that he made any requeſt to the Defendant to joyn in the ſurrender, which he ought to do, for it was not a ſingle Act to be done by the Defendant alone; but he was to joyn in the Act with another. Roll Juſtice ſaid, the promiſe is that the Defendant ſhall joyn in the ſurrender, and he doth not ſay that he did requeſt him to joyn, which he ſhould have done. And beſides the breach is not well aſſigned, for you have aſsigned a particular way how he ſhould ſurrender, namely into the hands of 2 Tenants of the mannour, whereas he did aſſume only to joyn in a ſurrender, which may be in Court, or into the hands of the Lord, as well as into the hands of two Tenants; ſo is Syms and Walkers Caſe, 9 Car. Alſo the Plaintiff ought to have ſhewed that there is ſuch a particular cuſtom in the manour, that a Copyhold Tenant may ſurrender into the hands of two Tenants of the manour, or elſe ſuch a Cuſtom cannot be taken notice of. Therefore let a nil capiat per billam be entred againſt the Plaintiff.

Demurrer to a Declaration in an action upon the caſe.

Requeſt.

Breach.

Notice.

Wright againſt Martin.

Trin. 24 Car. Banc. Reg.

THe Court was moved to change the venue in an Action for an eſcape, upon an affidavit that the eſcape touching which the Action was brought was in another County, and not in the County where the Action was brought. But Roll Juſtice ſaid, that an eſcape in one place is an eſcape all England over, and is not local; therefore the venue is not to be tyed to one place more than another. Yet let the other party ſhew cauſe why the venue ſhould not be altred.

To chauge a venue in an action for an eſcape.

Local.

Trin. 24 Car. Banc. Reg.

VPon a rule to ſhew cauſe why Judgement ſhould not be ſtayed in an Action upon the Statute of 2 Ed. 6. for not ſetting forth of Tithes, theſe exceptions formerly taken were anſwered. 1. It was ſaid the Statute was miſrecited, for the day when the Parliament began wherein the Statute was made is miſtaken; but to this it is anſwered, that the Declaration doth not ſay per Statutum in Parliamento inchoat. tali die, but in Parliamento tali die, and the Parliament was held by prorogation the day that it is mentioned, though it were not then firſt begun, and ſo that is well enough. To the ſecond exception, that the Declaration doth ſay that the Plaintiff was primo die occupator ac poſtea eodem die, &c. So that it appears

Exceptions anſwered offered in arreſt of Judgement in an action upon the Statute of 2 Ed. 6. for not ſetting forth of tithes.

Recital.

Proprietor. pears not, that he was proprietor, and ſo the Action may not lye, for he may be occupator wrongfully, and ſo not proprietor. It is anſwered, that the Declaration is, that he was tali die poſſeſſionatus et ab eodem die occupavit, and this ſhall be judged of a rightfull eſtate, and it is ſaid, that he is rector eccleſiæ, and ſo he ſhall be intended proprietor of the Tithes, if the contrary be not ſhewn. The rule was to ſhew better cauſe Friday following, elſe Judgement for the Plaintiff.

Sowthcott againſt Sowthcott

Trin. 24 Car. Banc. Reg.

Exceptions anſwered taken to arreſt judgement in an action for rithes. Tithes.

IN this Caſe formerly moved, and Judgement ſtayed till the Plaintiff ſhould move: Maynard for the Plaintiff moved for Judgement, and to the exception taken on the other ſide, that the word grain uſed in the Declaration is too general, and may extend to grain not titheable, viz. to rape-ſeed and cole-ſeed, &c. as well as to titheable, and ſo the Declaration is incertain; He ſaid it is well enough, for it is ſaid grain growing in ſuch a field by name, which makes it certain, 2 rep. lib. Int. 176. 2d. Coment. f. 161. b. and for the word grain in comon underſtanding it is meant for corn, and not for ſeeds, though in a large exception it may extend to ſeeds alſo. Hales on the otherſide ſaid, that the word grain is incertain, and ſignifies more than corn, and alſo the word Garbæ is too generall, for it may extend to more than ſheafs of Corn, for bundles of any thing bound up may be ſaid to be Garbæ, as well as Corn bound in ſheafs, and may extend alſo to grain not titheable. Roll Iuſtice held, the words in the Declaration,
Comon intent Seminavit cum grano proper enough, and that by common conſtruction it ſhall be meant with Corn, and not with ſeeds, 10 Car. Goldſmiths Caſe, Hill. rot. 8. And for Garbæ, it is alſo well enough, for it ſhall be taken according to common conſtruction, which is to ſignifie corn bound up, and ſhall not be taken in the large extent of the word for bundles of any thing elſe. And the Jury hath taken notice of it, for they have found debet, which had they not they could not have found the verdict ſo. The rule was for the Plaintiff to take his Iudgement, if cauſe were not ſhewn Friday following.

The King and Sr. Henry Spiller

Trin. 24 Car. Banc. Reg.

For quaſhing divers Endictments for not repairing of a Bridge.

THe Court was moved for the quaſhing of divers Endictments wherein Sr. Henry Spiller was endicted for not repairing a bridge; the exception to the firſt was, that it doth not ſet forth in what County the bridge lyes, and for that exception it was quaſhed. Another Endictment was for not repairing of Mays Bridge, and it doth not ſhew that the bridge is in the Highway. But to this Roll Iuſtice ſaid, that the Endictment doth ſay it is a Common bridge, and that is enough, and it is needleſſe to ſay it is in the Highway. Another exception was taken to this Endictment; that it did not ſhew whether the bridge were a cart bridge, or a horſe bridge, or a foot bridge, or what other paſſage was over it, and for that exception that Endictment was quaſhed. To a third Endictment for not repairing the ſame bridge, this exception was taken, viz. It ſayes that Sr. Henry Spillar was

bound

bound to repair the bridge ratione manerii, which cannot be good; but it should be rationæ tenuræ manerii. Roll Iuſtice ſaid, It ought to ſhew that he is owner of the manour, and although it do expreſſe that he is bound to repair it ratione manerii ſui, that is but implication that he is to repair it, and makes it not appear that he is poſſeſſed of the manor, and upon this exception was this Endictment quaſhed. To a fourth Endictment for not repairing the ſame bridge, this exception was taken, that there is no addition of the County, where Sr. Henry Spillar dwelt, as the Statute directs, and for this it was alſo quaſhed. Yet afterwards becauſe there was no certificate that the bridge was repaired, the Court would quaſh none of them, but ſaid, let him plead to them: The Defendants Councel moved that he might plead but to two of them, and that proceſſe might be ſpared to the reſt. Roll Iuſtice, Appear to all, and plead, and proceed in two of them, and proceſſe ſhall be ſtayed to the reſt.

Implication.

Addition.

Burrel and Lancaſter.

Trin. 24 Car. Banc. Reg.

BUrrell brought an Action of Treſpaſſe quare clauſum fregit againſt Lancaſter, and had a verdict; the Defendant moved in arreſt of Judgement, and for cauſe ſhews that there is a variance between the writ, and the Declaration, for the writ is quare clauſum fregit in the ſingular number, and the Plaintiff declares of divers Cloſes; But Roll Iuſtice ſaid, That it was well enough, for the word clauſum is nomen aggregativum, and may contain many Cloſes, and ſo may well enough agree with the Declaration. And therefore let the Plhintiff take his Iudgement.

Arreſt of Iudgement in Treſpaſſe quare clauſum fregit.

Variance.

Nomen aggregativum.

Glide againſt Dudeney.

Trin. 24 Car. Banc. Reg.

Paſc. 24 Car. rot. 426.

GLide brings an ejectione firmæ againſt Dudeney in the Common pleas, and hath a Judgement by default againſt the Defendant, whereupon a writ of enquiry iſſues out to enquire of the Damages, and before the return thereof, the Defendant brings a writ of Error, the queſtion was, whether the writ of Error were well brought, in regard that the courſe of the Common pleas is not to make up the Judgment untill the writ of enquiry be returned. Roll Iuſtice ſaid, that a writ of Error may be brought before the writ of enquiry be returned in an ejectione firmæ, for in that Action the Judgement is compleat at the Common Law before it be returned, for the Judgement is but to gain poſſeſsion, and ſo is it in a writ of Dower; but in an Action of Treſpaſſe where damages only are to be recovered, there the Judgement is not perfect till the writ of enquiry is returned, nor can be made up before as in this caſe it may, but in regard that here is no compleat Judgement entred, for there is no capias which ought to be in all Actions quare vi et armis, that the King may have his fine which elſe he cannot have

Error upon a Iudgement in an ejectione firmæ in the Comen plea

Iudgement. Error.

Error. Execution. if the party do not proceed in his Writ of Enquiry, the Writ of Error is brought too soon, and you may proceed to execution in the Common-pleas, for the compleat Record is not here. Therefore advise what to do in the Common-pleas, for it is mischievous quacunque via.

Norton against

Trin. 24 Car. Banc. Reg.

Arrest of Judgement in Assault and Battery. Mis-sworn

Amendment.

NOrton brought an Action of Assault and Battery against the Defendant, and had a verdict against him. The Defendant moved in arrest of Judgement, that in the Venire facias one of the Jurors was returned by the name of Edmund, and it appears by the Postea, that he was sworn by the name of Eward, which cannot be intended to be the same person. Roll Justice said, if the Clerk of the Assises, in returning of the Postea have mistaken the name, it may be amended here in Court by his notes, by which he made the Postea; and therefore let him be examined here whether it be a mistake or no.

Toby against Angel.

Trin. 24 Car. Banc Reg.

For a reference.

THe Court was moved for a reference in this Cause to the Secondary, because the Sute was commenced upon two Counter-bonds, which are both cancelled. Roll Justice answered, then why should it be referred: for you may plead non damnificatus, if the truth of the matter be so: but the party may peradventure be damnified, notwithstanding the Bonds be cancelled, and may have good cause of Action.

Langly against Wybord.

Trin. 24 Car. Banc. Reg.

Demurrer to a Replication in Debt upon an Obligation to stand to an Award. Award.

LAngly brought an Action of Debt upon an Obligation to stand to an Award against Wybord. The Defendant pleads nullum Arbitrium. The Plaintiff replies, that the Arbitrators did make an Award, and sets it forth in hæc verba; The Defendant demurs and shews for cause, that the Award is not well set forth: for he doth not shew, that the Award was delivered up by the Arbitrators, according to the submission. Roll Justice answered, it was well enough, though it be not. A second cause was, that it is not said touching what sutes the Award was made. Roll Justice answered, the Award is said to be de præmissis, and that is good enough. 3ly. The Award is, that all sutes shall cease. Roll Justice, This is well enough. 4ly. The Arbitrators have exceeded their submission. The rule was to bring the Roll into Court, and till then the former rule to stand. Afterwards the Award was judged good, and the Plaintiff had his Judgement.

Trin.

Trin. 24 Car. Banc. Reg.

A Writ of Error was brought to reverse a Judgement given in an Inferiour Court, and the Error assigned was, That the point was entred before such an one Maior, and the sute was continued before another Maior, and it is not shewn that the first Maior was removed, and that the other Maior was lawfully elect and sworn. Roll Iustice said, that the Continuances in Inferiour Courts ought to shew the manner of the Continuances, and it ought not to be expressed generally. And it is not said tunc majori, which would have made it more incertain. I doubt the Venire facias is discontinued, and then there is no Tryal; therefore it is good to advise.

Error to reverse a judgement in an Inferiour Court.

Continuance.

Tryal.

Pragnell against Goff.

24 Car. Banc. Reg.

Goff brings an Action upon an Assumpsit against Pragnell, and hath a verdict, and a Judgement against him. The Defendant brings a Writ of Error to reverse this Judgement. The Case was this, Pragnell did assume and promise unto Goff, that in consideration that Goff would mary the Daughter of Pragnell, that he would be bound to give over his Shop unto him, and not use his Trade in Basingstoke, and would lend unto him fifty pound, and for not performing this promise he had his Judgement. The Error assigned was, that there is a breach laid of all the promise, which consists of divers parts, and one part of it is against Law, namely, the Promise to be bound not to use his Trade, and yet dammages are given entirely for all, which is not good. Wild on Councel on the other side said, that in 2 H. 5. urged is no Judgement given, and in our Case it is not that he shall be bound not to use his Trade generally, but only in the Town of Basingstoke, and he may use it any where else, and therefore it is not against Law. Roll Iustice, If the words be general, that he shall not use his Trade in such a place without any consideration, this is ill; but it is otherwise if there be a consideration, for a man may sell his Liberty & Privilege for a Consideration, and it shall bind him. The rule was to shew cause Saturday next why Iudgement should not be affirmed. This was afterwards moved & objected, that part of the Assumpsit was to turn over the Defandants Trade, and dammages given for that which is impossible. Roll Iustice said, if dammages entire be given for some things with others wherof some are impossible, the dammages shall be deemed to be given for those that are possible, and void to the rest. The Indgement was affirmed.

Error upon a Iudgement in an Action upon an Assumpsit.

Assumpsit.

Dammages.

Peeling against Ken.

Trin. 24 Car. Banc. Reg.

Pasc. 24 Car. rot. 89.

Peeling brought an Action of Debt upon an Obligation to stand to an Award against Ken. The Defendant pleads Nullum Arbitrium. The Plaintiff replies and sets forth the Award in hæc verba, and assigns a breach

Demurrer to a Replication in Debt upon an obligation to stand to an Award.

breach. The Defendant demurs to the Replication, and the Plaintiff joyns in the Demurrer. The cauſes aſsigned for the Demurer were, 1. To the Award. Award it ſelf, which is that whereas it appears that there was ſix pound and a ſhilling due by the Plaintiff unto the Defendant; the Arbitrators had awarded, that the Plaintiff ſhould pay unto the Defendant ſix pound in full ſatisfaction thereof: which is leſſe than they acknowledge to be due, ſo that it cannot be a ſatisfaction, 9 H. 7. f. 11. 46 E. 3 f. 7. 2ly. The Award is, that one of the parties ſhall deliver Dimiſsionem prædictam, whereas it ought to be Indenturam dimiſsionis: for the dimiſsion is but the conſent of the party to the Indenture, and not the Indenture it ſelf, Cooks Inſtit. 43 6. 3ly. They award to deliver dimiſsionem prædictam in the Houſe of a Stranger, which ought not to be: for the party muſt commit a treſpaſs to do it, if he cannot get leave of the Stranger, which he is not bound to do, 9 H. 7. 16. 18 Ed. 3. 23 19 Ed. 4. 41. The words are, that it ſhall be delivered at the Houſe, and in and at are all one in grammatical conſtruction, Mich. 23 Car. Coleman and Painters Caſe. 4ly. They award one of the parties ſhall releaſe three years rent to the other, and there was but two years rent due, ſo that it is impoſsible to be done. 5ly. They have made their Award upon a thing not ſubmitted, viz. that there ſhould be a releaſe of all Actions which might con- Averment. cern the rent; and laſtly, the party ought to ſhew he hath performed the Award on his part, which he hath not not done, 8 H. 6. 18. Brook Arbitrement. Twiſden of Councel on the other ſide, to the firſt Exception ſaid, it is not to the purpoſe: for Arbitrators may award a leſſe ſum than is due, in ſatisfaction of it, and though it be ill, yet the Award is good as to ſo much, whereof a good breach is aſsigned. To the ſecond he anſwered, that the words dimiſsionem prædictam refer to the Indenture pleaded, and ſo that is well enough. To the third he ſaid, that the Award is that the Indenture ſhall be delivered at the Houſe, and it is lawfull for him to go to the Houſe, though not into the Houſe of a Stranger. To the 4th. he anſwered, that the words are to be underſtood that the party ſhall not pay the rent, and not that he ſhall releaſe it. To the fift he ſaid, that the words alleged are no part of the Arbitrement. And if the Obligation be releaſed it is not material, for the Arbitrement is performed, and the words Premiſes reſtrain the Arbitrement to the Submiſsion. And to the ſixth it is not neceſſary to ſhew how the Arbitrement is performed: for if it be not, the other party hath his remedy. Roll Iuſtice ſaid, that in 12 Iac. it was adjudged, that if an Arbitrement was for a thing to be done in or at the Houſe of a Stranger, it was well enough: for it may be intended to be done at the Houſe without doing a Treſpaſs, though not in the Houſe, except the contrary be ſhewed by the party. In Lynyn and VVilliamſon, Hoofs Caſe; and as to the words dimiſsionem prædictam, that is alſo well enough: for it ſhall be intended the Indenture of demiſe. But let us have Books and move it again. It was moved again, and another exception taken, that the promiſe was releaſed; Upon which the Court would adviſe.

Smith againſt Hobſon.

Trin. 23 Car. rot. 1078.

Arreſt of Iudgement in an action upon the Caſe. SMith an Inn-keeper in VVarwick brought an Action upon the Caſe againſt Hobſon, for ſpeaking theſe words, Collonel Egerton had the French pox,

pox, and hath ſet it in the Houſe (meaning the Plaintiffs Houſe) and William Smith and his wife (meaning the Plaintiff and his Wife) have it, and all you. The Plaintiff hath a verdict. The Defendant moves in arreſt of Judgement, and for cauſe ſhews, that the words are not actionable: for the words are, that Collonel Egerton hath ſet the French pox in the Houſe, which is impoſsible: for the Houſe could not have the pox, and the words William Smith and his Wife have it, ſhall not be meant that they have the pox, but the Houſe, for that is the next Antecedent to the words, to which they ſhall refer. And alſo where words are ſpoken doubtfully whether they be ſpoken true or falſe, they ſhall be taken to be true: and it may be here the words are true, and then no Action lies for ſpeaking of them: alſo the Baron and Feme ought to joyn in the Action, if they be actionable, for they are ſpoken to both their prejudice, and the Action is not to be brought by the Husband alone, as here it is. Alſo in this Caſe the words being ſpoken of a Houſe, the Writ of Enquiry of Dammages muſt be what Dammages is come to the Houſe, which cannot be. Roll Iuſtice, If an Action be brought for words, and part of them be actionable, and part are not, yet an Action lyes for them which are actionable. And in this Caſe the Husband alone may bring the Action for dammages to himſelf, and he may afterwards bring another Action for the dammages done to his Wife. And he held the words here actionable, and bid the Plaintiff take his Judgement, if cauſe were not ſhewn to the contrary Saturday following. Iudgement was afterwards given accordingly.

Joyn in Action.

Marſhall againſt Porter.

Hill. 23 Car. rot. 769.

MArſhall brings an Action of Treſpaſs Quare vi & armis for taking away his Cattel. The Defendant pleads non Cul. as to the vi & armis, and as to the taking of the Cattel he pleads, that he bought them in a Market-overt. The Plaintiff demurs to this Plea, and the Defendant joyns in the Demurrer. The Exception taken to the Plea was, that the Defendant doth not ſhew what day the Market was kept, nor whether it were out of Lent, according to the Patent for the keeping of the Market. Roll Iuſtice ſaid, this ought to have been averred in the Plea, and therefore the Plea is not good. Therefore let the Plaintiff have his Iudgement if cauſe be not ſhewn to the contrary.

Demurrer to a ſpecial plea in Treſpaſs Quare vi & armis.

Averment.

Pitcher againſt Symons.

Trin. 24 Car. Banc. Reg.

Hill. 23 Car. rot. 189.

SYmons brought an Action upon the Caſe upon an Aſſumpſit in the Com-pleas againſt Pitcher, and hath a verdict, and a Judgement. The Defendant brought a Writ of Error here to reverſe the Judgement. The Error aſsigned was, that there was no iſſue joyned between the parties to the ſute: for it is & prædictus Ioſephus ſimiliter, whereas it ſhould be prædictus Robertus. Roll Iuſtice cited 9 Eliz. Dyer, and ſaid, if it be prædictus Richardus where it ought to be Robertus, it cannot be amended, becauſe the Iſſue is altered: for it is joyned between other parties, and ſo is it in this Caſe. But move it again Friday next.

Error to reverſe a Iudgement in an action upon an Aſsumpſit.

Iſsue.

Amendment.

Deacon againſt Foreſt,

Trin. 24 Car. Banc. Reg.

VVhether a Plea was peremptory, or that there might be a Reſpondes ouſter.

Deacon brings an Action in this Court againſt Foreſt. The Defendant appears in Michaelmas Term, and imparls to Hillary Term, and before the day of Continuance pleads a Plea in abatement; to which the Plaintiff demurs. Yard of Councel with the Plaintiff ſaid, he conceived the Plea was peremptory to the Defendant, becauſe it comes after an imparlance, & a Continuance, and ſo comes in lieu of a Peremptory: for the Law admits but one delay, and therefore the Defendant ſhould have pleaded in Chief, and not having done it, his Plea ſhall be as if it were a Plea in Chief over-ruled, and cited Long Quint. E. 4. f. 139. Roll Iuſtice, You cite not the Book as it is, here is but a Plea in Abatement, and the Continuance makes it not peremptory, 2 Ed. 4. f. 10. A ſecond Exception was, that the Plaintiff hath not demurred upon the Plea, but pleaded to iſſue, and here is a departure from the general iſſue, 34 H. 6. f. 8, 9. Roll Iuſtice, The Book is againſt you, for upon a Demurrer a Plea dilatory is not peremptory: but upon an iſſue joyned it is. Yard, The delay of the Demurrer makes it peremptory, 22 H. 6. f. 55. Roll Iuſtice, The Book cited is againſt you, and in 50 E. 3. f. 20. There is a difference taken between the delay of the Court, and the delay of the party; and here is no delay in the party, for he might have been forced by the rules of the Court to haſten the proceedings, and the Book of 34 H. 6. is againſt you. The Plea in Abatement ought not to have been received after imparlance, but if it be received, & a Demurrer upon it, it cannot be helped and if one plead a Plea after imparlance, which ought not to be pleaded, the Plaintiff may pray the Court to over-rule it: but if he demur upon it, he admits that the Plea may be; and one may plead a Plea in Bar by way of abatement, & e contra. Therefore let the Defendant plead in Chief, if cauſe be not ſhewed on Friday to the contrary.

Peremptory. Plea.

Departure.

Difference.

Plea.

Burges againſt Dynham.

Trin. 24 Car. Banc. Reg.

Hill. 23 Car. rot. 1191.

Demurrer upon a Plea of Iuſtification.

Burges brought an Action of Treſpaſs againſt Dynham for taking 24 load of Tymber. The Defendant juſtifies, that he took the Tymber as a Deputy of a Purveyour to the King, for the reparations of the Manſion houſes of the King. To this Plea of Juſtification, the Plaintiff demurs, and for cauſe ſheweth, that it doth not appear, that the Defendant hath any authority by the Common-law, or by Statute to take this Tymber: for the Commiſſion which gives this authority ought to be renewed every ſix Months, and it doth not appear that it was ſo in this Caſe, 2 Inſtitut. f. 545. 10 E. 4. 2, 3. 2ly. He hath not ſhewed that the Houſes were in decay when he took the Tymber, and he cannot take it to make a Common ſtock, to repair them afterward when they ſhould fall to decay. 3ly. Purveyours ought to pay ready mony for the commodities they take, and he doth not ſhew in our Caſe that he paid ready mony for the Tymber, by the Stat. 36 Ed. 3. C. 22. 47 Ed. 3. f. 8. but by 22 Ed. 3. Tit. Bar. 259. it ſeems to be otherwiſe: but the Caſe there differs from this Caſe, for there it was that a Purveyour may take Horſes to uſe for a time, without paying mony: but it was not to alter the property.

Commiſſion.

Purveyours.

property. 4ly. He hath not shewed that he endeboured to agree with the Plaintiff for his Timber, as he ought to have done. Hill. 2 Car. rot. 509. Parker and Sturgens case. 5ly. The plea is hudled up, and is not pleaded particularly and distinctly as it ought to be, so that the Plaintiff knows not how to take an issue, 10 H. 7. The rule of Court was to hear the other side Friday next. Plea.

Brereton and Monington.

Trin 24 Car. Banc. Reg.

A Writ of Error was brought to reverse a Judgement given in an inferiour Court, and the Error assigned was, that the Plaint was entred against Francis, and the proceedings were against John. Roll Iustice said, that it was not good, for a Plaint is in the nature of an original writ, and therefore if that be erroneous it cannot be helpedthough it be after a verdict. And therefore shew cause Saturday next why the Iudgement should not be reversed. Error to reverse a judgement given in an inferiour court. Plaint. Amendment.

Gallop against Symson.

Trin. 24 Car. Banc. Reg.

CHase brings an Action of Trover and Conversion against Gallop, and his wife, and a stranger, in the Common pleas, and hath a verdict, and a Judgement against them. The Defendant brings a writ of Error to reverse this Judgement, and assigns for Error that the Plaintiff declares that the goods for which the Action is brought, venerunt ad usum ipsorum, viz. of the Husband, and his wife, and the stranger, which cannot be, for they cannot be said to come to the use of a Feme covert. Roll Iustice, This is not good, for he ought not to declare that the goods came to the use of the Feme, but to the use of the Husband only. And therefore reversetur judicium, except cause shewn to the contrary Saturday next. Error to reverse a judgement in a trover and conversion. Declaration.

Wainewright and VVhitly.

Trin. 24 Car. Banc. Reg.

VVAinewright brought an Action upon the Case against Whitly, for these words spoken of him; Thou art a theef, and hast broke my Chest; The Plaintiff hath a verdict, The Defendant in arrest of Iudgement moves that the words are not actionable. But Roll Iustice said, notwithstanding my Lord Hobarts opinion, he held the words are actionable, for the word and is cumulative, and aggravates the former words, are not barely explanatory, and the subsequent words are violent, and may very well stand with the former. Therefore let the Plaintiff takehis Iudgement. Arrest of Judgement in an action upon the case. Cumulative. Explanatory.

The King and Camell.

Trin. 24 Car. Banc Reg.

An arraignment for witch-craft.

ANn Camell endicted at Southwold in Suffolk for Felony and Witchcraft was brought to the Bar by an habeas corpus, and was here arraigned. The prisoner desired Walker for her Councel. Roll Iustice asked her for what cause and matter she did desire Councell; To which the prisoner making no answer, Roll Iustice viewed the Endictment, and upon that assigned her Walker for her Councel, and gave him the next day to shew his exceptions against the Endictment, at which time Walker desired that the Endictment might be read, which was done, and upon the

Endictment. reading of it he took these exceptions. 1. To the caption wherein it is expressed, that the Endictment was taken in pena cessione, where it should be in plena cessione. To this Roll answered, if the word pena be left out, the Endictment is good enough without it, and therefore passes ouster. A second exception was, that the Endictment doth not say that the Iustices before whom it was taken were iusticiarii ad pacem tenendam in villa prædicta, and then they might habe no power to find the Endictment; but this exception was also over-ruled by the Court. A third exception was, That the Endictment is too general, for it only sayes that the prisoner practicavit diabolicas artes, and doth not expresse what. To this Roll Iustice answered, that the employing of wicked spirits to any intent whatsoever is Felo-

Felony. ny within the Statute, and the intent why they were employed is well expressed in the Endictment, and if an Endictment fail in one part, it may be good in another: and therefore the Endictment is good, and the prisoner must plead; Whereupon the prisoner pleaded not guilty. Upon this Walker moved the Court that this was an old Endictment, and that the prisoner had been twice acquitted upon other Endictments of the same nature, and that this was prosecuted for malice, and prayed that the prisoner might be bailed, which was granted. And she was bailed by her Husband, and by

Bail. one Zachary Baggs a sufficient Citizen and Fishmonger of London, and two others, to appear at the next Assises to be held for the County of Suffolk.

Trin. 24 Car. Banc. Reg

To quash an Endictment upon the Statute of perjury.

THe Court was moved to quash an Endictment exhibited upon the Statute of perjury at Kingston upon Thames for these exceptions. 1. It is not expressed in what County Kingston is; and 2ly. the Endictment doth not expresse how the party is perjured, for it shews not in what cause it was nor that it was in giving any evidence upon oath as a witnesse in any cause. Vpon these exceptions the Endictment was quashed. Nota

Butler,

Butler againſt Long.

Trin. 24 Car. Banc. Reg.

Paſc. 24 Car. rot. 496.

LOng brought an Action of Treſpaſſe againſt Butler in the City of and hath a verdict and a Judgement, the Defendant brings a writ of Error to reverſe this Judgement, and aſsigns for Error, 1. That the Declaration doth not ſhew in what Pariſh within the City the Treſpaſſe was done, as he ought. To this Roll Iuſtice anſwered. That it ſhall not be intended that there are more Pariſhes within the City than one, except the contrary be ſhewed. 2ly. The Declaration eſt quod cum talis, viz. the Defendant, &c. which is not an expreſſe averment, that the Defendant did the Treſpaſſe; but it is ſet forth only by way of circumſtance that he did it, which is not good, for he ought to be charged directly with it. Roll Iuſtice, The ſetting forth the Treſpaſſe by a quod cum is not good, though in another Action it may be good. Therefore let the Iudgement be reverſed, except cauſe ſhewn to the contrary Saturday next.

Error to reverſe a judgement given in an inferiour Court.

Intention.

Declaration, Treſpaſſe.

VValker and Alder.

Trin. 24 Car. Banc. Reg.

ALder had a Iudgement and an Execution againſt Walker, and thereupon he was taken, and in cuſtody in the Kings Bench priſon. Alder the Plaintiff afterwards conſented that the Defendant Walker ſhould come to him out of priſon to the Horſhoe Tavern, which was out of the Rule, without a Keeper or rule of Court, thinking to make ſome agreement with him. The Defendant accordingly went thither, but becauſe no agreement could be made, The Plaintiff takes the Defendant again upon the ſame Execution, and layes him again in the Kings Bench, the Defendant thereupon brings his audita querela; And adjudged by the Court to be well brought for the Execution was diſcharged by the Priſoners going at large, and therefore he could not be again taken upon it.

Auditaquerela for one taken twice upon one execution

Audita querela. Diſcharge.

Reader againſt Palmer.

Trin. 24 Car. Banc. Reg.

READer brought an Action upon the Caſe againſt Palmer, and hath a verdict, the Defendant moved in arreſt of Iudgement that the Plaintiff altered his Declaration in the conſideration of the promiſe, and in the promiſe it ſelf, after he had pleaded, ſo that thereby the ſame iſſue which is tryed, is not that which was joyned. Twiſden of Councell with the Plaintiff ſaid, that the iſſue was not altered, for the words altered are not material words. Wild of Councell with the Defendant ſaid, the iſſue was altered by alteration of the words, for the Action is brought upon a ſpecial promiſe, and not upon a promiſe in Law, as the altering of the words have made the promiſe to be, and therefore it is a material alteration. Roll Iuſtice ſaid, it is a material thing that is altered, and it ought not to be amended; An Actual promiſe, and a conſideration continuing, cannot be taken

Arreſt of Iudgement in action upon the caſe for altering the Declaratio.

Amendment.

ken to be at another time. Hodg and Vaviſors caſe, 14 Iac. Barton and Shurlyes caſe, Mich. 15 Car. And therefore give new rules to plead, and ſo proceed according to the courſe to a new tryal.

VVolverly Strachy againſt

Trin 24 Car. Banc. Reg.

Demurrer upon a plea in an action for ſcandalous words. Plea.

VVOlverly Strachy brought an Action upon the Caſe againſt the Defendant, & declared, that whereas ſhe was a woman of agood fame, and honeſt reputation, &c. The Defendant ſpake theſe words of her, viz. ſhe is a common Whore, and I will prove her one, by reaſon whereof ſhe loſt her credit and reputation, and her mariage. The Defendant pleaded that ſhe was not of an honeſt reputation at the time when he ſpake theſe words of her, as is alleged in the Declaration: The Plaintiff demurs generally to this plea. Iudgement was given for the Plaintiff, except cauſe ſhould be ſhewed Saturday next to the contrary. Antea

and the Lord Moone.

Trin. 24 Car. Banc. Reg.

For a ſuperſedeas for a Peer of the Realm. Superſedeas. Privilege.

My Lord Moone had a Sute commenced againſt him in this Court, and thereupon he moves by his Councel upon an affidavit that he was a Peer of the Realm, and a Lord of the Parliament, and therefore ought not to be ſued, and prayes for a ſuperſedeas to ſtay the proceedings. Roll Iuſtice, Plead your privilege, for upon an affidavit we will make no rule, or elſe acquaint the other party that he is a Peer of the Realm, and it is like he will forbear to proceed thereupon. But you ought not to trouble the Court with ſuch motions as theſe.

Corniſh againſt Cowſye.

Trin. 24 Car. Banc. Reg.

Trin. 23 Car. rot. 1434.

Special verdict in Debt for rent againſt an Executor.

Variance.

COrniſh brought an Action of Debt againſt Cowſye an Executor, for arrerages of rent incurred, part in the life of the Teſtator, and part in the time of the Executor. The Plaintiff declares upon a leaſe made by him to the Teſtator by his Indenture made the firſt of May in ſuch a year, &c. The Defendant pleads nil debet, and upon this a ſpeciall verdict was found to this effect, That the Plaintiff did upon the firſt day of May, make the Indenture of leaſe to the Teſtator of the lands let, to have and to hold a die datus, for and during the term of 7 years, from our Lady day laſt paſt, from henceforth fully to be compleat and ended, upon this verdict, the queſtion inſiſted upon by the Councell was, whether there be not ſuch a variance between the leaſe, upon which the Plaintiff hath declared, and the leaſe found in the verdict, that they ſhall be ſaid to be ſeveral leaſes, or whether it ſhall be adjudged one and the ſame leaſe. Twiſden for the Defendant held that there is ſuch a variance between the leaſe in the Declaration, and the leaſe found in the verdict, that they cannot be the ſame, and

ſo

ſo the Plaintiff can have no Judgement, and he urged this ground of Law that a deed ſhall be ſo conſtrued that all parts of it may be made to ſtand together if it be poſsible without forced conſtruction of the words; but this cannot be here, and a Leſſor may make a leaſe to begin when he pleaſeth, and end when he pleaſeth, notwithſtanding the date of it, and a leaſe made to begin at a day paſt, doth begin in intereſt in preſent, though not in computation, and he cited Muſgraves caſe, Hob. rep. where two computations are in a leaſe for years, and one is repugnant to the other, the laſt ſhall be rejected. Hales of Councell with the Plaintiff held, that the leaſe begins in point of intereſt from the day of the date, and that there is no variance, or repugnancy between the leaſe mentioned in the Declaration, and the leaſe found in the verdict, and therefore the verdict is for the Plaintiff. Roll Iuſtice ſaid, it would be hard for him to maintain it, and ſaid, that in preſumption of Law, when a thing is to be done upon one day, all that day is allowed to do it in for the avoiding of fractions in time, which the Law admits not of, but in caſe of neceſsity, Hill. 14 Jac. More and Muſgrave Mich. 10 Jac. rot. 76 in the Exchequer. A Demiſe the 5 of May, by Indenture dated the 4 of May, habendum from the feaſt of the Annunciation laſt paſt, for 21 years, to have and to hold from the day of the date of theſe preſents. But there are other points in the Caſe at the Bar to be conſidered of, for the Action of Debt is for rent, part incurred in time of the Teſtator, and part in time of the Executor, and it is in the detinet, which ought not to have been; but I conceive that that is here helped by the verdict, yet it is worth conſideration: And he ſaid, that an Executor cannot waive a Term if he have not aſſets, but if he have he may. Another thing here conſiderable is, that the Action is brought in the detinet, and the Defendant pleads nil debet; yet he ſaid, that after a verdict it might be good enough, for it is a Debt though the Action be brought in the detinet, Trin. 10 Car. 1289. Porter and Jarvis Banc. Reg. and he ſaid that the Plaintiff hath miſtaken his leaſe, yet I will adviſe by reaſon of the opinion in Muſgraves caſe, Hob. rep. It is a leaſe in computation of time, from the ſealing, and according to the habendum a livery and ſeiſin habendum a die datus delivered the next day is good, if it be made by the party; but it is queſtioned whether it be ſo, if it be made by an Attorney. An antient deed which cannot be proved, ſhall be intended to be delivered the laſt hour of the day, to make good the conveyance. But I will take a little time to adviſe.

Leaſe for years.

Preſumption.

Fractions.

Detinet.

Waiver.

Leaſe.

Livery and ſeiſin.

Raw againſt Raw.

Trin. 24 Car. Banc. Reg.

RAw had a judgement in an Action of Debt brought for arrerages upon an accompt in Newcaſtle upon Tyne againſt Raw, the Defendant brought a Writ of Error to reverſe this Judgement, and aſsigned for Error, 1. In the iſſuing out of the venire, it is not ſaid to be per Majorem prædictum villæ prædictæ; but per Majorem generally. 2ly. It is ſaid, ad re co cognoſcendum inſteed of recognoſcendum. 3ly. It is ſaid the Jury aſſidunt damna de prædict. who is not named before, for it is aſſidunt damna ipſius Katharinæ Carr, whereas ſhe was before called Katharine Raw, and ſo damages are given to no certain perſon, for they have different names. Roll Iuſtice ſaid, the ſurname Carr is void, and it ſhall be taken as if it had been ſaid ipſius Katharinæ only, and that is good enough. But examine the tranſ-

Error to reverſe a Iudgement in Debt upon arrerages of an accompt.

Venire.

Damages.

ſcript

ſcript by the Record, whether the word be re co cognoſcendum or not, for if it be ſo, it is not good.

Lovell againſt Knatchford.

Trin. 24 Car. Banc. Reg.

Paſc. 24 Car. rot. 348.

Error to reverſe a Iudgement for Error in the Poſtea. Commiſsion.

KNatchford had a Judgement in the Common-pleas againſt Lovell. The Defendant brings a Writ of Error to reverſe this Judgement. The Error aſsigned was in the Poſtea, in that it is not ſaid that the Iuſtice of Aſsiſe Aſſociato ſibi, &c. as it ought to be by the Statute. Roll Iuſtice ſaid, the Iuſtice of Aſsiſe may have a ſpecial Commiſsion to go the Circuit alone, and then it muſt not be ſaid ſo, but if it be per formam Statuti, it ought to be aſſociato ſibi, &c. But the Clark of the Aſsiſe may bring in his notes by which

Amendment. he made the Poſtea, and amend it by them: for it is his fault to make the Retorn ſo.

Trin. 24 Car. Banc. Reg.

Plaintiff moves to diſcontinue his action. Diſcontinuance.]

AN Action of Debt was brought upon an Obligation to ſtand to an Award; The Plaintiff ſhewed to the Court, that the Award made was not under hand and ſeal, according to the ſubmiſsion, and therefore he had no cauſe of Action, and prayed that he might diſcontinue his Action. Roll Iuſtice anſwered, it is in an Award, and I will do nothing in it: but if it were upon a Debt, it might be the Debt remains, though the Award be ill, but Judgement is not demanded. I will do nothing in it.

Newton againſt Bales.

Trin. 24 Car. Banc. Reg.

Paſc. 24 Car. rot. 183. or 178.

Error to reverſe a Iudgement in an Action on the Caſe.

BAles had a Judgement againſt Newton, in an Action upon the Caſe upon an Aſſumpſit in the Court at Owſe-bridge in York. The Defendant brings a Writ of Error to reverſe this Judgement, and aſsigns theſe Errors, 1. It is ſaid, the Defendant was to deliver certain commodities ad ratum, inſtead of ſecundum ratum. But to this Roll Iuſtice ſaid, that ad ratum & ſecundum ratum are all one in ſignification. 2ly. There is no time ſet forth when the promiſe was made, for it is ſet down in figures, which is all one as if it were not ſet down at all. Roll Iuſtice, The Record is not ſo,

Amendment. though the tranſcript be, therefore that may be amended. 3ly. There are two ſeveral promiſes, and they are both alleged. Roll Iuſtice, Its well enough. 4ly. The Venire is not returned, for it is not returned to be in omnibus

Retorn. ſervitum & executum. To this the Councel on the other ſide anſwered, it appears that there is a panell returned, and therefore it is well enough, though thoſe words be omitted. Roll Iuſtice, The panel is not returned, nor annexed

ed according the Statute, and therefore it is no return in Law. Therefore let the Iudgement be reverſed for this cauſe, except cauſe ſhewed to the contrary.

VVatſon againſt Scotſon.

Trin. 24 Car. Banc. Reg.

VPon a ſute between Scotſon and Watſon in the Court of Admiralty, Scotſon entred into an Obligation to Watſon. Watſon brings an Action of Debt upon this Obligation in this Court againſt Scotſon. Scotſon appears, and puts in bayl to the Action, and after moves the Court, that Watſon may be ordered to proceed in the Admiralty upon this Obligation, in regard the Bond was given there, and that the bayl here may be diſcharged. Roll Iuſtice, I will not releaſe the bayl: for it is filed, and it is a Record here, and it is not unduly done. To diſcontinue an action, and to diſcharge the Bayl. Diſcharge. Bayl.

Aylet againſt Oates.

Trin. 24 Car. Banc. Reg.

Paſc. 24 Car. rot. 397.

A Iudgement was given in the Common-pleas in an Action of Aſſault and Battery againſt three. The Defendants brings a Writ of Error to reverſe this Iudgement, and aſsigned for Error, that the Action was brought againſt three, and that they all appeared by Attorny, and pleaded, whereas one of them was an Infant within age, and ought to have pleaded by his Guardian, and that Iudgement was entirely given againſt them all, which muſt be void againſt the Infant, and ſo it being intire is void alſo to the two other Defendants. Wild of Councel with the Defendant in the Writ of Error argued, that the Iudgement may be reverſed in part, viz. as to the Infant, and yet may ſtand good againſt the other Defendants: for the Action might have been brought againſt them ſeverally as well as joyntly, 35 H. 6. f. 21. 5 Ed. 4. f. 7. Roll Iuſtice ſaid, it is ruled contrary. Where a Iudgment is reverſed for an error in Law againſt ſome of the Defendants, it is reverſed againſt all of them: but it ſeems to be otherwiſe where it is reverſed for an Error in Fact, 35 H. 6. 2. Hales on the other ſide moved to reverſe the Iudgement wholly; for it is an entire Iudgement and cannot be reverſed in part only: for all the Defendants are equally concerned in it, and a diſcontinuance againſt one of them reverſes the Iudgement againſt all of them, and he denyed the Book of 5 Ed. 4. and cited 29 Ed. 3. f. 39. Roll Iuſtice ſaid, if it be a Iudgement at the Common-law, or a Iudgement where coſts are given by the Statute, if it be reverſed as to one, it is reverſed to all. And here is an entire judgement given by the Common-law, and it cannot be helped. But bring me the Book. Poſtea. Error to reverſe a judgment in Aſſault and Battery. Iudgement. Diſcontinuance. Error.

Crook againſt Samm.

Trin. 24 Car. Banc. Reg.

Mich. 23 Car. rot. 311.

Error to reverſe a Iudgment in an Eject. firmæ.

SAmm had a Iudgement in the Common-pleas upon a Nihil dicit in an Ejectione firmæ. The Defendant brought a Writ of Error to reverſe the Iudgement, and aſsigned the general Error. The Plaintiff in the Iudgement prayed it might be affirmed, Roll Iuſtice demanded of him, if it be a Iudgement upon a Nihil dicit how can it be of this Term? Therefore give notice and move again. But the Iudgement is, ideo conſideratum eſt quod recuperet, and there wants & defendens capiatur, and therefore the Iudgement is erroneous, and how can it then be affirmed? 3 Car. in the Exchequer, Mich. 5 Iac. rot. 269. Allens Caſe, 17 Car. Stewart and Stewart in the C. B. and though it be a Iudgement by default, yet it is a Iudgement, but being erroneous it cannot be affirmed. Therefore adviſe what you will do.

Iudgement.

Error.

Hobart againſt Boraſton.

Trin. 24 Car. Banc. Reg.

Arreſt of Iudgment in Debt upon the Stat. of 2 Ed. 6. for not ſetting forth of Tithes. Copy.

IN an Action of Debt brought upon the Statute of 2 Ed. 6. for not ſetting forth of Tithes, after a verdict, It was moved in arreſt of Iudgement, that the Statute was not well recited: for the Parliament began in the firſt year of Ed. 6. and was prorogued, and the Act was made the 26th of November, and not the fourth, as it is ſet forth to be. For proof of this a Copy of the Parliament-roll, and an Affidavit to prove the Copy to be true were read in the Court. Hales of Councel on the other ſide ſaid, that the Copy was taken out of the Parliament-Journal-book only and not out of the Writ for prorogation of the Parliament, as it ought to be. Roll Iuſtice ſaid to the Councel on the other ſide, Adviſe you how to anſwer this, and let the Iudgement ſtay in the mean time. antea.

Pimley againſt Robinſon.

Trin. 24 Car. Banc. Reg.

Paſc. 24 Car. rot. 476.

Error to reverſe a Iudgement in Treſpaſs vi & armis in York.

RObinſon brought an Action of Treſpaſs againſt Pimpley, for entring into his Cloſe, and taking away a Mare and a Bridle, in the County of York, and had a verdict, and a Iudgement againſt the Defendant. The Defendant brings a Writ of Error to reverſe this Iudgement, and aſsigns for Error, that the Court was ſaid to be held on Saturday the ninth of November, whereas the Saturday on which the Court was held, was not the 9th. day of November, but the 7th. and ſo there is no Court alleged to be held, for on the 9th. day there was none held, 1 H. 7. 11 E. 4. 10. Roll Iuſtice, It ſhould ſeem they did not look well into the Almanack, if they had, this miſtake had not been. Let the Iudgement be reverſed, except cauſe be ſhewn Monday next.

Error.

Mogg

Mogg againſt Shute.

Trin. 24 Car. Banc. Reg.

Trin. 23 Car. rot. 2097

Error to reverſe a judgement in Treſpaſs.

IUdgement was given in an Action of Treſpaſs and a Writ of Error thereupon brought to reverſe this Judgement, and the Error aſsigned was, that the Venire was returned by one that was not Sheriff at the time of the return. To this it was ſaid by the Councel on the other ſide, that this matter ought not to be aſsigned for Error, becauſe it is againſt the Record: on the other ſide it was inſiſted upon, that he may aſsign it for Error. Roll Iuſtice ſaid, it may be aſsigned for Error, but it is a Queſtion how it ſhall be tryed: for it is not upon a Demurrer, and ſo the matter is not before us, 11 Car. Smith and Smith. And this cauſe ought not as it is to have been put into the Paper.

Error.

VVorſely againſt VVorſely.

Trin. 24 Car. Banc. Reg.

Paſc. 24 Car. rot. 489.

Demurrer upon a plea in an action of Accompt. Bar.

VVOrſely brought an Action of Accompt againſt Worſely. The Defendant pleads that the Plaintiff ſtands convicted upon the Statute made againſt Recuſancy, and demands Judgement Si actio. The Plaintiff demurs upon the Plea. Wild of Councel with the Plaintiff ſaid, that this matter ought not to be pleaded in Bar of the Action, but he ought to conclude only Judgement if he ſhall be anſwered. The Councel on the other ſide deſired time to ſpeak in it. Roll Iuſtice, Shew cauſe Monday next why Iudgement ſhall not be given againſt you

Trin. 24 Car. Banc. Reg.

For quaſhing an Endictment. County. Liberty.

THe Court was moved for the quaſhing of an Endictment upon the Statute of 8 Hen. 6. againſt forcible entries. The exception taken againſt it was that the Endictment doth not ſhew in what County the forcible Entry was upon which the Endictment was grounded. Roll Iuſtice anſwered, if it be within a Liberty, it is not neceſſary.

Trin. 24 Car. Banc. Reg.

For quaſhing an Endictment of perjury.

THe Court was moved to quaſh an endictment of Perjury againſt Stephen Burton. The Exceptions taken to the Endictment were theſe, 1. The Endictment is ſaid to be taken in plena Seſsione pacis, and it doth not appear to be the Quarter Seſsions as by the Statute it ought. 2ly. It is ſaid, that the Defendant dixit, &c. and doth not ſhew where or in what Plea he gave the evidence

vidence wherein the perjury was committed. 3ly. It doth not say, that the Defendant gave the evidence corruptive, as it ought to do. 4ly. The prejudice is not said to be ad grave damnum of any body, and so no body being prejudiced by it, none ought to be endicted for it. Roll Iustice said, it is not enough to say the Endiament was taken in plena Cessione generally, but it must appear in what Sessions it was. Therefore let cause be shewn why it should not be quashed. It was afterwards quashed, because it did not shew, that any of the Justices before whom it was taken were of the Quorum, and not for the other exceptions.

Howard &

Trin. 24 Car. Banc. Reg.

Error in the Exchequer-Chamber to reverse a Judgement given in Debt in this Court. Bar.

A Judgement was given in an Action of Debt in this Court. The Defendant brings a Writ of Error in the Chequer Chamber to reverse this Judgement, and removes the Record thither. The Plaintiff brings an Action of Debt in this Court upon the Judgement given here. The Defendant pleads in bar of this Action Nul tiel record, and upon this the Plaintiff demurs, and the Court after motions and arguments on both sides, was by the Plaintiffs Councel moved for Judgement for him upon the Demurrer.

Iudgement.

But Roll Iustice answered, If you will have a Curia advisare vult, you shall have it, if not, take your course, for the Record is not here before us; Therfore we can give no Iudgement.

The King against Trigg.

Trin. 24 Car. Banc. Reg.

For quashing an Endictment for not being sworn a Headborow.

The Court was moved to quash a Presentment against Trigg for not going before a Justice of Peace to take the Oath of an Headborow, to which office he was chosen at a Leet. The Exceptions taken against it were, 1. That it doth not appear that any notice was given to him, to go before the Justice. 2ly. it appears not that the Justice had authority to administer the Oath. For the first exception the Presentment was quashed.

Collins against Page.

Trin. 24 Car. Banc. Reg.

Mich. 23 Car. ro. 269.

Error to reverse a Judgment in Debt, upon a Custom in Plymouth.

A Plaint was entred in the Court of Plymouth against Page for threescore pounds, and a pone taken out against his Goods, and upon this a default, and thereupon another pone issued out to attatch the Defendants Goods; and the Defendant, at three other Courts successively makes default', and upon the fourth default Judgement was given against him; Whereupon the Defendant brings a Writ of Error in this Court to reverse the Judgement, and assigns for Error, that here is a Judgement given before any appearance, which cannot be, but in this Case the Goods attatched are only forfeited for the default made by the Defendants non-appearance. The Councel on the other side desired time to answer the exception.

Forfeiture.

Roll

Roll Iuſtice. The Cuſtom upon which this iudgement is giuen is not reaſonable. Therefore if you anſwer not the exception Tueſday next, the Iudgement ſhall be reverſed. Cuſtom.

Skete againſt Clay.

Trin. 24 Car. Banc. Reg.

Paſc. 24 Car. rot. 180.

CLay brought an Action of Treſpaſs againſt Skete for taking away his goods, and had a verdict and a Iudgement in the Common Pleas. The Defendant brought a writ of Error to reverſe this iudgement; and the Errors aſsigned were to the Declaration, becauſe it had not proper latine words to expreſſe the goods; for 1. it is ſaid that the Plaintif took away decem Velamina, Anglice Coifes, whereas Velamina ſignifies coverings generally. 2. Pilum is uſed for Pileum, in Engliſh a Cap. 3. Decem Colores, Anglice Neckbands. 4. Cruralia, Anglice Garters. 5. He declares de uno inſtrumento, Anglice a Plate, for a Jack. And 6ly. Pro uno operimento, Anglice a Rayl. But Roll Iuſtice ſaid, We muſt not be too curious to expreſſe all things in Latin words in all Caſes, for it cannot be done, and therefore a deſcription with an Anglice muſt ſerve, and ſo it may here, therefore let the Plaintif have his Iudgement. Error to reverſe a Iudgement in Treſpaſs. Declaration. Deſcription.

Aylet againſt Oats,

Trin. 24 Car. Banc. Reg.

THis Caſe was moved again, and upon view of the Book Roll Iuſtice held, that the Iudgement was entire, and ought to be reverſed for the whole, although it be good in ſome part of it; and he cited Trin. 14 Car. Scudamore and Scudamores Caſe, 8 Car. Gritewel & Morefields Caſe, & Trin. 11 Car. Eltonhead and Deerhams Caſe, and Trin. 7 Iac. rot. 566. Bird and Ormes caſe, and 5. Rep. Specots Caſe, and 13 Car. Dye and Atkins Caſe, and upon theſe authorities the judgement was reverſed. Error to reverſe a judgement entire, good in part, and ill to other part.

Sir Charls Coot againſt Plunket.

Trin. 24 Car. Banc. Reg.

THe Court was moved on the part of the Defendant, that the Plaintif had declared upon an obligation with a condition, but had not ſet it forth in the Declaration, and therefore deſired that he may either have Oyer of it, or elſe that the Declaration being imperfect, ſo that he cannot plead, and he being now in priſon, may otherwiſe be ſet at large. Roll Iuſtice, We cannot compell the Plaintif to ſet forth the condition of the Obligation; but till he doth the Defendant ſhall not be compelled to plead, and let the Plaintif ſhew cauſe upon notice given to him, why the Defendant ſhall not goe at large upon Common bail. It was moved again, and then Roll Iuſtice ſaid, If you arreſt one, and doe not proceed in three Terms, he ought to goe out upon Common Bail. But move it again to morrow. To be diſcharged upon Common Bail. Plea. Commmon Bail.

Trin, 24 Car. Banc. Reg.

To quash an endictment of perjury.

THe Court was moved to quash an Endictment upon the Statute of 5 Eliz. against perjury. The exceptions taken against it, were, 1. The Endictment saith, the Oath was taken before Baron Atkins and Serjeant Turner, but it doth not say where, viz. whether it were at the Sessions, or Assizes. 2ly. It saith the Oath was taken Coram Iusticiariis Domini Regis, but it doth not express what Iustices they were. The Endictment was quashed for the first Exception.

The King against Bellingham.

Trin 24 Car. Banc. Reg.

For moderation of a fine upon conviction for perjury.

BEllingham was indicted upon the Statute of 5 Eliz. against perjury, and pleaded Not Guilty, and was found Guilty. The Case was this, Bellingham had a Process delivered him out of the Court of Wards to serve upon one, which he did accordingly; and upon the return thereof he made Oath that he served the Process upon the party the 8th. day of the Month, whereas it was the 9th. day but it appeared upon examination of the matter, that the Oath was not taken malitiously, but only rashly; and upon this the Court was moved to set a moderate fine. Roll Iustice said, because it was so, therefore let the fine be but 10 l.

Fine.

Gallop against Chase.

Trin. 24. Car. Banc. Reg.

Pasch. 24. Car. rot. 250.

Error to reverse a judgement in Trover and Conversion.

THe Case of Chase and Gallop was again moved, which was this. Chase brought an action of Trover and Conversion in the Common Pleas against Gallop and his wife, and a Stranger; and declares that the Baron and Feme and the Stranger converterunt ad usum suum proprium. The Plaintif had a Verdict and a Judgement. The Defendant brings a Writ of Error to reverse this Judgement, and assigns for Error, that the Declaration is not good, for it declares of a Conversion made by the Feme to her own use, which cannot be, she being a Feme Covert. Roll Iustice said, The Declaration doth intend, that all the Defendants did convert the goods, which cannot be, for the Feme cannot convert them, and cited Crow and Bakers case 1 Caroli 7 H. 7. f. 3. Therefore let the Iudgement be reversed.

Declaration. Feme Covert. Conversion.

Trin. 24. Car. Banc. Reg.

For a Certiorari.

THe Court was moved for a Certiorari to remove an Order of Sessions made for the electing of one to be a Constable, that the Order may be confirmed here, and the Constable compelled to be sworn. Roll Iustice an-

anſwered, That by granting it the execution of Juſtice by the Juſtices in the Country will be hindred, therefore appeal to the Juſtices of Aſsize, for we will not grant a Certiorari. Upon this a writ was prayed out of this Court to compell the Conſtable to be ſworn, which was granted. Mandamus.

Trin. 24 Car. Banc. Reg.

A Judgement was given in the Common Pleas in an ejectione firmæ quod recuperet, & a writ of Enquiry taken out; but before it was executed and returned the Defendant brought a writ of Error; and the queſtion was whether the writ of Error lay or no. Turner of Councel with the Defendant in the writ of Error argued, that it did not lie, becauſe the Original writ was not determined when the writ of Error was brought, and ſo the Judgement was not perfect or compleat, and conſequently a writ of Error could not be brought to reverſe it, and that the writ is not determined nor the Judgement perfect, is proved, becauſe the Action being an ejectione firmæ here is no coſts and damages found, nor is there any habere facias poſſeſſionem returned, which are the fruits of the judgement, and and he cited 34 H. 8. f. 18. 39 H. 8. Fitz. Error 40. 36 & 37 Eliz. in the Common Pleas, Year and Peverells Caſe, & 6 Car. Banc. Reg. But Roll Iuſtice ſaid, here is ideo conſideratum eſt quod recuperet, which is a perfect Judgement, but it had not been ſo if the Judgement had been quod recuperare debeat, and it is in your power whether you will have a writ of enquiry or not, and if the judgement be affirmed here upon the writ of Error brought you may have a writ of enquiry here in this Court. The Councel thereupon moved for a Certiorari. Roll Iuſtice, Take it but it will doe you no good, for the judgement iswell. Whether a Writ of Error good. Judgement. Brev. de enquiry.

Stent againſt

Trin. 24 Car. Banc. Reg.

Stent brought an Action upon the caſe for ſpeaking theſe ſcandalous words of him, Thou art a pick-pocket Rogue and haſt picked thy maſters pocket and his Money-box, and I will prove it. The Plaintif had a Verdict. The Defendant moved in arreſt of judgement that the words are not actionable, for that they are too general and uncertain. The Iudgement was arreſted till the Plaintif ſhould move. Arreſt of Judgement in an Action for ſcandalous words.

Trin. 24. Car. Banc. Reg.

A Certiorari was granted out of this Court to remove certain endictments of forcible entries, whereas in truth there were no Endictments of forcible entry found againſt the party; upon this a Superſedeas was prayed to ſuperſede the Certiorari. Roll Iuſtice, This Certiorari was gotten by way of perventon for what might be done, but take a Procedendo to the Juſtices to proceed notwithſtanding the Certiorari. For a *Superſedeas* to a *Certiorari*. *Procedendo*.

Trin.

Trin. 24. Car. Banc. Reg.

For the Defendant to plead in chief after imparlance.

A Scire facias was taken out to revive a judgement, and to have execution: The Defendant appears and imparls, and after imparlance pleads in abatement of the Scire facias, that the Plaintif had taken out a former Scire facias for the same cause, which is yet depending. It was moved for the Plaintif, that the Defendant ought not to plead this plea in abatement after imparlance, but that he ought to plead in chief. Roll Iustice, Let him plead such a plea as he will abide by within a week, or else let the Plaintif take his judgement.

Trin. 24 Car. Banc. Reg.

For a Steward of a Court to bring in the Court Rolls.

A Copyholder being sued in this Court for certain lands moved, that the Steward of his Lords Court, to whom he was a Copyholder, might be ordered to bring in the Court-Rolls into this Court, that by them he may be the better enabled to defend his title to the lands. But Roll Iustice said, He cannot be ordered to doe it by this Court, therefore we will make no rule in it.

Trin. 24 Car. Banc. Reg.

Error to reverse a judgement in the Common Pleas for ient. Misnosmer-

Deed.

AN Action of Debt was brought for Rent in the Common Pleas, where the Plaintif had a Verdict and a judgement, and a Writ of Error was brought in this Court to reverse this Judgement: The Errors assigned were, 1. There is an Indenture recited to be between the Plaintif and Iohn Barber, whereas it should have been Iohn Barker. Roll Iustice answered, It may be that he is known by the one name, and the other, and then it is well enough. A second Exception was, It is said per indenturam signatam, and doth not say deliberatam, and then it is no deed if it be not delivered. To this Roll Iustice answered, If he say per factum suum, it is well enough, notwithstanding, for that implies it to be a perfect deed. 3ly. He declares for Rent of Houses in Kent street, and doth not shew in what Parish Kent street is. Adjourned.

Trin. 24 Car. Banc. Reg.

For a Habeas Corpus for a prisoner in execution.

THe Court was moved for a habeas corpus for a Prisoner in the Kings Bench Prison, that he might be a witnesse in a cause to be tryed at the next Assises in Darby Shire. But Roll Iustice answered, we will grant no habeas corpus, for this is but a trick of the party himself to gain his Liberty that he may go a hawking and hunting this long vacation. But I have known it granted for one to be a witnesse at a trial at Yield Hall; but at the charges, and peril of the Party, for whom he was to be a witnesse, if he escape.

Mich.

Mich. 24 Car. Banc. Reg.

VPon a motion for a habeas Corpus for one in Execution upon a ſentence given againſt him in the Court of the Admiralty, It was ſaid by Roll Iuſtice, That if one be ſued in the Admiralty to a ſentence, and be in Execution upon it, and be brought hither by a habeas corpus; if upon the return it doth not appear that the Admiralty had not iuriſdiction of the cauſe, but it appears only that they had proceeded to a ſentence againſt the rules of their own Court, This Court will not deliver the Priſoner out of Execution, for he ought to have made his appeal, before he was taken in Execution. And ſo is it touching the proceedings in other Courts of equity.

For a habeas corpus for one in Execution upon a ſentence in the Admiralty.

Appeal.

Cage.

Mich. 24 Car. Banc. Reg.

ONe Cage was in Execution in the Kings Bench upon a Judgement had againſt him for a hundred pound, The Plaintiffs Attorney by fraud without the conſent of his Client acknowledgeth ſatisfaction upon this Judgement, afterwards the Attorney of the Defendant without the conſent of his Client acknowledgeth another Judgement for the ſame Debt. The Plaintiffs Councel moved, that the Defendant might be in Execution upon the firſt Judgement, and that the ſatisfaction acknowledged thereupon, might be vacated. Roll Iuſtice anſwered, The Attorney ought to be committed for acknowledging the ſecond Judgement without Warrant; But here are two frauds, one of each ſide, ſo that there is fraud againſt fraud, and ſo the partyes are left to their remedyes one againſt the other, but both the Attorneys ſhall be committed for their falſe practice. And we will examine the whole truth of the matter Saturday next.

To vacate a ſatisfaction acknowledged upon a Iudgement.

Commitment.

againſt Loveday.

Mich. 24 Car. Banc. Reg.

THe Court was moved upon an affidavit that one of the Jurors that gave the verdict againſt the Plaintiff had a ſute in law depending at that time with the Plaintiff, and therefore that the tryal was not indifferent, and therefore it was prayed there might be a new tryall. But the Court ſaid, it could not be, and asked the party why he did not challenge the Juror for this cauſe at the tryal, for want of which he had now loſt that advantage.

For a new tryal after verd. & becauſe a Iuror not indifferent.

Challenge.

Tryal.

Stradling and his wife againſt Boreman.

Mich. 24 Car. Banc. Reg.

STradling and his wife brought an Action of Treſpaſſe of Aſſault and battery, and taking of a horſe, againſt Boreman, and the Plaintiffs declare ad damnum ipſorum, and have a verdict; the Defendant moved in arreſt of Iudgement, and ſhewed for cauſe that the Baron and Feme cannot joyn in

Arreſt of judgement in Treſpaſſe.

Joyn in Action.

this Action, but ought to bring ſeverall Actions, for the wrong done to each was ſeverall. The Iudgement was thereupon ſtayed till the Plaintiff ſhould move.

Mich. 24 Car. Banc. Reg.

Arreſt of Iuogement in an action upon the Caſe.

AN Action upon the Caſe was brought for ſpeaking theſe words, He is gon and dares not ſhew himſelf for Debt, and he is a Banckrupt, for ought that I know; the Plaintiff had a verdict, the Defendant moves in arreſt of Iudgement that the words are not actionable, becauſe they are generall, and uncertain. But the Court held that all the words taken together are actionable, but ſtayed the Iudgement for a week.

Mich. 24 Car. Banc. Reg.

Iurors move for their charges.

IUrors who appeared for a tryal at the Bar which fel off for want of a full Jury, prayed the Court they might have their charges, becauſe they came a great way, and had attended long in town. The Court anſwered them, that it was their neighbours fault, who did not appear, that the tryal went not on, for both the partyes are ready, and if the cauſe had been tryed, you ſhould have had all your charges. But now we can order nothing.

Mich. 24 Car. Banc. Reg.

Exception to an order, and fine of Seſſions.

UPon a Return of a certiorari to remove an order of Seſſions made againſt a Pariſh for not repairing of a high way, Hales of Councel for the Pariſh took this exception, viz. That the fine was ſet upon the Pariſh without any proceſſe iſſued out againſt the Pariſh, only upon a certificate of one of the Juſtices of the peace made upon his own view that the way was not repaired, and ſo the Pariſh was condemned before they were heard. To this the Court anſwered, That a Juſtice of Peace may make

Certificate.

a certificate upon his own view, of the want of reparations of a Highway, by the Statute. Therefore bring a certificate that the way is repaired, elſe we will do nothing, for we muſt not be too haſty to overthrow ſuch preſentments which ſo much concern the publique good. And in this caſe if there

Conviction. Travers.

be a conviction in law, and the fine levyed, we cannot help it, and now you cannot traverſe, for it is too late.

Sir Anthony Aſhley Cooper againſt St. Iohn.

Mich. 24 Car. Banc. Reg.

Arreſt of Judgement in an action on the caſe.

SIr Anthony Aſhley Cooper brought an Action of Treſpaſſe upon the Caſe for falſe impriſonment of him againſt St. John, and hath a verdict againſt him; the Defendant moves in arreſt of Iudgement, and takes this Exception

tion

tion to the Declaration that it wanted vi et armis which ought to have been, becauſe this is not a meer Action upon the Caſe; but in its nature it is an Action of Treſpaſſe, and therefore it ought to have been declared in with vi et armis. Roll Iuſtice anſwered, what ſay you to the Caſe, quare fregit ſuum mill dam, which hath been adjudged good without vi et armis, as well as with vi et armis? and in one caſe it ſhall be ſaid to be an Action of Treſpaſſe, viz. with the vi et armis, and in the other an Action upon the Caſe, viz. without the vi et armis; and Bacon Iuſtice cited the 9. rep. The Earl of Shrewsburyes Caſe. Roll Iuſtice, It is a plain Action upon the Caſe, as it may appear by reading of the Record, for it is with an et quod cum. Bacon Iuſtice ſaid, one cannot have an Action of Treſpaſſe for the breaking of another mans fence; but if he be damnified by the breaking of it, he may have an Action upon the Caſe againſt the party that broke it.

Declaration.

Treſpaſſe. Caſe.

Ayre againſt Sils.

Mich. 24 Car. Banc. Reg.

AYre brought an Action upon the Caſe againſt Sils, upon a promiſe to pay certain arrerages of rent appearing due unto him upon an accompt made between him and the Defendant; The Plaintiff had a verdict. The Defendant moves in Arreſt of Iudgement, and for cauſe ſhews, that an Action upon the Caſe doth not ly upon a promiſe to pay rent appearing due upon accompt, for the rent was due by a reall contract, and upon that the Plaintiff had remedy without the promiſe. To this the Court ſaid, that this Action doth not ly for rent alone due upon a real contract, but for the rent with other things it doth lye, yet let the Iudgement be ſtayed, for there is here no new conſideration appearing to ground this promiſe upon, but only the old conſideration of Law for the payment of the rent, and upon that an Action of the Caſe doth not ly, for it is in the realty.

Arreſt of Iudgement in an action upon an aſſumpſit. Caſe.

Tomkins againſt Jourden.

Mich. 24 Car. Banc. Reg.

Trin. 24 Car. rot. 96.

A Writ of Error was brought to reverſe a Iudgment given in an inferiour Court, & theſe Errors were aſsigned. 1. It is ſaid in the ſtile of the Court that the Court was held per conſuetudinem et literas patences, which is not good, for the Court cannot be held by both. Roll Iuſtice, This is not good. 2ly. Againſt the writ of Error it is objected by the other ſide, that the writ of Error is directed to one, and is returned by another, for the certiorari was to certifie a Iudgement given before the Maior, Aldermen, and Recorder, and the Iudgement certified, is a Iudgement given before the Maior and the Aldermen, and the Recorder is left out, ſo that the Record is not removed, and then the Iudgement cannot be affirmed. Roll Iuſtice ſaid, the pleading is confuſed, and Bacon Iuſtice ſaid, you have changed the ſtile of the Corporation by your pleading; If a Court be held by Cuſtom, and after a patent be purchaſed to hold it, and they hold it by the patent, the Cuſtom is gone; but bring us a Copy of the certificate of the ſtile of the Court, and in the mean time we will adviſe.

Error to reverſe a judgement given in an inferiour court.

Cuſtom.

Pickering againſt Barkley.

Mich. 24 Car. Banc. Reg.

Paſc. 24 Car. rot. 154.

Demurrer upon a plea in an action of covenant.

PIckering brought an Action of Covenant upon a deed of Covenants of Charter-party, whereby it was Covenanted that the Defendant in conſideration of a certain ſum of mony agreed to be paid to the Defendant, for fraight of a Ship, ſhould make ſuch a voyage, and bear all loſſes and damage which ſhould befall the Ship, or Merchandiſes in her, excepting only perills of the Sea, and declares that the Defendant had not performed his agreement, and for this he brings his Action. The Defendant pleads, that in the making of his voyage upon the Sea, the Ship was taken per quoſdam ignotos homines bellicoſos, whereby he was hindred in making of the voyage according to his agreement; to this plea the Plaintiff demurs. The queſtion was in regard that in the Charter-party perills of the Seas were excepted, whether the taking of the Ship by theſe, unknown men of War ſhould be accompted a perill of the Sea, or not according to the meaning of Merchants. Twiſden of Councel with the Plaintiff held it ſhould not, and ſo the plea was not good, and that therefore the Plaintiff ought to have Judgment, and ſaid, this was not a danger of the Sea, but a danger upon the Sea. 2ly. He ſaid, the party (it may be) might have prevented it by vigilancy, or by making reſiſtance, and ſo it may be it was his own fault the Ship was taken. 3ly. The men of Warr that took the Ship were peradventure Engliſh men, and then the Defendant is not to be excuſed, for he may have his remedy for what he is damnified, againſt them, and cited 33 H. 6. f. 1. and prayed Judgement for the Plaintiff. Hales of Councel with the Defendant held, that to be taken and robbed by Pirates is a danger of the Sea, even as tempeſtuous winds, and Shelfs, and Rocks are. And 2ly. To that it is ſaid the pirates may be Engliſh men, we are not able to ſay of what Nation they were, and therefore our plea is good in that point alſo, and prayed Judgement for the Defendant. Roll Juſtice ſaid, it was not well pleaded to ſay per homines ignotos. Bacon Juſtice ſaid, The Defendant doth not ſhew that he and his Ship was carryed per locos incognitos, as he ſhould have ſhewn; but Roll Juſtice anſwered, that it may be the Ship is yet kept upon the Sea, but I ſuppoſe that Pirates are perils of the Sea, and to this purpoſe a certificate of Merchants was read in Court, that they were ſo eſteemed amongſt Merchants. Yet the Court deſired to have Granly the Maſter of the Trinity houſe, and other ſufficient Merchants to be brought into the Court to ſatisfie the Court viva voce Friday next following. Judgement was given this Term nil capiat per billam, becauſe the taking by Pirates are accompted perils of the Seas.

Plea.

Wood

Wood againſt Clemence.

Mich. 24 Car. Banc. Reg.

Hill. 22 Car. rot. 804.

WOod brought an Action of Debt upon an Obligation to ſtand to an award, againſt Clemence. The Defendant pleaded that the Arbitrators made no award: The Plaintif replies that the Umpire made an award, and ſets it forth at large. The Defendant demurs, and for cauſe ſhews that it appears by the pleading that the Umpire was choſen before he ought to be; for it appears not that the Arbitrators could not agree in making the award, or that they had any power to make an Umpire. 2ly. The Award is made for ſatisfaction to the Owners and Mariners of the Ship, concerning which the ſubmiſsion was made, and one of them is the Plaintif in this Action, and they cannot arbitrate that the monies which concern one ſhall be paid to another, and ſo all the award is naught. Alſo here is nothing arbitrated concerning Iohn Acton the Maſter of the Ship, who is one of the parties within the ſubmiſsion. Roll Iuſtice, As to the firſt Exception it is not a materſal one, as I conceive. But give a note of your exceptions to the Councel of the other ſide, and bring us Books. Poſtea, 136. 152.

Demurrer upon an award pleaded.

Award.

Frere and others againſt

Mich. 24 Car. Banc. Reg.

AN Action of Debt was brought for 1500 l. upon a deed of Charter-party. The Plaintif had a verdict. The Defendant moved in arreſt of judgement, and offers for cauſe, that the Declaration was inſufficient, for it appears not by it that the Defendant is indebted to the Plaintif, and then there is no cauſe of Action; for the Declaration only ſays, that he is indebted, as it appears, but ſhews not how. Roll Iuſtice ſaid, it is by indenture, and well enough. Dyer 2, 3 Phil. and Mar. f. 148. Plowden 121. 122. Buckleys caſe 143. Browning and Beeſtons caſe 21 E. 4. f. 29, he ſaid, either an action of debt, or an action of Covenant lies here, for it is upon a Charter-party. Here is not indeed a perfect allegation, yet it is well enough, for it hath been uſually thus pleaded. Speak to it again Wedneſday next.

Arreſt of judgement in debt.

Debt. Covenant.

Diſon againſt Bartue.

Mich. 24 Car. Banc. Reg.

DIſon brought an action of Aſſault and Battery, and taking of his goods, againſt Bartue, and had a Verdict; the Defendant moved in arreſt of Iudgement, and ſhewed for cauſe that the Declaration was not good; for it is with a quod cum, &c. which in an action of treſpaſs, vi et armis, is not good; for it is not a direct affirmative that the Defendant did the Treſpaſs; but it is only an implication that he did it, but as it is it might have been good if the action had been an action of Treſpaſſe upon the caſe. The Iudgement was ſtayed till the Plaintif ſhould move.

Arreſt of Iudgement in Aſſault and Battery.

Mich. 24 Car. Banc. Reg.

Demurrer upon an Award pleaded.

AN Action of Debt was brought upon an Obligation to ſtand to an Award. The Defendant pleaded nullum arbitrium. The Plaintiff replies, and ſets forth the Award, and aſsigns a breach; The Defendant demurs; The Plaintiff after demurrer moves the Court, that he might diſcontinue his Action. But the Court ſaid, that after a demurrer upon an Arbitration, it is not uſual to diſcontinue the Action. But let nil capiat per billam be entred, if cauſe be not ſhewed to the contrary.

Diſcontinuance.

Mich. 24 Car. Banc. Reg.

Arreſt of Iudgement by Baron and Feme.

AN Action of Debt was brought by Baron and Feme upon an Obligation made to the Feme dum ſola fuit, and the Declaration is ad damnum ipſorum; The Plaintiffs had a verdict; The Defendant moves in arreſt of Iudgement, and for cauſe ſhews, that the Declaration ſhould not be ad damnum ipſorum, but only ad damnum of the Husband only. But the Court held that the Declaration was well enough, and ſaid, it is the uſual way of declaring in ſuch Actions, and the mony due upon the Obligation not being paid to the Feme whileſt ſhe was ſole, it was dammage to her; and now being Covert it is a dammage to the Baron alſo, and ſo it is ad damnum ipſorum 16 E. 4. Therefore let the Plaintiff take his Judgement.

Declaration.

Quatermans Caſe.

Mich. 24 Car. Banc. Reg.

Antient uſe of practice altered.

IN the Caſe of one Quaterman, Roll Iuſtice ſaid, that out of indulgence to the Bayl, it hath been the uſe of later times, that if the Bayl do bring in the principal before the return of the ſecond Scire facias, which was taken out againſt the Bayl, thereupon to diſcharge the Bayl: but antiently it was not ſo, but it was then counted too late to bring him in.

Diſcharge.

Hill and Harris.

Mich. 24 Car. Banc. Reg.

Arreſt of judgement in an action of Debt againſt Executors.

AN Action of Debt was brought againſt divers Executors. The Defendants plead fully adminiſtred, and upon this an Iſſue was joyned, and a verdict found for the Plaintiff. The Defendants moved in arreſt of Iudgement, that there is contrariety between the iſſue joyned, and the verdict found: for the Action is entire againſt all the Executors, and they had all pleaded fully adminiſtred, and upon this the iſſue was joyned, and the verdict finds that ſome of the Executors had fully adminiſtred, and that others of them had Goods in their hands, whereas the verdict ſhould have been that they had not fully adminiſtred. The Iudgement was ſtayed till the Plaintiff ſhould move.

Verdict.

Mich.

Mich. 24 Car. Banc. Reg.

VPon a rule of Court to ſhew cauſe why reſtitution ſhould not be granted upon an Endictment of forcible entry, exception was taken to the Endictment, that it did not ſay, that the party entred illicite & manu forti, as the words of the Statute direct, and it was ſaid, that in a forcible entry there ought to be an entry, expulſion, and deteyner. Roll Iuſtice ſaid, that there ought to be manu forti in the Endictment, according to the Statute, to diſtinguiſh this kind of Entry from an ordinary Treſpaſs by entring into anothers Land, which is not ſo violent as a forceable entry is ſuppoſed to be. But let us ſee the Copy of the Endictment.

Cauſe why no reſtitution upon an endictment of forcible entry.

Endictment.

Gibbs againſt Dunn.

Mich. 24 Car. Banc. Reg.

GIbbs brought an Action upon the Caſe againſt Dunn, for theſe ſeveral words ſpoken of him by the Defendants Wife at ſeveral times, viz. thou art a thief for ſtealing my corn out of my Barn, and at another time for ſaying thou art a thief. The Plaintiff hath a verdict; The Defendant moved in arreſt of Iudgement, that entire dammages were given for both the words; whereas the firſt words were not actionable: for the Feme being a Feme Covert could have no Corn of her own, for it was her Husbands Corn, and ſo there could be no ſtealing of her Corn. But the Court anſwered, that in common intendment the Corn is hers and her Husbands Corn, though in legal conſtruction it be not ſo, and the Scandal is great, although it appear that the words were ſpoken by a Feme covert. Therefore let the Plaintiff take his Iudgement, except cauſe be ſhewn to the contrary. Iudgement was given the ſame Term, becauſe the laſt words were held to be accumulative.

Arreſt of judgement in an action upon the Caſe for words.

Dammages entire.

Intendment.

Mich. 24 Car. Banc. Reg.

THe Clark of the Errors in the Common-pleas attended here upon a rule of this Court, Whereupon one of the Clarks of the Court gave notice of it to the Court, and prayed he might be heard. But the Court anſwered, that Councel ought to move it, and not he.

A Clark of the Court ought not to move the Court.

The King againſt Doctor Trigg.

THe Court was moved for Doctor Trigg to eſtreate the Fine into the Exchequer which was ſet upon him by the Court upon his conviction upon an information preferred againſt him upon the Statute for practiſing Phyſick in London, without a licence from the College of Phyſicians. Hales of Councel with the College of Phyſicians moves it may not be eſtreated, for it is not neceſſary, and here the Iudgement is not only for the King: but it is tam pro rege, quam pro, &c. and ſo part of the Fine doth belong to the Sub-

For the eſtreating of a Fine.

Fine.

Eſtreat.

Eſtrear. Subject, and for that part the Proſecutor may have a priby Seal here to recover it: but if it be eſtreated into the Exchequer he cannot there have it, and ſo he ſhall loſe his reward, and therefore he deſired the Fine might be reſpited. But the Court anſwered, we cannot reſpite the Kings part, nor the other part: for there is an execution out for the whole Fine which cannot be ſtayed.

Heyford againſt Hobſon.

Mich. 24 Car. Banc. Reg.

Arreſt of judgment in Trover and Converſion. HEyford brought an Action of Trover and Converſion againſt Hobſon in the Common-pleas for taking away and converting of divers of his Goods and Chattels particularly named, and had a verdict. The Defendant moved in arreſt of Judgement, that the Declaration was incertain, for amongſt other things the Plaintiff in his Declaration declares for the taking de duobus caſtoribus, Anglice Hats, whereas caſtor is not a proper word for a Hat. 2ly. de uno ſervitio argenteo, Anglice one ſilver Salt, and there is no ſuch word for a Salt, but there is another proper Latin word for it, viz. ſalinarium. 3ly. De duobus catenis, Anglice two ſilver Diſhes, which is no word for a Diſh, much leſs a ſilver Diſh. Roll Iuſtice ſaid, one Declaration. may deſcribe a thing in a Declaration, if there be not a proper word to expreſs it, and if it be ſo deſcribed that the Jury may know what is meant by it, it is well enough. But let the Iudgement be here be ſtayed, for we will adviſe.

Wood againſt Clemence.

Mich. 24 Car. Banc. Reg.

Exceptions to an award. THis Caſe formerly (viz. this Term) moved and ſpoken to touching the validity of an Award made touching the fraight of a Ship, was again moved, and Exceptions taken to the Award. 1. That the award is repugnant in it ſelf. And 2ly. It is not final, and ſo not good. The Court anſwered, if the Award be ill, as of your own ſhewing it is, then you have no Iudgement. Subminſion. cauſe of Action, and ſo you cannot have Judgement, although the Defendants bar be not good, and a ſubmiſſion made by one for himſelf, and another, is good to bind the party that ſubmitted. But move it again, and we will adviſe in the mean time. Antea. 133. poſtea. 152.

Mich. 24 Car. Banc. Reg.

To quaſh an endictment of forcible entry. THe Court was moved to quaſh an Endictment of forcible Entry after the party endicted had pleaded, and a verdict againſt him. Roll Iuſtice, We muſt not be ſo curious in the framing of Endictments, as to quaſh them for every ſmall fault, and in this Caſe it was ſaid by him, that Endictment. if one interrupt a long poſſeſsion by force, and the other regain it with undue means, an Endictment lies not againſt him for this, for this is but vim vi repellere, and after a verdict, and before Judgement upon an Endictment Reſtitution. of forcible entry, the party ought not to move for reſtitution.

Ba-

Baniſter againſt VVright.

Mich. 24 Car. Banc. Reg.

IN a Tryal at the Bar between Baniſter and Wright in an Action upon the Statute of 2 Ed. 6. for not ſetting forth of Tithes, It was ſaid by the Court that Tithes which lye not within any Pariſh are due to the King, and that Lands muſt be parcel of a Pariſh, either by preſcription, or by Act of Parliament, and that Lands lying within a Foreſt, and in the hands of the King do not pay Tithes, although they be within a Pariſh: but if the Lands be diſafforeſted, and be within a Pariſh, they ought to pay Tithes, for their not paying Tithes being in the hands of the King, is but an immunity for that time only.

Lands free from tithes.

Tithes.

Mich. 24 Car. Banc. Reg.

A Baker was preſented in a Court Leet for ſelling Bread under weight, and a Fine ſet upon him, and an action brought againſt him for this Fine, and a verdict given againſt him. It was moved in arreſt of Judgement, that the preſentment upon which the Action was founded was not good, and ſo there was no ground of Action, and ſo there ought to be no Judgment. But Roll Juſtice anſwered, that the Action is for the Amercement which is a collateral thing, and the preſentment is not now to be called in queſtion, if it be only avoidable for ſome fault in it: but it were otherwiſe, if the preſentment were utterly void. But ſpeak again to it at another time.

Arreſt of judgement in an action for a Fine ſet at a Court leet.

Fine.

Amercement.

Preſentment.

Mich. 24 Car. Banc. Reg.

THe Court was moved for a Habeas Corpus for one committed at Norwitch for Treaſon in ſpeaking words againſt the Queen, becauſe he could not be tryed there. Roll Juſtice anſwered, he cannot be endicted here, except the fact were done in Middleſex, therefore adviſe with the Kings Councel, and prefer a Bill of Endictment where the fact was, and then you ſhall have a Writ ad deliberandum directed to the place where the fact was, and this is at the Kings ſute, and the Sheriff ſhall be allowed his charges upon his accompt, or elſe the Juſtices may try him by their Commiſsion of oyer and terminer.

For a Habeas corpus to remove a Priſoner committed for Treaſon.

Endictment.

Tryal.

Smith and Hancock, and others.

Mich. 24 Car. Banc. Reg.

SMith brought an Action of Treſpaſs againſt Hancock and others, for taking away divers parcels of Ribbin from him. The Defendants pleaded by way of Juſtification, the Cuſtom of London againſt Hawkers, viz. to take away wares from any that ſold them up and down the Streets.

For a new tryal, becauſe of a miſtryal.

The Plaintiff replyed, that there was no such custom, and issue was taken upon it & thereupon the custom was certifyed by the mouth of the Recorder, & a tryal upon it in London, & a verdict for the Defendants. The Plaintiff moved in arrest of Judgement, that it was a mis-tryal, because it was before them that were interessed in the cause, and therefore desired there might be another tryal. Roll Iustice said, it is against natural equity, for one to be Judge in his own cause, although the other party admit it to be so, and therefore it is a mistryall, though it were at the request of the Plaintiff, because it is against natural reason, 8 E. 3. f. 69. 5 Ed. 3. 8. 9 H. 7. f. 21. Hil. 38 Eliz. in the Exchequer. The prayer of the Plaintiff cannot help the tryal, for the consent of both partyes cannot change the Law, much lesse the prayer of one of the partyes. Hales of Councel with the Defendants argued that it was not a mis-tryall, and said this concerns them in point of privilege of the City, and not meerly in point of interest, before whom the Judgment was given. 2ly. The consent of the party hath barred him of the advantage which otherwise he might have had. But Roll Iustice answered, here is point of interest as well as point of privilege, for part of the goods taken come to the benefit of the City, and therefore they ought not to be their own Judges, for this is against natural reason, and so it is a mistryal. But it doth not appear here whether the Maior and Aldermen be another Corporation or not, and distinct from the Corporation alleged, which certified this custom by the mouth of the Recorder, and this is the sole doubt in the Case. The Court ordered that there should be a new tryal except cause shewn to the contrary: Q. whether there shall be a Repleader, or a new venire.

Tryal.

VVhite and his wife against Harwood and his wife.

Mich. 24 Car. Banc. Reg.

Whether a writ abated by death of one of the defendants. Abatement.

VVHite and his wife brought an Action upon the Case for slanderous words, against Harwood and his wife; the Defendant dyes, the Feme takes another Husband pending the sute. It was moved that the writ was abated. The Court inclined that becaus the Defendant had by her mariage changed her name, therefore the Writ was abated, but took time to advise.

Slade.

Mich. 24 Car. Banc. Reg.

For Iudgement stayed upon a Iudges certificat.

THe Court was moved for Judgement formerly stayed upon a certificate made by Baron Atkins, that the verdict passed against his opinion, Bacon Iustice said, Judgements have been arrested in the Common pleas, upon such certificates. Hales of Councell with the Defendant prayed, that this Judgement might be arrested, and that there might be a new tryal, for that it hath been done heretofore in like cases. But Roll Iustice held, it ought not to be stayed, though it have been done in the Common pleas, for it was too Arbitrary for them to do it, and you may have your attaint against the Jury, and there is no other remedy in Law for you; but it were good to advise the party to suffer a new tryal for better satisfaction. And let the Defendant take four dayes from hence to speak in arrest of Iudgement if the postea be brought in, if not, then four dayes from the time it shall be brought in.

Attaint.

Andrews

Andrews againſt Baily.

Mich. 24 Car. Banc. Reg.

VPon a tryal at the Bar between Andrews and Baily, upon an ejectment leaſe touching Sir Iohn Prowds title to lands. It was ſaid, that a man cannot be a ſubject to two ſeveral Princes. And that deniſation by letters patents do enable the party to purchaſe Lands, but not to inherit the Lands of his Anceſtor as Heir at Law; But as a purchaſor he may enjoy lands of his Anceſtor.

Deniſation by Letters patents do enable to purchaſe not to inherit lands. Denization, Inheritance.

Dunch againſt Smith and others.

Mich. 24 Car. Banc. Reg.

Hil. 23 Car. rot. 37.

DUnch brought an Action of Debt as an Executor for arrerages of a rent charge due to the Teſtator, againſt Smith and others the occuppyers of the Land. The Defendants demur to the Declaration, and for cauſe ſhew that it doth not ſet forth what eſtate the Defendants have in the lands charged with the rent, and ſo it appears not that they are to pay the rent. Hales of Councell with the Plaintiff anſwered, that it is not neceſſary for the Plaintiff to ſet it forth, for he is a ſtranger to the Eſtate, & cannot know what Eſtate it is. Roll Iuſtice ſaid, It doth not appear by the Declaration whether the Defendants claim under him that granted the rent or no. But move it again Saturday next. Poſtea.

Demurrer to a Declaration in Debt.

Smith againſt Hale.

Mich. 24 Car. Banc. Reg.

SMith brought an Action of Debt againſt Hale for rent; The Defendant pleaded that he is Tenant and Servant to the Lord Moone a Lord of the Parliament, and prayes his Writ of Privilege may be allowed. The Plaintiff demurs, It was argued by Barton of the middle Temple, that the plea was ill, for the very matter of it for the privilege is againſt the Common Law, and alſo againſt the Statute Law, and for proof cited 1 E. 1. f. 26. 2 E. 3. f. 3. 2 Ed. 6. C. 8. Roll Iuſtice anſwered, you ought not to argue generally againſt the Privilege of Parliament, for you know that every Court hath its privilege, as this Court alſo hath, therefore apply your ſelf particularly to this queſtion, whether a Writ of privilege belongs to a Parliament man ſo far as to protect his Lands and Eſtate, and I conceive he is ſo privileged; And you have admitted his privilege by your own Demurrer. But we will adviſe.

Demurrer to privilege of Parliament. Privilege. Admittance.

Wright.

Mich. 24 Car. Banc. Reg.

AN Action of Debt was brought upon an Obligation to perform Articles; The Defendant pleaded Covenants performed: The Plaintiff had

Plaintiff after a verdict for him moves for a new tryal.

had a verdict, and after verdict, and before Judgement, he moved for a new tryal, because it appeared that there was no issue joyned; the Plaintiff moved it for his own expedition, for he feared if he should enter Judgement, that the Defendant would bring a Writ of Error. The Court answered, that there was a perfect issue joyned; but the pleading is not good, and it was your own fault to joyn issue upon such a pleading, when you might have demurred. Yet let the Defendant shew cause why he should not consent to a new tryal, and a Repleader.

Tryall.

Mich. 24 Car. Banc. Reg.

The Lord chief Iustice Roll first took his place.

MEmorandum on Wednesday the 14 of November 1648 Henry Roll Serjeant at law then one of the Iustices of this Bench took his place in Court as Lord chief Iustice of England, and Twisden moved for a day to plead between Dunch and Smith being the first motion that was made in Court after he took his place.

Popham against Hunt.

Mich. 24 Car. Banc. Reg:

Mich. 23 Car. rot. 558.

Demurrer to a Declaration in an action of Covenant.

POpham brings an Action of Covenant upon an Indenture against Hunt, the Defendant demurs to the Declaration, and the Plaintiff joyns in the Demurrer: Upon the pleading the Case appeared to be this, a Feme sole delivers a certain sum of mony into the hands of I. S. and the Defendant thereupon Covenants with the Feme to pay unto A. B. 100 l. a yeer, so long as the mony should continue in the hands of I. S. The Feme takes Baron; The hundred pound per annum is arrere. The Baron makes his Executor, and dyes, and after his death the 100 l. a yeer is behind also. Popham the Executor brings this Action of Covenant, and the question was whether the Action was well brought, and the Court held the Action did lye, for the Covenant doth concern the Executor, because he represents the Testator; but the question here is whether the rent due after the death of the Husband ought to be paid, and how it shall be known whether he be dead for it is not specially alleged, and if he be not dead there is no cause of Action. Therefore consider of this.

Covenant.

Bragg against Nightingall.

Mich. 24 Car. Bane. Reg.

Trin. 24 Car. rot. 601.

Demurrer to a Declaration in an action of covenant.

BRagg brought an Action of Covenant against Nightingall upon an Indenture. The Defendant demurs to the Declaration, The Case was this. The Plaintiff let by Indenture certain houses for divers years to the Defendant, and covenanted with him to repair the houses by such a day expressed in the Indenture. The Defendant by the same Indenture covenanted with the Plaintiff, that from the time that the Plaintiff was to repair

pair the houſes, unto the end of the Term for which they were demiſed, he would well & ſufficiently repair and leave them ſo repaired at the end of the Term; for not performing of this Covenant, on the Defendants part the Plaintiff brought his Action. The cauſe ſhewed for the demurrer to the Declaration was, that the Plaintiff had not ſhewed that he on his part had repaired the houſes according to his Covenant, and ſo the Defendant ſuppoſed he was not bound to repair, becauſe he was to repair from the time the Plaintiff had repaired them, and not before, and ſo there is no cauſe of Action. After divers motions Roll chief Iuſtice ſaid, That here was a reciprocal Covenant to be performed on each part, and although one do not perform the Covenant on his part, this doth not excuſe the other party, but he is tyed to perform his Covenant nevertheleſſe, and if he do not an Action lyes againſt him, and he may bring his Action alſo againſt the other that firſt broke his Covenant, and therefore the Action lyes here againſt the Defendant, and ſo the demurrer is not good upon the cauſe ſhewed. But if this were not a reciprocal Covenant the Law would be otherwiſe, and cited Hayes and Hayes Caſe 11 Car. and Skippon and Lucas his caſe 10 Car. But Bacon Iuſtice held the contrary that the demurrer was good, for that it appears that it was the intent of both partyes that the Plaintiff ſhould firſt repair, and after that the Defendant ſhould keep the houſes in repair. The Court would adviſe. Covenant

Smithſon againſt VVells.

Mich. 24 Car. Banc. Reg.

SMithſon brought an Action upon the Caſe upon a promiſe againſt Wells, and declared upon a promiſe made to ſave the Plaintiff harmleſſe from ſuch an obligation when he ſhould be thereunto required. The Defendant pleaded non Aſſumpſit, and upon this a ſpecial verdict was found, viz. generally that the Defendant did make promiſe to ſave the Plaintiff harmleſſe from the Obligation, & that he had not done it. The queſtion hereupon was, whether the verdict had found the ſame promiſe ſet forth in the Declaration, becauſe that was to ſave harmleſſe upon requeſt; but the promiſe in the verdict mentions no requeſt to be made, but finds a promiſe generally to ſave one harmleſſe. The Court held that the Plaintiff ought to have Judgment, for that it was the ſame promiſe found in the verdict, which was ſet forth in the Declaration, for if one promiſe to ſave one harmleſſe from a thing, he that made the promiſe ought to do it at his perill without requeſt, and the requeſt is not material although the promiſe ſay upon requeſt; But if he be damnified if I do recompence him upon requeſt made, the Covenant is not broken. A ſpecial verdict in an action upon the Caſe upon a promiſe. Verdict. Requeſt. Covenant.

Emerſon againſt Ridley.

Mich. 24 Car. Banc. Reg.

Paſc. 24 Car. rot. 400.

RIdley brought an Action of Debt upon an Obligation againſt Emerſon; The Condition of the Obligation was, that the Defendant ſhould not Error upon a Iudgement in Debt upon an Obligation.

put his Cattel upon ſuch a Common before a tryal and proof, for the Common ſhould be for the Commoners, and aſsigns a breach, that he did put on his Cattel upon the Common before the Tryal for the Commoners; upon this an Iſſue was joyned, and a verdict, and a Judgement for the Plaintiff. The Defendant brings a Writ of Error, and aſsigns for Error, that the breach of the Condition aſsigned doth not agree with the Condition of the Obligation, and ſo the action being brought upon the Obligation, and no breach of the Condition being rightly aſsigned, there appears no cauſe of Action, and ſo the Judgement is erroneous. But it was ſaid by the Counſel with the Defendant, that tryal and proof of a matter in common intendment is all one, and ſo the difference alleged was only verbal and not real, and it ſhall be taken to be a breach of the Condition, and ſo there is good cauſe of Action, and the Judgement thereupon given is well enough. Holhead on Counſel on the other ſide denyed it to be all one in ſenſe, for that a Tryal may be, and yet the Title may not not proved, and there may be a Judgement upon a Nihil dicit, where is nothing proved, and ſo concluded the Writ of Error did lye. The Court deſired to have Books, Poſtea.

Intendment.

Jones againſt Iacob.

24 Car. Banc. Reg.

Iudgement in an action upon the Caſe.

IOnes a Citizen and Pewterer of London, brought an Action upon the Caſe againſt Iacob for theſe words ſpoken of him. He is gone, and doth hide himſelf for debt, and for ought I know he is a Banckrupt. The Plaintiff had a verdict, and upon the Defendants motion the Judgement was former y ſtayed. The Plaintiff moves for Judgement notwithſtanding: for that the words are actionable. The Court ſaid the words are ſcandalous, and by them he is diſgraced in his Trade. Hales of Counſel with the Defendant ſaid, that there were other words in the Declaration which are not actionable, and yet dammages are given for both, which ought not to be, and therefore no Judgement could be given. The words ſaid not to be actionable were theſe, Have a care, and do not truſt him, for he will run away and pay you nothing. But the Court held, that both the words taken together are actionable, and ruled the Plaintiff to have his Iudgement for both the words, if better matter be not ſhewed.

Dammages.

Nelſon againſt Tompſon.

Mich. 24 Car. Banc. Reg.

Trin. 24 Car. rot. 343.

Demurrer to a replication in Debt upon an Obligation.

NElſon brought an Action of Debt againſt Tompſon upon an Obligation with a Condition to ſave the Plaintiff harmleſs. The Defendant pleaded non damnificatus. The Plaintiff replyed and ſhewed a breach on the Defendants part, whereby he was damnified. The Defendant demurs to the replication, and for cauſe ſhews, that the breach was aſsigned to be at Weſtminſter, and doth not ſhew in what County Weſtminſter is. The Court held, that though Weſtminſter be a City, yet it ought to be ſhewed in what County it lyes, becauſe it is not a County of it ſelf. Therefore adviſe what you will do, for the Action is fit to be diſcontinued.

Place.

Diſcontinuance.

Thyn

Thyn againſt Thyn,

Mich. 24 Car Banc. Reg.

LAtch moved again in this caſe, that the Summons doth not appear upon the retorn to be well made: for it is not ſaid to be made at the Church-dore, as the Statute directs. To this nothing was anſwered. But Bacon Iuſtice ſaid, the retorn was naught for anorher reaſon, and ſo there is no Record before us to proceed upon; in the Writ of Error the fault is this, The Cuſtos brevium ought to make the retorn here, and it is mentioned to be made per unum deputatorum ſuorum; whereas his Deputy had no authority to do it. Therefore you had beſt to take a new Writ of Certiorari, and certifie the ſame matter by it, and this the Court may grant though it be very rare: for if one will aſsign an Error in a Record and pray a Certificate, and nothing be done upon it, we cannot proceed. Conſider which way you can help this fault.

Whether Summons well retorned.

Retorn.

Tracye againſt Poole

Mich. 24 Car. Banc. Reg.

TRacye brought an Action upon the Caſe againſt Poole upon a promiſe, and declares, that Poole the Defendant in conſideration of a mariage to be had between the Plaintiffs ſon, and the Defendants daughter, & of ſetling ſo much Land upon him upon the mariage, He did aſſume and promiſe that within ſuch a time after the mariage had, he and his Son ſhould be bound per ſcriptum ſuum debita juris forma fiend. unto the Plaintif, for the payment for 3000l. for a mariage portion, & aſsigns the breach that the Defendant & his ſon did not become bound per ſcriptum ſuum Obligatorium: for the payment of the 3000 l. and for this he brings his Action. The Plaintiff had a verdict. The Defendant in areſt of Judgment moves that the breach was not well aſsigned: for the Aſſumpſit was, that the Defendant and his Son ſhould be bound per ſcriptum ſuum debita juris forma fiend. and the breach is, that they did not give ſecurity per ſcriptum ſuum Obligatorium, which agrees not with the Aſſumpſit: for the Defendant might give ſecurity by a Judgement, which is not ſcriptum ſuum; yet it is debita forma juris factum, upon this the Judgement was for that time ſtayed, though then Bacon Iuſtice enclined, that the breach was well aſsigned, becauſe in common conſtruction it ſhall be intended, that the Defendant aſſumed to give his own and his ſons bond for ſecurity. Hales of Councel with the Plaintiff at another day moved for Judgement, and held, that the breach was well aſsigned, for that it expreſſeth the ſubſtance of the promiſe, though not the very words of it, and this was held good, 7 Car. in Michill and Cars caſe. 2ly. If the meaning of the promiſe be conſidered, it will appear that the Defendant and his Son were to be bound by Obligation 6 Car. Courtny and Gavills Caſe, and indeed the promiſe cannot be ſatisfied by any other way than by an Obligation, for a Judgment or a Statute will not do it; for by them he is not ſaid to be bound; and though all this be admitted againſt me, yet it is now after a verdict, and the Jury have found the breach. Maynard for the Defendant argued, that the breach was not well aſsigned: for the breach aſsigned tends to a perſonal engagement for paying the 3000 l. which is not ſo expreſſed in the promiſe, but only a general ſecurity to be given for the monies, and a recogniſance, and a judgement are not properly ſcriptum, as in 9 Car. Goldſmith and Sydners Caſe, and the Declaration doth not ſet forth

Arreſt of Iudgement in an action on the Caſe upon a promiſe.

Breach.

the

the death of Sir Henry Poole by whom the ſecurity was to be given, and ſo it cannot appear whether he had a convenient time to do it as he ought to have, and he held, that the Plaintiff was bound to do the firſt act, viz. to tender the Obligation to the Defendant, or elſe he is not bound to ſeal, and deliver any, and alſo he ought to make a particular requeſt to him to ſeal and deliver it. Hales replyed if a man plead a Statute, it is true, that he ought to ſay per ſcriptum ſuum, but pleading ought to be more nice than common parlance. 2ly. The living of Sir Henry Poole is expreſſed, and there appears time convenient between the promiſe and the time of his death for performing of it. 3ly. It is not neceſſary for us to tender a bond, but the other ought to have done it at his own perill, for it is to be done at his charge and not at ours. Roll Chief Iuſtice held, that Judgement ought to be given for the Plaintiff, and ſaid, that for the laying of the promiſe it is not neceſſary to purſue the very words of the promiſe, but the ſubſtance, ſo that there may appear to the Court, that there is cauſe of Action. 2ly. He held that there is no variance in the ſubſtance: for the intent of the parties is to be conſidered, which was, to have another act done by Sir Henry Poole and his Son, per aliquod ſcriptum, and not by a verbal promiſe, and we are to conſider if the breach aſsigned agree to this, and he held, that the promiſe will extend to a Judgement, or a recogniſance: for a Judgement, Statute, or Recogniſance is ſcriptum, and for the time, the Defendant ought to have alleged, that he had not convenient time, if the truth were ſo: but here doth appear convenient time, and it is not neceſſary for the Plaintiff to tender the Obligation: but the Defendant ought to do it at his own perill, and to pay the mony in convenient time after the mariage, and the other is not bound to demand it, nor to be at the charge to make the Obligation. Bacon Iuſtice to the ſame effect, and ſaid, the words ought to be intended of a writing obligatory, according to common intendment, and the meaning of the parties; although it be not ſo expreſſed, and it cannot be meant of a promiſe by parol, for there are no preſidents in Law for verbal ſecurities, but only for ſecurities in writing, and the word in debita juris forma implies ſo much, otherwiſe here would be only one promiſe to make good another promiſe, Paſc. 9 Iac. rot. 361. Banc. Reg. & 21 Iac. upon a Writ of Error in the Exchequer-Chamber, the former Judgement was affirmed, and the breach here aſsigned meets with the Aſſumpſit, for it is that he did not become bound per, &c. and ſo the breach is well aſsigned. 2ly. Here appears in the Declaration to be two Months for the performing the promiſe, which is a convenient time, and there doth not appear any hinderance, and the Defendant was bound to do it without requeſt, and there is no neceſsity for the Plaintiff to make an election of the time when he will have it done. The Court bid the Plaintiff take his Iudgement, except better matter were ſhewed on Monday following.

Requeſt.

Pleading.

Tender.

Intendment.

Time.

Mich. 24 Car. Banc. Reg.

To quaſh an Endictment.

The Court was moved to quaſh an Endictment of forcible entry. The Exception was, that the forcible entry is ſaid is to be made in meſſuagium ſive tenementum, which is incertain. But Roll Chief Iuſtice doubted, whether the exception was good or not, becauſe it was meſſuagium ſive tenementum, and the word Meſſuage may be good though Tenementum be not. But it was quaſhed upon another exception.

The

The King againſt VVood.

Mich. 24 Car. Banc. Reg.

The Court was moved to quaſh an Endictment taken at a Seſsions againſt one Wood for getting the horſe of another man into his poſſeſsion, by uſing another mans name, and a falſe token. The exceptions taken againſt it were, 1. The Endictment doth not ſay that it was contra Statutum: But to this the Court anſwered that it was an offence at the Comon Law, and the Endictment lay at the Common Law, and therefore it need not to be expreſſed to be contra formam Statuti. 2ly. It doth not ſhew what the falſe token was, nor in whoſe name it was uſed. But Roll chief Iuſtice took another exception, viz. that the Endictment was that the Defendant did the fact nuper, and that is ſo general a word that no anſwer can be given to it. And for that it was quaſhed. To quaſh an Endictment.

Twigg againſt Roberts.

Mich. 24 Car. Banc. Reg.

Hil. 22 Car. rot. 956.

An Action of Debt was brought againſt an Executor in Briſtow upon a Cuſtom of conceſſit ſolvere by him to pay a Debt due by the Teſtator upon a ſimple contract, and a verdict and a Judgement for the Plaintiff. The Defendant brought a Writ of Error in this Court to reverſe the Judgment, and the Error aſsigned was, that the cuſtom of bringing an Action of Debt upon a conceſſit ſolvere is not a good cuſtom, becauſe it hinders the party to wage his Law, as by the Law he may do. Walker of Councel with the Defendant in the Writ of Error argued that it was a good cuſtom, becauſe the party is not thereby hindred of a tryal, and there are cuſtoms in London which are againſt the Common Law, as for example for the Recorder to give Judgement upon an exigent. The Court deſired to ſee the book, and to have preſidents brought them: And ſaid, This Cuſtom had been allowed againſt the party that made the contract; but the doubt is whether it be good againſt an Executor, for a conceſſit ſolvere is without any conſideration. And Roll chief Iuſtice ſaid, that this cuſtom doth break three rules of the Law. Error to reverſe a Iudgment in Debt againſt an Executor. Cuſtom. Wager of Law

Barker againſt Denham.

Mich. 24 Car. Banc. Reg.

Trin. 23 Car. rot. 1280.

Barker brought an ejectione firmæ againſt Denham, and upon not guilty pleaded an iſſue was joyned, and thereupon a ſpecial verdict was found that by the Cuſtom of the manour, whereof the Lands in queſtion were held, a Copyholder might ſurrender his Copyhold out of Court into the hands of two cuſtomary Tenants, to the uſe of another, and at the next Court the party to whoſe uſe the Copyhold was ſo ſurrendred uſed to be admitted, and That there was ſuch a ſurrender made here, but that the party to whoſe uſe the Copyhold was ſo ſurrendred dyed before the next Court, and Special verdict in an Ejectione firmæ.

so was not admitted. The question was whether he dying before his admittance, shall be said to be a Copyholder by the Custom of the manour or no. Hales Argued, that he is not a Copyholder within the Custom, and then if this Custom hinder not, the Lands shall descend according to the rules of the Common Law, for so is it of all Copyhold Lands if a speciall custom hinder not, and here 1. the words of the Custom are to be considered, and 2ly. how they are to be expounded, and for this he cited 49 E. 3 f. 19. 22 E. 3. 2 E. 4. f. 24. A custom shall be construed according to the Common apprehension of the lay gens, and a Custom shall be interpreted according to the most effectual operation of the Law, 3 H. 7. 5. Doct. and Stud. 48. 21 H. 7. f. 33. 44 Ass. f. 10. 4 H 8. Dyer 28. A denyal actual by a Copyholder to pay his rent is a forfeiture, not an implicative denyal, lib. intrat. f. 238. And by a surrender of a Copyhold before admittance the surrender hath no real possession, and the heir of a Copyholder before his admittance holds by the Copy of his Ancestor, and so he hath title; but the surrenderee can have no title before admittance, and he cited Rawlins and Iones his case, and Spurlins case. A surrender before admittance, is but a a consent of the party to part with the estate, but passeth it not, and after administration it should have no relation to the surrender: Twisden for the Defendant. 1. He agreed that a Copyholder before admittance is not perfect in his Estate; but yet the admittance shall relate to the surrender, and both shall be accounted one entire Act contrary to other learnings. 2ly. The Son is in by descent, and the descent must be ruled by the custom, and he is now really a Copyholder, and cited Shellyes case, and prayed Judgement for the Defendant. Roll chief Iustice said, This Case differs from surrendring into the hands of Tenants, for it is into the hands of the Steward out of Court, which is good, and the Lords acceptance of his rent is an admission. But Bacon doubted, and therefore the rule was for the Case to be argued again the next Term, and then by reason of sickness I was absent. But that Term held not by reason of the Kings death.

Discent.

Custom.

Forfeiture.

Title.

Relation.

Surrend. Admission.

Dunch against Smith.

Mich. 24 Car. Banc. Reg.

Arrest of Judgement in Debt brought by an Executor.

DUnch brought an Action of Debt as Executor for arrerages of a rent charge due to the Testator against Dunch, an occupyer of the land, out of which the rent was issuing, and hath a verdict. The Defendant moved in arrest of Judgement, and for Cause shewed that the Plaintiff doth not shew any title that the Defendant hath in the Land; but only sayes generally that he entred into the Lands, and so it appears not that he is to pay the rent. To this the Councel on the other side answered, that the Plaintiff being but an Executor cannot know the title, and therefore is not bound to shew it. Roll chief Iustice said, there can be no Judgement, for the Declaration is too generall. But Bacon Iustice held the Declaration good enough. Antea.

Brown againſt Poyns.

Mich. 24 Car. Banc. Reg.

The Caſe was this, a man made his laſt Will, and made two Executors, the Executors dye in the life of the Teſtator, the Teſtator dyes having two Siſters, the eldeſt Siſter procures Adminiſtration, the younger Siſter moves for a Prohibition to repeal the Adminiſtration, becauſe ſhe being in equal degree of kinn ought to have equall ſhare of the Adminiſtration. But the Court anſwered that a prohibition lies not, for you may appeal if the Adminiſtration be not rightly granted,

For a prohibition to repeal an adminiſtration.
Prohibition.
Appeal.

Mich. 24 Car. Banc. Reg.

A Proceſſe iſſued out of this Court for a Cart and Horſes that were cauſe of a mans death, as a deodand, 12. Iac. and it was moved that there hath been a generall pardon by Parliament ſince that time, by which deodands were pardoned, and therefore it was prayed the proceſſe might be ſtayed. The Court asked whether there be not an exception of deodands or the Almoners intereſt in the pardon: The Councell anſwered there is not: The Court demanded by what words in the pardon are deodands pardoned; The Councel anſwered by the generall words. The Court ordered thereupon it ſhould be ſtayed till the Almoner be heard what he can ſay.

To ſtay proceſſe for a deodand.
Generall pardon.

Mich. 24 Car. Banc. Reg.

The Court was moved for a habeas Corpus for one that was taken in Execution by the Sheriff, and was afterwards ſet at liberty, and after that retaken upon the ſame Execution. The Court anſwered, take it, but you are in the wrong way, for you ought to bring your audita querela.

For a habeas corpus for one taken upon one Execution.
Audita querela.

The King againſt Bray.

Mich. 24 Car. Banc. Reg.

The Court was moved to quaſh an Endictment of forcible entry made upon a Leſſee for years, upon the Statute of 21 Iac. The exceptions taken to it were, 1: It doth not appear by the Endictment that the Leſſee had any title to the Land at the time of the force committed, for the force is ſuppoſed to be done before the leaſe commenced. 2ly. The leaſe is ſuppoſed to be a leaſe for ſo many years, if I. S. ſhall ſo long live, and it is not averred that I. S. was alive at the time of the forcible entry made. Roll chief Iuſtice cited the Lady Morlyes caſe, that there ought to be a direct allegation of the life. Therefore let it be quaſhed.

To quaſh an Endictment of forcible entry.
Averment.

Mich. 24. Car. Banc. Reg.

To quash an Endictment for assaulting a Collector for the poor.

THe Court was moved to quash an Endictment of Assault and Battery of an overseer of the poor villæ de A. in executing of his office: The exceptions taken to it were, 1. That there is no such officer as an overseer of the poor villæ, but it ought to be parochiæ; but the Court said it was well enough, as it was, though it had been more proper the other way. 2ly. The Endictment is for the Assaulting, and beating a Collector for the poor in executing his office, whereas there is no such office appointed for any one particular man by the Law, for the Statute is, that there shall be two Collectors for the poor in every Parish, and so the office is joynt, and not several; But the Court over-ruled this exception also; 3ly. It wants vi et Armis. Vpon this exception the Court bid the Counsel move it again.

Gill against Crosse.

Mich. 24 Car. Banc. Reg.

Spetiall verdict in Debt against Executors.

THe Plaintiff brought an Action of Debt against two as Administrators, upon fully administred pleaded issue was joyned, and a speciall verdict was found to this effect, viz. that one of the Administrators had fully administred, and that the other Administrator had assets. It was urged against the Verdict that the issue that was found is impertinent and impossible; and so there can be no judgement given upon it. But the Court answered that the verdict is good, yet if Judgement should be given upon it, the Judgement would be ill, and Nevills and Greenwoods case, Hill. 7. Car. in the Exchequer. rot. 1189. was cited, and it was said that Judgement may be against that Executor who hath assets, and nil capiat per billam against the other that hath fully administred. But take Iudgement at your peril.

Verdict. Iudgement.

Preston against Holmes.

Mich. 24 Car. Banc. Reg.

Trin. or Mich. 24 Car. rot. 2052.

Arguments upon a special verdict upon a Will.

VPon a special verdict found the Case in effect was this, one in fee having one Son by one venter, and another Son by a second venter, did by his last Will devise all his Lands to his wife for life, and after her death to I. his eldest Son, and to his Heirs, and the question was whether the Son shall take these Lands by the devise or as Heir at Law, and so the devise to be of no effect to make him come to the Lands by purchase, Christopher Turner held, that the devise is void, because it sayes no more than the Law sayes, for if there had been no such devise, Iohn & his Heirs should have had the Land, and he cited Paramour and Yardlyes Case in the Comentaries, and Hob. rep. 4. Counden and Clarks case. But it is objected, that in this case the Law speaks one thing, and the devise another thing, and so the devise sayes not the same thing. To this I answer, there is no difference concerning

ning the alteration of the Eſtate, between what the Law directs, and what the deviſe directs, all the difference is in the manner how his Son Iohn ſhall come to the Eſtate, 3 & 4 Phil. & Mar. Dyer, 134. & 37 Eliz. A man ſeiſed in fee had iſſue two Daughters, and deviſed the Lands to them, and to their Heirs, and it was queſtioned whether they were Joynt-tenants, and I conceive they are, and where one omits a thing in a conveyance which the Law ſupplies, this ſhall not hurt, and he cited Iennings and Pollards Caſe, 6 Car. Hales on the other ſide argued, that the Son takes by purchaſe, and not by deſcent: for the deviſe is not to the Son in preſent, but after the death of the Teſtators wife, and if he had the Lands by deſcent, he ſhould have them preſently. It is true the Son might have waived the taking by purchaſe, and might have taken by deſcent: but here prima facie he ſhall be intended to be in by purchaſe, and not deſcent, for here doth not appear to be any actual waiver of the purchaſe, and the Son doth here as I conceive, take by way of remainder, and not by way of reverſion. And as to the verdict I conceive it is not good, for it doth not ſhew how the lands are held, whether in Chivalry or Socage, and ſo it appears not whether the Teſtator had power to deviſe all of them or not, for if they be held in Chivalry, he can deviſe but two parts of them, as the Statute directs. 2ly. It appears not, that the Teſtator had but one Son by his firſt wife. 3ly. It is not ſhewed, that the Lands are parcel of the Manor. 4ly. It doth not appear in whoſe poſſeſsion the Lands are. Roll chief Iuſtice ſaid, Lands that are given by Will ſhall be intended to be ſocage tenure, if the contrary do not appear. And he held that the deviſe is void, and that it is not in the power of Iohn the Son, to make the election to take by deſcent or by purchaſe at his pleaſure, but he muſt of neceſsity take the Land as the Law directs, which is by deſcent; and it is againſt a maxim in Law to give a thing to ſuch a perſon to whom the Law gives it, if it had not been ſo given, 3 & 4 Phil. & Ma. Dyer, 114. and therefore the Plaintif ought to have Iudgement; And as to the verdict he hath primer poſſeſsion, and therefore if the other make no title, the verdict is for him, and good enough. Bacon Iuſtice to the ſame intent, viz. that the Heir doth here take by deſcent, and not by purchaſe, for this the Law ſays, and he cannot alter it, and cited Foſcues Caſe, 4 Car. and a Caſe in 7 Iac. And ſo judgement was given for the Plaintif.

VVaiver.

Intention.

Maxim.

Verdict.

Franck againſt Burt and others.

Mich. 24 Car. Banc. Reg.

The Plaintif brought an Action of Treſpaſs for breaking of his Houſe, and carrying away his Goods, at the Tryal the Plaintif was non-ſuite. The Plaintif moved, that there was error in the Declaration, and therefore there could have been no Iudgement, and prays that he may be ſpared coſts. Roll chief Iuſtice anſwered, that heretofore it hath been made a queſtion, whether the Plaintif being non-ſuite, ſhould pay coſts, but ſince the Statute of 4 Iac. it is clear, he ought to pay coſts for the veration of the Defendant, and ſo it hath been ruled here, and you are out of Court now by being non-ſuite, and therefore you muſt pay coſts; And therefore except better matter be ſhewed, let them be paid.

For coſts for the Defendant upon non-ſuite of the Plaintif.

Coſts.

Mich. 24 Car. Banc. Reg.

For a prohibition to the great Seſsions at Carnarvan in Wales.

THe Court was moved for a Prohibition to the great Seſsions of Carnarvan in Wales to ſtop a ſute in an Engliſh Bill of Equity exhibited there, whereas by the Bill it appears there is no matter of Equity in the Caſe, but only matter tryable at the Law. The Court anſwered, if they proceed there againſt Equity, we cannot hinder them. There was wont to be an Agent here from the Commiſsioners there for us to confer with in ſuch caſes as theſe, but it ſeems there is not any here now. Therefore give notice, and let them ſhew cauſe the next Term, why a Prohibition ſhould not be granted.

Prohibition.

Mich. 24 Car. Banc. Reg.

How a Habeas corpus to an inferiour Court ſhould be retorned.

Retorn.

VPon reading of a retorn made by the Sheriffs of the City of Norwitch upon a Habeas corpus directed unto them for one Chambers, It was ſaid by the Court, that it hath been ruled, That upon a Habeas Corpus to an inferiour Court to remove Corpus cum cauſa, they ought to retorn all the cauſes that are depending there concerning the party that hath the Habeas Corpus, if any of the cauſes depending be for above five pound of which they ought not to hold Plea, and therefore becauſe all the cauſes were not retorned here upon the retorn of this Habeas Corpus, The Court held, the retorn was not good, and ordered that it ſhould be amended upon pain of ten pounds by Monday next.

Raph againſt Davye.

Mich. 24 Car. Banc. Reg.

Arreſt of judgement in an action for words.

Averment.

RAph brought an Action of the Caſe againſt Davy for ſpeaking theſe words of her to the Plaintifs mother, viz. Your Daughter, innuendo the Plaintif, is a brazen faced Whore, and deſerves to be hanged, and for ſpeaking theſe other words to the Plaintif herſelf, viz. you Huswife are a Thief, and have ſtollen my Purſe. The Plaintif had a verdict; The Defendant moved in arreſt of Judgement, that the Plaintif doth not aver, that her Mother had not any other Daughter beſides herſelf, and ſo it is uncertain, whether the words were ſpoken of her or no. But the Court held, it was well enough without ſuch averment, becauſe the Declaration is, that the Defendant habens colloquium of the Plaintif did ſpeak the words, and that makes it certain enough; And therefore bid the Plaintif take her Iudgement.

Jennings againſt Lee.

Mich. 24 Car. Banc. Reg.

Arreſt of Iudgement in an action of aſſault and battery.

JEnnings brought an Action of Aſſault and Battery againſt Lee. The Defendant pleads a ſpecial plea, and juſtifies. The Plaintif replies de injuria ſua propria, and upon this an Iſſue is joyned, and a verdict found for the Plaintif. The Defendant moved in arreſt of Judgement, that the replication was not good, becauſe it anſwers not the ſpecial matter pleaded, nor takes

takes any traverſe by an abſque tali cauſa as it ought to do, and ſo there is no iſſue joyned, and conſequently there can be no Judgement. Roll chief Iuſtice ſaid, that the replying de injuria ſua propria, and not traverſing abſque tali cauſa is not good, for there is not an affirmative and a negative, and ſo there is no iſſue joyned, and therefore there can be no Judgement; and it is a direct Ieofail, and it is not helped by the Verdict, for it is no tryal, and not a miſtryal which a verdict may help. If there be two or three things in a Declaration upon which an iſſue may be joyned, if an iſſue be joyned upon any of them it is well, but here is no iſſue joyned at all: for the replication doth no more but affirm the wrong done, as the Count did. Therefore conſider how you can help it. Poſtea.

Traverſe. Iſſue. Ieofails.

Mich. 24 Car. Banc. Reg.

VPon the reading of a retorn of a Writ of privilege granted for one to be reſtored to the place of an Alderman of the Town of Stafford, Hales took theſe exceptions to the retorn, 1. that one cauſe ſhewed for the diſfranchiſing the party was, that he had done contrary to his oath, which he ſaid was no ſufficient cauſe for the diſ-franchiſing of the party, for their Letters patents do not warrant it. A ſecond cauſe returned is, for that he did not make an accompt of ſuch monies, as he had received for the uſe of the City, and this concerns not the party as an Alderman, and therefore his miſdemeanour in that office can be no cauſe to put him from his place of Alderman. 3ly. It is retorned for cauſe that he did miſ-behave himſelf in his place whilſt he was Maior of the City, and this as the former is no cauſe to put him from his Aldermans place. A fourth cauſe returned is, for ſpeaking contemptuous words againſt the Maior and Aldermen, viz. Knock your heads together till I come, which words cannot be ſo contemptuous as to be put out of his place for them, for they are not ſo much as actionable. 5ly. He held, that if any of theſe cauſes ſingly or all of them together were ſufficient to diſ-franchiſe him, yet they have not ſhewed, that they have lawfully removed him, for it appears not that he was ſummoned to anſwer any of the things objected againſt him, neither doth it appear, that he was diſ-franchiſed by thoſe that ought to have done it. The retorn was ordered to be filed, and time given to anſwer theſe exceptions till the next Term.

Exceptions to a Retorn of a VVrit of Privilege.

Diſfranchiſement.

Retorn.

Mich. 24 Car. Banc. Reg.

VPon an Affidavit read, that the cauſe was removed hither by the Plaintif, The Defendant moves for a Procedendo, that the Court may proceed where the Plaintif firſt brought his Action. But the Court anſwered, that the Plaintif may remove his cauſe hither by Certiorari, and upon the retorn of the Certiorari the Defendant ought to tender bayl, and if the Plaintif will not accept of it a Procedendo may be granted.

For a Procedendo.

Wood

Wood againſt Clement.

Mich. 24 Car. Banc. Reg.

Arguments of Councel, and the Judges opinions touching an Award.

THe Caſe of VVood and Clement formerly ſpoken unto, was again moved and ſpoken to, firſt by Twisden, who argued, that the Award ſet forth is void for two reaſons. 1. Becauſe it is not final, for it awards one to pay mony to I. S. to the uſe of another, without his conſent, and this cannot determine the matter in controverſie, but doth beget ſutes. 2ly. It is againſt reaſon, that the mony due to the Mariners ſhould be payd to any, but the Mariners themſelves, and this is not ſubmitted, and if it were, yet it is ill, for the Mariners include not the Maſter. Maynard held, that the Award was void to this clauſe, and ſo there is no breach aſsigned, and conſequently there can be no Judgement given, although ſome other part of the Award be good, and here is nothing awarded concerning Iohn Acland, who is one of the parties that ſubmitted to the Arbitration, and ſo as to the mony he hath no ſatisfaction by the Award, 2 Rich. 3. f. 16. Hill moved, that the Arbitrators have made an Award touching a thing not ſubmitted: for the differences ſubmitted are touching the Ship called the Salvadore, and they have made an Award touching the Ship, and the proceed thereof. Hales on the other ſide held, that Iohn Acland is not party to the ſubmiſsion no more than the Mariners, and that the other parties have ſubmitted by him. 2ly. He ſaid there is ſomething awarded for Iohn Ackland, for he is comprized within the Mariners, and ſo he hath ſatisfaction, and if he be not included, then it appears not that there is any difference touching him to be arbitrated, and here is a joynt truſt for all, and one may take upon him for all, and make a diſcharge for all. Roll chief Iuſtice ſaid, the Mariners, and owners of the Ship are all parties to the ſubmiſsion; but the Plaintif and Defendant in this action are only bound to perform the Award, for they only entred into bond to do it. And the Maſter of the Ship is the chief Mariner, and he comes in in this notion and ſo the Award concerns him, 7 E. 4. f. 14. And if the party have power by the Award either in Law or Equity to compell the other to perform it, the Award is good though the party be put to his Action to get it performed. Bacon Iuſtice agreed with Roll, and held Judgement ought to be given for the Plaintif, for that all the parties are included within the ſubmiſsion, although but ſome of them only are bound to perform the Award, and he ſaid that the Maſter of the Ship is a Mariner. Ierman Iuſtice ſaid, he would adviſe, becauſe it was a great cauſe, but he enclined that judgement was to be given for the Plaintif, becauſe the Award ſeemed upon the pleading to be good. Crown Iuſtice was of the ſame opinion, and ſaid, that the Maſter was a Mariner, and that there is a truſt between all the parties, and a good remedy for them all by the Award. Whereupon the rule was, that the Plaintif ſhould have Iudgement except better matter were ſhewn Monday next.

Award.

133-136.

Mich. 24 Car. Banc. Reg.

Arreſt of judgement in an action upon the Caſe upon a promiſe.

THe Plaintif brought an Action upon the Caſe upon a promiſe; The Defendant pleaded non Aſſumpſit, and thereupon an iſſue was joyned, and a verdict found for the Plaintif. The Defendant moved in arreſt of Judgement, and took exception to the ſetting forth of the promiſe, which was this, that the Defendant upon a conſideration moving from the Plaintif,

did

did assume and promise unto the Plaintif to pay a certain sum of mony, cuidam Fountain, and leaves out his name of baptism, and so it is incertain who the mony should be paid unto, or whether it be now paid or no, and consequently whether there be any cause of Action, and so there can be no Judgement. But Roll cheif Iustice answered, the Assumpsit was grounded upon a consideration past, and peradventure the Plaintif may not know the parties Christian-name to whom the mony is to be paid, though both the Plaintif and Defendant know the person of the man well enough. Therefore let the Plaintif have his Iudgement. Assumpsit.

Frank against Dixon.

Mich. 24 Car. Banc. Reg.

FRank brought an Action of Tresspas against Dixon for entring into his House, and breaking open his Chest, and taking away his Goods. The Defendant pleaded a special Plea, viz. that he did it by way of a distress for rent due unto him; The Plaintif replyed de injuria sua propria absque tali causa; upon this an Issue was joyned, and a verdict found for the Plaintif. It was moved at amicus Curiæ that no Judgement could be here given for Costs for the Plaintif, because the Plaintif had made no title to the Goods, and these Cases were cited, 44 Eliz. Trin. 7 Iac. Frith and Blackmans Case, and 5 Car. Davis and Evans. But Roll chief Iustice answered, that he wondered why any body should so move, for it is against the known practice of the Court, and said that he must pay Costs, otherwise there shall be vexation without amends. Therefore let the Plaintif take his judgement. Arrest of Iudgement in an Action of Tresspas. Costs.

Tyson.

Mich. 24 Car. Banc. Reg.

A Writ of Error was brought to reverse a Judgement given in an Action of Tresspas, and exception was taken to the Writ of Error, in that it was not brought by the same person against whom the judgement was given: for the judgement was given against Evison, with the addition of Gentleman, and the Writ of Error is brought by Ivison Yeoman. Roll chief Iustice answered, that Evison and Ivison sounded but as one and the same name, and for the additions of Yeoman and Gentleman it is not material, though they differ here: but if it were the addition of Knight, or Baroner, there the difference would be something, for that is made part of the name, but the additions of Yeoman or Gentleman are additions ad placitum. Error to reverse a judgement in Tresspas. Addition.

Cutsworth.

Mich. 24 Car. Banc. Reg.

THe Plaintif declares against two Defendants, against one of them, for an Assault and Battery, and against the other, for taking away his Goods, and upon not guilty pleaded the Plaintif had a verdict, and a judgement against them both joyntly for dammages, and this was assigned for error to reverse the Judgement. Roll chief Iustice said, the Writ cannot be helped, for the two Defendants cannot be joyned in one Action, because the Tresspasses are of several natures, and against several persons, and the Error to reverse a judgement in assault and battery. Joyn in action.

parties cannot plead to this Declaration. Therefore the Plaintif nil capia per billam.

Mich. 24 Car. Banc. Reg.

To quaſh an order of Seſſions.

THe Court was moved to quaſh an order of Seſsions made, that one ſhould keep his reputed Child, becauſe he had kept him heretofore, and it doth not ſhew either that he is his Baſtard, or his lawfully begotten Child. The order was quaſhed, becauſe not made according to the Statute.

Mich. 24 Car. Banc. Reg.

Error to reverſe a judgment in Debt.

Return.

A Writ of Error was brought to reverſe a judgement given in the Court at Exeter in an Action of Debt for rent. The errors aſsigned were, 1. That the names of the Jurors were not returned upon the panel. To this Roll chief Iuſtice anſwered, it is not neceſſary to return their names, though it was the old way to do ſo. A ſecond exception was, that the Writ of Error is not well returned, for it is directed to the Maior and Bailifs of the City of Exeter, and it is returned by the Maior and two of the Baylifs, whereas it ſhould be by all of them. Adjourned to the next Term.

Mich, 24 Car. Banc. Reg.

To quaſh an order of Iuſtices of the peace.

A Return of an order of Juſtices of peace, for keeping a Baſtard-Child, removed hither by a Certiorari was read, and upon the reading the Court was moved to quaſh the order upon theſe exceptions. 1. It doth not appear, the order was made by two Juſtices of the peace, whereof one was of the quorum. 2ly. It doth not appear that the Juſtices did inhabit near the place. 3ly. The order doth not direct how long the party ſhall keep the Child, as the Statute doth direct it ſhould. The order was quaſhed upon the laſt exception.

The King againſt Humphryes.

Mich. 24 Car. Banc. Reg.

To quaſh an order of Seſſions. Deputation.

THe Court was moved to quaſh an order of Seſsions made at Derby for Parents to relieve their poor Children. The exception taken was that the Statute appoints that the Juſtices in the Seſsions ſhall ſet the rate that is to be paid for their maintenance, and that the Juſtices here have not done, but have transferred their authority over to other Juſtices to do it, which they cannot do, and ſo the order made by the other Juſtices is not good. The Court ſaid, this is all one as if an Arbitrator ſhould arbitrate another to make the arbitrement, which is not good. Therefore let the order be quaſhed.

The

The King againſt Golding.

Mich. 24 Car. Banc. Reg.

The Defendant ſhewed for cauſe why reſtitution ſhould not be awarded againſt him upon an Endictmentof forcible entry, That he will appear and plead to the Endictment. Roll chief Iuſtice anſwered, Then you muſt go to tryal the next Term, and at your own charges.

Cauſe why no reſtitution upon an Endictment of forcible entry.

Mich. 24. Car. Banc. Reg.

Vpon view of the Parliament Roll of the Statute of 2 Ed. 6. for payment of tithes, and comparing it with the Declarations in the cauſes betweén Bowes and Broadhead, and Burraſton and Herbert, it was found that the Statute was rightly recited, notwithſtanding what had bèen objected, and the Journal Book of Parliament produced to the contrary; and thereupon Iudgement was given in both caſes, and the Court ſaid that they were to be ruled by the Parliament Roll, and not the Iournal book. And the ſame day, in the Caſe between Bowyer and Tantulyar, for the ſame reaſon, the Court ordered the Parliament Roll to be brought in Court the next term, to make it appear whether an adjournment of Parliament was well recited, and would not credit the Iournal book.

Parliament Roll brought in Court to examine a Declaration by. Recital. Parliament Roll. Iournal Book.

Mich. 24 Car. Banc. Reg.

PHillips moved the Court to quaſh an Endictment, for an Aſſault and Battery made upon Baron and Feme, and for pulling down of the houſe of the Baron, and he took theſe exceptions. 1. That the Endictment did conclude ad damnum ipſorum, whereas it ſhould be ad damnum of the Baron only. But the Court anſwered, that the Endictment is good, though the words ad damnum ipſorum be left out. A ſecond Exception was, that the Endictment doth not ſhew the time, and place, when the Aſſault was committed. 3ly. It is ſaid intulit and expulſit in the ſingular number, whereas it ſhould be intulerunt and expulſerunt in the Plural number, becauſe the Endictment is againſt divers, and ſo it is falſe Latin. 4ly. The Endictment uſes the word lignum for the tymber of the houſe, whereas it ſhould be maremium. Twiſden on the other ſide anſwered, that the Endictment was good at leaſt to the Aſſault and Battery, though it fail in the other particulars. The Court ordered the Defendants to plead to it, and would not quaſh it.

To quaſh an Endictment for Aſſault and Battery. Endictment. Falſe Latin.

Mich. 1649. Banc. Sup.

The Court upon the return of a Sheriff of a reſcous made, and read was moved to quaſh it for theſe exceptions taken to it. 1. It is ſaid feci warrantum meum Thomæ Tayler, and doth not ſay that Thomas Tayler was his Bayliff. 2ly. He doth not ſay for what cauſe he made his Warrant, and ſo it appears not whether it was lawfull or not. Vpon theſe exceptions it was quaſhed.

To quaſh a Reſcous. Warrant.

Mich. 1649. Banc. ſup.

Vaux and Vaux againſt Steward.

Arreſt of Judgement in an action upon an Aſſumpſit.

Joyn in action.

Promiſe entire.

VPon a verdict found for two Plaintiffs in an Action upon the Caſe upon an aſſumpſit, The Defendant moved in Arreſt of Judgement, and for cauſe ſhews that the Plaintiffs ought not to have joyned in the Action; but ought to have brought ſeveral Actions. The Caſe was this, the ſeveral Cattel of the two Plaintifs were diſtreyned; The Defendant upon conſideration of ten pounds paid unto him by the Plaintifs, did aſſume and promiſe unto them to procure the Cattel to be re-delivered unto them, and becauſe they were not re-delivered accordingly they brought their Action joyntly. Roll chief Iuſtice ſaid, the promiſe here is entire, for the conſideration is entire, and ſo the Action may be joyntly brought. Yet let Iudgement ſtay till the other move. Poſtea.

Mich. 1649. Banc. ſup.

Obſervations upon a Tryal. Preſentation. Licence. Grendons caſe, 11 Rep. Impropriation. Vicarage.

IN a Tryal between Cave and Oſby, for not ſetting forth of Tithes according to the Statute of 2 Ed. 6. Theſe things were delivered by the Court, 1. That the King may preſent to a living by a Letter, but it is a queſtion whether he can do it by paroll. 2ly. There ought to be the Kings licence to make an appropriation of a Church, and to endow a Vicar. 3ly. The King cannot make ſuch a licence without matter of Record, and it ought to be with a Condition to endow a Vicar, and the endowment of the Vicar may be by a diſtinct inſtrument from the appropriation, ſo that it be made at the ſame time when the appropriation was.

Mich. 1649. Banc. ſup.

Robbery of the ſervant may be robbery of the Maſter. Robbery.

IN the Caſe of one Wright, brought upon the Statute of Hue and Cry, Roll chief Iuſtice ſaid, that if a mans Servant be robbed of his Maſters Goods in the ſight of his Maſter, this ſhall be taken for a robbing of the Maſter. And if one caſt away his Goods to ſave them from a Robber, and the Robber take them up, and carry them away, this is a robbery done to his perſon.

Coles againſt Sibſye.

Mich. 1649. Banc. ſup.

Trin. 1649. rot. 148.

A Latitat in nature of an original.

Original.

COles brought an Action of Trover and Converſion againſt Sibſye, The Defendant pleaded the Statute of Limitation of actions in bar of the Action. The Plaintif replies, that he took out a Latitat out of this Court againſt the Defendant within the time limited by the Statute, which yet continues depending. Roll chief Iuſtice ſaid, a Latitat out of this Court is in the nature of an original in the Common-pleas, and ſo hath been alwaies held to be. Adjourned.

Mich.

Mich. 1649. Banc. ſup.

The Court was moved to quaſh divers Endictments againſt the Inhabitants of the Pariſhes of Shoreditch and Hackney in Middleſex, for not repairing the High ways. The exception taken was, that the Pariſhes are joyntly endicted, whereas their offences are ſeveral, and alſo not equal, and yet both fined alike. The Court quaſhed the Endictment, and diſcharged the iſſues which were not returned, but not thoſe that were returned. To quaſh Endictments of Pariſhes for not repairing the high way.

Gardner againſt Jollye.

Mich. 1649. Banc. ſup.

Paſc. 1649. rot. 189.

Jollye brought an Action upon the Caſe againſt Gardner for cauſing him to be endicted of Felony as acceſſary, for ſuffering a Priſoner to eſcape that was convicted of Felony. The Plaintiff had a verdict, and a judgement; The Defendant brought a Writ of Error to reverſe this judgement, and the error aſsigned was, that the party was endicted for a matter which is but a Treſpaſs, and not a Felony, and ſo the Declaration is miſtaken, and an Action upon the Caſe lyes not. But the Court anſwered, that the charge of the Endictment is for Felony, although the matter the party is charged with be not Felony, and a ſcandal lay upon him by it, and therefore the Action lies. Error to reverſe a judgement in an action on the Caſe. Caſe.

Vaux and Vaux againſt Steward.

Mich. 1649. Banc. ſup.

The Caſe between Vaux and Vaux, and Steward, was again moved in arreſt of Judgement. The objection made was, that the promiſe made amounted to a double promiſe, and therefore the parties to whom the promiſe was made ought to have brought ſeveral Actions, and not to have joyned in the Action, as they have done. But to this it was anſwered by the Councel on the Plaintiffs part, that the promiſe is entire, and is not double: for the conſideration of the promiſe is entire, viz. the ten pound which moved from them joyntly and not ſeverally. Roll chief Juſtice held, that it is an entire promiſe, and a joynt conſideration, though the Cattel taken were ſeveral, and therefore the Action may be joynt, and if one lay out mony for a thing aſſumed to be done for a third perſon, if it be not done an Action ſhall be brought upon the Aſſumpſit by him who layd out the mony; but becauſe a Caſe was cited out of Yelvertons Reports to be againſt the opinion of the Court, therefore the Court ordered the Councel to bring that Caſe, and in the mean time they would adviſe. Antea. Arreſt of judgement in an action upon an Aſſumpſit. Joynt promiſe. Rippon and Mortons caſe, f. 1.

Mich. 1649. Banc. ſuper.

Chriſtopher againſt How.

Arreſt of Iudgement in an Action upon the Caſe.

CHriſtopher brought an Action on the Caſe upon an Aſſumpſit againſt How an Executor, and declared upon a promiſe made by the Teſtator to the Plaintif, to deliver certain goods in the poſſeſsion of the Teſtator unto the Plaintif upon requeſt, and becauſe the Teſtator had not delivered them accordingly, the Plaintif brings his action. The Plaintif had a verdict: The Defendant moved in arreſt of Judgement, and for cauſe ſhews, 1. That the breach of this promiſe was in the Teſtators life time, and therefore the Action ſhould have bẽn brought againſt him, and is not now to be brought againſt the Executor. 2ly. The Teſtator did not promiſe that his Executors ſhould deliver the goods, but that he would deliver them upon requeſt; and there appears no requeſt to be made to the Teſtator, as there ought to have been. 15 Iac. Hob. rep. f. 300. Bodwells Caſe. But Roll chief Iuſtice anſwered, That an Executor may be charged upon a collateral promiſe, if there were a breach of it in the Teſtators life time, and here is a good requeſt, and goes to all: Therefore let the Plaintif take his judgement, except better matter be ſhewed to the contrary.

Requeſt.

Executor.

and Osborne.

Mich. 1649. 1 Reipub. Ang. Banc. ſuper.

Arreſt of Iudgement in an Action upon the caſe. Iſſue.

THe Plaintif brought an Action upon the Caſe upon two ſeveral promiſes, the Defendant pleaded non aſſumpſit, and upon this an iſſue was joyned, and a verdict found for the Plaintif. The Defendant moved in arreſt of judgement, and for cauſe ſhews, that there is no iſſue joyned as to the ſecond promiſe alleged, for he doth not conclude with petit quod inquiratur per patriam, and yet there is a verdict found upon both the promiſes. The Iudgement was arreſted till the other ſhould move.

Mich. 1649. Banc. ſuper.

A Caſe upon a ſpecial verdict argued.

VPon a ſpecial Verdict the caſe was this: Tenant for life, the remainder for life, the remainder in tayl, the remainder to the right heirs of him in the remainder for life; the remainder man in tayl levies a fine in the life of tenant for life; And the queſtion was, whether by the levying of this fine the eſtate tayl were diſcontinued or no. To prove that the eſtate tayl was diſcontinued, theſe Books were cited, 1 H 7. 22. Lit. Cap. Diſcents, Sect. 34. 14 Ed. 3. Fitz. Avowry 117. 3 Ed. 3. Fitz. grants 60. 15 Ed. 4. 9. 2 Rep. Butlers caſe 65. Cooks Lit. f. 25. Paſch. 13 Car. Hungates Caſe, Banc. Reg. Dyer. 339. Twiſden to the contrary argued, that the eſtate is not altered, neither to the right nor by way of Eſtople, 46 Edward 3. f. 23. An Eſtople ſuppoſeth a thing to be done; and therefore if the thing be impoſsible which is alleged by way of eſtople, it can be no eſtople. And one ſhall not be conſtrued to doe wrong by an Act which may be interpreted ſo; that by it he may doe no wrong. Brooks Abridgement Grants 49. Roll chief Iuſtice, The matter here is not how the eſtates ſhall paſs, and how

Eſtople.

how to make them good; but the Queſtion is upon the forfeiture: for he levies the fine as of an eſtate in poſſeſsion, and not of a reverſion in fee; and this is not upon the rule in Bredons caſe, 13 Car. Sir Julius Cæſars caſe; an Acceptance of an eſtate, or an Attornment by Tenant for life to a ſtranger, is a forfeiture. Jerman Iuſtice held there was no forfeiture. But the Court ſaid the Verdict was ill found; and therefore ordered it ſhould be amended, that the whole matter in Law might come in queſtion. Forfeiture. Amendment.

Gray againſt Walye

Mich. 1649. Banc. ſup.

WAlye brought an Action upon the Caſe againſt Gray, for ſpeaking theſe words of him, viz. Iack Walye was queſtioned for ſtealing of a gray Mare with a ſnip in her ear, and hue and cry went out after him, and he durſt not ſhew his face hereabouts. The Plaintif had a Verdict; and the Defendant moved in Arreſt of Iudgement, that the words were not actionable, becauſe they were general and uncertain words, and it doth not appear the party was damnified by them, nor how long ago they were ſpoken. Roll chief Iuſtice ſaid, that the party was defamed by ſpeaking of them, and he hath ſaid it that he loſt his Credit thereby. Therefore let the Plaintif have his Iudgement, except better matter be ſhewn. But Nicholas Iuſtice doubted whether they were actionable or no. And Ask Iuſtice nihil dixit. Arreſt of Iudgement in an Action upon the caſe.

Mich. 1649. Banc. ſup.

AN Attorney of this Court that was within age, appeared to an Action propria perſona, and pleaded to iſſue, and had a verdict and a judgment for him: and upon this a writ of Error was brought here, it being an error in fact; becauſe that being within age he did not appear per guardianum, nor by his Attorney; and it was ſaid, that it is not helped by the Statute of Jeofails, though it be after verdict. And thereupon the Court ſtayed the Execution. Error againſt an Attorney in Court, for appearing *propria perſona*, being within age. Error in fact.

Mercer againſt Rule.

Mich. 1649. Banc. ſup.

THe Court was moved, That a writ of Error was brought to reverſe a Iudgement, and that it was received and allowed: and notwithſtanding the Plaintif that had the Iudgement had taken out execution; and thereupon it was prayed for a ſuperſedeas to ſuperſede the execution, and for an Attachment againſt the party for his contempt to the Court. And it was urged by the Councel that moved, That after a writ of Error is received and allowed, the hands of the Court that gave the Iudgement, are foreclo-ſed from granting out execution, and that the writ of Error is in it ſelf a Superſedeas, and cited Dyer 283. and therefore concluded, that the execution is not well iſſued forth. Twiſden of Councel on the other ſide ſaid, that the writ of Error was not duly purſued, becauſe the roll was not marked; and therefore the party might well take out execution. But Roll chief Iuſtice anſwered, that the writ was well purſued, though the roll were not marked; yet if neither the roll be marked, nor notice given to the Attorney on the other ſide of the bringing the writ of Error, if the party proceed to take out execution, it is no contempt to the Court: otherwiſe it is For a *Superſedeas* & attachment for taking out execution after a writ of Error brought and allowed. *Superſedeas.* Attachment. Execution. Notice.

Contempt. a contempt; And it is the duty of the Clerk of the Errors to mark the roll, and not the Attorneys; and therefore take a Superſedeas, quia improvide emanavit, to ſtop execution.

Superſedeas.

Pym againſt Morgan, alias Bambery and Baſelye.

Mich. 1649. Banc. ſup.

Hill. 24 Car. rot. 1062.

Argument upon a ſpecial verdict in an *Ejectione firmæ.*

IN an Ejectione firmæ brought for the Manor of Caledown, The Defendant pleads Not guilty; and upon this the Jury find a ſpecial verdict to this effect, That Sir Thomas Morgan was ſeiſed in fee, amongſt other lands, of the lands in queſtion, and that in 13 Car. he made a ſettlement of theſe lands to himſelf for life, the remainder to his daughter Mary for life, the remainder to the heirs of the firſt Tenant for life, with a power of revocation, to alter all or any part of the ſettlement made at any time during his life: The verdict finds further, that there was an Ordinance of Parliament made in the year of our Lord, 1645. that Sir Thomas Morgan ſhould forfeit all his lands and eſtate which he was then ſeiſed or poſſeſſed of, or had been ſeiſed or poſſeſſed of from the year 1641. and that by the ſame Ordinance the lands in queſtion were given to Mr. Pym; & that by virtue of the ſaid Ordinance he entred & was ſeiſed pro ut; & that Mr. Pym died ſo ſeiſed, after whoſe death the Plaintifs leſſor, as his heir, entred, & made a leaſe to the Plaintif, & after that Sir Tho Morgan died, & Mary the Defendant claiming as tenant in remainder for life after the death of Sir Thomas her father, by vertue of the ſettlement made 13 Carol. entred into the lands in queſtion, and the Plaintif as leſſee of Pym brings the action. Upon this ſpecial verdict, the Queſtion was, Whether by the Ordinance of Parliament made not till the year 1645. yet looking back to the year 1641. the remainder of the lands in queſtion, which was ſetled 13 Car. being before the making of the Ordinance, and alſo before the time to which the Ordinance looks back, be forfeited by the Ordinance or not? Larch of Councel with the Defendant argued That it was not forfeited; 1. Becauſe that the Ordinance is penal, and retroſpective or looking back; and therefore it is odious in Law, and ſhall not be largely interpreted but as ſtrictly as may be. 2ly, The preamble of the Ordinance ſets forth 2. things, as the reaſons why the Ordinance was made; 1. Mr. Pyms deſerts, to whom the lands were given; 2ly, Morgans offences, for which he was thus puniſhed: and both theſe grounds for making the Ordinance can extend no further than to the year 1641. and ſo not to the time of the ſettlement made 13 Car. by Sir Thomas Morgan; for then neither of theſe cauſes alleged were in being; 2ly, The purview of the Ordinance is double; 1. punitive; 2ly, remunerative. 1. the punitive part, which concerns the puniſhing of Sir Thomas Morgan; 2ly, the remunerative part, concerning the rewarding of Mr. Pym; and the punitive part made in the year 1645. cannot reach the eſtate ſetled upon Mary his daughter ſo long before, viz. 13 Car. for it can reach no further back than to the year 1641. at the moſt, to which time, and no further, the Ordinance is retroſpective: and in the Statute of 23 H. 8. general words of an Act are reſtrained. Beſides, there is a demonſtration in the Ordinance, that ſhews the Ordinance doth not extend to the eſtate of the Defendant, as may appear by the proviſoes conteined in it; for although the children of Morgan are to be puniſhed within the Ordinance by the ſecond proviſo of it, yet this extends not to ſo long time as to 13 Car. when the eſtate was ſetled, but only to the eſtate, as it was in the year 1641. And there-

Forfeiture.

fore

fore prayed Judgement for the Defendant. Wadham Windham on the other side argued, that the estate of Morgan, though it was said to be setled 13 Car. was forfeited by the Ordinance. Because the estate was not absolutely setled at that time, for there was a proviso in the conveyance to revoke the settlement, so that at the time of the Ordinance made the estate was in Sir Thomas Morgan absolutely to dispose off as he pleased, and by the words of the Ordinance all Morgans estate is passed without any saving, and the provisoes of the Ordinance do prove, that the Children of Sir Thomas Morgan were excepted out of the savings made to preserve the estates of others. Also Boons and Favours bestowed use to be amply expounded, and this being a Boon bestowed by the Parliament shall receive as large a construction as is possible. Besides Morgan was a Papist, & therefore it may well be supposed, that he intended not this for any real settlement, but only by way of subtility for some private reasons: for we know that Papists do use to make such settlements as this was to preserve them from penalties of the Law. And the words of the Ordinance are accumulative to convey all Morgans estate, and there are no restrictive words, and if there were they should be void here: for the Manor of Callidown, being the Lands in question are expresly given by the Ordinance, and as to these Lands the rights of all men are bound, and therefore if there were a saving it would be void, as it is Cook rep. Alton Woods Case. And an act of Parliament sometimes is as a conveyance, sometime as a judgment, and both wales a saving in it is void and frivolous, 1 Rep. 4. A conditional estate or a right may be saved by Judgment or fine, but not an entire estate or interest, and therefore the estate of Mary in the Manor of Callidown, cannot be saved by any proviso, and he cited Alton Woods Case for authority in the principal Case, f. 51. But admitting a general saving had been good to save Maries estate, yet as the words of the Ordinance were penned, her estate is not saved by it, for the words were put in the Ordinance for the advantage of Pym, and not to provide for Mary: for she claims from Thomas Morgan, and so prayed Judgement for the Plaintif. Roll chief Justice said, that the provisoes in the Ordinance are not void to all persons, as Windham argued, for Strangers are clearly provided for by them. But let the Case be argued again Saturday fortnight. Postea. Saving.

Harwood against Payte.

Mich. 1649 Banc. sup.

Entred Hill. 24 Car. rot. 78.

THe question insisted upon in this Case was, whether upon a recovery in an Action of Debt against a Parson, the Tithes be extendible by Elegit. Hales of Councel with the Plaintif held, that they are, because that Tithes may be said to be Tenements, and the Parson hath a Free-hold in them, although he hold them jure Ecclesiæ. But Roll chief Justice said, that a Parsonage cannot be extended, but that the Debt may be levyed out of the profits of it by the Sheriff, as it was wont to be done: for now there being no Bishops the profits cannot be sequestred by the Bishop of the Dioces, as they used to be. But Ierman and Nicholas Justices doubted. Ask Justice agreed with Roll, and said, that by the Common-law the Clergy are no more privileged from paying their debts, than Lay men are. Roll chief Justice said, it hath been heretofore questioned, whether a Clergy-man be subject to watch and ward, or to contribute to satisfie for a robbery done within Whether Tithes be extendible upon an Elegit. Elegit. Extent. Sequestration Clergy.

in the Hundred: but now it is no queſtion but they are ſubject, and ſhall contribute. Adjourned till Saturday to be argued again. Poſtea.

Tyndal and others againſt Harington.

Mich. 1649. Banc. ſup.

Arreſt of judgement in Debt for arrerages of an annuity. Debt. Annuity.

TYndal brought an Action of Debt againſt Harington for arrerages of rent due to him as Leſſee of a Vicarage, and upon nil debet pleaded, there was an Iſſue joyned, and a verdict found for the Plaintif. The Defendant moved in arreſt of Judgement, that an Action of Debt did not lye, but that he ought to have brought a Writ of Annuity, becauſe it was for arrerages of an Annuity, which yet continues, and 6 H. 4. 7. & 9 H. 6. 94. were cited. The Iudgement was arreſted till the Plaintif ſhould move.

Compton againſt Allen.

6.

Mich 1649. Banc. ſup.

Entred Trin. 1649. rot. 348.

Demurrer upon a Plea in an action of Covenant. Covenant.

COmpton brought an Action of Covenant againſt Allen his Leſſee for years upon a Covenant of the Indenture, for not keeping the Houſe let unto him in repair. The Defendant pleads, that the Houſe was burnt by caſualty. The Plaintif demurs to this Plea, and for cauſe ſhews, that the Plea was contrary to the Defendants expreſs Covenant by his Deed, and therefore was not good. Roll chief Iuſtice ſaid, that a Leſſee that covenanteth to repair, ought to do it if the Houſe be burnt, be it by negligence, or by other means. Therefore let the Plaintif have Iudgement except cauſe ſhewed to the contrary. La action ſur le Covenant ne gyſt dongs le cas lou gist oppinr. autrement ni ſi Guys cult & Co. 24. n. 6. 145. F. Covenant 28. 29

againſt Phillips.

Mich. 1649. Banc. ſup.

Arreſt of judgement in an action upon the Caſe. Eſcape.

AN Action upon the Caſe was brought againſt Phillips for ſuffering one to eſcape; The Plaintif had a verdict; The Defendant moved in arreſt of Iudgement, and for cauſe ſhews, that the Declaration was inſufficient. For 1. it ſhews, that the party was arreſted that made the eſcape, but it doth not ſhew by what proceſs he was arreſted. 2ly. The Declaration ſaith, that he was arreſted virtute Querelæ, which cannot be: for he is arreſted by virtue of the Writ, and not of the Plaint. 3ly. The Declaration doth not ſhew by what authority the Priſon was kept, out of which the eſcape was made. Roll chief Iuſtice ſaid, that the ſecond exception was material, and then if the party be not well arreſted, there can be no eſcape, and ſo the Action lyes not. Therefore nil capiat per billam, if cauſe be not ſhewed to the contrary.

Eſcape.

Iohnſon

Iohnſon againſt Abington.

Mich. 1649. Banc. ſup.

IOhnſon brought an Action of the Caſe againſt Abington, and declared, that the Defendant in conſideration that the Plaintif would deliver unto the Defendants Son ſuch wares as his Son ſhould deſire, did aſſume and promiſe unto the Plaintif that he would pay the Plaintif for them, and avers that he had delivered certain wares unto his Son, and that the Defendant did refuſe to pay for them, and for this he brought his Action. The Defendant pleads non Aſſumpſit, and upon this an Iſſue is joyned, and a verdict found for the Plaintif. The Defeudant moved in arreſt of judgement, and for cauſe ſhews, that it doth not appear, that the Son of the Defendant did deſire the Goods that the Plaintif delivered unto him, and for which he brings his Action, and the Aſſumpſit being to pay for ſuch as his Son ſhould deſire, the Declaration ought to ſet forth an actual deſire of the Son, to have the wares delivered. But Twiſden of Councel with the Plaintif anſwered, that the delivery of the commodities by the Plaintif, and the acceptance of them by the Defendant implyed a deſire, and it is not neceſſary to ſhew an actual deſire. Ierman Iuſtice ſaid, there ought at leaſt to be a verbal deſire. But Roll chief Iuſtice ſaid, that the acceptance of the wares is an actual deſire, and that is more than a verbal deſire, and it is not neceſſary here to affirm the punctual words of the promiſe: but only the ſubſtance of it. And therefore let the Plaintif have his Iudgement, if better matter be not ſhewed.

Arreſt of judgement in an action upon an Aſſumpſit.

Averment

Declaration. Aſſumpſit.

Mich. 1649. Banc. ſup.

WAlker moved to quaſh an endictment againſt the Inhabitants of Mile-end, within the Pariſh of Stebenhoth for not repairing the high way, and to take off the iſſues upon a Certificate read, that the way was repaired, and upon this exception taken to the Endictment, viz. that the Inhabitants of Mile-end within the Pariſh of Stebenhoth are endicted, and Mile-end is but a Hamlet within a Pariſh, and a Hamlet within a Pariſh cannot be charged to repair a high way, except it be by preſcription, or for ſome other ſpecial reaſon: for of common right the whole Pariſh is charged with it; and here is no ſuch preſcription or particular reaſon ſhewed in the Endictment, and therefore it is not good. Roll chief Iuſtice anſwered, that of common right a Hamlet is not ſo charged, but a Vill is; and therefore let it be quaſhed, but the iſſues ſhall ſtand: for few will repair the high way till they be forced.

To quaſh an Endictment.

Common right.

High way.

Fines againſt Dell.

Mich. 1649. Banc. ſup.

FInes brought an Action of Debt upon an Obligation to perform certain Covenants contained in an Indentnre. The Defendant pleads performance generally; The Plaintiff demurs to the plea, and for cauſe ſhews, that divers Covenants are compriſed in the Indenture, and that ſome of them are in the Affirmative; and others of them are in the Negative, and therefore a general pleading of performance to all is not ſufficient: for as to the Covenants in the Affirmative he ought to plead a ſpecial performance, and to ſhew how he hath performed them. The Court bid the Plaintif take his judgement, except cauſe be ſhewed to the contrary.

Demurrer to a Plea in Debt upon an Obligation to perform Covenants. Plea.

Mich 1649. Banc. ſup.

For a rule to acknowledge ſatisfaction.

THe Court was moved that there might be a rule of Court for the party upon ſatisfaction made of a judgement obtained by him, to acknowledge ſatisfaction. But the Court denyed it, and ſaid there was ſome trick in the buſineſſe; For no doubt but the party upon receipt of what is due to him will acknowlege ſatisfaction without a rule to compel him.

Crible againſt Orchard.

Mich. 1649. Banc. ſup.

Entred Trin. 1649. rot. 230.

Error upon a judgement in debt upon an Obligation.

ORchard brought an action of debt againſt Crible upon an Obligation, the Defendant pleaded per minas; upon this an iſſue was joyned, and a Verdict and a Judgement given in the Court at Barnſtaple for the Plaintif, and upon a Writ of Error brought three Errors were aſsigned: 1. That the Declaration was inſufficient. 2ly. The Common Error. 3ly. That the Venire was not good; but theſe were over-ruled. And Roll chief Iuſtice upon Dyer of the Record found this Error, That the Jury in the aſſeſsing of damages ſay pro miſſis & Cuſtagiis, &c. but doe not not ſay circa ſectam et expenditis, and ſo it cannot appear for what the coſts and damages are aſſeſſed, and ſaid, It is true that the judgement is right entred; but there is no Verdict to warrant the Judgement, and therefore it cannot be good, and therefore let it be reverſed if cauſe be not ſhewn to the contrary. But we will not pronounce it now except the party deſire it for his own expedition.

Damages. Iudgement.

Ayre againſt Pyncomb.

Mich. 1649. Banc. ſup.

Arreſt of Iudgement in an Action upon the caſe for ſurcharging a Common.

AYre brought an Action upon the Caſe againſt Pymcomb for ſurcharging of a Common, and for treading the Graſs: The Plaintif had a Verdict: The Defendant moved in Arreſt of Judgement, That an Action of the Caſe doth not lie in this caſe, but an Aſsize. 2ly. That an Action of Treſpaſs doth not lie for a Commoner for treading of the Graſs. 3ly. The Treſpaſs is alleged to be done in quibuſdam peciis paſturæ, and the quantity of them is not ſhewed. To the firſt Exception Roll chief Iuſtice anſwered, That the Plaintif may have an Aſsize or an Action upon the Caſe at his election, although here be a diſturbance of the Plaintifs freehold, although that the antient books ſay the contrary: And thereupon the Court gave Iudgement for the Plaintif, except cauſe ſhewn to the contrary.

Aſsize.

Treſpaſs upon the caſe.

Brook againſt Hogg.

Mich. 1649. Banc. ſup.

Hill. 24 Car. rot. 660.

Iudgement in an accompt reverſed for Error in it.

A Judgement given in an Action of Debt upon an account in the Court of Knaresborough was reverſed here, becauſe the Venire facias was Veni-

Veuire facias, &c. which in an Inferiour Court is not good, but it ought to ſay Venire facias duodecem probos et legales homines de, &c. & ſo expreſs all at large in words, and not with an, &c. Note, Many Iudgements given in Inferiour Courts have been here reverſed upon the ſame exception: But I only mention this for an authority to be cited upon occaſion. Venire.

Ibſon againſt Beale.

Mich. 1649. Banc. ſup.

Hill. 24 Car. rot. 625.

IBſon brought a Writ of Error to reverſe a Iudgement given againſt him for Beale in the Court at York, in an Action of Debt upon an Obligation, and aſsigned for Errors. 1. That the party hath not entituled himſelf to the Action. 2ly. The iſſue is not well joyned; for the Plaintif ſaith, ideo ponit ſe ſuper patriam, where he ought to ſay, petit quod inquiratur per patriam. 3ly. He concludes, to his damage of l. l. (i.) fifty pounds expreſſed in numerical Letters, viz. L. for fifty, and L. for pounds, inſtead of quinquaginti librarum. The Iudgement was reverſed upon the laſt Exception. Error to reverſe a Iudgement in debt. Iſſue. Damage.

Stubs and *Manklyn*.

Mich. 1649. Banc. ſup.

A Writ of Error was brought to reverſe a Iudgement given in the Court at Owſe-bridge in York, in an Action of Debt upon an Obligation, and the Common Error only aſsigned. But Roll chief Iuſtice upon Oyer of the Record took this exception, That the Record was ideo præceptum eſt Vicecomiti, and it is not ſaid in Curia, and ſo it doth not appear to be the Proceſs of the Court; And for this Error the Iudgement was reverſed. Error to reverſe a Iudgement in debt. Venire.

Topladye againſt Stalye.

Mich. 2649 Banc. ſup.

Mich. 24 Car. rot. 596.

TOpladye brought an Action of Treſpaſs quare clauſum fregit & pedibus ambulando &c. againſt Stalye: The Defendant makes a ſpecial juſtification, That he did enter into the Plaintifs Cloſe to ſearch for Shéep that were ſtollen from him. To this Plea the Plaintif demurr'd, and for cauſe ſhews that the juſtification is not good, for it is not ſaid by the Defendant that the Plaintif had ſtollen the Shéep, or that he had any ſuſpition that he had ſtollen them, or that any other had ſtollen them & driven them upon the Plaintifs land, and ſo had no colour to come there to ſearch for them, and the Books of 17 E. 4. f. 1. and 27 H. 8. 23. & 6 E. 4. 7. & 21 H. 7. f. 10. & 22 H. 8. f. 36. & 38 E. 3. f. 10. were cited. Another exception was alſo taken, That the Defendant doth not ſay that the Gate of the Cloſe where he entred was open; and though he may juſtifie to ſearch for his Shéep in the Cloſe, yet he cannot juſtifie the breaking of his Cloſe to doe it. But Demurrer and argument upon a plea in Treſpaſs. Iuſtification.

Roll chief Iuſtice over-ruled this exception: And for the matter in Law, whether the Defendant had made a good juſtification or no. He held that he had not, for all that he hath alleged by way of Juſtification is but matter of private profit to himſelf, and not for the publique good; for he went not thither to find or apprehend the Felon, but to look for his Sheep; And if Cattel be ſtollen and put into my ground, I may take them damage feaſant, or bring an Action of Treſpaſs againſt the owner, and the owner cannot take them away without the licenſe of the poſſeſſor of the ground, for if he might, by that means the poſſeſſor of the ground would be without remedy for the damage the Cattel had done him: And he ſaid, That when one hath ſuſpition of another for felony, he ought to ſhew the cauſe of his ſuſpition, otherwiſe the party ſuſpected ought not to be arreſted upon it; and concluded that the Plaintif ought to have Judgement. Ierman Juſtice held, that the Defendant ought to have Judgement, becauſe a private injury as this Treſpaſs is, ought to give way to the publique good, viz. the diſcovery of Felony; and here is a publique good intended, and it ought to take place of the Plaintifs inconſiderable injury. And he ſaid that one may be arreſted for Felony only upon Common fame, if there be a felony committed: Otherwiſe it is if there be no Felony done. Ask Juſtice ſaid the Caſe was hard on both ſides. But the Court gave Iudgement for the Plaintif except cauſe ſhould be ſhewn to the contrary.

Diſtreſs. Damage feaſant. Licence. Arreſt.

Mich. 1649. Banc. ſup.

To quaſh a Return of a Reſcous.

WIld moved the Court that the return of a Habeas Corpus granted for certain rioters called the Diggers that were committed by Juſtices of Peace upon finding the Riot upon their view might be filed, which was granted, upon which he moved that the priſoners might be diſcharged, but the Court commanded the return to be read, upon the reading of it Wild took this exception, viz. That the priſoners were committed contrary to the Statute of H. 4. c. 7. for by that Statute the Sheriff ought to be preſent at the finding of the Riot, which was not ſo here. Walker held that the Juſtices had power by the Statute without the Sheriff to enquire of the Riot, and to commit the Rioters. But Roll chief Iuſtice ſaid, that there is no enquiry made in this caſe, for the Riot is found upon the view, and ſo there néeds no enquiry, and the Record ought to be made up by the two Juſtices that had the view, and by the Sheriff, and it is not made by them as Juſtices, but as Judges joyned with the Sheriff by the Statute, & Juſtices that find a Riot may either bring in the Record in Court propriis manibus of their own accord, or may ſend it into Court, as they have done here. The priſoners committed upon the firſt Record read (for there were two here read in Court) were bailed, but not diſcharged, although the return was not good, becauſe the Court ſaid it was not uſual to diſcharge priſoners at the firſt reading of the return; For the other priſoners, The Court adviſed.

View. Record. Diſcharge.

Donor
~~Bendir~~ againſt Oyle.

Mich. 1649. Banc. ſup.

For a Prohibition to the Court of Policy of aſſurance.

A Prohibition was prayed to the Court of the Commiſsioners of policy for aſſurance upon a ſurmiſe that they proceeded there in the tryal

of

of the Assurance of a mans life, which was said to be tryable at the Common law, as it was before the Statute made that erected that Court, as may appear by the preamble of the Statute. Roll chief Iustice said, that the Assurance of the life of a man is not within the Statute of Assurance, as the Assurance of a mans life upon the buying of an office; but this case is different, for the man whose life is here assured is going to sea upon Merchants affairs, and his life may be as well assured, as the safe return of the ship he goes in. But let Councel be heard on both sides Wednesday next; but wee will stay nothing in the interim. Postea. 173. Assurance.

Mich. 1649. Banc. super.

AN Information was exhibited against the Inhabitants of the Town of Burmingham, for not repairing Burmingham-bridge; two of the Defendants plead to issue, and a verdict was found for them in pais. It was moved for the Defendants, that Mr. Attorney General had mistaken the Christian name of one of the Defendants in his replication; and prayed that the Record might be amended before Iudgement entred, that the Iudgement may not be erroneous by reason of this mistake. The Court answered, Bring a Copy of the Record to us to advise upon; but they said they did not see how it could be amended, for that they conceived there was no issue joyned. To amend a Record after verdict. Amendment. Issue.

Hobbs against Blanchard.

Mich. 1649. Banc. sup.

Pasch. 20 Car. rot. 220.

BLanchard brought an action of Trespas in the Court at Norwitch against Hobbs, and had a verdict and a judgement. The Defendant brought a writ of Error to reverse the judgement. The error assigned was, that the Jury had not found the issue joyned; for the issue joyned is, de injuria sua propria absque tali causa, and the Jury have found not guilty generally. Panel of Councel with the Defendant in the writ of Error said, that the Jury have found the effect of the issue, though they have not found the very words, and therefore it is good enough, and he cited Fabian & Kingstons case, 32 Eliz. and Wingrave & Homes his case 3 Car. entred 2 Car. rot. 632. Roll chief Iustice answered, That the verdict found the issue argumentatively only, and not directly; and therefore it is not good. Ierman Iustice was of the same opinion: and the Iudgement was reversed, except better cause shewn. Error to reverse a judgement in tresp. Verdict.

Carew against Bawd.

Mich. 1649. Banc. sup.

Trin. 24 Car. rot. 1607.

CArew brought an Action of trespas against Bawd for entring into his ground, and taking away a certain parcel of Tynn. The Defendant pleaded Demurrer to a plea of privilege of Parl. in an action of trespas.

pleaded that he was ſervant unto the Lord Moone, who was a Lord of the Parliament, and that he took the Tynn by his Command, and claims his priviledge as his ſervant, not to be impleaded: to this plea the Plaintif demurrs, and for cauſe ſhews, that the Defendant doth not ſhew that he was the Lord Moons menial ſervant, and attending upon his perſon: and it may be he was his Carter or Plowman, and ſuch ſervants are not priviledged. Roll chief Iuſtice ſaid, The priviledge is not claimed here meerly as his ſervant; but he juſtifies here as his ſervant in defence of his Maſters title to the Tynn, which he took by his command. But let the Defendant plead in Chief, and let the Plaintif waive the Demurrer: Or elſe let the Plaintif enter his ſuggeſtion upon the roll, that the Houſe of Lords is now diſſolved, and ſo let them take iſſue and go to tryal: Or elſe let the party plead what he will upon record, and we will adviſe in the mean time.

Privilege.

Waiver.

Paroch. de Hardingham verſus Paroch. de Briſley.

Mich. 1649. Banc. ſup.

For quaſhing an Order of Seſſions for the ſetling of a Vagrant.

A Order of Seſſions made for the ſetling of a poor woman in the pariſh of Hardingham was returned hither by a Certiorari granted to the ſaid pariſh, and upon the return read, and opening the matter by Councel, the caſe was this. An inhabitant dwelling within the pariſh of Briſley, did hire a maid ſervant for a year, and Covenanted to give her Forty ſhillings for her wages, and entertained her into his ſervice. The maid ſervant ſome time after fell ſick in his ſervice; her Maſter thereupon turns her out of his ſervice, without giving her any thing: the maid, for neceſsity, in travelling from Briſley toward Hardingham where her friends lived, and where ſhe was born, was forced to beg for relief: whereupon ſhe was ſent as a Vagrant to Hardingham, where ſhe was born. The Will of Hardingham ſend her back to Briſley, where ſhe was entertained as a Covenant ſervant: whereupon they of Briſley procure an order of Seſſions to ſettle her at Hardingham. The Queſtion was, Whether this were a good order, or not, for ſetling her at Hardingham according to the Statute? Or, whether ſhe ought to be ſetled at Briſley, where ſhe was entertained as a Covenant ſervant and turned out of ſervice, and forced to begg by that means. Roll chief Iuſtice ſaid, That here ſeems to be fraudulency in the Maſter to make his ſervant a Vagrant, that ſo he may be rid of her; but if one begg meat and drink, for neceſsity, in paſsing between one Town and another, this is not begging to make one a beggar within the Statute. And therefore the Court ordered that the party ſhould be ſetled at Briſley, where ſhe was entertained for a Covenant ſervant, and not at Hardingham where ſhe was born, if cauſe were not ſhewn to the contrary.

Vagrant.

Settlement.

Harwood againſt Paty.

Mich. 1649. Banc. ſup.

Argument in treſpaſs, whether Tithes be extendible.

The caſe between Harwood and Patye was again ſpoken unto, by Wild of Councel with the Plaintif, wherein the Action being an Action of Treſpaſs for taking away wheat, rye, and wood, upon an Elegit taken out againſt a Parſon, The Queſtion was, Whether Tithes are extendible upon an Elegit by the Statute, or not? And he held that they are not extendible, firſt by the Common law confirmed by Mag. Charta they are not extendible. Cook upon Magna Charta, 3. & N. Brev. 227. Tithes are meerly

Extent.

Spi-

Spiritual things, and exempt from all Lay conſideration, 11 Rep. 14. Pridle and Nappers caſe. Cawdries caſe, 5 Rep. f. 15. 35 H. 6. 39. where rights of Tithes are in diſpute, the Common Law ſhall take place; but not where the Tithes themſelves are in diſpute: Seldens Hiſtory of Tithes, cap. 14. 2ly, The Statute of Weſtminſter makes no alteration of the Common law in this point, and non uſage is a good argument to prove it; for if they had been extendible, it would ſometime or other have been put in practice; and by the expreſs words of the Statute of Weſtminſter, the 2d. Tithes are excepted, and the proceſs uſually before that directed to the Biſhop for ſequeſtration, is not taken away by the Statute of 5 Ed. 3. 53. N. Brev. 166. Though it be a freehold, yet is it not within the Statute; and if it be within the words of the Statute, yet is it not within the meaning of it, as Cook upon the Stat. of Weſtm. 2. doth prove, 35 H. 5. 50. 9 E. 2. Clergy men antiently were not included in general Acts of Parliaments, becauſe the Church was accompted as an Infant alwayes within age, and ſo favoured and protected by Law. Next the late Ordinance of Parliament hath made no alteration in this caſe; for the Ordinance intended not to puniſh the Parſons of Churches, although it doe out Biſhops of their Biſhopricks and dignities. And as to the Objection, That if the Tithes ſhould not be here extendible, there would be a failer of juſtice. I anſwer, That our caſe is out of the Common law, upon which, the rule, that extraordinary courſes are to be taken, rather than there ſhould be a failer of Juſtice, is grounded. Roll chief Juſtice ſaid, that there are two Queſtions in this caſe, 1. Whether Tithes are within the Statute? 2ly, Whether now that Biſhops are taken away by the Parliament, the Sheriffs may levy the debt of the Clergy as the Biſhops uſed to doe? and I conceive they may, by a levari facias. But the great queſtion is, Whether the Elegit lye? And the Court inclined it did. But you will argue it again, therefore we will deliver no opinion in it. And the Court clearly held with Mr. Selden, That Tithes are not due jure divino; and directed to ſearch preſidents, if a Recogniſance had ever been extended upon Tithes.

Clergy.

Levari.

Elegit.

Tithes.

Cane againſt Golding.

Mich. 1649. Banc. ſup.

CAne brought an Action upon the caſe againſt Golding for ſlandring his title, by ſpeaking theſe words, viz. His right and title thereunto is naught, and I have a better title than he. The Plaintif had a verdict. The Defendant moved in Arreſt of Judgement, that the words were not actionable. Twiſden of Councel with the Plaintif argued that the words are actionable; for though the words ſpoken of themſelves may not be actionable, yet here they are alleged to be ſpoken falſo et malitioſe, and that will make them actionable, 43 E. 3. f. 33. N. Br. 95. Hob. Rep. Water and Freemans Caſe; and as to the Objection that is made, that the Declaration is only quod fuit veriſimilis vendere, and that he was hindered by the words; and therefore there might have been no bargain made, though the words had not been ſpoken: The anſwer is, That it is well enough ſet forth as it is; for all treaties upon Contracts are but likely to proceed, and are not certain till the Contracts be made; but which is more, it is further alleged here, that by reaſon of the ſpeaking of theſe words he could not receive his Tithes, which is an expreſs loſs Hales for the Defendant argued, that the words of themſelves are not actionable, although they be ſaid to be ſpoken falſo et malitioſe, except a ſpecial damage be alleged to come to the party; for ſuch

Arreſt of Judgement in an Action upon the caſe, for ſlandering the Plaintifs title.

words as theſe differ from words that are ſpoken of the perſon of a man: And though there be damage, yet they are not ſcandalous; for the Defendant claims a title as well as the Plaintif: and the ſaying that the words were ſpoken falſo & malitioſe, doth not make them to be ſo ſpoken, nor makes them actionable, if they be not ſo in themſelves. Roll chief Juſtice ſaid, there ought to be a ſcandal and a particular damage ſet forth; but it is not ſo here. But move it again Saturday next. Poſtea.

White againſt Holford.

Mich. 1649. Banc. ſup.

Trin. 1649. rot. 1214.

Error to reverſe a judgement in Debt upon an Obligation.

A Writ of Error was brought upon a Judgement given in an Action of Debt upon an Obligation to ſtand to an Award, and the Error aſſigned was, that the Arbitrement exceeded the ſubmiſſion: for the ſubmiſſion was to ſtand to the award touching all matters in difference between the parties, and the award was, that the parties ſhall make general releaſes each to other of all demands; and the word demands, is a word of a larger ſignification than the word differences. But Roll chief Juſtice anſwered,

Award.

That if the releaſe be more large in words, yet it is good enough: for it ſhall be intended only of all matters in debate between the parties, and if there be other matters, you ought to have ſhewn them in pleading, otherwiſe the Court will not intend there are any; to which the other Judges agreed, and gave judgement for the Plaintif, except better matter ſhould be ſhewn.

Brooke againſt Brooke.

Mich. 1649. Banc. ſup.

Mich. 24 Car. rot. 287.

Error to reverſe a judgement in treſpaſs, quare clauſum fregit.

BRook brought an action of treſpaſs quare clauſum fregit, & for eating of his graſs with Cattel, &c. againſt Brooke: Upon Not guilty pleaded, an iſſue was joyned, and the Plaintif had a verdict and a judgement. The Defendant brought a writ of Error to reverſe this Judgement, and aſsigned for Error, that the Declaration was incertain; For the Plaintif declares of breaking his Cloſe, and eating his graſs, cum quibuſdam averiis, and doth not ſay what Cattel; and ſo he may recover damages in this action, and bring another action for the ſame treſpaſs, becauſe it cannot be known what Cattel did the former treſpaſs. Hales of Councel with the Defendant, ſaid the Declaration was good enough; for it is good in ſubſtance, although it might have been better in form, and it being after a verdict, the incertainty is helped. And the Defendant, if the Plaintif ſhould bring a new action for this treſpaſs, may plead by averment that he hath ſatisfied the treſpaſs don already, and aver with what Cattel it was done. Jerman Juſtice ſaid, the beaſts ought to be named particularly; for averia is a large word, and ſignifies cattel of divers kinds; and it is too general a word to declare upon. But Roll chief Juſtice anſwered, where the thing it ſelf is in demand, and an action is brought for it, as it is in an action of trover and converſion, the thing ought to be particularly named; but here the action is brought for damages for breaking his Cloſe, and eating his graſs. And if you had demurred to the Declaration, it had not been a good Demurrer; but now it is

Barr. Averment.

Demurrer.

after

after a Verdict which makes it ſtronger againſt the Defendant. Nicholas and Ask Juſtices concurred with Roll, ſo the Iudgement was affirmed.

Mich. 1649. Banc. ſup.

The Court was moved for a Prohibition to the Admiralty upon a ſurmiſe that one was arreſted there for reſcuing one out of the hands of a Meſſenger of the Admiralty, who was taken by him by the warrant of the Court, for a contempt to the Court in a ſute depending there betwixt him and another. Roll chief Iuſtice anſwered, if the cauſe were maritime which was depending, there the Court may examine a contempt to the Court in that cauſe, but they cannot proceed criminally againſt the party that reſcued him that did the contempt. Therefore give them notice that they ſhew cauſe why we ſhould not grant a Prohibition.

For a Prohibition to the Admiralty.

Contempt.

Prohibition.

Ireland againſt Michelborn.

Mich. 1649. Banc. ſup.

Entred Mich. 24 Car. rot. 111.

Michelborn brought an Action of Treſpaſs againſt Ireland, quare vi et armis clauſum ſuum fregit, and for driving and beating his Cattel; The Plaintif had a Iudgement; the Defendant brought his writ of Error to reverſe this Iudgement. The Errors aſsigned were, 1. That it appears not by the Continuando how long the Treſpaſs continued. 2ly. There is a diſcontinuance to part of the plea, and a departure alſo. Windham in anſwer to the firſt Exception ſaid, that it is diverſis diebus et vicibus, and it is without an uſque, and the continuance is but in aggravation of the Treſpaſs and the Action it ſelf is for the firſt Treſpaſs, which is the original, and the diverſis diebus et vicibus ſhall be intended before the Action brought. 26 H. 6. f. 15. 35 H. 6. f. 4. Hob. rep. 377. and the party may well enough averr in another Action brought for this Treſpaſs that the Plaintif had recovered for it in an action formerly brought, and for the new aſsignment he ſaid it was but as a new Declaration. But the Court bid the Defendant in the writ of Error adviſe concerning the ſecond exception. Roll chief Iuſtice ſaid, he believed the caſe cited out of Hobard was not well printed, but ſomething left out: for it hath been ruled that after a verdict it is good enough to ſay, one had impriſoned him for a long time; but here is a Iudgement upon a nihil dicit, which will alter the Caſe. Ierman Iuſtice ſaid, it was conſiderable, and fit to be adviſed on. Holhead of Councel with the Plaintif in the writ of Error took another exception, viz. that there was an iſſue joyned as to the beating of the Cattel, and that is not tryed nor continued, and yet damages are given entire for the chaſing and beating of the Cattel.

Error to reverſe a judgement in Treſpaſs vi et armis.

Diſcontinuance.

Harris againſt Gibbons.

Mich. 1649. Banc. ſup.

Paſch. 1649. rot. 303.

Error to reverſe a judgement in an Action on the Caſe.

Gibbons brought an Action upon the Caſe againſt Harris upon an Aſſumpſit, and declared that the Defendant, in conſideration that the Plaintif ſhould let unto the Defendant a Booth in Sturbridge-fair, did aſſume & promiſe to pay the Plaintif ten pound for the ſame, and to pay the Plaintif for all ſuch Wine and Hops as ſhould be ſpent in the Booth during the Fair. The Plaintif had a Verdict and a Judgement. The Defendant brought a writ of Error to reverſe this Judgement, and aſsigned this Error, that it did not appear in the Declaration that the Fair was ended when the Action was brought, and conſequently that there was cauſe of Action. But Twiſden of Councel with the Defendant in the writ of Error ſaid, it ſhall be intended it was ended; for the ſtanding there during the Fair is the cauſe of Action. Roll chief Iuſtice took another exception. That the Declaration doth not expreſs that the Plaintif gave notice how much Wine and Hops he laid into the Booth during the Fair, nor that he made any demand of the payment of any ſum of money due, and ſo the Defendant could not know how much money he ſhould pay, and therefore the Declaration is not good, becauſe it is too general. Therefore adviſe whether you will maintain it or no, and becauſe the Councel deſired not to be farther heard in it, the Iudgement was reverſed.

Declaration. Notice.

Mich. 1649. Banc. ſup.

Arreſt of Iudgement in an action of Covenant.

An Action of Covenant was brought upon an Indenture for the payment of a certain ſum of money at a certain time. The Defendant pleaded payment at the time, and upon this an iſſue was joyned, and a Verdict found for the Defendant: The Plaintif moved in arreſt of Iudgement, and alleged for cauſe that the Iſſue was miſ-joyned, becauſe the place of the payment was not alleged, which is material, and ſo there can be no Iudgement. Maynard for the Defendant moved for Iudgement, and ſaid that the iſſue was well joyned, and that it was not material to allege the place of payment, becauſe it is a perſonal Action, and the place ſhall be intended where the Action is brought, 1 E. 5. f. 3. And here he cannot allege an immaterial place, and ſo it muſt neceſſarily be intended to be where the Action is brought. Roll chief Iuſtice, If you will argue it put it in the Paper. But there is a difference between finding the money paid, and the finding it not paid.

Denoir againſt Oyle.

Mich. 1649. Banc. ſup.

For a Prohibition to the Court of policy for aſſurance.

Upon a Rule formerly made in this caſe to ſhew cauſe why a prohibition ſhould not be granted to the Court of Policy for aſſurances. Hales opened the caſe, as formerly had been done, and prays that there may be a Prohi-

Prohibition granted, because the party may have remedy here as well as in that Court, and so this Court ought to be preferred; and the contract here hath no relation to merchandizing, and so it doth not properly belong to that Court. Serjeant Glyn of Councel with the Defendant prayed that there might be no prohibition granted, because it hath not been known that ever such a prohibition was granted, and he recited the Statute made for assurances of 43 Eliz. and said this Case was within that Statute, and is to be tryed by the Court of Policy, and that this case doth properly concern merchandizing, and is within both the Letter and reason of the Law. And by the words of the policy it appears plainly that the Contract concerns merchandizing, & the party ought not now to suggest the contrary against his own words in the policy. Roll chief Iustice said, the words of the policy are not material, for the words may be false, and the Contract may be for things not touching merchandizing notwithstanding, and the intent of the Statute is for things merchantable, and if it appear they be not so, a prohibition ought to be granted. Serjeant Glyn replyed, that the voyage depended upon the skil of the party, whose life was assured by the policy, and although the party were indebted, and there were security given by bail for his debt, to the intent he might goe the voyage, yet this is within the Statute. Roll chief Iustice answered, This is a far fetch'd construction, and we cannot avoid the granting of a prohibition; but draw the suggestion and deliver it on Monday next, and joyn issue and try it this term. The Case in which this prohibition was moved for and granted was this, Denoir and Oyle were baile for one Captain Parr (whose life was assured by the policy) in a sute against him in the Admiralty brought by one Bushel for 100 l. for fraight due by Parr unto him, and upon that Parr having part in a plantation in the Barbadoes, and a quarter part in the ship he was to make his voyage, and his life was assured by Denoir and Oyles who were his bail. Prohibition. Assurance.

Weston against Plowden.

Mich. 1649. Banc. sup.

Rot. 505.

The Court was moved for time for Sir Edmund Plowden the Defendant to plead, because the Plaintif had declared against him by the name of Sir Edmund Plowden Knight, whereas he is by Creation Count Palatine of Nova Albion, and that is now part of his name, and he must also plead a special plea. Roll chief Iustice answered, he is also called a Count of Ireland, and neither the one nor the other is part of his name, as is suggested; and therefore if you will plead in Chief take a weeks time more for it; otherwise plead at your peril; for a Count Palatine of Nova Albion, or a Count of Ireland, are not additions in England. For time to plead. Addition.

Mich. 1649. Banc. sup.

A Petition was presented to Commissioners of Sewers against one for obstructing a navigable River, and prayed that the Commissioners would remove the obstructions; upon which an Order was made by the Against an Order of Commissioners of Sewers.

the Commiſsioners to make a view, and to certifie the matter to them, and upon this certificate a Jury was returned to enquire of the nuſance, and a verdict was given by the Jury upon Articles preſented unto them to enquire of it. This Order of the Commiſsioners, and the proceedings thereupon were removed hither by a Certiorari; and theſe exceptions were taken upon reading of the return. 1. That it doth not appear by what authority the Commiſsioners did ſit. 2. The preſentment made was not good, for it is ſaid that antiently the river was ſo and ſo, and this is incertain. 3ly. The preſentment is, that they know not when the Mill was made, which is ſuppoſed to be an obſtruction; and if the Mill were made beyond time of the memory of man, the Commiſsioners have no power to enquire concerning it. Roll chief Iuſtice, Give notice to the Councel for the Commiſſioners of Sewers to anſwer the exceptions Wedneſday next.

Shayler againſt Bigg.

Mich. 1649. Banc. ſup.

Mich. 24 Car. rot. 90.

Writ of Error brought by the bail.

BIgg brought an Action of Trover and Converſion of a Horſe, and had a Verdict and a Iudgement. The bail for the Defendant in the Action brought a writ of Error to reverſe this Iudgement given againſt the principal. The Court was moved to abate the writ: The Court anſwered, If the writ of Error be brought upon the principal Iudgement it ought to be abated. It hath been a queſtion heretofore, whether a writ of Error brought upon the principal Iudgement, and alſo upon the Iudgement given againſt the bail together be good in part, and ill for other part. But of later times it hath been ruled that it ought to abate for all. Therefore let the party ſhew cauſe why the writ ſhall not be abated here.

Error.

Mich. 1649. Banc. ſup.

For quaſhing an Endictment.

THe Court was moved to quaſh an Endictment for a forcible Entry, upon theſe Exceptions. 1. The party hath made no title. 2ly. The Endictment is not ſaid to be found by the Jury, but by the Iuſtices. 3ly. It doth not ſay that the force was contra pacem publicam, as the late Act of Parliament directs, but contra pacem reipublicæ. The Court anſwered, it was a foul riot, and deſerved no favour, yet the Endictment was quaſhed upon the 1 and 3 exceptions.

Dell againſt Brown.

Mich. 1649. Banc. ſup.

Error.

BRown brought an Action of Treſpaſs againſt Dell in the Common Pleas, for taking away three Cowes, and had Iudgement againſt him upon a nihil dicit. The Defendant brought a writ of Error in this Court to reverſe the Iudgement. The Error aſsigned was, that for two of the Cowes there was no value declared, and yet entire damages were given for them all, which was not good. Roll Chief Iuſtice, This is a

Entire damages.

Iudge-

Judgement upon a Nihil dicit, and ſo there is no Verdict to help it. Poſtea 182.

Barber againſt Pomeroy.

Mich. 1649. Banc. ſup.

Entred Hill. 24 Car. rot. 595. or 1095.

BArber brought an Action of debt againſt Pomeroy for arrerages of rent due for 7. years, and for 7. Capons; the Defendant pleaded nil deber; upon this an iſſue was joyned, and a verdict found for the Plaintif; the Defendant moved in Arreſt of Judgement, and took this exception, that the Plaintif of his own ſhewing had demanded more than was due, & ſo ought not to have Judgement. The Queſtion here was, Whether the Plaintif might not relinquiſh that part which is not due, and have judgement for ſo much as is due? Yard of Councel with the Plaintif held that he might, and cited Godfryes caſe, 11 Rep. f. 55. b. and Hubbards caſe, 4 Rep. and prayed for Judgement. Twiſden of Councel on the other ſide, prayed judgement might not be given, and he agreed the caſes cited by Yard, and cited other caſes of the ſame nature, where the Plaintif may releaſe part, and have Judgement for the reſt. But he ſaid, that here the thing is entire and cannot be apportioned, for then he ſhall falſifie his own writ, 1 Ed. 4. 24. But Roll chief Iuſtice held, that the relinquiſhing of part is not the falſifying of his own writ, although the thing demanded be entire; for he may as well releaſe after the writ brought, as before; and there was no queſtion but he might have releaſed part before, and he may releaſe where there is an ill demand, as well as where a demand is good. Jerman Iuſtice held, that Judgement ought not to be given; for he ſaid, that the reaſons of the caſes cited, are not like to the reaſon of this caſe; for here the verdict is not given for the ſame ſum which is demanded, and it doth appear that here is an unjuſt demand, and it is his own fault: and if the Defendant had demurred upon the Declaration, it would have been adjudged no good Declaration. But Nicholas and Ask Iuſtices, agreed with Roll chief Iuſtice, and ſo judgement was given for the Plaintif, except better matter ſhould be ſhewn on Saturday next.

Arreſt of judgement in an action of debt for rent.

Relinquiſhment.

Releaſe. Damages.

Avery againſt Kirton.

Mich. 1649. Banc. ſup.

Mich. 23. Car. rot. 239.

KIrton brought an Action of treſpaſs againſt Avery, and declared upon an original, for impriſoning him till he entred into a bond of 600 l. upon Not guilty pleaded, the Plaintif had a verdict and a judgement. The Defendant brought a writ of Error, and upon the Certiorari to remove the Record, the Record was certified, and in nullo erratum pleaded, but the original in the Record certified was, that the Defendant kept the Plaintif in priſon till he entred into 2. bonds of 300 l. a piece, whereas the right original was till he entred into one bond of 600 l. whereupon the party brought a new writ of Error, and by that, had the true original certified. The Councel for the Defendant in the writ of Error ſaid, That original after original may as well be certified before in nullo eſt erratum pleaded,

Error upon a judgement in treſpaſs.

Certificate,

as

as afterward; but here the parties are at iſſue, and the firſt original is certified, and iſſue joyned upon that, and there cannot be a new original certified; and the original here doth not agree with the other parts of the Record, and ſo cannot ſupport it, and our original certified ſtands with the Record, and here is no Certiorari to warrant the original here certified, and it is a material variance, 3 Iac. Banc. Reg. Cummins caſe, 9 H. 6. f. 38. Paſch. 1649. Kedgwins caſe. Yard on the other ſide anſwered, that now the original is certified, and is before you in this Court, and you ought to judge as it is, and not as it ought to be; and it is agreeing with the former proceſs. And both the originals were before the Declaration, and the Court ſhall take the right original, and the other ſhall be intended for another cauſe. Roll chief Iuſtice ſaid, The Certiorari is general, and not inter partes prædict. but the certificate is inter partes prædict. And the Court may take the right original that is certified, and the Iudges are not bound by the plea in nullo eſt erratum that is pleaded, but may grant a new original writ of Error, but the party cannot require it, for he is concluded by his own plea; and if he diſcontinue his original, he may have a new, but not if he plead, and the Certiorari is good, and well certified, and therefore judgement ought to be affirmed. Ierman, Nicholas, and Ask to the ſame effect; and ſo judgement was affirmed, except better matter ſhould be ſhewed Saturday next.

Original. Certiorari.

Ratcliff and Dudeny.

Mich. 1649. Banc. ſup.

Entred Hill. 23 Car. rot. 369.

A queſtion upon the caſe falling out upon a ſpecial verdict.

Upon a ſpecial verdict, the caſe was this, A leaſe of a houſe and lands was made to I S. for 99 years, the remainder to I D. for 99 years, the remainder to A. B. for 99 years; provided, that if the leſſees doe not inhabit in the houſe let during the whole term, that then the leaſe ſhall be void. The queſtion here was, How long the leſſees were bound to inhabit in the houſe? whether for the firſt 99 years? or for that term, & alſo during all the years in remainder? and which of the leſſees were to inhabit? Windham held, that the two firſt leſſees only ought to inhabit during the firſt 99 years, and no longer. But Roll chief Iuſtice held, that thoſe in the remainder were not bound to inhabit before the remainder falls to them; but reddendendo ſingula ſingulis they ought to inhabit ſucceſsively one after another. And he took an exception to the verdict. That the leaſe being to begin after the death of one Robert Dudeny, it did not find that Robert was dead, and ſo it appears not that the leaſe is yet begun; and ſo there can be no queſtion ſtirred as yet: and thereupon the caſe was not argued, but a Venire facias de novo was to iſſue, becauſe the ſpecial verdict was imperfect.

Venire.

Cane againſt Golding.

Mich. 1649. Banc. ſup.

Opinion of the Judges upon an arreſt of Iudgement in an Action of the caſe.

This caſe, formerly ſpoken to and argued, being an Action of the caſe for ſlandering the Plaintifs title, was now ſpoken to by the Iudges: And firſt by Roll chief Iuſtice, who held that the Action did not lye, although it be alleged that the words were ſpoken falſo et malitioſe; for the Plaintif ought to ſhew a ſpecial Cauſe: But that the verdict may ſupply. But the Plaintif

Plaintif ought alſo to have ſhewed a ſpecial damage, which he hath not don, and this the verdict cannot ſupply. The Declaration here is too general, upon which no good iſſue can be joyned: and he ought to have alleged, that there was a communication had before the words ſpoken touching the ſale of the lands whereof the title was ſlandered, and that by ſpeaking of them, the ſale was hindred, and he cited 13 Iac. Tuer and Bailyes caſe, B. R. & 21 Iac. Doctor Edwards and Balls caſe, and 4 Car. Roe and Harwoods caſe, a Judgement in it in Windſor Court, and reverſed here: and 12 Jac. Sell and Paryes caſe, B. R. Ierman Iuſtice to the ſame effect: and he ſaid, that there ought to be damnum et injuria alleged to maintain the Action; for one without the other is not enough, and here doth not appear any damage, becauſe there appears no communication of ſelling of the land. Nicholas and Ask Iuſtices of the ſame opinion: So the rule was, Nil capiat per billam, except better cauſe ſhewn. Roll Iuſtice ſaid, that there is digitus Dei in the caſe; for there was a ſtrange verdict found. Caſe.

Mich. 1649. Banc. ſup.

The Court was moved for a Superſedeas for the Earl Rivers, who was Arreſted by a bill of Middleſex, and is in cuſtody of the Marſhall of this Court, becauſe he is Peer of the Realm, and ought not to be arreſted. The Court anſwered, You muſt plead your privilege if it be ſo; for we cannot take notice of it upon a motion. For a Superſedeas for a Peer of the Realm denyed. Privilege. Notice.

Ridley and *Emerſon*.

1649. Banc. ſup.

Paſch. 24 Car. rot. 400.

The caſe between Ridley and Emerſon was again ſpoken unto. It was in a writ of Error to reverſe a Judgement given in an Action of debt upon an Obligation in the Common Pleas. The Condition of the Obligation was, that the Defendant ſhould not put cattel upon a Common, viz. Ranſom Moor, before the proof and tryal of the title of the Common were had. The Defendant pleaded, that he did not put in his Cattel. The Plaintif replied, that the Defendant did put three Mares there before the proof or tryal. An exception was taken, that there is variance between the Replication and Rejoynder, and the Condition of the Obligation, and ſo it is not good. Twiſden of Councel on the other ſide, held that it was good enough notwithſtanding, becauſe it is after a verdict, and there is a good iſſue joyned. Holhead on the Contrary held it ill; 1. Becauſe the Replication doth not aſsign a breach of the Condition of the Obligation. 2ly, It is ſaid in the Condition, he ſhall not put Cattel into our Common; and the Replication is, that he did put cattel into ſuch a Common, naming it, and doth not ſhew where the Common lies. 3ly, There is variance between the Declaration and the writ of error. 4ly, There is a name miſtaken, for in one place it is Matheum, and in another it is Mathiæ. The Court bid them adviſe, and bring Books to the Iudges. Argument in a writ of Error to reverſe a Iudgement in debt upon an Obligation. Variance.

Brungy againſt Lee.

Mich. 1649. Banc. ſup.

Trin. 1649. rot. 1491.

Demurrer upon a Plea in Treſpaſs.

BRungy brought an Action of Treſpaſs againſt Lee, for taking of a Mare and impounding her till the Plaintif had payed 10 l. The Defendant pleaded by way of Juſtification, that he did diſtrain her by virtue of an order made by Commiſſioners of Sewers, for a tax aſſeſſed by them upon the Plaintif. The Plaintif demurred to this Plea, and ſhewed for cauſe, 1. That it doth not appear, that the Commiſſioners who impoſed the Tax had authority to do it, for it ought to be done by ſix of them, and it doth not appear here, that they were more in number than four. 2ly. It doth not appear, that they were all of them of the Quorum, as they ought to be. 3ly. There doth not appear to be any fault in the Plaintif, why he ſhould be taxed. 4ly. The number of the Acres of Land doth not appear upon which the Tax was layd. 5ly. It doth not appear, that the Land taxed did lye within the Juriſdiction of the Commiſſioners. Upon theſe Exceptions the Plea was over-ruled.

Plea.

Coles againſt Sibſye.

Mich. 1649. Banc. ſup.

Demurrer upon a replication in Trover and Converſion.

COles brought an Action of Trover and Converſion againſt Sibſye; The Defendant pleads the Statute of Limitation of Actions in Bar. The Plaintif replyed, that he took out a Latitat ſuch a Term againſt the Defendant for this cauſe now depending, which was within the time limited by the Statute. To this replication the Defendant demurred, and for cauſe ſhewed, that it was incertain, and ſo no iſſue can be joyned upon it: for it only ſays, that he took out a Latitat ſuch a Term, and doth not ſhew what day of the Term he took it out, and ſo we cannot take iſſue upon it, and the uſual form is to ſhew the day. Latch maintained the replication, and ſaid, it was good in matter of ſubſtance, and the Latitat ſhall be intended to iſſue forth the firſt day of the Term: for all the Term is but one day in conſtruction of the Law, and the Defendant may take a certain iſſue, as it is pleaded. Roll chief Juſtice anſwered, you ought to have ſhewed the teſte of the Latitat: for the time is material in this Caſe, viz. to know whether it were ſued forth within the time expreſſed in the Statute for the limitation of Actions, or without, namely within ſix years or no, and you might have made it certain by your pleading it ſpecially. Iſerman differed in opinion; and thereupon the Court took time to adviſe. Vid. antea.

Term.

Time.

Cuſtodes, &c. againſt the Inhabitanrs of Owtwell, Tyd. Newton, &c.

1649. Banc. ſup.

For exceptions and anſwers to them, upon a retorn of Commiſsioners of Sewers.

VPon a Retorn read of certain orders made by Commiſsioners of Sewers, againſt the Inhabitants of Outwell, removed hither by the ſaid Inhabitants, by a Certiorari, Theſe exceptions were taken, 1. There doth

doth not appear to be any adjournment of the Commiſsion. But to this the Court anſwered, that it needed not. Hales ſaid, that the charge of reparation of a breach in Sea-walls, which happens by inevitable neceſsity, ought to be repaired by the whole Level, and not by any particular Will or perſon. And 2ly. the charge ought to be laid indifferently: but here is a particular Cuſtome of which the Commiſsioners of Sewers may take notice, and therefore the Commiſsioners are not compell'd to lay the tax equally upon the Lands within the Will, for the Cuſtome may be to the contrary, and yet have a reaſonable conſtruction, and this is the Cuſtome of Marſhland for the ſpeedy repair of breaches to prevent publique danger, and afterwards the tax is equally diſtributed upon the Wills adjacent. And an implication in a Return made by Commiſsioners of Sewers is good enough. Maynard on the other ſide held, that the Cuſtome was well ſet forth for the general charge for the preſent neceſsity, and afterwards the particular Inhabitants charged ſhall have remedy againſt the other Inhabitants to make them contribute, as it was in Doctor Lambs Caſe, that was ſlain in an Uproar in London, where the City was fined generally, but the Citizens afterwards contributed to the payment of it: for all are lyable to the charge by the Common law, and it may be alſo by the preſcription. The Court reproved the Councel, and ſaid, you ought not to argue two of you at one time on the ſame ſide, except it be upon concluſion of the arguments at Bar in the cauſe. Roll chief Juſtice ſaid, the tax ought to be particular, but it is not to be laid upon the Townſhip, if there be not a Cuſtome for it, and ſuch a Cuſtome may be reaſonable, and it is dangerous to deſtroy it, for fear of the publique danger that may ariſe by doing it. And for the return of the Commiſsioners it is not neceſſary it ſhould be ſo ſtrict as our pleadings are. The Court gave Twiſden time till that day ſeven night to be heard on the other ſide. At which time to the exception that was taken, that it appears not that Lynn Regis is within the limits of the Commiſsion by virtue of which the tax is made; It was anſwered, that it doth appear. To the ſecond exception taken, that here is a new Bank or Wall ordered to be made, and not the repairing the old, and this is not within the Commiſsion; It was anſwered, that the making of the new Bank is but to ſtrengthen the old Bank, and ſo is but a repairing of an old work, and not the making of of a new. 2ly. The Wall is to be made by conſent of all the Inhabitants intereſted in the benefit, which may accrue by the making of it. As to the exception that it appeares not that Tyd and Newton are within the Hundred of Wisbitch, touching which only this Commiſsion of Sewers was granted; It was anſwered, that it ſhall be ſo intended, and it is alſo ſo found. To the exception, that the new Bank was made in another manner than the old Bank, and ſo it is a new work, and it appears not that the parties tared have any benefit by it; It was anſwered, that it doth not appear that the Drayners have done any thing for their own benefit in the making this Bank, nor were any cauſe of making the new Bank. To the exception that it is not preſented where the Bank is; It was anſwered, it is certain enough ſet forth in the Preſentment, and Preſentments are not required to be ſo preciſe as other pleadings are. To the exception that Tyd and Newton ought not to make the Bank becauſe other Towns uſe to do it; It was anſwered, that for making it in the new manner, the other Wills are not bound to make it alone, but thoſe alſo that receive the benefit by it. Theſe exceptions following were alſo taken to the laying of the Tax. 1. That all the Lands within the Wills of Newton and Tyd are not charged, but ſo many Acres in one, and ſo many in another. To this it was anſwered, that it doth not appear that there were more Acres than are tared either in Tyd or Newton. 2ly. The high grounds and the low grounds are equally tared, which is not indifferent: for ſome

Adjournment. Cuſtome. Return. 10 Ed. 3. f. 8, 9. Return.

acres are of a greater value than others are. To this it was answered, that for ought that doth appear they are of an equal value. 3ly. They ought not to sell the distress taken, because the Mills did not bring in the number of acres, by the Officer appointed by the Commissioners to doe it. It was answered, that they may sell the goods, or allow a Replevin: And secondly here appears not to be any distress or impounding of the goods. Serjeant Barnard on the other side: First he said, that all the exceptions are not opened, and the first exception is not answered; for it appears not by averment that the Mills taxed are within the extent of their Commission, as it ought doe, 2 H. 7. f. 13. Nor is the second Exception answered; and although the Councel might at the finding of the Commission have taken it, yet it may be taken now; and it is not shewed how the old bank was insufficient, nor what the charge would be to repair it: Nor is it shewed how Tyd and Newton are in danger by the not repairing and making of the new bank. Also the Commissioners have exceeded their authority in exceeding the antient manner of taxing for the maintenance of this bank, and the tax ought to be laid according to the quality and quantity of the lands, which are to be taxed, and here doth not appear how many acres are in the several Mills, nor whether the tax doe extend to all, and the good land and bad lands are also equally taxed, neither ought there to be a new tax imposed upon one Mill to ease another, which by the custom ought to repair the bank: And they have also made a new Officer here, which by the Statute they have not authority, and have made an order to punish one for refusing this Office, by distress of his goods, which ought not to be; and they ought not to refuse a replevin of the distress taken, as they have here done, and the lands only that are lyable to the tax are to be distrained for it, and not the goods of another that is not within the extent of the Commission, and upon these exceptions he prayed the presentment might be quashed. Roll chief Iustice answered, we will not make all the law void for some exceptions, therefore give notice upon what exceptions you will stand upon. Maynard answered, upon these. 1. That there ought not to be such a tax laid, because the lands taxed are not within the extent of the Commission; for it appears not that they are within the Hundred of Wisbitch. 2ly. All the Inhabitants within all the Mills are not taxed, which ought to be, because they have equal benefit, as it appears by the presentment. The Court ordered it should be moved again the next term. And Roll chief Iustice asked why the drainers should not discharge this charge, who have been the cause of it, and they receive benefit by their draining; and it is not fit they should prejudice others by it. Postea.

Pymm and Morgan, alias Bambery and Basely.

Mich. 1649. Banc. sup.

Argument upon a case upon a special verdict in an Ejectione

THis case was again moved upon a special Verdict in an Ejectione firmæ, wherein the question was, Whether the estate of Mary Morgan that was setled 13 Car. is taken away by the Ordinance of Parliament made 1645. and which looked back to 1641. which was after 13 Caroli. It was held by the Councel that argued against the Ordinance that it was not, because the Ordinance is made against a dead man. 2ly. The estate of Morgan was forfeited to the State, and they out of it doe make an estate for Pymm, with retrospection to the year 1641, and no further; and therefore the estate

ſtate ſetled before that time is not taken away: And if a Statute have a double ſence, one againſt Common Juſtice, and the other with Common Juſtice, in equal ballance, it ſhall be interpreted in the better ſence; and that that hath been objected, that there is a power of revocation in the ſettlement is not material; for Morgan is now dead, and ſo this perſonal power is now gone, and ſhall not hurt the ſettlement. A ſecond reaſon is taken from the ſcope of the Ordinance, which conſiſts of three parts: 1. The Parliament injured. 2ly. Morgan the Offender puniſhed. 3ly. Pymm rewarded, and the Ordinance ſhall not be ſtretched to puniſh Mary, who hath a particular intereſt, although there be not an expreſs ſaving for her in the Ordinance, 21 H. 7. 4. Plow. Comment. 487 7 Car. Porter and Bellingham, and that this is the meaning of the Ordinance may appear, becauſe the remainder is reſerved to the Common-wealth; and in doubtfull Conſtructions of Statutes and Ordinances, that ſhall be taken, which makes all parts of the Ordinance or Statute ſtand together, and ſuch is the Conſtruction here in not interrupting the eſtate of Mary. But it is objected, that the right of the Daughters is provided for if they claim from another Anceſtor, and not from Morgan their Father. It was anſwered, that there is the ſame reaſon to provide for Morgans eſtate that was rightly conveyed from him before the year 1641. as of a ſtrangers ſo deriving from Morgan. It is alſo objected that the Truſtees for Pymm and the Common-wealth ſhall have Morgans lands, and they ſhall not be ſaid to be forfeited. It was anſwered, that the Act diſtributes no more than is forfeited, which can be no more than Morgan had at that time. 2ly. The Parliament took no notice that Morgan was ſeized in fee ſimple, nor what eſtate he had. 3ly. After the eſtate of Mary Morgan ended, the reverſion in fee returns to Thomas Morgan, ſo that Mary hath but a particular eſtate, and the Ordinance may be ſatisfied though Mary Morgans eſtate be not forfeited; for the reverſion may be forfeited, and the particular eſtate preſerved, as Cleres Caſe is; and the ſaving is not here repugnant, as it is objected, nor deſtroyes the generality of the Ordinance, for it is here ſatisfyed. And the Parliament doth not take notice of the conveyance made by Thomas Morgan, nor of any other eſtate than that he had at the time of the making of the Ordinance; otherwiſe there would be a great inconvenience; but it is objected, that the Sons claiming under Thomas Morgan are excluded out of the ſaving. It was anſwered, that although they are, yet they are not excluded out of the body of the Act, Dyer 273. 10 Eliz. and here the excepting of the intereſt of the Daughters in the ſaving hath its effect, viz. the eſtate which they have of Thomas Morgan after 1641. which ſhall be given by the Ordinance, and not that which they had before, and ſo prayed judgement for the Plaintif, viz. Mary Morgans leſſee. Maynard for the Defendant, viz. Pymms heir ſaid, That the Act is the rule to meaſure our caſe by; and that the Act doth take away the right of all the Children, and that the ſaving helps none but ſtrangers, and notwithſtanding the recompenſe reſerved for Pymm, if the eſtate ſhall be ſhort, it is intended of ſuch an eſtate not within the ſaving; and the eſtate of the Children is not within the ſaving, and here is not a general gift, but theſe lands particularly; And in this caſe Morgan had power to revoke his ſettlement, and ſo there is no breach made by the Ordinance of Common Juſtice, as is objected; becauſe he had an intereſt in the eſtate, notwithſtanding the ſettlement. And all parts of the Act ſtand very well here together upon the beſt conſtruction of it, according to the makers intent. If I grant all my trees, fruit-trees will not paſs; but if I except all my Apple-trees, all other fruit-trees paſs, and the inheritance in Morgan doth not ſatisfie the Act, and ſo prayed Judgement for the Defendant. Roll chief Juſtice ſaid: Mr. Maynard

Interpretation.

nard you miſtake the firſt part of the Ordinance, for do you think that the Ordinance looks further back than 1641. in other lands not expreſſed? and he ſeemed to encline for the Plaintif, but the other Judges for the Defendant. But the Court concluded that it was a great caſe, and deſerved great conſideration, and therefore ordered, That it ſhould be argued again the firſt Saturday the next Term.

Mich. 1649. Banc. ſup.

For a Habeas Corpus for one cōmitted for ſuſpition of felony.

THe Court was moved upon an Aſſidavit for a Habeas Corpus for one committed for ſuſpition of felony, for uttering counterfeit money, becauſe the Juſtices will not bail him. Roll chief Juſtice ſaid, It is dangerous to remove ſuch a priſoner, and there is a Commiſſion of Oyer and Terminer to try ſuch Offenders; and we have no Copy of the Mittimus now, but if you bring it we will make ſome rule in it. If the priſoner be bailable, if the Juſtice will not bail him, bring your Action againſt him.

Mittimus.

Caſe.

Coſwell.

Mich. 1649. Banc. ſup.

To reverſe an Outlawry.

Abbreviation.

One Coſwell outlawed moved to reverſe the Outlawry upon theſe exceptions. 1. Inſtead of proxim. there is uſed px. for an abbreviation of it, without any dath. 2ly. Inſtead of Infra ſcr. the abbreviation of infra ſcriptam there is uſed infra ſr. And for theſe exceptions it was quaſhed.

Dell and Brown.

Mich. 1649. Banc. ſup.

Error upon a Judgement in Treſpaſs.

IT was moved formerly to reverſe a Judgement in an Action of Treſpaſs for the taking away of three Cowes, becauſe the Declaration doth not ſay neither pretii nor ad valentiam as to two of the Cowes. Serjeant Earl moved for Judgement notwithſtanding that exception, for he ſaid it was not neceſſary to expreſs either, and urged 19 E. 2. br. f. 842. and Paſ. 20 Ed. 3. f. 2. 8 H. 6. reg. 97. b. But Roll chief Juſtice anſwered,

Declaration.

That which you urge is againſt the received opinion; for if they be live Cattel that are taken, it ought to be pretii; but if dead, it ought to be ad valentiam. Therefore ſhew cauſe before the end of the Term why the Judgement ſhould not be reverſed. Vide 174.

Spry againſt Mill.

Mich. 1649. Banc. ſup.

Paſc. 1649. rot. 208.

Error to reverſe a judgement upon a nihil dicit in a Trover and Converſion.

SPry brought a writ of Error to reverſe a Judgement given againſt him upon a nihil dicit in an Action of Trover and Converſion for a Mare, in the Court at Lanceſton in Cornewall, and theſe Errors were aſsigned: 1. In the judgement it is ſaid ideo ad eandum Curiam conſideratum eſt;

Where-

whereas it ought to be per eandem Curiam. 2ly. It is recuperare debeat, whereas it ought to be debet. But Roll chief Iuſtice anſwered, that is well enough in a judgement upon a nihil dicit. 3ly. In the awarding of the Venire, it is præceptum fuerit. 4ly, It is for the Jury to enquire in forma prædicta. 5ly, The Defendant is not demanded. To this Roll chief Iuſtice ſaid, The Defendant did appear, and ſo that is not material. 6ly. It is ſaid Conſideratum fuit, and it ſhould be Conſideratum eſt. Roll chief Iuſtice ſaid, that was a good exception for the incertainty of the words. Upon this, Preſtwood the Councel on the other ſide moved, that the Record is not removed; for the Certiorari to remove it was directed to the Maior and the Recorder, and the Record is returned by the Maior and Deputy-recorder. Roll chief Iuſtice ſaid, It appears not to us that the Recorder hath power to make a Deputy. Therefore adviſe upon it, and ſo will we. Poſtea.

Judgement.

Error.

Certiorari.

Mich 1649. Banc. ſup.

A Return made by an Officer of the Admiralty for one committed by their warrant, was read, and it was prayed by Hales of Councel with the Priſoner, that the return might be filed, and the Priſoner diſcharged for theſe reaſons: 1. the party was committed for reſcuing himſelf: and 2ly, for a Contempt to the Court, and becauſe he would not find bail: and it appears that the warrant for his commitment is not good: for he is not committed for matter ariſing upon the Sea, and ſo they have no Juriſdiction. But the Court bid them proceed upon their prohibition, for they would not releaſe the priſoner. But if you will you may move it again Friday next.

To diſcharge a priſoner upon a return by an Officer of the Admiralty.

Bail.

Gilbert againſt Marden.

Mich. 1649. Banc. ſup.

Trin. 1649. rot. 942.

A Writ of Error was brought to remove a judgement given in the Common pleas in an Action upon the caſe. Upon opening the record, Twiſden took exception that the record was not removed; for the Judgement in the Common pleas was given Coram Petro Pheſant, and the writ of Error was to rectifie a record, quod coram vobis reſidet. The Court abated the writ of Error for this exception.

Error upon a judgement in the Common Pleas.

Abatement.

Smith againſt Andrews.

Mich. 1649. Banc. ſup.

ANdrews, an Attorney, brought an Action upon the caſe againſt Smith, for ſpeaking of theſe words againſt him, He, meaning the Plaintif, ſtirrs up men to ſutes, and promiſeth, that if he recover not for them, he will take no fees; and yet in a ſute which he ſo undertook for me wherein I was overthrown, he took Charges of me. Upon not guilty pleaded, there was a verdict and a judgement for the Plaintif. The Defendant brought a writ of Error, and for cauſe it was ſhewed by Mayoard, that there are entire damages

Arreſt of ludgement in an action on the caſe.

mages given for divers words ſpoken at one time, whereof ſome are Actionable, and others not, which ought not to be: and 2ly, The words in themſelves are not actionable; for an Attorney may ſtir up men to ſuits, if their ſuits be lawful; (which Roll chief Iuſtice denyed) 17 Car. Gibſon and Baxter. And he ſaid, that an Attorney may proſecute his Clyents cauſe without fees, and yet it is not maintenance, Trin. 16 Car. Hill and Sands his Caſe. Hales on the other ſide held that the words are Actionable; for the words ſhall be taken in the worſt ſenſe: and he alſo ſhews how he had ſtirred up ſuits in an unlawful manner, viz. by making of bargains with men at Markets. Roll chief Iuſtice ſaid, that ſuch words ſhall be taken mitiori ſenſu, and this is a ſpecial maintenance, for it is in the caſe of an Attorney, and therefore lawfull; but here are other words ſpoken to ſhew that he ſtirred up ſutes unlawfully; and the ſtirring up of ſutes and making bargains to follow them, is in it ſelf unlawfull, and great inconveniences doe grow by ſuch manner of practiſing, and all the words ought to be taken together, and not dividedly; for ſo you may make any words not actionable. Ierman Iuſtice held the words were actionable; becauſe they are a great ſcandal, and trenching to deſtroy the Plaintifs livelihood & practice. And ſaid, that Attorneys ought not to go to Markets to get practice, & the words ſpoken are to ſhew he is a ſtirrer up of ſutes, and to ſhew that he was a falſe dealer, and the words ſhall be taken in the Common acception, and not mitiori ſenſu. Nicholas as Ierman; and that the words taken together are actionable. Ask Iuſtice to the ſame effect. Whereupon Iudgement was affirmed, except better matter ſhould be ſhewn Monday next.

Maintenance.

Johns againſt Leviſton.

Mich. 1649. Banc. ſup.

Arreſt of Iudgement in an action upon an Aſſumpſit.

IOhns brought an Action of debt againſt Leviſton upon an Aſſumpſit that the Defendant would enter into a judgement unto the Plaintif for ſo much monies as Sir Iohn Hall did owe unto the Plaintif, if the Plaintif would take Common bail of him the Defendant, if Hall ſhould die before ſuch a day, and for not performing this promiſe the Action was brought; upon non Aſſumpſit pleaded, there was an iſſue joyned, and a verdict found for the Plaintif. The Defendant moved in arreſt of Iudgement, and ſhewed that it doth not appear that there was any notice given by the Plaintif to the Defendant, how much mony was due to the Plaintif from Sir Iohn Hall, as there ought to be. Roll chief Iuſtice anſwered, You did undertake to know, at the time of the Aſſumpſit, how much mony he did owe, and notice is not neceſſary, and if it were, he might have gone to Sir Iohn Hall to tell him, and ſo it ſhall not only be intended to be in the knowledge of the Defendant himſelf, but that he might have alſo knowledge of it by others. Ierman Iuſtice doubted, but Nicholas and Ask Iudges were of Rolls opinion, and the Plaintif ordered to take his Iudgement, if better matter were not ſhewen.

Notice.

Cuſtodes Libertat. &c. againſt the Inhabitants of Outwell.

Mich. 1649. Banc. ſup.

Exceptions upon an order of Commiſſioners of Sewers, and anſwers to them

THis Caſe was again moved: wherein upon a preſentment made to Commiſſioners of Sewers, an order was made by them to reimburſe the

the Dike-reeves, for mony expended in repairing a Sea wall, by laying a tax upon divers Mills, amongſt which Owtwell was one: divers exceptions had been formerly taken to the preſentment and order. At this time it was 1. objected, that the Commiſsioners cannot alter the uſual cuſtom for making the tax, as they have here done: and therefore their Order is not good. It was anſwered, that there is no cuſtom here preſented; but if there be, yet the tax cannot be laid generally upon the Mill, but diſtributively; for every one of the inhabitants have not an equal ſhare of the land, nor are all the lands of equal goodneſs: And there is no cuſtom for the Mill of Owtwell to apportion the tax, ſo that they have no authority to doe it. Windham on the ſame ſide ſaid, that there is no preſcription or cuſtom here found, and ſo the tax ought to be ruled by the Common Law, and other Towns ought thereby to be Contributory, which receive benefit by the making of the bank; and the Commiſsioners of Sewers have not here purſued the direction of the Statute of Sewers as they ought to doe. And here the preſentments, upon which this order for the tax was grounded, were made by three Juries of ſeveral Hundreds, and the breach to be repaired doth not appear to be within any of the Hundreds whence the Juries come, as the Statute doth direct, neither is it ſhewed how the inhabitants are chargeable, whether by tenure, or cuſtom, or how elſe. Holhead on the ſame ſide ſaid, It is not ſaid how the lands are lyable to the tax. 1. It is not ſhewed in what part of the Poe-Dike the breach hapned. Maynard on the other ſide ſaid, that the Commiſsion of enquiry finds by what default the breach happens, but they cannot tell how many acres every one holds, to charge them ſeveral; and it may be intended that they hold joyntly, and it ſhall be intended that the lands are lyable to the tax by preſcription, and it is not neceſſary to ſhew in what place of the Poe-Dike the breach happened. Roll chief Iuſtice ſaid, the preſcription here is waived; for you ſay that it was not an inevitable breach, and ſo you are at the Common law, and not upon a cuſtom, and then the tax ought to be equal, and according to the number of the Acres, and it is not ſo here. And it appears not that the breach is within the Hundreds whence the Jury came and ſo they have no authority to enquire. Hales ſaid, that there is a clauſe to help this, for there is a power in the Commiſsioners to eaſe them that have wrong done to them. Roll chief Iuſtice, This will not help, for the tax ought to be well and equally laid, according to the Statute, viz. upon the number of the Acres, and here it is laid upon the perſons of the inhabitants. Therefore make a new tax. Tax.

Archer againſt Holbidg.

Mich 1649. Banc. ſup.

IN this caſe the Action being an Action brought upon the Statute of 1 R. 3. Cap. 3. and a verdict for the Plaintif, it was formerly moved in arreſt of Iudgment, that the Statute was miſrecited; whereupon it was ordered the Parliament Roll ſhould be brought in Court, which was now done, and read, and upon the reading it appeared that it was miſrecited; for the Statute was for ſuſpition of felony, and the Declaration was for felony: whereupon it being held by the Court to be miſrecited in matter of ſubſtance, whereupon the Action was grounded, The Court ordered a nil capiat per billam. Arreſt of Iudgement in an action upon the Stat. of 1 R. 3. cap. 3. Miſrecital.

Mich. 1649. Banc. ſuper.

For reſtitution upon an Indictment of forcible entry Reſtitution.

AN Indictment was found againſt one for a forcible entry: The Defendant traverſeth the Indictment, and enters his traverſe & pleads. The Plaintif moved the Court upon a ſuggeſtion that there had been divers verdicts found for this land for the Plaintif, that the Plaintif might have reſtitution. But the Court would not grant reſtitution before the tryal, becauſe the Defendant had traverſed and pleaded.

Mich. 1649. Banc. ſup.

To diſcharge iſſues for not repairing the high way. Quaſh.

THe Court was moved to diſcharge the iſſues ſet upon the inhabitants of Bridgwater, for not repairing a High way, and to quaſh the Indictment, upon a Certificate that the way was repaired. The Court anſwered, that further proceſs ſhould be ſtayed, and the iſſues diſcharged: But we cannot diſcharge the Indictment, if you have no exception to take againſt it.

Mich. 1649. Banc. ſup.

To quaſh an Indictment for ſelling bread under the Aſſiſe.

THe Court was moved to quaſh an Indictment againſt a Baker for ſelling of bread under the Aſsiſe. The exceptions were, 1. That it doth not ſay what Aſsiſe, whereas there be divers Aſsiſes of bread. 2ly, The Indictment doth not ſhew where he ſold the bread, nor to whom. Roll cheif Iuſtice ſaid to the firſt exception, It is good enough to ſay he ſold the bread contra aſſiſam, although it ſay not what aſsiſe; but upon the ſecond exception the Indictment was quaſhed.

Earl Rivers againſt More.

Mich. 1649. Banc. ſup.

Privilege of Parliament pleaded.

THe Earl Rivers was taken by a Latitat and committed to the Marſhalſea; The Earl by his Councel pleaded his privilege of Peerage, and prayed he might be ſet at large. Roll chief Iuſtice asked, How is the plea now amended? for yeſterday you pleaded in abatement of the writ, and now you pray to be delivered upon a bare ſuggeſtion. Wild of Councel with the Defendant held, that a Capias doth now lye againſt an Earl; for comes dicitur a Comitando rege, & ceſſante rege ceſſat comes, And demurred to the plea for want of form. Roll chief Iuſtice ſaid, That Earls and Barons are antient titles of the Realm. But let him plead as he will ſtand to it, and adviſe well of the plea before the Demurrer joyned; for we can give leave to amend the plea.

Capias.

Amendment.

VVare againſt Chappell.

Mich. 1649. Banc. ſup.

Demurrer to a plea in Covenant.

VVAre brought an Action of Debt for 500. l. againſt Chappel, upon an Indenture of Covenants between them, viz. That Ware ſhould raiſe 500 Souldiers, and bring them to ſuch a port, and that Chappel ſhould find

find ſhipping and victuals for them to tranſport them to Gallicia; and for not providing the ſhipping and victuals at the time appointed, was the Action brought. The Defendant pleaded, that the Plaintif had not raiſed the Souldiers at that time; and to this plea the Plaintif demurs. Windham of Councel with the Plaintif, held, that the Defendant ought to have provided the ſhipping and victual againſt the time, though the Souldiers were not raiſed; for the not raiſing of the Souldiers can be only urged by way of mitigation of damages, and not pleaded in diſcharge of the breach aſsigned. Yard of Councel with the Defendant, held the plea was good in barr of the Action, for the Covenants of each part have relation one to the other, and there is a condition precedent made by the words, to find ſhipping for the Souldiers: ſo that the Defendant was not to find ſhipping, except the Plaintif raiſed the Souldiers, neither is there any notice given us how many Souldiers he had raiſed. Roll chief Juſtice held, that there was no condition precedent; but that they are diſtinct and mutual covenants, and that there may be ſeveral actions brought for them: and it is not neceſſary to give notice of the number of the men raiſed, for the number is known to be 500. and the time for the ſhipping to be ready, is alſo known by the Covenants; and you have your remedy againſt him if he raiſe not the men, as he hath againſt you for not providing the ſhipping. Herman and Nicholas Juſtices, held againſt Roll, that there is a precedent condition. Ask Juſtice was of Roll the Chief Juſtices opinion, Nicholas changed his opinion, and ſo judgment was given for the Plaintif, except better matter were ſhewn.

Precedent condition.

Notice.

Jenkinſon againſt Porter.

Hill. 1649. Banc. ſup.

Paſch. 1649. rot. 237.

These Errors in the Record were aſsigned, to reverſe a judgement given in the Court at York in an Action of debt. 1. That the time of the Judgement is in figures. 2. The ſum recovered is in figures. 3ly. Venire is not good, for it is Venire facias duodecim, &c. which is not good with an &c. in an inferiour Court. 4ly. It doth not appear that the cauſe of Action is infra juriſdictionem Curiæ. And for theſe errors the judgement was reverſed, niſi, &c.

Error to reverſe a Judgement in debt.

Weſton againſt Plowden.

Hill. 1649. Banc. ſup.

Mich. 1649. rot. 503.

This caſe formerly ſpoken to, was again moved, which was this in effect: Weſton brought an Action of debt againſt Plowden, upon an Obligation of 2000 l. for the payment of 1000 l. The Defendant appears and imparls, and after imparlance, pleads in Abatement of the writ, that he is Earl of Nova Albion in Ireland, and ought to be impleaded by that name, and not by the name of Edmund Plowden Knight: upon this plea the Plaintif demurred; 1. Becauſe it came in after imparlance, whereas a plea in abatement of a writ, ought to be pleaded before imparlance. 2ly. The plea is frivolous; for he pleads that he was Earl of Nova Albion before he entred into the bond, which he cannot now plead, for he is eſtopped to plead ſo by his own deed, which teſtifies the contrary. Roll chief Juſtice ſaid, it is a dilatory

Plea in abatement, after imparlance.

Plea.

Eſtoppel.

latory plea, for he is but a Knight here, though he be an Earl in Ireland, and his own Obligation ſtops him from pleading as he doth. And therefore let him ſhew cauſe why he ſhall not plead in chief within a week, otherwiſe let Iudgement be entred. Vid. antea.

VVats and Dix.

Hil. 1649 Banc. ſup.

Entred Trin. 24 Car. rot. 1529.

Argument upon a ſpecial verdict in an ejectione firmæ.

AN ejectione firmæ was brought for certain lands in Lincolne Shire, and upon not guilty pleaded, there was a ſpecial verdict found to this effect. I. S. being ſeiſed of the Lands in queſtion in Fée made a Feoffment thereof to A. B and C. D. and to their Heirs till they ſhould make a Leaſe of the ſaid Lands for divers years to certain uſes, to begin at the Feaſt of Philip and Jacob next comming; The Feoffees enter, and make a leaſe for years of the Lands to begin from the Feaſt of Philip and Iacob next. The queſtion was whether the Feoffees have made ſuch a Leaſe as the deed of Feoffment directs, and ſo the uſes are raiſed thereupon, or whether it ſhall be intended another leaſe, and not warranted by the Feoffment, and ſo no uſes raiſed; Latch held that the Leaſe is not warranted by the deed of Feoffment, and that there are no uſes raiſed, for the words at the Feaſt, and the words from the Feaſt make ſeveral beginnings of the Leaſe, and ſo here is another Leaſe made than the deed intended. 2ly. It is not in effect and intention the leaſe of the parties, becauſe it is not made according to their directions, and ſo there are no uſes raiſed, for the authority is not purſued, nor the precedent condition obſerved, and ſo the leaſe hath another beginning, and another ending, and ſo it muſt be another Leaſe, Fitzh. graunts 63. And here is not the ſame reverſion intended to the party, viz. his Son Watſon, becauſe it is upon another Leaſe, and ſo a different reverſion. And although the Jury might have found the intent of the party, and ſo the ſame Leaſe, yet they have not found it, 2. rep. Cromwells caſe. 5. rep. Earl of Rutlands caſe, and if the Jury find evidence only, and not matter of fact, the Court can give no Judgement, 9. rep. Downhams caſe, the meaning of the party ought to be found, Oxfords caſe 10. rep. 11. Iac. Banc. Reg. Iſack and Clarkes caſe, 3 Ed. 6. Bendloes Reports. As to the ſecond point, viz. whether the uſe ſhall reſult to the Feoffor or remain in the Feoffees, he held that it doth reſult to the Feoffor, and remains not in the Feoffees; For firſt there was no other thing intended to be in the Feoffees than to make the leaſe good. and that is not here done, and Dyer 300. cited is not to this purpoſe. The intention of the parties is not prevalent in directing of uſes, and Dyer 300. may be applyed to our caſe to determine the uſe, 4. rep. 82. Barbers caſe, Mich. 2, & 3 Eliz. Bendloes Reports the uſe reverted: Dyer 16 Eliz. Humphreſtons caſe. An eſtate ought to be made in convenient time, otherwiſe the uſe is to revert out of the Feoffees to the Feoffor, according to his firſt eſtate. 3ly. For the queſtion whether a good eſtate paſſe to Elizabeth, and the others, he held that there did a good Eſtate paſſe either by bargain and ſale, or otherwayes. But it is good by bargain and ſale, notwithſtanding it be upon conſideration paſt, which is no conſideration, and the other conſideration expreſſed to raiſe the uſe hurts not, and here is a good conſideration, Mich. 8 Iac. Goſman and Carington, C. B. There was no good conſideration; but a curteſie, 13. and 14 Eliz.

14 Eliz. Horwoods caſe there was a good conſideration, although there be no monies paid, but land for land. 2ly. If it doe not paſs by way of bargain and ſale, yet it ſhall paſs by way of Covenant to ſtand ſeiſed to uſes, and the conſideration expreſſed is good to raiſe the uſes: Bedles caſe 7 Rep. & theſe conſiderations cannot be ſilenced by the conſiderationsof bargain & ſale; nor ſhall the intent to paſs it by way of bargain & ſale hurt it, & if he take by way of uſe, yet it makes not the joyntenancy operate as a tenancy in Common, & ſo it is the ſame leaſe declared upon, and not divers, and there is no diſſeiſin by the entry of the Leſſee at election; for though he be not Leſſee by the Leaſe intended, yet he is Leſſee by the one Leaſe or the other; for the Leaſe is made either by the Feoffor, or by the Feoffee, and ſo he prayed judgement for the Plaintif. Pannell for the Defendant put the caſe at large, and made theſe queſtions. 1. Whether here be ſuch a Leaſe as the firſt Indenture doth direct. 2ly. If the uſe do not ariſe where the eſtate is. 3ly. Whether there be a good bargain and ſale. 4ly. Whether there be a good conſideration to make a bargain and ſale. 5ly. If there be not a good bargain and ſale, whether it ſhall enure by way of Covenant to ſtand ſeiſed to a uſe; and he ſaid, if all theſe points be not for the Plaintif, all is againſt him, and he held that the words at and from are all one as to ſignifie the intent of the parties. The words have here an extraordinary ſignification, according to time and place, and at or in a place are all one, and the word at may be ſatisfied with time precedent or ſubſequent, & quæ incontinenter fiunt ineſſe dicuntur, et inſtans eſt indiviſibile, and he denied Berwick's caſe in the 5th. Report to be law. And here is no need of a forced conſtruction; for the intent of the party appears by the caſe 8 rep. 91, For the ſecond point, if the Leaſe be not good, and no uſe raiſed, then where the eſtate of the land is? And he held that it is in the Feoffees notwithſtanding; for here the uſe is limited, but not in the caſes put on the other ſide. And here was a fee ſimple determinable; but it being become impoſsible, it is a fee abſolute. Trin. 18 Car. Roll and Bois, and Dyer 300. is miſtaken in putting of the caſe on the other ſide: And it cannot reſult, for there is no uſe here to reſult, but the party is in by the Common Law. To the 3 point, if the uſe doth reſult, yet the eſtate of Hamond hinders the bargain and ſale; for he is a wrong doer, becauſe that the fee being determined by his holding over he is a wrong doer; but if not, yet his Eſtate is paramount. For the 4th. he held that the bargain and ſale is not good upon the conſideration expreſſed, becauſe it is not made for monies paid nor ſecured to be paid. 37 Eliz. VVard and Lamberts caſe C. B. For the 5th. point he held, that it doth not enure as a Covenant to ſtand ſeized, becauſe here are no words of Covenant. Boyntons caſe, Plow. Coment. 301. 2ly. There are plain words to ſhew the intent of the party to be againſt it, and alſo actions following thereupon. Foxes Caſe, 5 Rep. 15 Car. Pitfield and Pierce, Banc. reg. 17 Eliz. Gallards caſe. And whether the uſe ariſeth or not, it matters not, if the uſe ariſeth, Watſon hath title, if not, Cumberland hath the eſtate, and ſo it is an ill feoſment, and prays judgement for the Defendant. Roll chief Iuſtice ſaid, there is a variance, and it cannot be the ſame leaſe; yet it is a good leaſe to raiſe a uſe, becauſe the feoffor joyns in it. Ierman Iuſtice to the ſame effect, and he held that the words at and from are all one. Nicholas Iuſtice doubted. Roll chief Iuſtice ſaid, that it is a diſtinct leaſe; but the party hath made ſuch a leaſe and more, and a feoſment made habendum a die datus, if the ſeiſin be not made at the laſt inſtant of the day it is not good. The Court ordered it ſhould be argued again Tueſday ſevennight following. Poſtea.

Leaſe.

Variance.

Uſe.

Feoſment.

Hill. 1649. Banc. ſuper.

Arreſt of Iudgement in an Action upon the Stat. againſt engroſſing Victual.

VPon an Endictment preferred 22 Car. at the Aſsizes in Kent againſt one for engroſsing Apples, Pears, and Cherries, framed upon the Statute made againſt engroſſers of Victuals, the Defendant pleaded and was found guilty, formerly judgement was arreſted, and the Councel heard. Edward Iohnſon of the Inner Temple prayed for Judgement for the Keepers of the liberty, &c. notwithſtanding what had been objected formerly; and that upon theſe reaſons. 1. Becauſe that Apples, Pears and Cherries are Victuals within the Statute, and that becauſe the Statute is not to be abridged. And the Statute of 2 Ed. 6. made concerning fruiterers expounds this Statute, that Apples and Pears, &c. are Victuals, for the Fruiterers are called ſellers of Victuals; and for Bois his caſe that is objected that Apples are not Victual, it is not to be meant of all ſorts of victual in a general acception, and without doubt engroſsing of them is engroſsing at the Common Law, 26 Eliz. Salt is no Victual per ſe, nor is uſed as Victual in any Country; yet it is there ſaid to be Victual. But Apples are Victual per ſe, and Coſtermongers are called Victuallers by their Charters. Roll chief Iuſtice ſaid, That 4 Iac. Apples were adjudged no Victuals; and after upon a writ of Error this Judgement was affirmed in the Exchequer Chamber, and therefore that judgement is not to be lightly paſſed over; and if they ſhould be adjudged Victuals, the trade of the Coſtermongers would be deſtroyed: and for Salt it is no Victual, but a preſervative of Victual; and Hops was adjudged to be no Victual, 20 Iac. upon a reference made to the Judges. Neither are Apples to be accompted Victual within the Statute. Ierman Iuſtice differed, and Nicholas Iuſtice held, that Apples are Victual within the Statute, becauſe they are better than Fiſh. Ask Iuſtice held, that Apples are Victual, but not within the Statute, for a Statute cannot alter by reaſon of time, but the Common Law may. It was adjourned.

Barnwell againſt Graunt.

Hill. 1649. Banc. ſup.

Entred Trin. 1649. rot. 791.

Error to reverſe a judgement where ſome are found guilty, and others acquitted. Abatement. Error.

THe Court was moved for their opinion in this cauſe, whether the writ of Error did lie or not. It was ſaid that a writ of Error is not like another writ; for another writ may be abated for one perſon, and ſtand good to another; but if the writ of Error will not lie, it is abated in all. Hacker and Wotton Paſch. 24 Car. rot. 342. And Roll chief Iuſtice asked the Counſel what he could ſay to the Books of 2 Ed. 3. and 3 Ed. 3. Privies in Record may joyn in a writ of Error, ſo is it here, and an inconvenience may come to all the parties by this judgement, although but ſome of the parties againſt whom the action was commenced are found guilty, and others are acquitted, and therefore they may all well joyn in the writ. And therefore let the Iudgement be reverſed if cauſe be not ſhewn Wedneſday next to the contrary.

Roberts

Roberts againſt Tucker.

Hill. 1649. Banc. ſup.

Paſch. 18 Car. rot. 116.

A Writ of Erroꝛ was bꝛought to reverſe a Judgement given in the Court at Bridgewater in an Action of the Caſe upon an Aſſumpſit to pay ſuch a ſum of money at the Defendants return out of Ireland. The Court held that Bridgewater hath no power to enquire of a thing done beyond their jurisdiction, and Ireland is out of their jurisdiction, whence the party upon the Aſſumpſit was to return. Latch of Councel with the Defendant in the writ of Erroꝛ ſaid, that the writ of Erroꝛ is returned by the Mayoꝛ, and Deputy Recoꝛder, and their Letters Patents give not power to have a Deputy Recoꝛder, and the writ of Erroꝛ is directed Maiori Aldermannis et Recordatori. The Court ordered cauſe to be ſhewn why the Writ of Error ſhould not be quaſhed. Poſtea

Error to reverſe a judgement given in an action upon an Aſſumpſit.

Jurisdiction.

Return.

quaſhed.

Poynes and Francis.

Hill. 1649. Banc. ſup.

Mich. 24 Car. rot. 222.

A Writ of Erroꝛ was bꝛought to reverſe a Judgement given in the Common Pleas, in an Action of Treſpaſs, and the Erroꝛ aſsigned was, that in the poſtea there is no aſſociation to the Juſtice of Aſsize expꝛeſſed, as ought to be. Roll Chief Iuſtice anſwered, this is the fault of the Clark of the Aſsize: Therefore let him attend and ſhew cauſe why the Poſtea ſhall not be amended.

Error to reverſe a Iudgement in Treſpaſs.

Amendment.

Hill. 1649. Banc. ſup.

The Court was moved to quaſh an Endictment foꝛ a riotous entring into certain land, and carrying away 4 loads of Hay. The exception taken was that the Endictment ſaith aſportavit duo Carucat. fœni, inſtead of duo Charectat. fœni. Roll chief Iuſtice anſwered, If the party be culpable foꝛ the entry into the land, although he carried away no Hay, yet the Endictment is good, therefoꝛe plead non cul. to all the Endictment, and it may be if it prove not good in all parts it will be naught in all.

To quaſh an Endictment for a rioꝛ.

Hill. 1649. Banc. ſup.

The Caſe of the Mills of Newton and Tyd concerning the preſentments made to the Comiſsioners of Sewers foꝛ the Hundꝛed of Wisbitch, and their oꝛder made thereupon was again ſpoken to. Twiſden againſt the preſentment ſaid, That it is not a preſentment by Jury, as it ought to be by the Statute; foꝛ the Jury have only power to enquire of things within the Hundꝛed of Wisbitch, and it doth not appear that Newton and Tyd are within that Hundꝛed. 2ly. The ſubſtance of the preſentment is not good; foꝛ the Commiſsioners cannot oꝛder that Newton and Tyd which have

For quaſhing preſentments, and Orders of Commiſsioners of Sewers.

have no benefit by the repairing of the bank shall contribute to the reparations, 18 E. 3. f. 22. 3ly. They cannot order to make a new wall notwithstanding Callice his opinion in his reading upon the Statute of Sewers. 4ly. The Tax is not well laid, for it is not laid upon all the Lands within Newton and Tyd, as it ought to be charged, if any ought to be. Holhead answered to this last exception, that it does not appear there are more Lands in Tyd or Newton than are charged. And Roll chief Justice said, that is well enough. To the third exception, Holhead said it is not wholly a new work, and therefore they may order to make it. To which Roll chief Justice assented, and said it was so notwithstanding the Case of the Ile of Ely, for that was for the making of a new work totally. To the 2d. Exception he read the words of the presentment, by which it appears, that because the adventurers had no Lands to be charged, and it is found necessary to be repaired, that therefore it is to be repaired by Newton and Tyd for the present necessity. Maynard answered, that they are not bound to repair for the Act of a Stranger. Roll chief Justice answered, Newton & Tyd may take there remedyes against the strange adventurers, and it seems there was a present necessity to repair it for publique safety. If one be bound by prescription to repair a wall, yet to prevent the present, and publique danger, the Commissioners may tax others to do it, and the Law is just that is here made by the Commissioners. But the 1. Exception is not answered, and so the Commissioners have exceeded their authority. Therefore let their be a new Law made by consent, and quash the presentments, except better matter be shewed. But we cannot order you to have your monyes again. But for that take your remedy at Law.

Taxes.

Garret against Blisard.

Hil. 1649. Banc. sup.

Hil. 24 Car. rot 983.

Arguments upon a case upon a special verdict in an ejectione firmæ.

UPon a special verdict found in an ejectione firmæ, The Case was this, Grandmother Tenant for life, the remainder to the Father for life, the remainder to the Son for life, the Son levyes a fine come ceo, &c. of the Land, the question was whether it be a forfeiture of his estate or not. Hales argued that it was a forfeiture, but I could not here him well; He cited these books 41 Ed. 3. 1. 24 E. 3. f. 70. Pasc. 11. Car. Banc. Reg. Huttens reports, Trin. 7 Car. Banc. Reg. and adjudged 11 Car. in King and Edwards case: Dyer 239. And he said that a fine sur conisance de droit come ceo, &c. as it is in our case, is a Feoffment upon Record, and doth imply a Livery: And said, that a remainder may be forfeited by levying such a fine, and concluded it was a forfeiture. Wadham Windham on the other side argued that it was no forfeiture; And cited Mich. 24 E. 3. and Dyer 139. and said this for a ground, that where a Feoffment in Fee made by a Tenant for life, doth displace any remainder, that such a Feoffment is a forfeiture, but it is not so in this Case, and therefore it can be no forfeiture. If Tenant for life of a rent or of an Advowson levy a fine, it is a forfeiture, although that no remainder be displaced, this is the great objection, 15 E. 4. f. 15 by Littleton, and the fine sur conisance de droit implyes a Fee simple, 40 Ed. 3. But there a Fee simple really passed with the estate for life; But here it passes by way of interest, and not by way of estopel, and the Conusee may confesse and avoid, and therefore here is no estopel, and so it differs from the Cases, objected 6 Rich. 2 Estopel 211. But it is objected, that he hath taken upon him to passe all the estate, which is more than he hath to passe, and this makes it a forfeiture, 43 E. 3. f. 22.

Forfeiture.

It

It is good for the reversion in Fee, and not for the other estate, 37 H. 6. f. 5. 41 E. 3 f. 14. by Thorpe. It was answered, that he hath not taken upon him to passe all the estate, but only his own estate: It is objected, that the fine joyns all the estates together, and purports the passing of them whole and entire; It was answered, that the fine doth not purport the entire estate, 44 E. 3. f. 10. so much shall passe by the fine as may rightfully passe, and no more, and so the estate passes by fraction, Cooks Instit. 345. The Law construes the effect of the fine according to the intent of the parties, and that wrong shall not be intended so is it here; And if there be Tenant for life, the remainder in tail, the remainder in Fee to Tenant for life, if Tenant for life levie a fine it is no forfeiture, 10 H. 4. f. 2. Tenant for life may pray in ayd of all in the remainder, and he said, that in this case is no forfeiture nor estopel, nor hath he passed more than he hath, & there is no wrong by the fine; but it shall only passe what may be passed, and he said, a fine is a Feoffment when the thing to passe by it lyes in Livery, otherwise it is but a grant, and devests no estate as a Feoffment doth. And in Baker and Hackers Case in this Court, Bredons Case was denyed for Law by Bramston, Jones. and Barkley, Hob. 388, 389. It is no discontinuance, and such estate shall first passe, by which no wrong shall be done. The Judges ought to be Astuti to invent reasons to support estates, and to defend from injuries, and where the Conusee of the fine hath an interest to passe by it to satisfie the operation of it, such a fine is good, and doth no wrong, as it is in our Case. It is objected, that there is a Fæ simple here, but it is of no value, for it is after an estate tayl, and shall not be assets in the Heir; It was answered, It is but of little value, but it hath more than a right in it, and so he prayed judgement for the Defendant. Roll chief Justice held, it was a forfeiture although there be no displacings of estates, because it puts an estate in a stranger, who ought not to have it, as Bredons Case is, where one doth acknowledge another to have the inheritance by the fine, this is a forfeiture: By the fine here the Conusor acknowledges more to the Conusee than he hath, and he might have expressed in the fine the estate that he hath in the Land, and no more, and so there is an estate in possession here. Ierman Justice said, the fine shall not be construed to do wrong; but the Case is of consequence, therefore he would advise. Nicholas held it was no forfeiture. Ask was of the opinion of the chief justice. Roll chief Justice said estopels will make forfeitures in many Cases. Q. what Judgement was given. Forfeiture.

Meers against French.

Hil. 1649 Banc. sup.

Entred Hil. 24 Car. rot. 24.

AN ejectione firmæ was brought for ejecting the Plaintiff out of a rectory, and declares of a lease thereof made unto him by Indenture. The Plaintiff had a verdict, the Defendant moved in Arrest of Judgement, that the Plaintiff had declared of a lease per Indenturam, and doth not say in curia prolatam. The Court answered, if an Indenture be pleaded but by way of inducement, it is not necessary to say in curia prolatam, otherwise if it be pleaded to entitle the party by it. 2ly. He declares, that the Defendant did eject him out of such a close, and doth not say whether it was pasture or arrable land, nor how many Acres it was. Roll chief Justice said, it is not good if it be of a close of Land, if he do not give it a name, nor Arrest of Judgement in an Ejectione firmæ. Declaration.

declare of what nature the land is. 3ly, He declares that the Defendant ejected him de uno Crofto, which is incertain. But Roll chief Iuſtice ſaid, That a writ of Dower and an Aſsiſe will lie de uno Crofto, and ſo will an Ejectione firmæ, although a Formedon will not lie de uno Crofto. And therefore let the Plaintif take his Iudgement, except cauſe be ſhewed to the contrary Monday next. Poſtea.

Dower. Aſsiſe.

Hill. 1649. Banc. ſup.

Entred Trin. 24 Car. C. B rot. 1010.

Error to reverſe a Iudgement in Trover & Converſion.

A Writ of Error was brought to reverſe a judgement given in the Common Pleas in an Action of Trover and Converſion of divers goods, for many improper words uſed in the Declaration to expreſs ſeveral of them, as 1. Argentum ſervitium is uſed to expreſs a ſilver Salt-cellar, which is not good; for ſervitium is Latin for ſervice: And in Parker and Martyns caſe in this Court, Inſtrumentum ferreum, anglice a Horſe-lock, was held not good, and 3 Iac. Robotums caſe, Hama, anglice a Crow of Iron, was adjudged naught; 2ly, He declares de duobus Caſtoribus, anglice two Hats. 3ly, De duobus Catenis pro patinis, anglice Diſhes. 4ly, De duodecem Crinalibus et plagulis, anglice Coifs and Croſscloaths. Ed. Turner prayed for Iudgement notwithſtanding theſe exceptions: Becauſe as to the 1. there is no proper word for a ſilver Salt-cellar, and it is here well enough deſcribed by divers words. 2ly, There is no proper Latin word for Hats called Demy-Caſtors, and therefore it is lawfull to frame words, & ſo for the reſt, being new things not known to the Romans, there are no Latin words for them, & ſo words may be invented well enough to expreſs them, and ſervitium argenteum is here with an anglice, and therefore it is a good deſcription of the thing: and de inſtrumento ligneo Compoſito, anglice a skreen, hath been adjudged good, becauſe there is not a proper word to expreſs it. But the Court doubted of the words uſed for Coifs and Cloſe-clothes, becauſe they are divers things. Jerman Iuſtice ſaid, argenteum ſervitium, anglice, a ſilver Salt-cellar, cannot be good, for ſervitium is Latine for ſervice. But Roll chief Iuſtice ſaid, if ſervicium ſignifie nothing, then the Jury gave no damages for that, and then the reſt may be good. But yet the Iudgement was ordered to be reverſed, except cauſe ſhewed, and was then at the prayer of the Councel pronounced; which if it be not prayed, the Iudge will not doe it. Quod nota.

Peiſe againſt Mablye.

Hill. 1649. Banc. ſup.

Paſch. 1649. rot. 222.

Error to reverſe a judgement in an action upon the caſe for words.

Caſe. Judgement.

A Writ of Error was brought to reverſe a judgement given at Launceſton in an Action of treſpaſs upon the caſe, for theſe words, Theſe Town weights in Georges poſſeſſion (meaning the Plaintif, who was the Common weigher of the Town) are falſe and coſening weights. The 1. exception was, that here was no Communication had of the Plaintif, but the words are only ſpoken concerning the weights. 2ly, The judgement is not well entred; for it is ſaid to be given ad eandem Curiam, whereas it ought to be per eandem Curiam. Upon theſe exceptions the Iudgement was reverſed.

Colſon

Colſon againſt Ree.

Hill. 1649. Banc. ſup.

Hill. 24 Car. rot. 561.

A Writ of Error was brought to reverſe a Judgement given in the Court at Newcaſtle upon Tyne, in an Aſſiſe of Novel diſſeiſin. The Error aſsigned was, that the Plaintif doth declare that the Defendant did diſſeiſe him de uno muro lapideo, and that the Defendant had erected a houſe in the place to his nuſance. The Court anſwered, The Plaintif ought to have brought an Aſſiſe of Nuſance for this wrong, which becauſe he hath not done, let the judgement be reverſed. Error to reverſe a Judgement given in an Aſſiſe. Aſſiſe of Nuſance.

Batisford againſt Yate.

Hill. 1649. Banc. ſup.

Paſc. 1649, rot. 289.

A Writ of Error was brought to reverſe a judgement given in an Action of Trover and Converſion for theſe errors: 1. It is ſaid of the Jurors in entring of their verdict, Dixerunt pro querente: and aly, In the awarding of the Venire it is ideo præceptum fuit, with an, &c. and ſo it is not certain whence the Venire iſſued, as it ought to be. The rule was, the judgement ſhould be reverſed, if cauſe were not ſhewn to the contrary. Error to reverſe a judgement given in a Trover and Converſion. Venire.

Cooke againſt More.

Hill. 1649. Banc. ſup.

Trin. 1649. rot. 645.

Cooke brought an Action upon the caſe againſt More upon an Aſſumpſit, to pay for certain barrels of beer, ſold and delivered unto him ſuch a day. The Defendant pleads ſpecially, that he did not aſſume as the Plaintif hath declared. To this plea the Plaintif demurs, becauſe that by thus pleading the Plaintif is tied up to a particular day: whereas he may give in evidence for any other barrels of beer ſold at any time before the Action brought. The Court ordered cauſe to be ſhewn why the Plaintif ſhould not have judgement upon this demurrer. Demurrer to a plea in an action upon an Aſſumpſit.

Banbury againſt Baſely.

Hill. 1649. Banc. ſup.

Hill. 24. Car. rot. 1062.

This caſe ariſing upon a ſpecial verdict found in an Ejectione firmæ, touching the title of the Manor of Callidowne, being part of Sir Thomas Morgans eſtate that was given to Mr. Pym by Ordinance of Parliament, and heretofore argued on both parts, was again ſpoken to: Firſt by Twiſden Pym. Argument upon the Caſe concerning the Manor of Callidown given to Mr.

den, who argued for the Plaintif; who said, the Question is, Whether the estate setled by Sir Thomas Morgan before the year 1641. be forfeited by the Act of Parliament, and consequently well given to Mr. Pym, or no? And he said, the intent of the Parliament in making this Act is first to be interpreted: and he held, that according to the Act no estate passeth, but such estate as Morgan had in the year 1641. and no more; for no man can forfeit a thing that he hath not, but only that which he hath; but Morgan then had not this estate: and therefore he could not forfeit it. 2ly, There is a priority of vesting the estate in the Parliament, and next from the Parliament to the Trustees, and the Trustees can have no more than is forfeited to the Parliament, and the estate setled before the year 1641. is not forfeited to the Parliament. 3ly, The penning of the Act is considerable; The Act saith all the said lands, that is all the said lands that Morgan had in the year 1641. and not all the lands that Morgan ever had before that time, and had setled; for the precedent words are restrained by the words subsequent, Altams case, 8 Rep. Dyer 369. and from the preamble of the Act to make a construction to punish innocent persons, is against the Law of God, Man, and Nature, Nichols case, f. 398. Of rewards and punishments consist the essence of Commonwealths, and it could not be the intent of the Parliament to punish innocent persons, 3 Ed. 4. 2. The Parliament did not intend to give more of Morgans estate, than what he had 1641. for then they might give that which might be evicted, which they intended not. And whereas it is objected, that there is a clause of Revocation in Morgans settlement, and so the estate was not absolutely setled; It is answered, That notwithstanding this power of Revocation, the estate is not given by this Act unto Pym; for it cannot give a power, 7 Rep. 13. and a power cannot be forfeited, and Mary Morgan had an interest in the land, notwithstanding the power of Revocation. And notwithstanding there is no saving for Mary, yet the estate is not passed; for Mary Morgan is not intended to be punished, Nichols case, Com. f. 483. and so there needs no saving for her, 14 H. 8. f. 2. and it cannot be intended because there is no saving for her, that therefore she shall forfeit her estate, and the saving is not therefore idle; for it hath an operation another way. The saving is not intended of the estate of a Collateral Auncestor only, for this is the begging of the question, for the saving saves not any thing, and the penning of the words are against this exposition: and so he concluded, that nothing was given by the Statute to Mr. Pym, but the estate of Morgan which he had in the year 1641. and prayed judgement for the Plaintif. Steel, the Recorder of London, for the Defendant, said, he would only answer the argument of Twisden, because he had heard no other arguments. And first he held, that the Ordinance reaches all the estates that Morgan had, as well before, as at the time 1641. and the estate setled by Morgan before 1641. was the estate of Thomas Morgan in the year 1641. 2ly. The lands are expressly named which are given by the Statute, & it is not material who hath the estate in them, for certitudo nominis tollit demonstrationem, Dowbty and Dudingtons case, and Mildmayes case, 1 Rep. do interpret how the word others shall be interpreted. And here cannot be said to be any injustice in the Parliament. The Question here is, Whether the estate be setled by the Parliament? and if it be setled, it would be a supposition of injustice, to suppose it is not rightly done. The Law hath invested the Parliament with a power to dispose of all lands, and therefore it cannot be intended injustice; And the estate is not in Mary Morgan notwithstanding the Conveyance, because there is a clause of Revocation in it; for it is a void Conveyance as to her estate, by reason of the clause of Revocation, for that makes it fraudulent. And the estate of Mary Morgan is not passed by the Statute, notwithstanding

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ing the clauſe of eviction in the Ordinance, an if or an an are no ſaving of an eſtate, and here is no eviction in the caſe: and here is no ſaving, otherwiſe their eſtate cannot be ſaved, for then the lands are all paſſed, And the ſaving extends to the lands deſcended to the Children of Thomas Morgan, from Collateral Anceſtors, and not from Tho. Morgan the Father; and as reaſonable a Conſtruction ought to be made of an Ordinance of Parliament as this is, as of an Act of Parliament, and ſo he praid Judgement for the Defendant. Roll chief Iuſtice ſaid He did not doubt of the power of the Parliament in this caſe, but of their meaning, whether they intended theſe lands ſhould be forfeited, or not: And the Ordinance was made by the Houſe of Commons without any proviſo in it, and the proviſo was put in by the Houſe of Lords, and he enclined that Mary Morgans eſtate was ſaved. But Jerman Iuſtice ſaid, he conceived that Maries eſtate was not ſaved, but only the eſtate of ſtrangers. The Court was divided, and ſaid they would conſider till next Term, and then give Iudgement in this and the Caſe of Garret and Blizard.

Quære, What Iudgement was given in both caſes, for I was not in Court at the day they were ſpoken to again.

Vincent againſt VVallis.

Hill. 1649. Banc. ſup.

Hill. 24 Car. rot. 966. rot. 906.

IN a Replevin for diſtraining of Cattel the Defendant emparled, and afterwards pleaded that the lands are antient Demeſne where the diſtreſs was taken, and to this plea the Plaintif demurred. Serjeant Parker for the Plaintif, and againſt the Demurrer held, that the plea is not to be admitted, becauſe that the party hath made his defence, and cannot therefore afterwards plead to the juriſdiction of the Court, and cited 11 H. 4. f. 47. 12 H. 7. f. 17 b. That freehold only is to be ſued for in antient Demeſne. And 2ly, the plea is not ſufficient, for it doth not appear that the lands are held of the Manor, but only are parcel of the Manor, and ſuch lands are pleadable in other Courts, 20 H. 6. Nat. Brev. 11 M. 41 Ed. 3. 3ly, It is not ſaid that the lande are pleadable by Writ of Droit Cloſe, which ought to be 2 H. 7. f. 17. 3 H. 6. f. 146. 4ly. He preſcribes that the lands are not pleadable elſewhere, which is not true, for in ſome caſes they are pleadable here in this Court, Nat. Brev. 19 D. and ſo prayed judgement for the Plaintif. Roll chief Iuſtice demanded, why is there not a ſpecial demurrer here? After imparlance one may plead that the lands are antient demeſne, for a plea of lands in antient Demeſne to the juriſdiction of the Court differs from other pleas pleaded to the juriſdiction of the Court. It is true that parcel of a Manor of antient demeſne is pleadable at the Common Law; but lands held of the Manor are pleadable in the Court of the Lord. Adjourned to be heard Tueſday following. Afterwards it was moved again, and Roll chief Iuſtice ſaid, that after imparlance this plea is not good; becauſe by it he hath admitted the juriſdiction of the Court, And therefore let him ſhew cauſe why he ſhould not plead in chief.

A Demurrer to a plea in a replevin after imparlance.

Plea.

Special Demurrer.

Paſcall againſt Sparing.

Hill 1649. Banc. ſup.

Paſch. 1649. rot. 75.

Error to reverſe a judgement in Debt for Conceſſit ſolvere.

A Writ of Error was brought to reverſe a Judgement given in an Action in Briſtow upon a Conceſſit ſolvere by the Defendant. Roll chief Iuſtice ſaid, that an Action of Debt did well lie upon a Conceſſit ſolvere by the cuſtom of Briſtow, and ſo is it in London, 28 H. 6. 1 E. 4. f. 6. Another Error aſsigned was, that it is ſaid that the party recovered the damages per

Declaration.

juratores Compert. whereas it ought to be Aſſeſſ. for this is the proper word; but this exception was alſo over-ruled. Latch took another exception, that there wants the words pro miſis et cuſtagiis in the aſſeſsing the damages; and ſo it doth not appear for what the damages are aſſeſſed. And

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for this the Iudgement was reverſed except better matter ſhewn.

Iennings againſt Lee.

Hill. 1649. Banc. ſup.

Whether an iſſue well joyned.

GEnnings brought an Action of Treſpals of an aſſault and battery againſt Lee and his wife; for an aſſault and battery made by the wife, the Feme pleads a ſpecial plea of juſtification, that it was in defence of her Husband: The Plaintif replies de injuria ſua propria, upon this there was an iſſue joyned, and a verdict for the Plaintif; it was moved in Arreſt of Judgement that the iſſue was not well joyned, becauſe the replication was not good, and ſo the verdict not good, and ſo there can be no Judgement. Serjeant Parker prays judgement for the Plaintif, for he held the replication was good, and ſo a good Iſſue joyned, and if there be not, yet it is helped by the Verdict, or elſe by the Statute of Jeofails, or if not, yet it is at

Iſſue.

leaſt good in part. And the iſſue here doth imply a negative, although there be not a direct negative, but an affirmative in the words of it. And 6 E. 4, 16 b. in a Replevin, and 9 H. 5. f. 1. b. there are good iſſues joyned in the affirmative, becauſe they imply a negative. Trin. 18 Jac. Banc. reg: Aldridge and Walthalls caſe: and here wants only a Traverſe; which is but only matter of form, and not material. 2ly. The Verdict hath made the iſſue good, although it be not well joyned, 5 H. 7. f. 15. 3ly. If the Verdict helps it not, yet the Statute of Jeofails helps it, 5 Rep. Nichols caſe, 19 Eliz. Dalliſons Reports, 8 & 9 Eliz. Bendloes Reports, and 14 Car. Banc. Reg. 4ly. If the Statute help not, yet it is well enough, becauſe it is good in part, and for part it is well found, and damages ſhall

Damages.

be intended to be given for that which is well found, 9 H. 7. f. 4. 16 H. 7. f. 16. 10 Rep. James and Osburns caſe, 3 Iac. Banc. Reg. Bigrane and Selling, Mich. 1649. Deſmond & Osborn (this caſe the Court denied.) Roll chief

Iſſue.

Iuſtice ſaid, if there be 2 iſſues, and one iſſue is not well joyned, and damages be given entire, this is not good, but will make all naught, 40 Ed. 3. f. 40. 18 Iac. Aldridges caſe. 16 Iac. Iones and Gates adjudged, and he ſaid that the material thing is not here put in iſſue, and ſo the iſſue is immaterial,

Jeofail.

and there is a Jeofail, and the damages being given entire there can be no judgement given. Ierman Iuſtice did differ in opinion, and ſaid, if the Defendant plead an immaterial thing, and the Plaintif joyn iſſue, and it be found for him, he ſhall have judgement; otherwiſe where the plea is partly material, partly immaterial; for there the iſſue ought to be upon the material

rial thing, otherwiſe there can be no judgement. It was adjourned till Thurſday following.

The Caſe was this, An Action of Aſſault and Battery and wounding was brought; the Defendant pleads non cul. to the wounding, and juſtifies the Aſſault and Battery in defence of her Husband, in keeping poſſeſsion of certain lands. The Plaintif replied de injuria ſua propria, and doth not traverſe abſque tali cauſa. The Jury find entire damages for all, whereas there is not a perfect iſſue joyned as to the Aſsault and Battery for want of the Traverſe. Poſtea.

Hodges againſt Iane.

Hill. 1649. Banc. ſup.

IN an Arreſt of Judgement in this caſe, the queſtion was, Whether an Action do lie againſt an Executor upon a Conceſſit ſolvere of the Teſtator upon a ſpecial cuſtom. Roll chief Iuſtice held that it doth not, for this would be to charge an Executor in an Action of Debt, where he may by the Law wage his Law, and an Action of Debt lies not againſt an Executor upon a ſimple contract made by the Teſtator. And he ſaid that the reaſon for Ley gager is, becauſe it is intended that as well as the contract to pay money may be in private, ſo may alſo the payment be made in private. Adjourned.

Whether debt lie againſt an Executor ſur conceſſit ſolv. of the Teſtator.
Wager of Law.
Debt.
Executor.

Graves againſt Drake.

Hill. 1649. Banc. ſup.

IN an Action of Trover and Converſion for divers parcels of Houſhold ſtuff, an Exception was taken to the Declaration, becauſe the Plaintif amongſt other things had declared pro ſex parcellis plumbi cinerii Anglice Pewter Porringers: whereas the word parcellis is uncertain; for a parcel doth conſiſt of many things in number, and ſo ſex parcelli cannot be properly applyed to ſix Porringers, but if it had bèen ſex peciis it had been better, though that be alſo incertain. Hales held it was all one as if it had bèen pro ſex peciis plumbi Cinerii. Roll chief Iuſtice enclined it was well enough, becauſe, though the words are not ſo proper, yet the deſcription is good enough. Ierman Iuſtice was of the ſame opinion. But Nicholas Iuſtice held that the Latin is not good, for if there be proper words for a thing, they ought to be uſed, otherwiſe Barbariſm will be induced; and circumlocution ought not to be uſed where there is a proper Latin word to be had to expreſs a thing. Ask Iuſtice agreed with Roll the chief Iuſtice: And the Plaintif was bid take his Iudgement, except better matter were ſhewn to the contrary.

Arreſt of Iudgement in a Trover and Converſion.
Declaration, Words.

Hobſon againſt Hudſon.

Hil. 1649 Banc. ſup.

HObſon brought an Action upon the caſe againſt Hudſon for ſpeaking theſe words of her, viz. She went to the Wells to be cured of the French Pox. Upon Not guilty pleaded, and a verdict found for the Plaintif, the Defendant moved in Arreſt of Judgement, that the words are not actionable,

Arreſt of Iudgement in an action for words.

nable, becauſe they are incertain words, and doe not expreſs that the Plaintif had the French Pox at the time of the ſpeaking of them, and the cauſa dicendi ſhall not make them actionable. Shaſtoe on the other ſide ſaid the words are actionable; for theſe words thou haſt been laid of the Pox, have been adjudged actionable, which are not ſo ſcandalous as theſe, Mich. 7 Iac. Thou art a Pocky whore, and the Pox hath eaten out the bottom of thy belly, were held actionable. Roll chief Iuſtice ſaid the words required conſideration; but the words ſeem to imply that the party did believe that ſhe had the French Pox, elſe ſhe would not have gone to be cured, and ſo they are ſcandalous. Ierman Iuſtice ſaid, intentions ſhall not make words actionable, and therefore he conceived they are not actionable. Nicholas Iuſtice ſaid, he conceived them prima facie to be actionable, for words ſhall be taken according to the common intendment, and an Action on the Caſe may ſometimes be brought upon words ſpoken by implication and interrogation. Aſk Iuſtice held they were actionable. But the Court ſaid they would adviſe. Poſtea.

Hill. 1649. Banc. ſup.

For quaſhing an Endict-ment.

The Court was moved for the quaſhing an Endictment, for ſuffering one to eſcape that was taken for Felony; But the Court would not quaſh it though there was cauſe, but ordered the Defendant ſhould plead to it, becauſe they believed he had compounded with the Felon.

VVyat againſt Harbye.

Hil. 1649. Banc. ſup.

Mich. 1649 rot. 426.

Error to reverſe a Judgment in Debt at Barneſtable.

A Writ of Error was brought to reverſe a Iudgement given in the Court at Barneſtable in an Action of Debt upon an Obligation. The Error aſsigned was, that the place alleged for the payment of the mony, ſued for is out of the juriſdiction of the Court. It was anſwered, that it is ſaid to be at Chitlehampton aforeſaid, and it doth not appear whether Chitlehampton be within the juriſdiction of the Court, or where it is, and therefore it ſhall be intended to be within the juriſdiction. Roll chief Iuſtice ſaid, the Declaration is, that the Obligation was at Barneſtable, and the plea is that it was at Chichley which is a forein plea, and the plea is not ſworn, neither is there any demurrer upon the plea; but the plea is received, and day given to ſwear it, and for not ſwearing it accordingly, a

Iudgement.

judgement is given againſt the Plaintiff by default, whereas it ought to have been a Iudgement upon a nihil dicit for want of a plea, and he ſaid

Forein plea.

alſo, that if one plead an inſufficient plea, although it be a forein plea, it is not neceſſary it ſhould be ſworn. The Iudgement was ordered to be reverſed, except cauſe ſhewed to the contrary.

Iones againſt Blunden.

Hil. 1649. Banc. ſup.

Mich. 1649. rot. 34.

A Writ of Error was brought to reverſe a Judgement given in the palace Court at Weſtminſter in an Action of Aſſault and Battery. The Caſe was this, an Action was brought for an Aſſault and Battery in Surry; The Defendant pleads a plea of juſtification in Middleſex: The Plaintiff replyed that he beat him in Southwark, (which is in Surry) de injuria ſua propria abſque tali cauſa, and this iſſue was tryed by a Jury of Midleſex. The queſtion was whether it were a good tryal. The Court would adviſe. Poſtea.

Error to reverſe a Judgement given in the palace Court at Weſtminſter.

Tryall.

VVatſon againſt Norbury and others.

Hil. 1649 Banc. ſup.

VVAtſon brought an Action upon the Caſe againſt Norbury a Commiſsioner upon the Statute of Bankrupt and others, for the breaking of his houſe, and taking away his goods upon pretence of the ſaid Commiſsion, whereas he was no Bankrupt, by reaſon whereof he was empaired in his credit, and hindred in his Trade, and declares to his damage, &c. The Defendant pleads that the Plaintiff had heretofore brought an Action of Treſpaſſe againſt him for the ſame treſpaſſe, and goods taken, and had recovered damages againſt him. To this plea the Plaintiff demurred; And upon the demurrer the queſtion was whether this plea pleaded by the Defendant be a good plea in abatement of the writ of Treſpaſſe, upon the Caſe now brought, or not? Shafto of Councel with the Plaintiff argued that the plea was not good, becauſe the matter in this Action upon the Caſe, and the matter of the former Action of Treſpaſſe are not all one; but are ſeveral and various matters, and therefore ſeverall Actions may be brought for them, 5. rep. f. 43. Sparies caſe, Hob. 493. The Earl of Bedfords caſe, 4. rep. Slades caſe, Petty Brook 105. 4. rep. f. 43. Hudſons caſe, 11 Ed. 2. Fitzh. Treſpaſſe 107. 2 R. 3. f. 14. 18 E. 4. f. 23. 20 H. 7. f. 9. 12 E. 4. f. 13. Fitzh. eſtopel 58. 7 H. 4. f. 44. And the variances here between the Action upon the Caſe, and the Action of Treſpaſs prove that they are not all one: And that there is a difference it is plain; for in this Action upon the Caſe, it is ſaid that the Defendant did enter into the Plaintiffs houſe malitioſe; but in the former Action of Treſpaſs it was ſaid, that he did enter vi et armis, which is a plain difference and variance, 8 H. 6. f. 27. Cooks Entries fol. 59. And the matters pleaded upon Record in theſe ſeveral Actions do not deſtroy one another; but may well ſtand together, Paſc. 2 Car. Laicon and Barnards caſe: And here this Action of the Caſe is to repair the Plaintiffs credit; but the former Action was to recover damages, for his goods taken from him. An abduxit of Cattel will maintain a chaſing, and one may therein recover for the chaſing, and the value alſo, ſo here both Actions may ſtand together. And there is matter for both Actions, and the matter pleaded in Bar is but to encreaſe the damages, and if the ſpecial matter alleged in the Action of Treſpaſſe alleged in the Action upon the Caſe had been leſſe, yet it is well enough, and it is but ſurpluſage, and only by way of inducement to prove

Demurrer to a plea in Treſpaſſe upon the Caſe.

Abatement.

the ſcandal, and the Defendant here is not at any miſchief, for the words here are only put in aggravation of dammages, 7 H. 6. f. 34. and ſo prayes judgement for the Plaintiff. Green of Councell with the Defendant prayed the Writ might be abated. Becauſe 1. here is not any thing laid, that the Defendant hath poſitively affirmed the Plaintiff to be a Bankrupt. 2ly. There are general words in the former Action, namely alia enormia, which words do comprehend the matter for which this Action is now brought, and he denyed the differences taken by the Councell on the other ſide. And it doth here appear to the Court, that the former Action of Treſpaſſe was brought for the ſame things, and damages were therein given for them, and it is unreaſonable to puniſh one twice for one and the ſame offence, and the averment is good, and doth ſhew that both Actions are for one and the ſame cauſe, and he hath recovered damages already for all the wrong he ſuſtained, and here is no converſion alleged in the Caſe, nor is it vi et armis, and the Law hates double veration, 9 H. 6. f. 54. Brook brev. 397. 3 H. 7. 4. Brook brev. 77. and damages might well enough be recovered in the firſt Action, for all the damages ſuſtained, 19 H. 6. f. 44. And if this Action now brought, had been brought for calling the Plaintiff Bankrupt, the Action would have lien; but not as it is here brought, and one entire Action ſhall never be divided to put the party to a double veration, as it is in our caſe, 41 Aſſ. pl. 16. Brook brev. 309. 5. rep. Hudſons caſe, and in the firſt Action the words alia enormia were purpoſely put in, that all matters touching that Treſpaſs might be brought in queſtion, to encreaſe the damages, 9 E 4. Brook Treſp. f. 109. and ſo all the damages were recovered in the former Action. And he agreed Laicons caſe put by Shafto, that the Plaintiff might recover damages as well for the value of the Sheep, as for the chaſing of them, and prayes the Writ may be abated. Roll chief Juſtice ſaid, it is hard to maintain Laicons caſe; for cepit et abduxit intends that the owner hath not the Sheep again, otherwiſe it would be if the Action had been for the driving of them only. And Mr. Shafto hath taken a good ground, viz. that the Actions are for ſeverall things, and the Declaration is in part but an inducement to increaſe the ſcandall, and to prove it, and the words alia enormia ſhall not be intended of collateral matter, but of matter incident to the Act done; And one and the ſame thing may give ſeveral cauſes of Action, and one Action is not to be confounded with another Action. Ierman Juſtice ſaid, Laicons Caſe was not like this Caſe for the queſtion here is whether the Plaintiff can recover damages in this ſecond Action, which he hath by intendment recovered in the former Action, and he inclined that it may be ſo here, and that there is a recovering of the ſame damages in divers manners for the ſame thing. Nicholas Juſtice ſaid, he may bring ſeverall Actions, although he might have joyned them both in one. Aſk Juſtice ſaid, That one Act may be divided into divers Actions, and ſo it is here, and well enough. Roll chief Juſtice ſaid, the Plaintiff in this Action cannot recover damages for his Goods, ſo that this Action is brought for another matter. Therefore plead in chief if cauſe be not ſhewed to the contrary, for the Action doth well lye.

Meers againſt French.

Hil. 1649. Banc. Reg.

Arreſt of judgement in an ejectione firmæ.

IN an ejectione firmæ, and a verdict for the Plaintiff, The Defendant moved in arreſt of Judgement, that there is no certainty in the Declaration

tion neither of the place nor of the quantity, nor of the quality of the Land whence the Plaintiff was ejected, for it is e duobus Acris fundi, Anglice, a hopground, which is not warranted by the Latin, and so it is incertain, and it is also dimisit unum crostum, and a peice of Land, and the quantity is not expressed, for it is per estimationem sive plus sive minus, & medietatem sive unam partem is also incertain. Twisden answered, it was certain enough, because it is expressed by a certain name. But Roll chief Justice said, it is good in grants; but not in a Declaration: for there is required more certainty, and the Anglice here doth not help it, for the Anglice is not to interpret a Latin name by which it is called. And the sive plus sive minus is also ill; but if it had been so many Acres per estimationem, it had been good. Therefore advise better of it. Antea. Declaration. Grant.

Vaux and Vaux against Draper.

Hill. 1649. Banc. sup.

Entred Trin. 1649. rot. 1104.

VAux and Vaux brought an Action upon the Case against Draper, upon a promise, and declared, that the Defendant in consideration of ten pounds paid by the Plaintifs unto the Defendant, did assume and promise unto the Plaintifs, to procure certain Cattel of the Plaintifs taken from them by a third person, to be redelivered unto them by such a time, and for not performing this promise they brought their action. Upon Non assumpsit pleaded, there was an issue joyned, and a verdict found for the Plaintifs, after this case had been twice spoken unto, The Defendant moved in arrest of Judgment, that this Action was not well brought joyntly by the Plaintifs, but that they ought to have brought two several Actions, in regard that the promise upon which the Action was founded was not an entire promise, but was a several promise made to each of the Plaintifs. The Councel on the other side prayed for Judgement, and said the promise was intire, made to both, and not several, and so the Jury have found it, which shall be intended to be true: and if it should not be so, it would be disadvantagious for the Defendant. Hales said on the other side, that the assumpsit is several, and the acts to be done by the Defendant to the Plaintifs are several, although the assumpsit sounds as a joynt assumpsit. Roll chief Justice said, That the Consideration given is entire and cannot be divided, and there is no inconvenience in joyning in the Action in this case; but if one had brought the Action alone, it might have been questionable. Nicholas and Ask Justices of the same opinion. But Jerman Justice differed, and said, that they are several promises, viz. to deliver such Cattel severally to each of them, as did belong properly to them, and so there must be two several Actions. But Judgement was given for the Plaintif, except better matter shewed. Antea. Arrest of Judgement in an action upon the case, upon a promise. Joynt action.

Spry against Mill.

Hill. 1649. Banc. sup.

Pasch. 1649. rot. 208.

IN a Writ of Error brought to reverse a Judgement given in a Trover and Conversion at Launceston in Cornwal, upon a nihil dicit, Prestwood moved Error to reverse a judgement in a trover and conversion.

Abatement. moyed, that the record is not certified; for it is returned by one who is not Judge there; for it is returned by the Maior, Aldermen, and Deputy-recorder, whereas the writ of Error was to return a record before the Maior, Aldermen, and Recorder, 1 E. 5. f. 3. Jordan and Tompkins case, 1648. Upon this the writ of Error was abated.

Wats against Dix.

Hill. 1649. Banc. sup.

Trin. 24. Car. rot. 1529.

Argument whether a lease well made according to direction of a Deed in trust. THis case was again argued, by Hales for the Plaintif, and by Twisden for the Defendant. I could not hear Hales but imperfectly; Therefore I omit his Argument. Twisden, that argued for the Defendant, put the case briefly thus. A Feofment was made of lands to I. S. in fee, until he should make a lease of 21 years to A. B. from the feast of Philip and Iacob; I. S. makes a lease for 21 years, to begin at the feast of Philip and Iacob, And he held this was a good Lease, made according to the direction of the Deed. 2ly, If it be not a good Lease, yet the use shall not revert to the Feoffor. 3ly, He held that there is neither a good bargain and sale, nor doth it work by way of use. For the first point he held, if it had been by way of pleading, it had not been good in pursuance of the Agreement: otherwise it is being found by verdict; but here the agreement and the intention of the parties is satisfied, and the variance is not considerable, & de minimis non curat lex, 10 Iac. Hob. f. 120. 38 E. 3. f. 7. Waste 35. 2ly, In the Judgement and estimation of men, at and from are accompted to be all one in signification. In the Stat. of 32 H. 8. it is so taken, and in the Stat. of 27 H. 8. of enrollments, and words shall be Construed according to common intendment. And if there be a variance, yet the use rests in the Feoffees, and shall not revert to the Feoffor: for the word until, is an Adverb of time, Borastons case; Sir Andrew Corbets case, 11 Rep. f. 85. Dyer 300. 3 Eliz. Mores Reports, 3 Iac. Sir Guy Fairfax case: if they make not the estate, the estate remains in them. And if it do not remain in the Feoffees, yet it cannot revert to the Feoffor, for he hath conveyed from himself all the estate that he had, and if it return to the Feoffor, it is a disseisin, 2 Rep. Butlers case; And for the bargain and sale, that cannot be good; for here is no Consideration, but that which is past, and not continuing, which is no good Consideration, Plow. Com. 302. 15 Car. Burton and Sherly. 2ly, The Consideration, if there be any, is not meritorious, for ought any thing appears, the monies may not be discharged which are laid out, and so the Defendant remains unsatisfied, and so there can be no Consideration, Allens case, 23 Car. 3ly, If the debt be discharged, yet it cannot raise a use, for here is no monies paid but a debt; And a use is not raised here, because it was the intent of the parties to pass the land by way of bargain and sale, Ed. Foxes case, 13 Eliz. Plowd. 32. 11 Car. Whitfield and Pierce, rot. 438. And if one intend to pass an estate out of himself, he may do it either by the Common law or by Statute law. Roll chief Justice said, if lands are passed for money only the deed ought to be enrolled; but if it be for money and natural affection, it is not needfull to enroll it, but the lands will pass without enrolment. And so here the land passes one way or other; and if the use will rise all the other points are out of doores. And there is here a continuing consideration to raise a use. But the main question is whether the use riseth to the Feoffor, if not, all the other points are gone. And he held

Enrollment. Vse.

that

that here was only a meer matter of truſt, & the intent is not that the Feoffees ſhall have any thing by the not performing the truſt, but the uſe ſhall be to the Feoffor. And there can be no diſſeiſin in the caſe. And here is a material difference in point of law, in the making of this leaſe, for it is made for one day more then was agreed by the deed, for that leaſe was to begin from the feaſt of Philip and Jacob; and this leaſe is made to be begin at the Feaſt of Philip and Iacob. Jerman Juſtice held, that the intent of the parties is performed, and that there is no material difference, and held for the Defendant. Nicholas Juſtice ſaid, here is no performance of the agreement, for all the parties agreed not to this Leaſe, for it is made for longer time than was agreed; and he held that the uſe ſhall be to the other parties by contingency, and that here is no diſſeiſin. Ask Juſtice ſaid, all the difficulty is whether the leaſe be made or not; and he held it was a good leaſe according to the agreement, and ſaid that the intent is not that the Feoffees ſhall have any thing, but that it ſhall reſult to the Feoffor. Roll chief Juſtice ſaid, the intent of the parties ſhall not be implyed againſt the direct rules of Law. Nil capiat per Billam niſi, &c. Leaſe. Intent.

Pendarvis againſt Dawkes.

Hill. 1649. Banc. reg.

PEndarvis brought an Action of Accompt againſt Dawkes for divers ſums of mony as his receiver. The Defendant pleads that as to all except ten pounds ne unques receptor; upon this an iſſue was joyned, and a verdict found for the Plaintif. The Defendant moved in arreſt of Judgement, that it doth not appear what ten pounds they are that are menrioned in the plea; and ſo it is incertain whether they be part of the monies, for which the Action is brought, Roll chief Juſtice ſaid, he ought to have expreſſed what ten pounds it is, for as it is, it is incertain, and ſo not good. Therefore take a venire facias de novo, for though the iſſue be not well joyned, yet the Declaration is good. Arreſt of Judgement in Accompt. Venire de novo.

Cowley againſt Locton.

Hill. 1649. Banc. reg.

Trin. 24 Car. rot. 932.

IN a writ of Error to reverſe a judgement given in an Action of Debt upon an Obligation the caſe was this. One was bound in an Obligation (for the payment of certain ſums of money) to a Feme ſole, the Feme takes Baron and dies. I. S. takes out Letters of Adminiſtration of the goods and Chattels of the Feme, and brings an Action of Debt upon the Obligation againſt the Obligor. The Obligor pleads that by the enterma-riage of the Feme the Debt due upon the Obligation became due to the Baron, and demands Judgement Si Actio, To this Plea the Plaintif demurs. The Court ſaid this Debt due upon the bond became not due to the Husband, for it is a thing in Action, and therefore the plea is not good. Writ of Error to reverſe a Judgement in Debt. Choſe in Action.

Iones againſt Blunden.

Hill. 1649. Banc. ſup.

Mich 1649. rot. 34.

Whether a good tryal or no.

THis Caſe formerly ſpoken to was again moved by Wild, who held, that in regard that the matter triable ariſeth from two places, and ſo the venire may be from both places; yet it is well enough if it be from any of them, and the Court hath jurisdiction in both places, and therefore the tryal is well enough in this caſe. Twiſden on the other ſide ſaid, that here are two iſſues in tryal, and ſo it is not within the Statute of Jeofails; for that is of force only where one iſſue is tryed. Roll chief Iuſtice anſwered, here are not two iſſues, for you have made them one by pleading, and ſo it is within the Statute of Jeofails, and helped by it. Ierman Juſtice to the ſame intent; and ſo Nicholas and Ask Iuſtices. Roll chief Iuſtice ſaid, that the iſſue is joyned upon the matter ariſing in both places, and yet it is well enough; for the principal matter was in St. Clements Danes. Therefore let the judgement be affirmed, except better matter be ſhewn. Antea.

Iſſue. Jeofails.

Adſtone againſt Hunter.

Hill. 1469. Banc. ſup.

Arreſt of Iudgement in an Action on the Caſe.

ADſton brought an Action upon the caſe againſt Hunter and his Wife for theſe words ſpoken of the Plaintif by Hunters wife, viz. Iane Adſtone did bewitch my good man, innuendo her Husband. Upon Not guilty pleaded, and a Verdict found for the Plaintif, it was moved in Arreſt of judgement that the words were too general, and uncertain, to raiſe any ſcandal, and therefore an Action could not be brought for ſpeaking of them. Shaftoe of Councel with the Plaintif held that the words are actionable, becauſe they declare an Act or thing done, and the party is ſcandalized by the words, 4 rep. Ieames his caſe, and the words my good man are words well known to expreſs her Husband by, as 7 Iac. to ſay, Thou art a healer of Felons, was well underſtood to mean a Concealer of Felons; and if the words good man be incertain, yet they are certain enough to ſhew that ſome body is bewitched, for the Act done is certainly enough expreſſed, and the Plaintif is thereby ſcandalized, and beſides it is after a Verdict, and by it they are made certain, and damages are given for ſpeaking them, Mich. 15 Car. Com. Banc. Stones caſe rot. 26. Roll chief Iuſtice ſaid, Theſe words, Thou haſt bewitched a man are actionable, & it is ſcandal to ſay, One hath killed a man by Witchcraft, and he held the words actionable. Ierman Iuſtice ſaid, they could not be actionable, becauſe by this there is no act of witchcraft expreſſed. Nicholas Iuſtice ſaid, the words are not actionable for thou haſt bewitched one may be ſpoken in a good ſence, & words are but wind, & ſpoken in paſſion ſometimes, and other times in Jeſt or merriment. Ask Iuſtice ſaid, that the words tend to ſcandal as they are ſpoken, and ſhall be intended that ſhe hath bewitched one by Diabolical Art; And Roll chief Iuſtice ſaid, It is not neceſſary to aver what Act of Witch-craft was done. And theſe words, Thou haſt bewitched me and my Aunt have been adjudged Actionable in this Court. It was adjourned to be argued again the next term.

Caſe.

Averment.

Hill.

Hill. 1649. Banc ſup.

The Court was moved to quaſh an Order of a private Seſsions of the peace, that was removed hither by Certiorari. The Order was, that one ſhould contribute to half the charge towards the keeping of a Baſtard Child, becauſe he did ſuffer a Souldier to get the Child upon the body of his Maid ſervant. The Court ſaid this was not within the Statute of 18 Eliz. and therefore let the Order be quaſhed. To quaſh an Order of a private Seſſions of Peace.

Hill. 1649. Banc, ſuper.

A Prohibition to the Court of the Admiralty was prayed for Binckes a Clark of this Court for libelling againſt him there for proſecuting a matter at the Common Law, which they pretend to belong to their Court, and for granting an injunction againſt him to ſtop his proceedings. The Court anſwered there is no libel here, this is but a citation to appear, and is no Injunction againſt him; but becauſe upon the citation there appeared to be matter of Prohibition contained in it, A Prohibition was granted. For a prohibition to the Admiralty.

Saunderſon againſt Raiſin.

Hill. 1649. Banc. ſup.

Upon a rule to ſhew cauſe why a Judgement ſhould not be reverſed, the Court was moved that the Roll wherein the Error aſsigned was might be amended according to the Original which is right, though the Niſi prius Roll be not ſo. Holhead on the other ſide prayed there might be no amendment, but the Judgment reverſed, for if Judgement be given upon an erroneous Declaration, which is the ground of the Action, as it is here, it is not good, nor is amendable. The Court anſwered, this is the fault of the Clark, who had the original before him, which is the ground of all, and by which he ought to form the Declaration. But the matter is that here it is after a Verdict, and it will be perillous to attaint the Jury, though it being the Clarks fault, it be amendable. But let it reſt till the next term, and in the mean time we will adviſe. To amend a Record after Errors aſsigned. Amendment.

Williamſon againſt Mead.

Hill. 1649. Banc. ſup.

Mich. 1649. rot. 428.

Williamſon brought an Action upon the Caſe againſt Meade, and declared upon three Aſſumpſits made by the Defendant to the Plaintif, that the Defendants ſon ſhould pay ſuch a ſum of money to the Plaintif for his boarding with him, when he ſhould be thereunto required; upon non Aſſumpſit pleaded, and a verdict for the Plaintif, the Defendant moved in Arreſt of Judgement, That the Plaintif doth not ſhew that he did require the Son to pay the ſum of money, which the Defendant did aſſume ſhould be paid upon requeſt; but only ſaith that the Defendant licet ſæpius requiſitus non ſolvit. The Judgement was arreſted till cauſe ſhould be ſhewn to the contrary. The ſame day it was moved again, and the Counſel urged Arreſt of Judgement in an action upon an Aſsumpſit.

Request. urged that the request was not necessary to be made, and prayed for judgement. But Roll Chief Iustice answered, that this was a collateral promise, and therefore the request must be averred to be made to the Son. Therefore the Plaintif can have no judgement, and so nil capiat per billam was ruled to be entred.

Hudson.

Hill. 1649. Banc. sup.

For time to assign Errors. The Court was moved that there was a scire facias issued out to certifie Errors, and time was desired to assign them. But the Court answered, the bringing of the writ of Error is delay enough; and therefore if you have not assigned the Errors according the rules of the Court, they shall not be now accepted.

Dewick against Bamber.

Hill. 1649. Banc. sup.

That an Attorney might be forced to plead. Plea. Appearance. The Court was moved upon an Affidavit that the Defendant might plead and goe to tryal, because his Attorney hath appeared; and now he saith he is not an Attorney of this Court, and doth refuse to plead. Roll chief Iustice answered, If he hath appeared, and yet will not plead, enter your judgement against this Clyent, and though he have not appeared, if he did promise to appear we will force him to doe it

VVhitchurch against Pagot.

Hill. 1649. Banc. sup.

To be restored to a Clerks place in the Custos Brevium Office. Restitution. The Court was moved in the behalf of Whitchurch a Clerk of this Court, that he might be restored to his Office in the Office of the Custos brevium, according to an Order of this Court, otherwise that he may have liberty to bring his Action against the Custos brevium. The Court answered, that the Master of the Office is answerable for all his Clerks, and hath power over them, and they are not Officers but meer Servants, and therefore there is no remedy to be had in Law against him, but in Conscience he ought to restore him. Therefore let him shew cause next Term why he should not be restored.

In Michaelmas Term 1654. After divers motions and hearing what was objected on both sides, upon his submission in Court to Mr. Paget the Master of the Office he promised to restore him.

Mich 1649. Banc. sup.

Arrest of Iudgement for pleading per Guardianum. The Court was moved in Arrest of Judgement that the Plaintif was 19 years old, and sues per guardianum, which ought not to be; for after he is 17 years years old he ought to sue per Attornatum suum. The Court answered, this is no good exception, for if he be within the age of 21 years, he may sue per guardianum, and he is admitted by the Court to doe so. And therefore let the Plaintif take his Iudgement.

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Bigford against Topsam.

Pasc. 1649. Banc. sup.

Mich. 1649 rot. 85.

A Writ of Error was brought to reverse a Judgement given in an Action of Debt upon an obligation with the condition for the payment of a certain sum of money after the return of the Ship, to the Port of Plymouth. The Defendant pleaded a special plea, to which the Plaintiff demurred, upon this demurrer the Judgement was given for the Plaintiff, upon which Judgement the writ of Error was brought. Wadham Windham assigned for error, 1. That there issued a pone out of the Court of Plymouth, returnable the 1 of March, and the Defendant did not appear till the 8 of March, and so there is a discontinuance. Hales of Councell on the other side, answered, that the Plaintiff had accepted of a Declaration, and so that fault is helped. The Court answered, the acceptance of the Declaration doth not help it; But the Record is not so, therefore passes ouster. A 2d. Exception was, that there is no bail taken, for it is erroneous bail, and so shall be accompted no bail. The Court answered, this is not material here. A 3d. Exception was, that it is said that the plea was held before the then Maior, and doth not shew that he was elected. The Court answered, it is well enough as it is, though it might have been otherwise. It was adjourned.

Error to reverse a judgment in debt.

Discontinuance.

Bail.

Custodes Libertat. &c. against Mountain and Lydal.

Pasc. 1649. Banc. sup.

AN information was exhibited by the Attorney generall against the Defendants for engrosing divers Acres of Corn. They pleaded that they had been heretofore prosecuted in the Court of the Exchequer, and were acquitted thereof. To this plea the Attorney general demurred, and these reasons were shewed why the plea was not good. 1. It is not pleaded that they were acquitted by judgement, or upon a verdict, or upon a former information exhibited against them. 2ly. It doth not appear that the Exchequer had jurisdiction of the cause. 3ly. There could be no information duly exhibited, for it is said to be the 10. of September, which is out of the Term, and so the Court did not sit. 2ly. there is no issue joyned, for the Plaintiff saith, ponit se, &c whereas it being by way of recital, ought to have been posuit se, and the other saith petiit quod inquiratur per patriam. 3ly. There is no verdict in the Case, for the issue is non culp. contra Statutum, and the verdict is non est culp. juxta Statutum. 4ly. There is no judgment, for it is eat ad præsens, and it ought to be iret ad tunc. 5ly. There is no averment, that the first information was for the same offence. 6ly. The information ought to be in the same County, by the Statute of 21 Jac. and the Barons of the Exchequer are not Judges by the Statute. and so prayes Judgement against the Defendant. Hales of Councell with the Defendant answered to the third exception. That in the Exchequer there is a Court the 10. of September to receive informations, although it be out of the Term time. And he said there is a good issue joyned, and a good verdict, for the words juxta et contra in this place have one and the same sence.

Demurrer to a plea to an information for engrossing.

And the Judgement is alſo good. And the information was well brought in the Exchequer, notwithſtanding the Statute of 21 Jac. for the offence was in Midleſex where the Exchequer is. Alſo if the Judgement be not good by reaſon of Error, yet it ſhall be accompted good, till it be avoided by plea: And although it be erroneous, yet here is a diſcontinuance; for Mich. 24 Car. St. John was chief Juſtice of the Commons Pleas, and not ſolliciter, as the plea ſuppoſeth. The Court anſwered, that they cannot take notice of that: And here is no iſſue joyned, nor any continuance to part of the plea pleaded by the Defendant, and the demurrer goes not to the plea, upon which the party puts himſelf upon the Country, and there is no demurrer to that. The demurrer is referred to the laſt plea, and not to all, and ſo there is a diſcontinuance to part, and the firſt Judgement is not void, untill it be avoided by plea, and here the fact was done in the County where the Exchequer is, and ſo the Barons are Judges of it by the Statute, and a fine that is voideable is not void, untill it be made ſo by pleading. And if you cannot anſwer the diſcontinuance, all the reſt is to no purpoſe, therefore take time to anſwer that. It was ſaid alſo by the Court, that the Defendant may remove an information exhibited againſt him, out of any County to the Courts at VVeſtminſter, notwithſtanding the Statute.

Void and voideable. Diſcontinuance. Certiorari.

Hamond againſt Kingſmill.

Paſc. 1649. Banc. ſup.

Arreſt of in an action for words.

HAmond a Juſtice of peace brought an Action upon the Caſe againſt Kingſmill, for ſpeaking theſe ſeveral words of him, viz. Mr Hamond did of his own head put into Mores confeſſion that he ſtole the Lambs. And aly. That he was a debauched man, and is not fit to be a Iuſtice of Peace. Upon not guilty pleaded, and a verdict for the Plaintiff, The Defendant moved in Arreſt of Judgement that none of the words were actionable, or at leaſt the laſt words are not, and ſo Judgement cannot be given. For the firſt words he ſaid, they ought to be taken in mitiori ſenſu, and they may have a good conſtruction, viz. that he framed the confeſsion without being helped by any other body. And for the ſecond words that he was a debanched man they cannot touch his office at the preſent, Mich. 24, & 25. Eliz. C. Banc. 1. becauſe they are ſpoken in the preterperfectence, & not in the preſent tence. The Court ſaid that the words, was a debauched man, are incertain words. Therefore take Iudgement for the firſt words, and nil capiat per billam for the ſecond, except cauſe ſhewed to the contrary.

Iennings againſt Lee.

Paſc. 1649. Banc. ſup.

For a repleader becauſe an immaterial iſſue joyned.

IEnnings brought an Action of Aſſault and Battery againſt Lee, The Defendant pleaded non cul. to the Battery, and pleaded a ſpecial juſtification as to the Aſſault. It was prayed there might be a repleader granted, becauſe the iſſue joyned is immaterial. The Councel on the other ſide prayed for Judgement. Wild held, that there is an Iſſue joyned, for the Record ſaith ſo, and the Jury have found the Iſſue, and if it be ill, it is not helped by the Statute, and ſo there can be no Judgement. All iſſues are not joyned by an expreſſe affirmative, and an expreſſe negative, for if it be but by implication it is good enough. An immaterial Iſſue is not helped

helped by the Statute; but an informall iſſue is helped, and here the iſſue is immaterial, 32 Eliz. Lovelace and Griffin, rot. 934. Trin. 22 Car. Coles caſe, rot. 932 Banc. Reg. 23 Car. More and Clipton, and prayes for a repleader. Serjeant Parker on the other ſide ſaid, the caſes cited were not to the purpoſe as to the Caſe at the Bar, for here is a good iſſue joyned to one thing pleaded, if not to the reſt. Roll chief Iuſtice held, that where there is an immaterial iſſue, there ought to be a Repleader, and it is not helped by the Statute, and there can be no Judgment, for the matter is not putin tryal, and for this cauſe, it would be unreaſonable to give Judgement, and this is an immaterial iſſue, Trin. 9 Car. entred Mich. 8 Car. rot. 366. Tayler and Sparks, an affirmative and an implyed negative make a good iſſue, though it be not an expreſs negative. Therefore replead.

Repleader. Ieofail. Iſſue.

Hurd againſt Lenthall.

Hill. 1649. Banc. ſup.

Entred Mich. 1649. rot. 568.

VPon a ſpecial verdict in an ejectione firmæ, The Caſe upon the words of a Will was this, Lands were devised to two daughters equally to be divided, and to the Survivor of them, and to the Heirs of the Body of the Survivor of them. Maynard held that here is a joyntenancy, becauſe otherwiſe the Will cannot take effect in all parts. Hales held that there is a tenancy in Common, and not a joyntenancy, nor any croſſe remainders. Roll Chief Iuſtice ſaid, That the words equally to be divided in a Will, do make a tenancy in Common by conſtruction, but in a grant it would be otherwiſe; but here upon the entire Will it doth not appear that the Lands ſhould be divided; but that there ſhould be a Survivor. And the Land was intended for a ſecurity for a portion, and that the devise ſhould ſtand till the monyes ſhould be paid. And in a Will the laſt words of it do explain the firſt words; but it is not ſo in a grant. All the Iudges agreed in opinion with the chief Iuſtice, and Iudgement was given for the Plaintiff niſi cauſa, &c.

Queſtion upon the words of a will whether a joyntenancy or a tenancy in Common. Ioyntenant. Tenant in common. Will. Grant.

Paſc. 1649. Banc. ſup.

THe Court was moved for a Certiorari, to the Lord Maiors Court of the City of London to remove an information exhibited in that Court, againſt a Woodmonger of London, grounded upon an Act of Common Councell. The Court anſwered, we cannot do any thing in it, if it ſhould be removed hither, if it be grounded upon an act of Common Councel; but if the Act of Common Councell be againſt Law, we may grant a Certiorari. Adjourned till Friday next to hear Councell on both ſides.

For a certiorari to the Lord Maiors court of London. Certiorari.

Lamb againſt Duff.

Paſc. 1649. Banc. ſup.

VPon an Affidavit the Court was informed that Lamb had arreſted Duff after a verdict found for Lamb againſt him, to the intent, that he may have him in Cuſtody, when the Iudgement is entred againſt him, and

For falſe practice.

for no other cauſe, as appears by his own confeſſion, & it was therefore prayed the party may be ſet at large. The Court made anſwer, that this was a ſtrange and an irregular courſe, and ought not to be. If one take out a latitat againſt one, and have no cauſe of Action againſt him, the party may have an Action of the Caſe for it. Take an attachment if he will not diſcharge the party, or elſe let him ſhew cauſe to morrow why he ſhould not diſcharge him.

Caſe.
Attachment.

Hollingworth againſt VVhetſtone.

Paſ. 1649. Banc. ſup.

HOllingworth brought an Action of Debt upon a ſingle obligation againſt Whetſtone, The Defendant pleaded payment of part of the ſum, ſince the Action brought, in Bar of the Action. To this Plea the Plaintif demurred. The Court anſwered the plea was not good in Bar of the Action; but in abatement of the Writ it had been good. Therefore let the Defendant ſhew cauſe why Iudgement ſhould not be againſt him upon the demurrer.

Demurrer to a plea in debt upon a ſingle obligation.
Bar.
Abatement.

Gibbon againſt Kent.

Paſch. 1649. Banc. ſup.

Paſch. 24 Car. rot. 60.

A Writ of Error was brought to reverſe a Iudgement given in the Common Pleas, in an Action of Debt brought upon the Statute of 2 Ed. 6. for the not ſetting forth of Tithes. The Errors aſsigned were, 1. That it doth not appear that the Lands ſowed do lye in the Pariſh that is laid in the Declaration. 2ly. The Plaintiff hath not intitled himſelf well to his Action, for the Statute of 38 H. 8. is taken away by the Statute of 13 Eliz. 3ly. The Statute is not well pleaded, for it is pleaded too generally, and not in the ſeveral circumſtances thereof, as it ought to be. The Court commanded the Record to be read, and upon Dyer of it, anſwered, That 2 Churches united by the Statute, are both of ſpiritual promotion. And the Statute of 12 Eliz doth not repeal the Statute of 38 H. 8. But let the party ſhew cauſe why the Iudgement ſhould not be reverſed, and let us ſee a book.

Error to reverſe a judgement in debt upon the Statute of 2 Ed. 6.
Repeal.

Burton againſt Low.

Paſc. 1649. Banc. ſup.

Mich. 1649. rot. 27.

AN Action of Debt was brought upon a Bond taken by a Sheriff, for the Defendant to appear in Chancery upon an Attatchment iſſued out thence againſt him. The Defendant pleads the Statute of 23 H. 6. That the Sheriff ought not to take Bonds of any, but in ſpeciall caſes, and that this Bond is void, becauſe it is taken againſt the Statute. To this plea the Plaintiff demurred. The queſtion was whether an Attatchment out of the Chancery, be within the Statute of 23 H. 6.

The

Demurrer to a plea in debt upon a Sheriffs Bond.

4. 81. 364.
30. 2. Cro. 286. 208.

The Court ordered cauſe to be ſhewn why Iudgement ſhould not be given for the Plaintif upon this Demurrer. Poſtea.

Edwards againſt Fallowes.

Paſch. 1649. Banc. ſup.

EDwards brought an Action upon the Caſe againſt Fallowes for ſpeaking of theſe words of him, viz. Edwards hath ſtollen my Axe from my Wood Pen, and for cauſing him to be bound over to the Quarter-Seſsion. It was moved in Arreſt of Iudgement that the words were not Actionable. But the Court held they were actionable, and gave Iudgement for the Plaintif, Niſi cauſa, &c. Arreſt of Iudgement in an Action for words.

Viccarye againſt Barns.

Paſch. 1649. Banc. ſup.

rot. 1724.

VIccarye, being a Mercer by his Trade, brought an Action upon the Caſe againſt Barns for ſpeaking theſe words of him, viz. Thou art a Cuckold, and a Cuckoldly Raſcall, and doſt owe more than thou art worth, and art not able to pay thy debts: Upon non culp. pleaded, and an iſſue joyned, and a verdict found for the Plaintif, it was moved in Arreſt of Iudgement, that the words are not actionable; for, for the firſt part of the words they are clearly not actionable, and for the latter words they do not imply any ſhifting fraud or falſhood, and ſo cannot imply him to be a Bankrupt; for though he doe owe more than he is worth, and is not able to pay his debts, yet he may be an honeſt man, and he may have credit and friends to ſupport him in his trade. Apes and More, Paſch. 15 Car. and Iones and Iacob, 24 Car. The Court anſwered, here is no fraud or deceipt implyed, which do make a Bankrupt within all the Statutes touching Bankrupts; and if there be a ſpecial loſs alleged, the words will be actionable, otherwiſe not. But let Iudgement ſtay till the other ſide move, and bring us a book, for the words are worthy conſideration. Poſtea. Arreſt of Iudgement for words. Bankrupt.

Barneſtone againſt Gale.

Paſch. 1649. Banc. ſup.

AN Action of Treſpaſs was brought for chaſing of the Plaintifs Hogs; the Defendant by way of juſtification pleads a ſpecial plea, viz. That he did hunt them with a Dog by the command of his Maſter, becauſe the Plaintif did put them into his Maſters ground to eat the Acorns there. The Plaintif replyed that he had Common there: Upon this an Iſſue was joyned, and a Verdict found for the Plaintif. The Defendant moved in Arreſt of Iudgement upon this exception, that the Plaintif in his replication hath not anſwered the bar, for he preſcribes only for Common of Paſture, and pannage is no paſture, and ſo he hath no right to the Acorns. But Roll chief Iuſtice ſaid, If they have cauſe to eat the Graſs, they may alſo eat the Acorns there, for they may be on the grounds, and therefore it is a good juſtification. And therefore let the Plaintif have Iudgement, except cauſe be ſhewn to the contrary. Arreſt of Iudgement in Treſpaſs. Replication.

Bolton againſt VVills.

Paſch. 1649. Banc. ſup.

Arreſt of Iudgement in an Action upon the Caſe upon an Aſſumpſit.

AN Action upon the Caſe was brought upon an indebitatus Aſſumpſit for a hundred and ninety Weathers ſold by the Plaintif unto the Defendant at 18 s. a Sheep, which in all amounts to 190 l. Upon an Iſſue joyned, and a Verdict for the Plaintif, It was moved in Arreſt of Iudgement that the Declaration is not good, but miſtakes the promiſe, for the Weathers promiſed to be paid for, do not amount to the ſum for which the Declaration is laid. And alſo the iſſue is taken upon the immaterial part of the plea, and the matter well pleaded is waived. The Court anſwered, That miſtaking of a Iudgement is a miſtake of the Clark, and is not material; but here the Declaration it ſelf is miſtaken, and that is material; for the Action is grounded upon the promiſe in Law, upon the ſale of the Sheep, and not upon any new Contract, and by the ſale there wants 2 s. in every Sheep to make up the ſum demanded, therefore the Declaration is repugnant. Nil capiat per billam, niſi, &c.

Amendment.

Declaration.

More againſt the *E*arl Rivers.

Paſch. 1649 Banc. ſup.

Mich. 1649. rot. 588.

Argument againſt the plea of Peerage.

VVIlſon of Councel with More the Plaintif, argued againſt the Plea of Peerage pleaded by the Earl Rivers, as it is pleaded, and took theſe Exceptions. 1. It appears not here by the Return by what Warrant the Earl was committed, and brought hither, and ſo he hath no day in Court, and ſo the Plea is not good. 2ly. It is not ſhewed by virtue of what Warrant he was taken. 3ly. The Plea is, 1. In abatement of the writ. 2ly. In avoidance of the Act of the Iudge, and the latter ought not to be queſtioned by Plea. 3ly. There is no Plea, but bare words, for he pleads the Common Law. 4ly. He pleads his Patent as Earl, only by way of Argument. 5ly. He ought to ſhew the writ under the Seal, teſtifying the matter, 8 H. 6. f. 9. 6ly. The inveſtiture of the Earldom is the livery and ſeiſin of the Earldom, and he hath omitted the pleading the Ceremonies of the inveſting, and ſo he doth not ſhew that he is an Earl. By the Statute Law, viz. of E. 3. a Capias was given in debt, and before that a Summons was the proceſs. The Councel on the other ſide ſaid they had demurred to the Plea, and ſhewed the cauſe of their Demurrer; but the Court reproved them, becauſe they had ruled the matter in Law ſhould be argued at the Bar to enform their own Iudgements. Adjournatur Poſtea.

Capias.

Summons.

Syms againſt VVilſon.

Paſch. 1649. Banc. ſup.

Paſch. 23 Car. rot. 120.

Demurrer to a Plea in Bar in an Action upon the caſe.

SYms brought an action upon the Caſe upon the Statute of Monopolies againſt Wilſon. The Defendant pleaded the Statute of limitations of Actions

Actions in Bar of the Action to this Plea, the Plaintif demurred. Hales held that this action grounded upon the Statute is not within the Statute of limitations of Actions of 21 Iac. becauſe it is not a meer Action on the Caſe at the Common Law, but an Action upon the Caſe grounded upon the Statute of Monopolies. But Twiſden on the other ſide ſaid that a Monopoly is an offence at the Common Law, for which an Action of the Caſe did lie before the Statute, and that the Statute was made but to inflict a greater puniſhment for the offence, and ſo it is within the Statute of limitations of Actions. And 2ly. the very words of the Statute ſay, that all Actions ſhall be brought within ſix years, and he that ſays all without limitation, excludes none, and by conſequence this Action is not excluded. 3ly. The end of the Statute of limitations was to quiet ſales, and therefore the Statute ſhall be largely interpreted, becauſe made for ſo publique a good. Adjourned to the next term to be argued again.

Monopoly.

Statute of limitations.

Paſch. 1649. Banc. ſup.

Upon a verdict given againſt a Hundred, that was ſued in an Action upon the Statute of Wincheſter of Hue and Cries, It was moved for the Hundred in Arreſt of Judgement, that the Hundred was ſued by Bill, whereas it ought to have been ſued by Original. But the Court over-ruled the Exception, and ſaid that there are many Preſidents to prove that ſuch Actions may be commenced as well by Bill as by Original.

Arreſt of Judgement in an Action upon the Statute of Wincheſter.

Bill.

Original.

Paſch. 1649. Banc. ſup.

Letchmore moved to quaſh an Inquiſition taken againſt one upon the Statute of Weſt. 2. for the throwing down of Encloſures. But the Court anſwered, that it was not proper to move to quaſh the Inquiſition, becauſe the Defendant came in upon proceſs, and therefore he muſt either traverſe or plead to the Inquiſition. Letchmore replyed, that the Inquiſition was ſo uncertain, that the Defendant could not tell how to plead to it. But the Court anſwered, he might plead to the Diſtringas, And that the monies already levied for the offence ſhould reſt in the Sheriffs hand until the tryal.

To quaſh an Inquiſition denied.

Plea.

Traverſe.

Hamond againſt Ireland.

Paſch. 1649. Banc. ſup.

Hill. 1649. rot. 818.

Upon a Verdict given in an Ejectione firmæ, It was moved in Arreſt of Judgement, that the Plaintif declares that the Defendant ejected him ex uno Cottagio, whereas an Ejectione firmæ lies not of a Cottage, no more than a præcipe quod reddat lies of a Cottage. But the Court anſwered, that an ejectment doth lie of a Cottage, becauſe the deſcription of the thing by that name is ſufficient and certain enough to ſhew the Sheriff of what to deliver the poſſeſſion of; yet it was ſaid that a recovery lies not of a Cottage. Rethorick and Chapels caſe 10 Iac. was cited that an Ejectione lies of a Cottage, and alſo a præcipe quod reddat.

Arreſt of Judgement in an Ejectione firmæ.

Ejectment.

Recovery.

Wood

VVood against Topham.

Pasch. 1649. Banc. sup.

Arrest of Iudgement in an action upon the case.

VVOod brought an Action upon the Case against Topham, quare filium suum & hæredem rapuit et maritavit, and obteined a Verdict against the Defendant. In Arrest of judgement moved for the Defendant, these exceptions were taken against the Declaration. 1. That it doth not say hæredem apparentem, but only filium & hæredem. 2ly. It doth not say rapuit contra voluntatem, but only rapuit. 3ly. It doth not set forth that the heir was within age. 4ly. It doth not say Cujus maritagium ad ipsum pertinet. But the last Exception only was insisted upon. Wilmot of Councel with the Plaintif, to prove that that Exception was not material, cited one Grayes case Pasch. 29 Eliz. Banc. reg. and the Books of 12 H. 4. f. 16. and 23 E. 3. Brook Tit. Trespass 43. But Hales urged that the last Exception

Case.

was not answered. Roll chief Iustice said, That an Action quare filium & hæredem suum rapuit will lie, although the heir be of full age; for the Father hath the mariage of his Son although he have no estate to leave unto him. Adjourned to the next Term. Postea.

Dawkes versus Payton.

Pasch. 1469. Banc. sup.

Pasch 1650. rot. 306.

Error brought in the Upper Bench upon a Iudgement given there.

AN Infant brought an Action in this Court, and had a Verdict and a Iudgement, the Defendant brought a writ of Error in the same Court to reverse this judgement, and it was assigned for Error that the Infant brought his Action in propria persona, whereas he ought to have sued per guardianum, and this is Error at the Common Law, and is not helped by the Statute of Jeofails; and it was argued that the writ of Error may be well brought in this Court to reverse a judgement given here, if the Error assigned be matter in fact, as it is in this case, for by such a writ of Error the judgement of the Court is not called in question, as it

Error.

would be if the Error assigned were matter in Law; and these Books were cited, viz. 7 H. 6. 28. Dyer 136. Mich. 25, & 26. Eliz. Banc. reg. Hales on the other side argued that the writ of Error did not lie. And he made 2 questions, 1. Whether the writ of Error did lie at all. 2ly. If it did lie in an other Term; and he said, that admitting the writ of Error doth lie, yet it ought to have been brought the same Term wherein the judgement was given; but so it is not here, and therefore it is not well brought: And 2ly. If the Error assigned be Error, yet it is helped by the Statute of 21 Iac. of Jeofails. But if it be not, yet the Error assigned here is not assignable; for it doth not appear whether the party appeared per guardianum or not, for the party is a privileged person. The Court answered, we cannot know whether the party be within age or of full age, and therefore know not whether he ought to appear by Attorny or by Guardian; but for Error in matter of fact, in a judgement given in this Court, a writ of Error will lie here well enough, and it is all one whether the writ be brought the same Term, or in another Term. But bring us Books and we will advise. Postea.

Viccarye

Viccarye againſt Barnes.

Paſch. 1650. Banc. ſup.

AN Action upon the caſe was brought by a Mercer againſt the Defendant, for ſpeaking theſe words of him, Thou art a Cuckold, and a Cuckoldly Raſcal, and art not able to pay thy debts, and art not worth a Groat. The Plaintif had a Verdict, and upon a motion in Arreſt of judgement, becauſe the words were ſuppoſed not actionable, the judgement was formerly ſtayed till the Plaintif ſhould move. At this day Pepes for the Plaintif prays for judgement, becauſe he held the words were actionable, and cited one Bragges Caſe, adjudged, and ſaid that the Plaintif had laid a ſpecial damage by the words. Windham on the other ſide ſaid, That the Plaintif had not laid any ſpecial damage as Pepes ſuppoſeth, but only allegeth a general damage, namely, that he by ſpeaking of the words loſt his credit, and could not buy wares upon truſt as he uſed to do before, but only for ready money, and ſo there can be no iſſue joyned. Ierman Juſtice held the words actionable, and alſo Roll the chief Iuſtice, for he ſaid it was a hinderance to him in his Trade to be ſo ſpoken of, although they bring him not within the Statute of Bankrupt, and he cited 11 Car. Jackſon and Hewes his caſe, where an Action was brought by Jackſon being a Grazier, againſt Hewes, for ſaying of him Thou art a baſe beggarly Rogue, and art not able to pay thy debts. Nicholas Juſtice held the words actionable, but Ask Iuſtice doubted, for ſuch words may peradventure be true, if they be ſpoken of a young Tradeſman that begins with little, And ſaid that the chief queſtion is whether the averment of the damage be well alleged; and he held it was not, becauſe it was ſo general that no iſſue can be joyned upon it. Roll chief Juſtice ſaid, the words are found by the Verdict to be ſpoke falſo et malitioſe, And therefore let the Plaintif have his Judgement except better matter be ſhewed.

Arreſt of Judgement in an Action upon the Caſe for words.

Paſch. 1650. Banc. ſup.

AN Information was exhibited in this Court againſt one for engroſsing of Hay, the Defendant appeared and pleaded to the information, the Plaintif moved that the Defendant might be ordered to carry the cauſe down to be tryed at the Aſsizes at his own charge. But the Court anſwered that they could make no ſuch Order, becauſe the ſute was not upon an Endictment, which is at the ſute of the Cuſtodes, but upon an Information, which is at the ſute of the party.

For the Defendant to try an Information at his own charge denied.

Indictment.

Information.

Cater againſt Startute.

Trin. 1650. Banc. ſup.

Hill. 1649. rot. 1025.

THe Plaintif brought an Action of Debt upon an Obligation to ſtand to an award: The Defendant pleaded that there was no award made; The Plaintif replies that there was an award made, and ſets forth the award, and aſsigns the breach; Upon this the Defendant demurs, and for cauſe ſhews that part of the award was, that one of the parties ſhould

Demurrer to a replication in debt upon an Obligation to ſtand to an award.

make ſuch a general releaſe to the other as Councel ſhould adviſe, ſo that the Councel are made Arbitrators, in regard that a judicial act is referred to them, which ought not to be; for the Arbitrators cannot delegate their authority to others, and 8 E. 4. f. 10 was cited to this purpoſe. But Wild on the other ſide ſaid, that the referring of the making of the releaſes to Councel was warrantable, becauſe it is but a miniſterial act, and not a judicial, as is objected. Roll chief Iuſtice ſaid, that there is no judicial thing left for the Councel to do, but only a miniſterial act, and therefore it is well enough; but it had been otherwiſe had it been a judicial act, for that had bẽn for the Arbitrators to delegate their authority to others, which is not warrantable, becauſe it is contrary to the ſubmiſsion of the parties, but to delegate a miniſterial act is not contrary; And with him the Court agreed, and ordered the Plaintif to take his Iudgement, except better matter were ſhewn Saturday next.

Miniſterial. Judicial.

Dawkes againſt Payton.

Trin. 1650. Banc. ſup.

Paſch. 1650. rot. 306.

Error to reverſe a judgement in the Upper Bench upon an iſſue directed out of the Chancerie.

AN Action was ordered out of the Chancery to be tryed in this Court; Whereupon the cauſe was tryed, and a Iudgement upon a Verdict was given for the Plaintif. The Defendant brings a writ of Error here to reverſe this judgement. The firſt queſtion was, whether it did ſufficiently appear by the Record, whether the party did appear in perſon or by Guardian. Hales held that it did not appear, but that it belongs to the other party to ſhew it; for he ought to have all the Record upon which the Error is aſsigned. A ſecond queſtion was, Whether the Error aſsigned, if it be Error, be not helped after a Verdict by the Statute of 21 Iac. Hales held, that however the party appeared, whether by Guardian, or in proper perſon, it is helped by the Statute of 21 Iac. and cannot be aſsigned here for Error, and the writ of Error that is brought is as well to reverſe the judgement given here, as the former judgement given in Chancery, which cannot be, for this Court cannot reverſe their own Iudgement, except it be for Error in proceſs, 17 H. 6. 2. 44. 7 H. 6. f. 28. nor can this Court reverſe their own judgement for Error in fact, becauſe it is to overthrow their own act, yet the Chequer chamber may doe it; yet there it is more proper to appeal to the Parliament; and he ſaid, that the Caſes of 2 Rich. 3. f. 1. and Dyer 175. cited, to be reſolved, have been ſince diſputed, and ſo prayed the writ of Error might abate. Roll chief Iuſtice ſaid, that for the firſt matter, whether it appears by the aſsignment of the party, whether the appearance were per Guardianum, or otherwiſe, we will not imagin either Attorney or Guardian in the Caſe, but that he appeared in propria perſona, becauſe nothing to the contrary appears by the Record, and if it be otherwiſe you ought to have ſhewn it. And for the matter, whether it be Error to appear by Attorney, where the party ought to appear by his Guardian, he held it was Error, and that it is not helped by the Statute of 21 Iac. becauſe it is more dangerous for an Infant to appear in propria perſona, or per Guardianum, than per Attornatum; for againſt an Attorney he may have remedy, but not againſt himſelf or his Guardian; and this is caſus omiſſus out of the Statute. And as to the queſtion, whether this Court may reverſe their own judgement, he held, that they may for Error in matter of fact, as the caſe here is, though they cannot for Error in matter in Law, as was adjudged, Mich. 25. rot. 96. and Mich. 5 Jac. in Watkins and Giffins caſe, and if it ſhould not be

Appearance.

Error.

Caſus omiſſus

ſo here, the party would be without remedy, for he can have no remedy in the Chequer Chamber, and there is no preſident in Parliament he to relieved there, and it is neither againſt reaſon nor any Rule of Law for this Court to do it. Upon this the Counſel moved to quaſh the writ of Error upon an exception taken to it, as it was entred in the Record, but becauſe it was but a miſ-entry, the writ it ſelf being right, the Record was ordered to be amended by the Writ. Amendment.

Roberts and Tucker.

Trin. 1650. Banc. ſup.

Paſch. 18. Car. rot. 116.

THe Court was moved to quaſh a writ of Error, becauſe the writ was to remove a Record coram Majori et Recordatori, whereas the Record certified was a Record coram Majori et Deputato recordatori. Roll chief Juſtice, the Record is not well removed, why may you not have a new Certificate upon the ſame writ? But that cannot be, and therefore you muſt have a ſpecial writ directed to remove the Record before the Major and the Deputy Recorder; for if there be a ſpecial cauſe to alter the uſual form of a writ, the Curſitors ought not to hold themſelves to the old preſidents, but are compellable to alter them if the caſe require. Therefore let the writ be abated, and take another Writ. Vid. antea. To quaſh a Writ of Error. Alteration. Abatement.

Shertlife againſt Tymberlye.

Trin. 1650. Banc. ſup.

Hill. 1649. rot. 438.

SHertlife brought an Action of Debt againſt Tymberlye upon an Obligation, the condition whereof was, that the Defendant ſhould ſave the Plaintif harmleſs from ſuch a perſon, & ſhould releaſe unto him all his right in certain goods: The Defendant pleads that he had ſaved the Plaintif harmleſs, and had releaſed unto him all his right in the goods, and to this plea the Plaintif demurred, and ſhews for cauſe that the Defendant ought to have ſhewed how he had ſaved the Plaintif harmleſs, becauſe the condition was in the affirmative. To which the Court agreed, becauſe he might have pleaded generally in the negative, viz. non damnificatus, and that had been good, and therefore judgement was given againſt the Defendant. Demurrer to Plea in debt upon an Obligation to ſave harmleſs. Non damnificatus.

Hobſon againſt Hudſon.

Trin. 1650. Banc. ſup.

HObſon brought an Action upon the Caſe againſt Hudſon for theſe words, Thou wenteſt to the Wells to be cured of the Pox: The Plaintif had a Verdict againſt the Defendant, who moved in Arreſt of Judgement that the words were not actionable, becauſe they were too general and uncertain. But Roll chief Juſtice, and Nicholas and Ask Juſtices held they were actionable. But Ierman Juſtice doubted, becauſe the party that went to the Wells to be cured might ſuſpect he had the Pox though Arreſt of Judgement in an Action for words.

he had them not, But Iudgement was given for the Plaintiff.

Elſy againſt Mandit.

Trin. 1650. Banc. ſup.

Paſc. 1650. rot. 409.

Arreſt of judgement in an action for words.

ELſye brought an Action upon the caſe againſt Mandit for ſpeaking theſe words of him; Thou Sirrah art a rogue and a run-away rogue, and didſt run away from Oxford, and art a rogue upon Record at Oxford. The Plaintiff upon not guilty pleaded had a verdict, the Defendant moved in arreſt of Iudgement that the words were general, and uncertain, and not actionable the Court thereupon ſtayed Iudgement till the Plaintiff ſhould move. The Plaintiff at another day moves by, Hales of his Councell for Iudgement, who ſaid that the words are actionable, or at leaſt ſome of them, for thou art a rogue upon Record are actionable words, and that is part of the words. The Court enclined alſo that they were actionable, yet would adviſe. Poſtea. The ſame Term Indgement was given for the Plaintiff.

Chaſe and Iones againſt Lovering.

Trin. 1650. Banc. ſup.

Arreſt of judgement in an action upon the caſe upon a promiſe.

Averment.

CHaſe and Iones brought an Action upon the caſe againſt Lovering, upon a promiſe made by the Defendant to the Plaintiffs to pay unto them 84 l. out of the fraight of the Ship and for not paying it the Plaintiffs bring their Action. Upon non aſſumpſit pleaded there was an iſſue joyned, and a verdict found for the Plaintiffs. The Defendant moved in arreſt of Iudgement, & allegeth for cauſe, that the Plaintiffs averment in their Declaration of the non payment of the 84 l. is not good, for it doth not appear by the averment that there was any fraight due for the Ship, out of which the monies were to be paid. Roll chief Iuſtice anſwered, that the Plaintiff ought to have averred that there were monies due for the fraight of the Ship, otherwiſe how can it be known whether there be any monyes due to be paid out of them, therefore the averment is very incertain, to whom Ierman Nicholas and Ask Iuſtices agreed. Roll Chief Iuſtice added, that it is part of the promiſe that the mony ſhall be paid out of the fraight, and as the averment is; the matter cannot ſtand together, and here is no demand for the monyes to be paid out of the fraight. Therefore againſt the Plaintiff let there be a nil capiat per billam entred.

Blackden againſt Harvye.

Trin. 1650. Banc. ſup.

Hill. 1649. rot. 928.

Demurrer upon a plea after imparlance.

BLackden brought an Action upon the Caſe, upon an indebitatus aſſumpſit to pay unto him 9 l upon delivery of certain Cloath againſt Harvy as Executor of I. S. The Defendant appeared and imparled; and after imparlance pleads in abatement of the Writ, that I. S. made other Execu-

tors

cutors together with the Defendant, who ought to have been named in the Writ. The Plaintiff demurs, and for cause shews, 1. That the Plaintiff doth not shew what goods the Defendant administred, nor at what time he administred any, as he ought, and 6. Iac Edwards and Foyes case was cited to prove it. A second cause of the demurrer was, that the plea in abatement of the Writ is after imparlance, which is not good, because it is touching a thing in the Defendants knowlege, and so he might have pleaded it before imparlance, as it is 35 H. 6. f. 36. Ierman Iustice absente Roll answered, that the first exception is not material; but he held that the second was a good exception, and that the Defendant cannot plead in abatement after imparlance, for by his imparlance he hath admitted the Writ good. Therefore plead in chief if cause be not shewed to the contrary on Friday next. Abatement.

VVinter against Barnard.

Trin. 1650. Banc. up.

VVInter brought an Action upon the Case against Barnard, and declared, that upon the rumor that a Bastard Child was drowned. The Defendant said to the Plaintiff, I do verily believe the Bastard Child was thine, nay it was thine; upon not guilty pleaded an issue was joyned, and a verdict found for the Plaintiff: It was moved in arrest of Judgment that the words are not actionable, as they are laid for that it doth not appear that there was a Bastard Child drowned, for the Declaration is that there was only a rumor, that a Bastard Child was drowned. But all the Court agreed, that by the conference set forth in the Declaration, it is agreed that there was a Bastard Child, and it is a scandal to the party, whether there were a Bastard Child or no, and if there were none, you ought to shew it on the Defendants part. Therefore let the Plaintiff have his Iudgement. Arrest of judgement in an action for words.

Elsy against Mandit.

Trin. 1650. Banc. sup.

Pasc. 1650. rot. 409.

THe Case of Elsy and Mandit was again moved, wherein the Plaintiff had a verdict against the Defendant, in an Action upon the Case brought against him, for speaking these words of him; Thou Sirrah art a rogue, and a run-away rogue, and didst run away at Oxford, and art a rogue upon Record at Oxford; upon a motion in arrest of Judgement, Judgement was stayed till the Plaintiff should move. Hales now moved for Judgement, because the words are actionable, for they make the Plaintiff to be such a Rogue as may be endicted within the Statute, and receive corporal punishment; But Twisden denyed it. Roll chief Iustice held it was within the Statute. Yet the Court would advise. In this case Ierman Iustice said, That if one say that another is forsworn in a Court of Record, the words are not actionable; but if he say that he is forsworn upon Record, the words are actionable. But Roll chief Iustice held there was no difference between the words, but that they are both Actionable. Antea et Postea. Arrest of judgement in an action for words.

More

More againſt the Earl Rivers.

Trin. 1650. Banc. ſup.

Mich. 1649, rot. 588.

Earl Rivers caſe touching privilege of peerage.

MOre Arreſted the Earl Rivers by a bill of Midleſex in a plea of Debt. The Earl was therupon brought before Mr. Iuſtice Nicholas to put in bail, and not being able to put in ſufficient bail according to the courſe of the Court, was committed to the cuſtody of the Mareſchal of the Marſhalſea, the Earl being in cuſtody brings himſelf into Court by a habeas corpus, and there pleads his privilege of his peerage, and ſayes, that he ought not to be arreſted, and demands Iudgement of the Writ, and prayes to be delivered; to this the Plaintiff demurred. Hales of Councel with the Earl argued to divers points, but I could not here him well. But the main queſtion he inſiſted upon was, whether that by taking away the houſe of Lords in Parliament, whereby their voice and place in Parliament was gone, the Privilege of his peerage not to be arreſted for Debt, was alſo taken away, and he argued that it was not, for he ſaid, that at the Common Law, no capias did lye againſt a Peer, and the Statute of E. 3. which gave a capias for Debt againſt others, did not give it againſt a Peer, and it doth appear here that the Defendant is really an Earl, and not in nomination only, and he cited 27 H. 8. 22. The reaſons he ſaid why an Earl had the privilege not to be arreſted, are two. The firſt is in reſpect of the dignity of his perſon, being called comes a comitando rege (as ſome have thought,) and he is called by the King conſanguineus noſter. The ſecond is in reſpect of the preſumption of his ſufficiency of eſtate in lands to be ſummoned by, and not by reaſon of his place in Parliament, for they have the privilege not to be arreſted, as well in the vacancy of Parliaments, as when the Parliament doth ſit, and the privilege of Parliament is that he ſhall not be ſued; but the privilege of peerage is, that he ſhall not be arreſted in his perſon, and ſo they are diſtinct privileges, and by taking away the Lords houſe, the former privilege is taken away, but not the latter, and this privilege (annexed to the perſon) not to be arreſted, may belong to a perſon that hath not the privilege of Parliament, as for example unto Widowes of Peers which could not be arreſted, and yet had no place in Parliament, ſo that the excluding them from the Parliament doth only take away their privilege of Parliament, and not their privilege of peerage, and Nevills caſe is, that the privilege not to be arreſted belongs to them in reſpect of the dignity of their perſons, 9 Rep. Salops caſe. And it hath been a queſtion whether comes be ſo called a comitando rege, or in reſpect of their Counties whereof they were Earls, and I conceive the latter derivation is the truer, and then the taking away the King takes not away their privilege, for the Counties remain. 2ly. Earls have by intendment ſufficient freehold to enforce them to come in, and anſwer at this day, and therefore are not to be arreſted, and impriſonment of a mans perſon for debt, was but a ſuppliment to make him anſwer where he had not ſufficient freehold, which we cannot intend here, Nat. brev. f. 93. And an Earl ſhall be amerced higher than another man, in regard of the preſumption of his freehold, and Earls are called majores Barones in this reſpect, 7 E. 4 Nevils caſe, and the widow of an Earl had the privilege not to be arreſted, for the two very reaſons that her husband had it, ſo was it of a

Capias.

Biſhop

Bishop, Abbot, and Prior of England; but otherwise it was of a Bishop that had a Bishoprick out of England. And the late Statute that takes away the Kingly office doth not take away their names, and dignities, nor the presumption that they have freeholds, and therefore they are not to be arrested, and their will be since the Act, no more a failer of right than there was before, and so he prayed the Writ might be abated. Roll chief Justice answered, your Clyent ought to have prayed the Writ might have abated, before he was turned over to the Marshall of this Court, for then he was in Midlesex where he was arrested; but now it is too late, for now he is in custodia Marescalli, and any body that hath cause of Action against him may declare against him. Jerman Justice said, that the Writ is now determined, which you pray to have abated, so your prayer is to no purpose. Roll chief Justice said, that the dignity of the person of an Earl may relate to him as he is Peer of the Parliament, and the other presumption that he hath sufficient freehold may also fail; but it doth not appear here by averment that he hath not freehold, therefore it may be a question whether there shall be intended a failer of Justice, for want of freehold, if the party should not have been arrested, and he agreed that an Earl as a Peer of Parliament had a double privilege, one of his person to be free from arrests, the other of his Estate to be free from sutes, and he said, if it had appeared by averment that the party had freehold, it had been good without doubt to free him from arrests. Jerman Justice said he is now in custodia, and the Declaration against him is good, and now it is too late to claim his privilege. Nicholas in all points was against the privilege. Roll chief Justice asked, what say you to them that have Declarations on the by against the Earl, for certainly they are good whether he be rightly committed or not, for they are not to examine his commitment, and therefore surely it is now too late to speak in abatement of the Writ.

Abatement.

Declaration.

Arrests.

Declaration.

Nayler against Ash.

Trin. 1050. Banc. sup.

Hill. 23 Car. rot. 611.

NAyler brought an Action upon the Statute of 5 Eliz. against Ash in this Court for using the Trade of a Draper, and upon not guilty pleaded there was an issue joyned, and a verdict found for the Plaintiff. The Defendant moved in arrest of Judgement, and took two exceptions to the Plaintiffs Declaration. 1. That the Statute doth not name the trade. 2. That it being a popular Action, it ought to have been brought in the County where the offence was committed, and not in this Court. To the 1. Exception the Councell on the Plaintiffs side answered, that the trade is comprised in the meaning of the Statute, because it was a trade used at the time of the making of the Statute. And to the second he answered, that notwithstanding that the original processe issued out of this Court, yet the tryal thereupon was in the County where the offence was done, and the remedy that the Statute intends, is made use of by the tryal being in the County where the offence was done. Roll chief Justice answered, we directed you to search for presidents, but you have not done it. But I conceive the Statute is not satisfied, for it says that the party shall not be compelled to appear out of the County, and here he is compelled, and this is not helped by the verdict, to which the Court agreed.

Arrest of judgement in an action upon the Statute of 5 El. for using the trade of a Draper.

Appearance.

Ernely.

Ernely againſt Allen,

Trin. 1650. Banc. ſup.

Mich. 1649. rot. 351.

Error to reverſe a judgement in a Trover and Converſion.

ERnely brought an Action of Trover and converſion againſt Allen, for taking away, and converting to his own uſe divers of his goods, and Chattels, and amongſt others he declares for the Trover and Converſion de ducentis ponderibus, anglice waight, medicamenti, anglice drugs; the Plaintiff had a verdict, and a Judgement, and entire damages given for all the things laid in the Declaration. The Defendant brought a Writ of error to reverſe this Judgement, and aſsigns for Error, that the words de ducentis ponderibus, anglice waight, medicamenti, anglice drugs, mentioned in the Declaration are incertain, and ſo the damages being given intire for all, it was not good. Wadham Windham of Councell with the Plaintiff in the Writ of Error, held the words to be incertain, both in reſpect of quantity, as alſo in reſpect of the quality or nature of the drugs, for the word pondus may ſignifie a pound, an ounce, a dram, a ſcruple, or any other waight, ſo that the waight cannot be known. And the anglice waight is as incertain as the Latin word pound, for waight may ſignifie as many different waights as the Latin word pondus may; But it might have been otherwiſe, if it had been anglice a ſtone, or a weigh, which were words certainly known what they mean; but here a waight of drugs is not underſtood by the Druggiers. And for the words they ſhall not be ſaid to be void, ſo that there are no damages given for them, for the words are not like to the words duodecem duodena fili, for they are adjective words; but the words here are ſubſtantive, and ſignifie by themſelves. And the word medicamentum alſo is as incertain as the other words, and the anglice drugs doth not make it more certain, for a drug is of as an incertain ſignification as the word medicamentum, for all vegetable creatures, and extractions out of them, as alſo out of the living creatures, made uſe of in phyſick, either by themſelves, or elſe compounded one with another, are called drugs, and ſo he prayed the Judgement might be reverſed. Maynard on the other ſide ſaid, that the words joyned with the anglice were certain enough, for pondus ſignifies a waight, which word is well and commonly known amongſt the Druggiers how much it contains, and he cited one Pennyes Caſe, where decem ponderibus without an anglice was held good; and one Wardners Caſe 21 Iac. in this Court. Next for the word medicamentum being joyned with an anglice, it is a good word to expreſs drugs, for of it ſelf it is no Latin word to ſignifie any certain thing, and here is no incertainty in the matter, for it may be brought to a certainty to the Juries underſtanding, and it is not neceſſary to expreſs the matter like a Scholar, or a Philoſopher, but only as they are known by tradeſmen according to common underſtanding. And in an Action brought amongſt other things, for a Library of Books, which is more incertain, Judgement was given for the Plaintiff, and Melhuis Caſe, where the Declaration inter alia was pro decem ponderibus ferri, ten tuns of Iron, was agreed between the parties, and Laurence and Turners Caſe, Mich. 23. Iac. in Trover and Converſion, pro tribus ponderibus lani, was naught, becauſe it was without an anglice. Serjeant Glin argued to the ſame effect on the ſame ſide. Hales on the other ſide ſaid, that notwithſtanding the anglice the Declaration was incertain. And it is not like the caſes de tribus

pon-

ponderibus, Anglice, weights of Cheese, or Salt, or stone weight of Cheese. And the word medicamentum is as uncertain as the other word, for it signifies divers species of things. But Roll chief Iustice held, that the Drugs were well expressed by the words in the Declaration in the vulgar and usual acceptation of the words; and for the word weight it is also well known amongst Tradesmen. Nicholas Iustice said, we must not frame niceties to overthrow judgements, and here is certainty enough in both the words to describe the thing, and it is impossible to express them aptly and particularly. Roll chief Iustice said, the Declaration is two hundred weight, and every one knows the meaning of a Hundred. Ierman Iustice held the Declaration certain enough, and cited a case where one declared pro decem doliis spirituum, Anglice, ten Hogsheads of Spirits, and adjudged good. Ask of the same opinion, and so the judgement was affirmed, nisi. Declaration.

Dudeny against Collyer.

Trin. 1650. Banc. sup.

Hill. 23 Car. rot. 156.

DUdeny brought a writ of Error against Collyer to reverse a judgement upon a nihil dicit given against him at the Court of Barnestable in an Action of debt brought upon an Obligation, and assigns for Error, that the Condition of the Bond was for the payment of money at Wotton Courtney, which is not within the Jurisdiction of the Court, and so they cannot hold plea for it at Barnestable, and the judgement was given upon a nihil dicit, because the Plea being forein the Defendant would not swear it, which in this case he is not bound to doe. Roll chief Iustice, If it appear by the Declaration that the money was to be paid out of the jurisdiction of the Court, the Judgement is not good, and it is not necessary to swear the Plea, if it appears upon the Obligation that the monies were to be paid out of the jurisdiction of the Court, and he plead payment according to the Condition; but if one will not swear a forein Plea where he ought to doe it, the Plaintif may enter judgement upon a nihil dicit; for such a forein Plea not sworn, is no Plea upon the matter. The Iudgement was reversed nisi, &c. Error to reverse a judgement upon a Nihil dicit in debt upon an Obligation. jurisdiction. Plea Iudgement.

Ley against Anderton.

Trin. 1650. Banc. sup.

Pasch. 1650. rot. 524.

LEy brought a writ of Error to reverse a judgement given in the Common Pleas for Anderton in an Action of Debt upon an Obligation, and Assigns for Error that the Obligor in the Obligation upon which the Action was brought made his wife his Executrix, and dyed, and that the wife being Executrix dyed intestate; and that the Plaintif in the Action took administration of the goods and Chattels of the feme, and brought the action of Debt upon the Obligation, as Administrator to the wife; whereas the Plaintif ought first to have taken Letters of Administration de bonis non administratis of the Testator, and so to have brought his Action. To which the Court agreed; and said it is a plain fault, and reversed the Iudgement, nisi, &c. Error to reverse a judgement in debt upon an Obligation. Administration.

Elſy againſt Mawdit.

Trin. 1650. Banc. ſup.

Whether the Husband muſt put in bail for his wife in aſſault and baitery.

ELſy brought an action of Aſſault and Battery againſt Mawdit an Attorny of this Court, and his wife. The Defendant Mawdit appeared in propria perſona, and his wife was in cuſtodia, and ſo the Plaintif declared againſt them; the queſtion here was whether Mawdit the Defendant ought not to put in bail for his wife. Burrel of Councel with the Defendant argued, that the Declaration was not good, becauſe that the Husband Mawdit ought to have put in bail for his Wife, and cited Smith and Smiths caſe, and Mich. 17 Car. Simon Fanſhaws caſe, and Dyer 377 a. and Brook title Privilege, 353 a. and 9 rep. Roll chief Iuſtice ſaid, he ought to put in bail; Bail. therefore the Plaintif nil capiat per billam, becauſe his Declaration is not good againſt her in Cuſtodia.

The City of London againſt De roy.

Trin. 1650. Banc. ſup.

Cauſe why a procedendo ſhould not be granted to London.

LAtch ſhews for cauſe why a procedendo ſhould not be granted to London againſt De roy, who upon a tryal againſt him was committed in London for uſing the Trade of a working Gold-ſmith, and a working Jeweller, not having ſerved as an Apprentiſe to the Trade, and was brought hither by a Habeas Corpus. 1. That the Declaration is founded upon a By-law, and that By-law is founded upon a Cuſtom, and if either the Cuſtom or By-law be not good in all patts, the Declaration is naught; and here the Cuſtom is certified in the negative, and this is oppoſitum in ſubjecto, and By-law. meerly contradictory in it ſelf, 8 E. 3. 77. and the By-law alſo that is certified is not certain, and it is alſo unreaſonable, for every ſtroke the Defendant ſtrikes, is uſing of his Trade, and it is unreaſonable he ſhould pay five pound for every ſtroke. 2ly. The Declaration is not applied to the By-law upon which it is grounded, for the doing of a thing one day is not uſing to doe it, and the words diverſis vicibus do not help it, for they are not applyed to his working as a Jeweller, but to his working as a Gold-ſmith only; alſo it doth not appear who is to have the forfeiture for one third part of the fine ſet upon him; and it is not ſaid that he gained his living by the Trade or ſale of the commodity wrought, and the words of uſing it pro lucro et proficuo do not help it, for it may be he uſes it for his private uſe, and that is to his profit, though he ſell not the commodity. Next it is unreaſonable that a ſtranger an Alien ſhall be reſtrained by a By-law made 40 years ago, whereof he had no notice, and that by reaſon Notice. of ſuch a Law he ſhould be puniſhed for doing a thing which the Common Law allows, namely to get his own living. It is alſo ſaid, Non exiſtens liber homo uſus eſt arte, &c. which are words very incertain; for by the offence ſo expreſſed every Apprentice may be puniſhed for working, for an Apprentice is not Liber homo. Maynard on the other ſide cited 5 E. 3. that a negative with an affirmative implyed is good, and that it is excluſive of Strangers, and incluſive of the Citizens. And the offence is the matter, & not the time of the Defendants uſing the Trade, & it is alſo well deſigned in all points to what uſe the fine is to be put; and if there be Error they ought to bring a writ of Error, and not to except to the Declaration; And this caſe cannot be likened to an Apprentiſes working, for he uſes the

Trade

Trade not for himself but his Masters benefit. The Court desired books, and adjourned it till the next Term.

Custodes libert. &c. against White.

WHite was outlawed in an Action of Trespass, It was moved to reverse the Outlawry, because in the exigent it was Utlest, being put for an abbreviation of utlagatus est, and upon this exception it was reversed. To reverse an Outlawry. Abreviation.

Disne against Grigson.

Trin. 1650. Banc. sup.

Hill. 1649. rot. 98.

DIsne brought an Action of Debt upon an Obligation against Grigson, the condition was for the payment of a certain sum of money upon the resignation of a living, and a certain annual sum at two payments. The Plaintif assigns a breach in not paying such a sum at such a day, upon this the issue was entred, and after the Defendant demurs. Roll chief Justice, The Defendant is a Mad-man, and we cannot give Judgement against him, stay therefore till he is recovered. Yet take your Judgement, nisi, &c. for the other may bring his writ of Error if he will. Nota. Demurrer after an issue joyned. Judgement, Error.

Bernard against Levit.

Trin. 1650. Banc. sup.

BErnard brought a writ of Error against Levit to reverse a Judgement given against him in the Common Pleas in an action upon the case for speaking these words of him, Thou Bernard art a base fellow, and didst kill thy first wife. The Error assigned was, that it doth not appear in the Declaration that the Plaintif was maried before. But the Court affirmed the judgement, and said, the Defendant hath confessed it by joyning issue non culp. upon the words. Error to reverse a judgement in an Action upon the Case.

VVood against *Topham*.

Trin. 1650. Banc. sup.

THis case being an Action upon the Case quare filium suum cepit et abduxit, et maritavit, was again moved, and the exception insisted upon was, that the Plaintif doth not say Cujus maritagium ad ipsum pertinet. But Roll chief Justice said, that it could not be otherwise intended, but that the mariage belongs to him, and it doth not appear that his Son was maried before, and the value of the mariage is not here material; for the mariage of his Son belongs unto him as a parent, in regard of his protection and advice. Ierman differed, and said, that if he were maried before, he was then Pater Familias, and is out of the protection of his Father. But Nicholas and Ask Justices agreed with Roll, and Roll said, the matter here is not the loss of the mariage, for that is but to increase the damages, but the Action lies only, quare cepit et abduxit. Adjourned to be argued the next Term. Antea et Postea. Error to reverse a judgement in an Action on the Case. Mariage. Protection

Oreſwick againſt Armery.

Trin. 1650. Banc. ſup.

Mich. 1649. rot. 354.

Error to reverſe a judgement in an Action of Debt. Debt. Cuſtom.

OReſwick brought a writ of Error againſt Armery to reverſe a judgement given againſt him in Briſtow, in an action of debt upon a Conceſſit ſolvere, according to the cuſtom of the City; but the Iudgement was affirmed, for the Court ſaid, an action of debt will lie by a cuſtom upon a Conceſſit ſolvere, but not if it be brought againſt an Executor.

Cuſtodes Libertat. &c. againſt Valconbridge.

Trin. 1650. Banc. ſup.

To quaſh an Endictment of Aſſault and Battery.

THe Court was moved to quaſh an Endictment of Aſſault and Battery. The Exception was, that the Endictment was taken before the Iuſtices of Aſsize and Gaol delivery, and Oyer and Terminer, and ſo it doth not appear by vertue of what Commiſsion it was taken. Roll chief Iuſtice, He ought to ſhew by virtue of what Commiſsion particularly it was taken, and therefore let it be quaſhed, and a fine of 40 s. ſet upon the Clark of the Aſſizes for his negligence.

Fine.

Bowles againſt Clark.

Trin. 1650. Banc. ſup.

Why a Prohibition ſhould not be granted to the Prerogative.

IT was ſhewed for cauſe upon a rule of Court, why a Prohibition ſhould not be granted to the Prerogative Court, That in the will which the Prerogative Court endeavoured to repeal, there were lands given to the Executor. The Court anſwered, If the Prerogative have power to prove a will, they may alſo repeal it by appeal; but if lands be deviſed, together with goods, they have no power to repeal it as to the lands, but if they ſhould have no power to repeal it as to the goods it would be miſchievous. But they have no authority to make the deviſe good or ill, as to the lands. And the Court was at firſt agreed to grant a Prohibition as to the lands only. But afterwards the Court held that there could be no ſuch diviſion made of the will by Prohibition, as to ſtand good in part, and to be repealed for the reſt, and ſo would not grant the prohibition. Nota.

Prohibition.

Keniſton againſt Crouch.

Trin. 1650. Banc. ſup.

For a rule to hand Execution in the Common Pleas denied.

THe Court was moved that upon a Judgement given in the Common Pleas, ſince the Act that a writ of Error ſhall be no ſuperſedeas, a writ of Error was brought in this Court, and the record removed, but that depends undetermined, and that the party had moved for execution in the Common Pleas; but the Clarks refuſe to make out execution, without the rule of this Court, and therefore a rule was prayed to them to make out execution. But the Court anſwered, proceed as the Act directs, we will make no rule; But we conceive there is no writ of Error now depend-

Rule.

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ing, and therefore you may take out execution of Courie. Q. Tamen, for it was doubted at the Bar. Execution.

Denton againſt Hariſon.

Trin. 1650. Banc. ſup.

DEnton brought an Action upon the Caſe againſt Hariſon in London, for ſpeaking theſe words, Thou art a Whore, and my Husbands Whore, and he doth maintain thee. The Defendant removed the cauſe into this Court by a Habeas Corpus, whereupon the Plaintif moved for a procedendo. Roll chief Juſtice was of opinion that a procedendo ought to be granted; for if it ſhould not, the party hath no remedy to proceed; and if they do proceed in London, and the judgement be thereupon erronious, the party grieved may bring a writ of Error in the Huſtinges, and reverſe it. Ierman Juſtice ſaid, here is a wrong done, and the remedy is given according to the cuſtom of the City, and it is a good cuſtom, becauſe it is for the preſervation of the Peace of the City, and it is the cuſtom of the City to whip a Whoremonger, and to Cart a Whore; and this may be the ground or reaſon why an action lies in London for calling of a woman whore there, thought it doe not lie in other places. For a Procedendo to London. Cuſtom.

Trin. 1650. Banc. ſup.

VPon an Iſſue joyned, and a Tryal thereupon, a Verdict was found for the Plaintif, and the Poſtea was delivered to the Clark of the judgements to enter the judgement; but through the Clarks neglect execution was taken out, the Judgement being not entred, upon this the Court was moved that the Judgement might not be entred, becauſe it ſhould have been entred before Execution iſſued forth, and therefore it was ſuggeſted that now it was too late, and prayed to ſuperſede the Execution, becauſe there was no judgement to warrant it. But Roll the Chief Juſtice anſwered, that this being but a neglect of the Clark, judgement might be well enough entred, though the Execution were iſſued forth, and becauſe the tryal betwéen the parties is right, therefore let it be entred. That Judgement might not be entred. Iudgement. Superſedeas.

Cane againſt Pell.

Trin. 1650. Banc. ſup.

CAne brought an Action of Debt upon the Statute of 2 Ed. 6. for ſubſtraction of tithes, againſt Pell, and hath a verdict againſt the Defendant: The Defendant moved in Arreſt of Judgement, and took an Exception to the Plaintifs Declaration; That it did not appear by it in what Parish the lands lie, out of which the tithes grew due. On the other ſide it was ſaid, it appeared well enough by implication; but if it did not, it is not now material, there being a verdict in the caſe by which it is helped. Ierman Juſtice ſaid, there is only an implication to ſhew in what Parish the lands lie, and that is not a violent implication neither, and therefore the Declaration cannot be good. But Roll Chief Juſtice anſwered, What if the Plaintif had only ſaid, that the tithes belonged unto him? And it is here after a verdict, and the Declaration is helped by it; but if you had demurred to the Declaration, it would have been ruled to be naught. And if the tithes do belong to the Plaintif, why may it not be implyed that they Arreſt of Iudgement in an action upon the Statute for tithes. Declaration. Demurrer.

belong to him as Parſon of the Parish, and are of lands lying within the Parish: But let us ſee a Book, and ſpeak to it again the next Term.

Robinſon againſt VValker.

Trin. 1650. Banc. ſup.

Paſc. 1650. rot. 251.

Demurrer for doubleneſs in a replication.

VValker brought an Action upon the Caſe upon an indebitatus Aſſumpſit for wares ſold. The Defendant pleaded the Statute of limitations of Actions in Bar. The Plaintif replyed, that he is a Merchant, and was in Ireland, and did not return thence till ſuch a time, and ſhews preciſely when, and that within ſix years after his return he brought this action. Upon this Replication, The Defendant demurred, and upon the Demurrer Judgement was given for the Plaintif. The Defendant brought a writ of Error to reverſe this Judgement, and aſsigned for Error, 1. That the replication of the Plaintif, upon which the Demurrer was joyned, is double; For firſt he allegeth that he is a Merchant, & ſo is a perſon out of the Statute of limitations: And ſecondly he ſhews that he brought his Action within 6 years after his return, which is needleſs. 2ly. He ſaith, That he did not return into England, whereas the Statute is general, If he return, and he may return into Wales. But to that the Court anſwered, that to return into England, or into Wales, was all one as to the intent of the Statute. 3ly. The Action was an Action upon the Caſe, & that Action is not mentioned in the Statute. But Roll chief Iuſtice ſaid, this is no new Caſe; for it hath been ruled that an Action upon the Caſe is within the Statute. Ierman Iuſtice ſaid, the Proviſo of the Statute is intended to be as large as the body of the Act. Nicholas Iuſtice to the ſame effect, and ſaid, that the word Treſpaſs mentioned in the Act doth compriſe in it an Action upon the Caſe. The Iudgement was affirmed, niſi.

Caſe.

Trin. 1650. Banc. ſup.

To quaſh an Endictment.

An Endictment was quaſhed, becauſe it was ſaid to be taken ad generalem Seſſionem Pacis Cuſtodum libertatis Angliæ, where it ought to be Seſſionem Pacis publicæ, by Ierman Iuſtice, abſente Roll.

Treton againſt Squire.

Trin. 1650. Banc. ſup.

To have a Priſoner to teſtifie at a Trial.

The Court was moved that a Priſoner in the Marſhalſea might have liberty by rule of Court to be at a tryal to give his teſtimony as a Witneſs in the cauſe. Ierman Iuſtice, abſente Roll, anſwered, Bring him thither by a Habeas Corpus, but take a good guard with him, for it ſhall be at your peril if he eſcape, and he ſhall be brought thither, and carried back again at your own charge.

Habeas Corpus.

Gibs

Gibs againſt Price.

Trin. 1650. Banc. ſup.

Gibs a Barreſter of Lincolns Inne brought an action upon the caſe againſt Price for ſpeaking theſe words of him, William Gibs hath dealt falſely with me being his Clyent, and hath joyned with mine Adverſary. Upon not guilty pleaded, there was an iſſue joyned, and a Verdict given for the Plaintif. The Defendant moved in Arreſt of Judgement that the words were not actionable. But the Court held clearly the words were actionable, and were ordering judgement to be entred for the Plaintif, but becauſe another exception was taken, That the Plaintif doth not aver that he was a Practiſer at the time of the bringing of his Action; and becauſe it was alſo objected that the Plaintif was now ſequeſtred, Therefore the rule was, that the Record or the Poſtea ſhould be brought into the Court, and that Councel ſhould again be heard. This was moved again, And Roll chief Iuſtice ſaid, That the Plaintif ought to aver he is a Practiſer, for he may be a Barreſter and not practiſe. But the Court would adviſe.

Arreſt of Iudgement in an Action for words.

Caſe.

Averment.

Boomer againſt Cleve.

Trin. 1650. Banc. ſup.

In this Caſe in Arreſt of Judgement upon a verdict given for the Plaintif in an Action upon the Stat. of Winch. 12 E. 1. of Hue & Cryes, the queſtion being, whether the Plaintif in his Declaration had miſ-recited the Statute or not, Roll chief Iuſtice took this difference, that if one bring an Action upon a Statute, and in his Declaration miſ-recite it, in words which go to the ground of the Action, though there be a Verdict in the caſe, yet it is not helped; but if the miſ-recital be in words which doe not goe to the ground of the Action, it is helped after Verdict by the Statute of Ieofails.

Arreſt of Iudgement in an Action upon the Statute of 12 E. 4. of Hue and Cries.

Recital.

Ieofails.

Bynion againſt Trotter.

Mich. 1650. Banc. ſup.

Bynion brought an Action upon the Caſe againſt Trotter for ſpeaking theſe words of him, He is a Thief, and hath ſtollen my Turnips and my graſs. Upon a Verdict given for the Plaintif, The Defendant moved in Arreſt of Iudgement that the words are not actionable, becauſe the graſs might be growing upon the ground, and the Turnips in the ground, and ſo part of the Freehold. But Roll chief Iuſtice held, the words are actionable, for the Turnips ſhall be intended to be pulled up, and the Graſs mowed, & the laſt words are not cumulative. Therefore let the Defendant ſhew cauſe why the Plaintif ſhall not have his Iudgement.

Arreſt of Iudgement in an Action for words.

Caſe.

Pinder

Pinder againſt Dawkes.

Mich. 1650. Banc. ſup.

Error to reverſe a Iudgement in Treſpaſs quare clauſum fregit.

PInder brought an Action of Treſpaſs againſt Dawkes, and declares, quare clauſum fregit contra pacem publicam, et poſtes et palos ſuos ibidem nuper inventos cepit et aſportavit. The Plaintif hath a Verdict and a judgement, the Defendant brings a writ of Error to reverſe the judgement, and aſsigns for Error, 1. That the Treſpaſs was done in the late Kings time, and therefore the Declaration ſhould have been contra pacem Domini Regis, and not publicam. 2ly. That the Declaration is incertain; for it appears not whether the Poſts and Pales were fixed to the ground or no, nor how many of them there were, and ſo the nature of the offence cannot be certainly known. But the Court held that the firſt exception was but a miſtake of the Clark, and ſo may be amended, and as it is, there is no repugnancy in it. And as to the ſecond, the Court held that it ſhall be intended that the Poſts and Pales were not fixed to the ground; and there is no neceſsity to expreſs how many Poſts and how many Pales the Defendant took, and it is not material whether they were fixed or not. But the Court would adviſe, and ordered Councel to ſpake again to it.

Amendment.

Intendment.

Popham againſt White

Mich. 1650. Banc. ſup.

Exception to a Declaration in a Trover and Converſion.

AN Action of Trover and Converſion was brought, wherein the Plaintif declared pro Arboribus. Twiſden of Councel with the Defendant argued that the Declaration was not good, becauſe a Trover cannot lie de Arboribus. Roll chief Iuſtice, he may declare de Arboribus, if he ſay that he was poſſeſſed ſicut de Arboribus ſuis propriis. But Ierman Iuſtice doubted Therefore the Court would adviſe.

Martin againſt Hendlye.

Mich. 1650. Banc. ſup.

Arreſt of Iudgement in an action of Debt againſt a Sheriff for an eſcape.

Advantage.

Detinet.

MArtin brought an Action of Debt againſt Hendlye a Sheriff for an eſcape, and had a Verdict againſt him. The Defendant moved in Arreſt of Iudgement, and took theſe exceptions. 1. That the Action was brought by the Plaintif as an Adminiſtrator, for the eſcape, which was made in the life of the Inteſtate only. 2ly. That there is no Capias iſſued to the Sheriff. The Court anſwered, That the Sheriff cannot take advantage of an erronious proceſs; but the firſt exception is good, for the Action ought to be brought in the Detinet only, the Plaintif being but an Adminiſtrator, who recovers not to his own uſe. Therefore ſtay Iudgement till the Plaintif move.

Derhick

Dethick againſt

Mich. 1650. Banc. ſup.

DEthick moved for a Prohibition to the Admiralty for preferring an Endictment there, which is not within the Statute touching the Admiralty, and ſo they have no juriſdiction of the cauſe. The Court anſwered, that a Prohibition lies not in caſes of Felony, but if there be Cauſe it may be removed by Certiorari. But we will adviſe. For a prohibition to the Admiralty. Prohibition. Certiorari.

Bennet and the Hundred of Hartford.

Mich. 1650. Banc. ſup.

IN a tryal at Bar between the inhabitants of Hartford and Bennet a Carryer upon an Action brought againſt them upon the Statute of Wincheſter, for a robbery committed within that Hundred upon his ſervant, It was ſaid by the Court, that if either of the parties to a tryall deſire that a Juror may give evidence of ſomething of his own knowledge, to the reſt of the Jurors, that the Court will examine him openly in Court upon his oath, and he ought not to be examined in private by his companions. And it was alſo ſaid, that if a robbery be done in crepuſculo, the Hundred ſhall not be charged; but if it be done by cleer day light, whether it be before Sun riſe or after Son ſet, it is all one, for the Hundred ſhall be charged in both caſes. Evidence by one of the Jury to the reſt. Evidence. Examination. Where a hundred ſhall be charged for a robbery or where not

Mich. 1649. Banc. ſup.

SErjeant Earl, A Jury being ready at the Bar for a tryal, challenged the Array for want of Hundreders, and delivered in the challenge in writing to Woodward the Clark of the Court to be read; But the Court interrupted him, and ſaid to the Serjeant, you ought firſt to read it your ſelf in French, which he accordingly did, and afterwards Woodward read it in Latin. Twiſden of Councel on the otherſide ſaid, that the challenge was taken to no purpoſe, for the Jury was returned by the Secondary by rule of Court, and the Hundreders were put out by the conſent of the parties; But the Court anſwered, that the conſent of the parties was to no purpoſe to avoid the challenge, but that it was a good challenge, and there cannot be a tales granted upon a challenge for default of Hundreders, and therefore the panel was quaſhed, and a new Jury ordered to be returned by the Sheriff. In this caſe it was ſaid, that after the firſt man of a Jury is ſworn, the Array cannot be challenged. A challenge of the array for want of Hundredors, the manner of it. Conſent. Challenge. Tales.

Cage againſt Dod.

Mich. 1650. Banc. ſup.

VPon a tryal betwen Cage and Dod touching a Copyhold it was ſaid by the Court, that a Copyholder for life cannot preſcribe againſt his Lord; but a Copyholder in fee may, for he hath the Copyhold in the nature of Land of inheritance. And alſo that if a Copyholder for life cut down tymber trees, the Lord may take them. And that if an under Leſſee for years What copyholder may preſcribe againſt his Lord, and what not.

Forfeiture. of a Copyholder cut down tymber, it ſhall not be a forfeiture of the Copyholders eſtate.

The Counteſſe Rivers.

Mich. 1650. Banc. ſup.

A Plea of privilege of peerage by a Counteſs. Privilege.

THe Counteſſe Rivers put in her plea of Privilege of Peerage into Court, and prayed by Serjeant Glin of her Councel that it might be read, and allowed. Upon which it was read by Woodward Clark of the Court. After which Roll chief Iuſtice ſaid, it is queſtionable whether a Counteſs made ſo by patent only for her life be privileged or no, therefore let her remain in the Cuſtody of the Sheriff till Saturday, and not be turned over to the Cuſtody of the Mareſchall, and then move it again. Poſtea.

Burton againſt Low.

Mich. 1650. Banc. ſup.

Demurrer in debt upon a Sheriffs bond.

2/2. 2/3. 6. 1/8 & 9.

BUrton brought an Action of debt againſt Low, upon a Sheriffs bond given by Low to the Sheriff, being arreſted by him by virtue of an Attatchment directed to him out of the Chancery, the condition of the Bond was, that the Defendant ſhould appear on ſuch a day in Cancellaria apud Weſtmonaſterium ubicunque fuerit. The Defendant pleads in Bar the Statute of 36 H. 6. the Plaintiff demurred to this plea. Moſeley of Councell with the Defendant argued that the Bond upon which the Action was brought was void, and againſt the Statute. 1. Becauſe the party is bound to appear in a Court, which is not a fixt Court, and ſo incertain, namely the Court of Chancery at Weſtminſter, whereas the Chancery is a moveable Court, and not fixt to Weſtminſter or any other place. 2ly. The condition of the Obligation is impoſsible, for it is that the Defendant ſhall appear in the Chancery at VVeſtminſter wheresoever it ſhall be, and it is impoſsible for him to appear at VVeſtminſter, and at another place at the ſame time. 3ly. The Bond varies from the Statute in ſome things, and enjoyns more than the Statute requires in other things. VVilmot on the other ſide held that the Bond is not within the Statute, becauſe the King is not within the Statute, as was held 13 Car. & 7 H. 4. f. 44. 5 rep. VVhelpdales caſe, Dyer 119. Roll chief Iuſtice held, that a Bond given to appear upon an Attatchment out of the Chancery is within the Statute; but it hath been heretofore a queſtion whether a Serjeant at Arms of Wales were within the Statute; but it hath been ſince ruled that he is not, and here is a material variance in the Bond, which makes it void, and neither the upper Bench nor the Chancery are fixt Courts, and therefore the Defendant ought not to be bound preciſely to appear at VVeſtminſter, and then to add ubicumque fuerit is a material variance, and makes the Bond naught. Ierman Iuſtice to the ſame effect, and ſaid, that the Chancery may ſit at any time out of the Term when they pleaſe, and their not ſitting in the Vacations, is for the eaſe and convenience of the people. Nil capiat per billam ſi, &c. Antea.

Obligation.

Chancery.

Variance.

Paine

Paine againſt Preſtny.

Mich. 1650. Banc. ſup.

PAine brought an Action upon the caſe againſt Preſtny, for ſpeaking theſe words (to a Conſtable) of him; Take charge of him, and carry him away, for I lay flat Felony to him, and for ſpeaking theſe words to the Plaintiff himſelf, I will make you hold up you hand at the Bar: upon not guilty pleaded an iſſue was joyned, and a verdict found for the Plaintiff. It was moved in arreſt of Judgement that the words are not actionable; but the Court held them cléarly actionable, and ruled the Plaintiff to take his Iudgement, except other cauſe were ſhewed to the contrary Friday following. Arreſt of judgement in an action for words.

Popham againſt VVhite.

Mich. 1650. Banc. ſup.

VPon a verdict found for the Plaintiff in a Trover & Converſion, the Defendant in Arreſt of Judgment took exception to the Declaration becauſe the Plaintiff had declared of a Trover & Converſion de decem arboribus, whereas the trees were Tymber trees that were felled, & ſo they are not well expreſſed, for the word arbor properly ſignifies a tree that grows, and not one cut down, according to the old verſe, Arbor dum creſcit lignum dum creſcere neſcit, and ſo a Trover cannot be brought pro arbore. But Roll chief Iuſtice ſaid, that they were well enough expreſſed by the Declaration, and that they ought not to be too ſtrict in ſcanning ſome words where the thing is well deſcribed. Arreſt of judgement in Trover and Converſion. Declaration. Deſcription.

Goffs Caſe.

Mich. 1650. Banc. ſup.

CLement Goff of Greenwitch in Kent, arraigned of felony at Maidſtone in Kent, and there condemned, was brought to this Bar, and there it was demanded of him by the Clark on the criminal ſide, what he could ſay why he ſhould not ſuffer death according to his Iudgement: whereupon the Priſoner pleaded he had a pardon, and produced it, and it was read openly, the Priſoner kneeling on his knees in the mean time; after reading of it, he was asked what it was he demanded, beſides of the Court: he anſwered, that he prayed his pardon might be allowed, which, after Iherman Iuſtice had made a grave ſpeech to exhort him to a better carriage for the future, was done accordingly. A pardon for Felony pleaded and allowed.

VVood againſt Topham.

Mich. 1650. Banc. ſup.

THe caſe between VVood and Topham, being an Action of Treſpaſſe, quare filium et heredem ſuum rapuit et maritavit, was again ſpoken unto, and in arreſt of Judgement Green took theſe exceptions to the Declaration. 1. That it is too ſhort, becauſe that after the words quare filium ſuum & heredem rapuit & maritavit, there ought to have been added cujus maritagium ad ipſum pertinet, for elſe it appears not that the Plaintiff hath cauſe of Action, &c. Fitz. f. 20. & 35 El. Child and Towrs caſe Banc. Reg. 2by. Arreſt of judgement in caſe ~~treſpaſs~~ quare filium et heredem rapu & maritavit.

The Declaration doth not say filium ſuum apparentem, which it ought to do, becauſe the Father is alive. 3ly. It doth not expreſſe the Heir to be infra ætatem. 4ly. It doth not ſay the Heir is in cuſtodia ſua. 5ly. It doth not ſhew that the Heir was not married before. 6ly. It doth not ſhew that the Plaintiffs Father is dead, 12 H. 4. f. 16. Brev. Tit. Treſpaſſe, 101 Nat. brev. 142. Reg. 163 Nat. Brev. 140. 20 H. 6. f. 44. And he ſaid, that a Declaration ought to be certain; but that here was no certainty, by reaſon of the former exceptions. VVilmot on the other ſide ſaid the Declaration was certain enough, and according to the preſidents, and cited the Regiſter, f. 88, 89. & 5. rep. Ratcliffs caſe. Roll chief Iuſtice ſaid, It is a Treſpaſſe to take away a mans Son and Heir, although he be not within age; but if it be another Son it is not ſo. Nicholas Iuſtice to the ſame effect; But becauſe the Court was not full, in regard that the damages given by the Jury were exceſsive, the Court deferred to give Judgement that time, and perſwaded the Plaintiffs councell to go to a new new tryall. Antea et Poſtea.

Declaration. Treſpaſs.

Marſhall againſt Ledſham.

Mich. 1650. Banc. ſup.

Arreſt of Judgement in debt by an Adminiſtrator

MArſhall brought an Action of Debt as an Adminiſtrator againſt Ledſham, and obteins a verdict againſt the Defendant. It was moved for the Defendant in arreſt of Judgement, That the Plaintiff had not ſhewed in his Declaration by whom the Letters of Adminiſtration were granted unto him, as he ought to do, according to the books of 26 H. 6. 29. & 35 H. 6. The Court anſwered that he ought to have ſet it forth, and therefore the Plaintiff might have demurred to the Declaration; but it now being after a verdict, the queſtion is, Whether that fault be not helped by it? And therefore they would adviſe. Poſtea.

Demurrer

VVats and his wife againſt Lord.

Mich. 1650. Banc. ſup.

Arreſt of Judgement in an Aſſault and Battery.

VVAts and his wife brought an Action of Treſpaſſe of an Aſſault and Battery againſt Lord, and obtein a verdict. The Defendant moved in arreſt of Judgement, That the Declaration was by the Baron and Feme, for an Aſſault and Battery made to the Feme, and they alſo declare that the Defendant alia enormia eis intulit, which ought not to be, for the wrong being but a perſonal wrong done to the perſon of the Feme only, could not be ſaid to be done to the Husband. To which Roll chief Iuſtice agreed.

Faireſax againſt Fairfax.

Mich. 1650. Banc. ſup.

Error to reverſe a Judgment in dowr.

IN a writ of Error brought to reverſe a Judgement given in a writ of Dowr theſe exceptions were taken; 1. That the original was not well returned, for their appears not to be any return of the Proclamation of the ſummons, and though the party do appear, yet it was ſaid that it is not helped thereby. 2ly. The demand is incertain, for the demand is de tertia parte decimarum garbarum in Colton, and by this

this demand the kind of the Tithes demanded is not made certain, for the word garba admits of divers constructions, and so Lynwood the Civilian shews. 3ly. It is not expressed whether the Defendant be terr-Tenant, or heir. 4ly. The demaund is ac etiam de rectoria de Acerstall Malvis, which is incertain, for it ought to be de rectoria ecclesiæ. Roll chief Iustice to the 1. Exception said, that the appearance of the party will help miscontinuances of proces, and so it doth here. Hales to the 2d. exception said, that decimæ garbarum is certain enough to common understanding. To the 3d. Exception he held it not necessary to say de rectoria ecclesiæ, for it must be so necessarily intended. The Court desired to see books, and so it was adjourned. At another day the case was again moved, and these spoken to and answered, 1. As before that decimæ garbarum is certain enough to common intendment. 2ly. That it is not necessary to expresse the setting forth of the dowr in the tithes by metes and bounds, for tithes cannot be so set forth, and it is not constant to use the expression per metas et bundas. Latch took another exception that it was improperly expressed, for one to enter into an Advowson. And to the exception formerly taken, he held that the Proclamation of summons ought to have been returned, and that fault is not helped by the late Act, because it is matter of substance, and not meer matter of form, and he said that appearance of the party doth salve a discontinuance of mean processes; but not of originall processe as this is, which is the very foundation of the Action, and that though the want of a summons be helped by the partyes appearance, yet the want of returning the summons is not helped by the partyes appearance. Nert he held, as formerly, that decimæ garbarum is incertain, and that the nature of the corn ought to be shewed. Roll chief Iustice said, that the not returning the proclamation of summons is not material, for the summons is only to make the party appear, and he hath appeared in this case, and the late Act extends to it if it were not good without it. And the demand of tertiam partem garbarum is certain enough by common intendment, but it seems more certain here than so, for it is tertiam partem garbarum granorum which signifies corn; And it is not necessary to express the setting forth of the dowr per metas et bundas, but it is well as it is without that expression. And lastly, It is well enough said, ingressus est into the advowson, although it be not so proper an expression as might have been used, for it is good enough to make the party tenant. Ierman Iustice to the same effect, and said, that if there be two Tenants in Common, and one of them dye, it is a great question how the wife shall be endowed, viz. whether per metas & bundas or no. And he doubted whether the Writ of error here brought were good or not, for it is returnable coram custodibus libertatis, &c. apud Westmonasterium, whereas as it ought to be coram custodibus ubicunque, for they are not fixed to Westminster. Nicholas Iustice to the same effect. Roll chief Iustice said it was a good exception that Ierman took to the Writ of error: But the Court was here at Westminster at the return of the Writ, and the Writ was made by the Custodes themselves, and the partyes did appear upon it, and therefore he questioned whether it might not be made good for these reasons. Ierman Iustice held it could not. Roll chief Iustice said that all the Latin presidents are agreeable to this Writ, and it would be dangerous to alter them; But let the cursitors attend, and give their reasons why they do not alter this form, and if the Writ be good, me thinks the Judgement should be affirmed. Yet we will advise a little of the writ, and whether the demand of decimam partem garbarum, without granorum, be good or not. Postea.

Miscontinuance.

Return.

Error.

Presidents.

Lumley againſt Nevil.

Mich. 1650. Banc. ſup.

Error in an habere facias Poſſeſſionem.

IN a writ of error brought upon a Judgement given in an ejectione firmæ, It was ſaid by Roll chief Iuſtice, That if the writ of habere facias poſſeſſionem do conteine more Acres of Land than are expreſſed in the Declaration, that it is error. But if the Sheriff do give poſſeſsion of more Land than is conteined in the writ of habere facias poſſeſſionem, an Action of the caſe lies againſt the Sheriff, or an Aſsiſe lyes for the land. It was alſo ſaid, that if a Judgement be affirmed upon a writ of error in the Exchequer Chamber, yet they cannot grant out execution there; but it muſt be in this Court.

Error. Caſe. Aſſiſe. Execution.

Hunt againſt Popham.

Mich. 1650. Banc. ſup.

The court not to be moved for a rule where it may be given in the office. Nonſuit.

IT was moved for the Defendant to have the rule of Court for the Plaintiff to bring in the poſtea, that the Defendant may move in Arreſt of Judgement. The Court anſwered they would make no rule, for the Defendant may give rules in the office to force him to it, and if he will not bring it in he is to be nonſuit.

Fairefax againſt Fairefax.

Mich. 1650. Banc. ſup.

Whether ademand in dowr good or not.

THe Caſe between Fairefax and Fairefax was moved again, and Hales held that the demand of dowr de decimis garbarum was certain enough, though it be not garbarum granorum, and he cited the Regiſter 46. and Dyer, f. 84. and one Cavendiſhes caſe, 8. Iac. Roll chief Iuſtice took a difference between a demand of Tithes, and the ſuing for a recompence for Tithes, upon the Statute of 2 Ed. 6. and cited the Regiſt. 165. and he held the demand here to be good, with whom concurred the other Iudges. Ask Iuſtice ſaid, that a garb is a french word, and ſignifies any thing bound up into a bundle; but by Cowell the Civilian it ſignifies Corn bound up, and ſo is the word commonly uſed at the Common Law. Roll chief Iuſtice ſaid, that a demand in a præcipe ought to be more certain, than it is neceſſary for a demand in dowr to be. Latch ſaid that the words coram nobis apud VVeſtmonaſterium is part of the ſtile of the Court, which Roll chief Iuſtice denyed, yet he ſaid it was well enough, becauſe the Court was there at the return of the writ of Error. To which the other Iudges agreed, and the rule was that the Iudgement ſhould be affirmed niſi, &c. antèa.

Demand.

Mich. 1650. Banc. ſup.

Moved to diſcharge an arreſt

THe Court was moved that one was arreſted upon a day of thanks-giving appointed by the Parliament, and that he was forced to put in bond to the Sheriff for his appearance, and therefore it was prayed that the party arreſted might be diſcharged, and that the bond given to the Sheriff

rif might be delivered up. Roll the chief Iuſtice anſwered, Endict the Bailies that made the Arreſt, or bring your Actionagainſt them if you pleaſe, for we will not diſcharge the party arreſted. Diſcharge.

Bois againſt Cranfield.

Mich. 1650. Banc. ſup.

rot. Q.

BOis as Executor to another brought an Action of Debt upon divers Obligations made to his Teſtator. The Defendant pleaded that he did pay a leſſer ſum than is expreſſed in the Obligations to the Teſtator during his life, and that he did accept thereof in full ſatisfaction of the ſaid Obligations. To this plea the Plaintif demurred. Roll Chief Iuſtice upon opening the matter ſaid, that the queſtion here is, whether the payment, or the acceptance of the money paid in ſatisfaction be to be traverſed. And he held it was indifferent to traverſe either of them; but he ſaid it was more proper to joyn iſſue upon the payment, but the Court would adviſe. It was then alſo ſaid, that if one pay money in ſatisfaction of an Obligation, and the party to whom it is paid ſaith that he will receive it for another cauſe, yet if he receive it it ſhall be judged to be paid in ſatisfaction of the Obligation; for he muſt receive it upon ſuch terms as the other will pay it. Debt upon divers Obligations by an Execution. Traverſe. Satisfaction, payment.

Brian againſt Stone.

Mich. 1650. Banc. ſup.

STone moves the Court for an Attachment againſt Brian and others, for that he was arreſted by a Latitat out of this Court in the County of Wilts, and thence carried into the Town of Malborow, and there arreſted by a Serjeant of that Town by a writ out of that Corporation, and the Plaintif proceeds there againſt him upon that writ, and not upon the latitat, by which he was firſt arreſted, which is a contempt to this Court. The Court ruled the party ſhould have an Attachment, niſi, &c. and alſo ſhould have a Habeas Corpus cum cauſa. For an Attachment. Attachment. Habeas Corpus cum cauſa.

Mich. 1650. Banc. ſup.

THe Recorder of London moved for the Inhabitants of Biſhopsgate againſt one Withringes; who for refuſing to ſerve upon the Ward mote Enqueſt was indicted for his refuſal in London, and convicted and fined 20 l. the Defendant being committed for not paying his fine, removed himſelf hither by a Habeas Corpus, but now hath ſubmitted himſelf to a fine, it was therefore prayed he may be moderately fined here. The Court thereupon fined him 20 l. For the ſetting a moderate fine upon one that ſubmitted to a fine.

Beal

Beal againſt VVyman.

Mich. 1650. Banc. ſup.

Trin. 1649. rot. 849.

Queſtion upon words of a Will.

VPon theſe words of a will, viz. I give and bequeath one half of my lands to my wife, and after her death I give all my lands to the heirs males of any of my Sons, or next of Kin, Latch made queſtion in the Caſe, 1. Whether there were a good eſtate created by theſe words of the will. 2ly. Whether the eſtate were deſtroyed by the fine levied of the lands. For the 1. he held, that the heirs males of any of his Sons, are words certain enough to create an eſtate; for it is all one as if he had ſaid to the heirs males of all his ſons, if they have heirs males, or to thoſe who have heirs males, and the words, or to the next of Kin, are alſo certain enough, being joyned with the precedent words, and ſhall be meant to the next of Kin, and their heirs males, if his ſons have no heirs males; For in a Will if there be words to expreſs the meaning of the Teſtator it is ſufficient enough, though the words be not apt. And he cited 21 Rich. 2. Deviſe 27. and 8 Rep. 46. and ſaid, that the caſe in 30 Aſſ. pl. 47. is the ſame with this in terminis. And here is no contingent remainder, but only a contingent deviſe, & there is no neceſsity for a particular eſtate to ſupport it; for it ariſeth out of the eſtate of the Deviſor; yet if there were need of a particular eſtate here to ſupport the remainder, here is a particular eſtate in the wife, who by implication of the will doth take all the land during her life, as it is 13 H. 7. 29 H. 8. Br. Deviſe 48. Trin. 3 Ed. 6. Bendloes. Plow. Com. 521. Whelpdales caſe, Paſch. 25 Eliz Com. Ban. To the 2 point he ſpake not, holding it not materſal. Hales of Counſel on the other ſide held, that the wife had not an eſtate for life in all the land by implication of the will, but only an eſtate for life in a moyety of the land, and ſo there is no particular eſtate to ſupport the contingent remainder, which he held was in this caſe; & that it is not a contingent Deviſe as Latch urged; for the remainder here depends by way of remainder, and not as a contingent Deviſe. And he held the Deviſe it ſelf to be void, admitting all the precedent matter alleged to be true. 1. Becauſe the deviſe is uncertain; for the intent of the deviſer doth not appear; for it appears not what heir male ſhall have the land, whether the heir male of his ſon, or the heir male of his next of Kin; for the words are disjunctive; 41 & 42 Eliz. Com. Banc. in the Caſe of Tayler & Sawyer land deviſed to a Mans Iſſue was adjudged a void deviſe for the incertainty of it. And he held that the intent was that the heir male of his ſon ſhould inherit before the heir male of the next of Kin, otherwiſe the further off of Kin ſhould have the land before the nearer of Kin. And he ſaid that Hill. 2. Car. Rot. 1288. Com. Banc. in Hunt and Fiſhers caſe, the caſe at the Bar was adjudged in point. Roll chief Iuſtice ſaid, That the intention of the Teſtator here is cœca & ſicca, and ſenceleſs, and cannot be known, and we ought not to frame a ſence upon the words of a Will, where we cannot find out the Teſtators meaning. Ierman Iuſtice held, that the deviſe was not void, but that the words are to be interpreted as they may ſtand with Law, and as the words will bear. Nicholas Iuſtice prima facie that the deviſe is void, but yet it is queſtionable. Ask Juſtice to the ſame intent. Roll chief Iuſtice ſaid, that there is too much way uſually given to ambignous deviſes. But let it be argued again the next Term.

Intention.

Will.

Parker

Parker againſt Cook.

Mich. 1650. Banc. ſup.

Hill. 23 Car. rot. 660.

The Action was an Action of Treſpaſs quare Clauſum fregit: The Defendant pleaded a ſpecial plea of juſtification, viz. That the Plaintif was a Copyholder to his Manor, and that for refuſing to appear and do his ſervice at his Court he had forfeited his Copyhold, and that therefore he did enter. The Caſe was this, The Defendant being Lord of the Manor, and holding of his Court, the Plaintif being Tenant, and being in the Court, and there being a queſtion whether the Court were legally then held or no, and being asked if he did appear or not, he anſwered, If it be a legal Court, I do appear, but if it be not a legal Court, I do not appear. The queſtion was, whether this be an appearance, or ſuch a refuſal to appear whereby the Copyholder ſhall forfeit his Copyhold, or not. Latch held it was no appearance, and that therefore the Copyhold was forfeited, and cited 43 Ed. 3. f. 25. And he ſaid, though it be not expreſſed by the Defendant, that the Plaintif was legally ſummoned to appear in Court, it is not material, ſeeing he was preſent in Court, and did refuſe, being demanded, to appear. And that this was a ſufficient contempt to make a forfeiture. And he ſaid that the Rejoynder is ill; for it is dixit comparuit, and he doth not anſwer to the fact alleged, viz. That he denied to do his ſute and ſervice. Wild on the other ſide ſaid, that it is no forfeiture; for if the Court be well held, then he doth appear, as his words do plainly manifeſt, and ſo there is no contempt; and if the Court were not well held, his not appearing ſhall not hurt him, for he is not required to do it. 37 Eliz. Eſt and Hardinges caſe, and 4 rep. 27. Hobard and Hamonds caſe: And beſides, this cannot be a voluntary contempt, becauſe he did appear conditionally, and did not abſolutely refuſe. And the Replication hath not entitled you to a forfeiture. Beſides it appears not here that the Court was legally ſummoned, as it ought to do, nor that there was any proclamation made for the holding of the Court, nor any notice given to the Tenants of the holding of the Court, 38, 39 Eliz. Banc. Reg. Criſp and Dyer. Roll chief Juſtice, This caſe hath depended long. It is a hard thing to make a forfeiture of the Copyhold, if there was a real controverſie whether the Court was well held or not; but if not, and that the words were uſed only as a ſhift to avoid the Plaintifs ſute and ſervice, it is a forfeiture; for the words are like Jack in a Box, and no body knows what to make of them. Jerman, Nicholas, and Ask enclined that it was no forfeiture. Adjourned to the next term.

Upon a Demurrer the queſtion was, whether a Copyhold were forfeited or not.

Forfeiture.

Fielder againſt Tovy.

Hill. 1650. Banc. ſup.

Paſch. 1650. rot. 430.

Fielder brought an action of debt upon a bond given to the Sherif by Tovy the Defendant, to appear to the Plaintif in the Upper Bench, to an Action there brought againſt the Defendant. The Defendant appears, and demurs to the Declaration, and ſhews for cauſe, that the Bond upon which

Demurrer to a Declaration upon a Sheriffs Bond.

the Plaintif declares, and the Declaration do not agree, for the Plaintif declares pro quadragint. libris, and the Obligation mentions, that the Defendant is bound in quadragent. libris. Divers cases were put to resemble this, viz. Massam and Iollies case, where sexigint. was put for sexagint. and yet held good, and Waters case, where septuagint. was put for septingent. And Downes and Hussies case, 12 Car. Banc. Reg. where quingint. duabus libris was used instead of quinquagint. and yet held good, because it might be an abbreviation of quinquagint. Ierman Iustice held the Declaration not good, because the condition of the Obligation is to doe a collateral thing, and so it cannot appear by it what the sum is in which the party is bound, as it may where the condition is for the payment of money. Roll chief Iustice held the Declaration not good, because the Bond upon which it is grounded doth not warrant it, and the meaning of the word cannot here be known, and if the Condition were not collateral it would not help it. Nicholas Iustice differed, and said, it would be hard to make it no Obligation for the mis-writing of a word, and therefore it were good to search presidents, for it as a considerable case. Ask Iustice said, the meaning is obscure, and this makes the difficulty. Adjourned, Postea.

Declaration.

Wentworrh against Wentworth.

Hill. 1650. Banc. sup.

Mich. 1650. rot. 531.

WEntworth brought an Action of Debt against Wentworth upon an Obligation; The Condition of it was this in effect, That whereas the Defendant had granted an annuity to the Plaintif, that the Defendant should make further assurance to the Plaintif for the enjoying thereof within one month, when he should be thereunto required: Upon a special verdict the question was from what time the month should begin, whether from the date of the Obligation, or from the time of the request to be made. Latch held it should begin from the request, and not from the date of the Obligation, because a month from that time is too small a time to do the thing required, but if it shall be after the request it will be a proportionable time fit for the doing it. Roll chief Iustice, If there be an indifferent construction, which may be taken two ways, we will take it that way which is most reasonable to make the Obligation stand in force, and me seems the words here are plain, namely, that the assurance shall be made within a month after request, & not after the date of the Bond. Ierman Iustice to the same effect, and said, that although the request for further assurance were not within one month after the date of the bond, yet the party may require it after the month is ended, and within a month after such request the assurance is to be made, and the Obligation shall be intended for the benefit of the Obligor. Nicholas and Ask Iustices to the same effect, so judgement ruled for the Plaintif, Nisi, &c.

Interpretation.

Child

Child againſt Guiat.

Hill. 1650. Banc. ſup.

Hill. 1649. rot. 153.

IN an Action upon the Caſe upon an Aſſumpſit made by the Defendant to pay the Plaintiff a certain ſum of money, at a certain day. Upon a ſpeciall verdict, The queſtion was whether there were a variance between the promiſe, and the Declaration, which queſtion grew from the doubt, whether the day of payment in the Aſſumpſit ſhall be intended according to the old ſtile, or according to the new, for if it were intended one way there was no variance, if the other way there was a variance. Hales held that there was no variance, and though there ſhould be, yet he ſaid the Plaintiff ought to have Judgement; becauſe the time in this caſe is not material, for the debt for the payment whereof the promiſe was made, appears to be due upon an Accompt made between the parties, which time is paſt, and grows not due upon the Aſſumpſit, for this is no new promiſe in Law, and it is all one here as if the promiſe had been ſet forth that he promiſed to pay, when he ſhould be thereunto required. And whereas it hath been objected, that the debt upon the Accompt appears to be due by two, and that the Action therefore ought to have been brought againſt them both, and not againſt one of them as it is here, he anſwered, that the Action may be brought againſt both, or any one of them at the election of the party, and the cuſtom of Merchants makes no difference in the caſe, for the Law creates the debt and makes both lyable, though the cuſtom give election to ſue one or both of them, and ſo one may here be ſued, for the debt is by the cuſtom transferred upon one, although it be the debt of both. And here both the dayes, viz. according to the old ſtile, and according to the new were paſt before the action brought. Roll chief Iuſtice held, that the Plaintiff ought to have Judgement; but that day ſhall be taken according to the old ſtile, if there be not a ſpeciall averment to the contrary, and ſo there is variance between the pleading, and the verdict; but this doth not hurt here, for the Action doth not fail, although the day be limited upon the evidence, otherwiſe than it is in the Declaration, for the debt is the duty ariſing upon the accompt made between the parties, and the day upon the Aſſumpſit for the payment is not material, for the Action lies though no Aſſumpſit had been made, and here is no need of an actual promiſe; But if an Aſſumpſit be made upon a contract, there is no precedent duty, and ſo there is a difference between one caſe and the other. And if two be found in arrearages of accompt, by the cuſtom of Merchants one may be charged to pay all the debt as well as both. Ierman Iuſtice as Roll, and ſaid, that where the day is part of the contract, it ought to be alleged to be paſt at the time of the Action brought; but it is not ſo here, and alſo both the dayes are here paſt. Nicholas to the ſame purpoſe, Roll chief Iuſtice, If the Action be ſpecially laid, and the day made part of it, there if the Plaintiff fail in the day, his action alſo fails. And if one declare generally for 100 l. upon an indebitatus, and it appears upon the evidence, that the Defendant did owe the Plaintiff but 10 l. yet the Plaintiff ſhall recover; But if the Plaintiff declare ſpecially, viz. for a horſe ſold for ſo much, and by the evidence it appears he owed a leſſe ſum, there the Plaintiff ſhall not recover, for it ſhall be intended another contract, and not that, upon which the Action is brought, and ſo Iudgement for the Plaintiff

Special verdict. Q. whether a variance between the declaration, and the promiſe on which it was granted.

Date.

Averment.

Time.

Actual promiſe.

Debt.

Cuſtom.

Declaration. General. Special.

niſi, &c. Maynard ſpake again to it; But Iudgement was given for the Plaintiff upon the former reaſons.

Paul VVilliams and his wife againſt the Cuſtodes.

Hill 1650. Banc. ſup.

Error to reverſe a Judgment at the Seſſions for ſpeaking words.

PAwl Williams and his wife had a Iudgement given againſt them at the Seſſions at Hickes Hall, upon an endictment for ſpeaking words againſt the Lord Fairefax, whereupon they brought a Writ of Error in this Court to reverſe the Iudgement. The Exceptions taken were theſe, 1. That the Iuſtices there had not power to hold plea for words ſpoken. To this the Court anſwered that they have power to hold plea for ſuch words, becauſe they tend to breach of the peace, and the ſpeaking of them is a great miſdemenour. The ſecond exception was, that it is ſaid juratores jurati electi triati ad veritatem dicunt, & ad dicendum is left out. 3ly. There iſſued out a capias pro fine againſt the parties, whereas there was no fine ſet upon them. The Court to that anſwered that a fine was ſet. Wild took another exception, viz. that the endictment ought not to be joynt againſt two, for words ſpoken by them both; but ſeverall endictments, for the words of one are not the words of the other, though they be the ſame words; But the Court anſwered, that a joynt endictment was good enough, although a joynt Action of the Caſe cannot be brought againſt two, for words ſpoken by them both. He took alſo this Exception, that it doth not appear that the parties were tryed in the Court, for it is only ſaid that they were ducti ad barram, and then that they were removed from Hickes Hall to Newgate. The Court anſwered, that the words ducti ad barram were ſufficient, and it is needleſs to ſay they were tryed in Court. And therefore the whole matter reſts upon the 1. Exception, whether the want of the words ad dicendum be Error, and for that let the Clark of the peace be here on VVedneſday next, and then ſpeak again to it, and then by the whole Court the Exception was adjudged good. And the Clark of the peace was fined 40 l.

Endictment.

Caſe.

Maſterman againſt Ruſholme.

Hill. 1650. Banc. ſup.

Paſc. 1650. rot. 594.

Error to reverſe a judgement in an Action upon an Aſſumpſit.

A Writ of Error was brought to reverſe a Iudgement given in an Action upon the Caſe upon an Aſſumpſit, to pay Mariners wages, the Exceptions taken were firſt, that the plaint was for 10 l. and the Declaration is to the damages of 20 l. and ſo there is variance between the plaint, and the Declaration. Next the promiſe is laid to be made the 1. of May, 1641 to ſerve the Defendant for a year, and he ſaith that he ſerved him from the 1. of May for a year, whereas the 1. of May ought to be excluded, ſo that he ought to ſay that he ſerved for a year, from the making of the promiſe. Roll chief Iuſtice ſaid, that there is variance between the plaint, and the Declaration; but it is helped by the verdict, for that finds that he hath ſerved a whole year. But two other exceptions were taken at the Bar. 1. That the Declaration was pro ſalore inſteed of Salario. And 2ly. It is ſaid deſerviret for deſervivit. And upon theſe the Court ordered the Defendant in the VVrit of error to ſhew cauſe why the Iudgement ſhould not be reverſed.

Variance.

Error.

Hill

Hill. 1650. Banc. ſup.

AN Action upon the Caſe was brought in London for calling a woman whore, the Defendant removed the cauſe into this Court, whereupon the Plaintiff moved for a procedendo to try it in London, where the action was firſt brought. Roll chief Juſtice held, that a procedendo was to be granted, for we cannot determine the Cuſtom; but if a Judgement be given in London, if it be erroneous, a writ of Error may be brought in the Huſtings to try the cuſtom, therefore take a procedendo niſi cauſa oſtenſa fuerit in contrarium. Antea. For a Procedendo into London.

Davis againſt Ockham.

Hill. 1650. Banc. ſup.

Mich. 1650. rot. 557.

DAvis brought an Action upon the Caſe againſt Ockham for ſpeaking theſe words of him; The knave the Apothecary that married my ſiſter hath poyſoned my Vncle, and I will have him taken up again to hang him. The defendant pleaded an accord betwixt him, and the Plaintiff, that whereas the Plaintiff had done a Treſpaſs againſt him, that one Treſpaſs ſhould be ſet againſt the other. To this plea the Plaintiff demurred, and Twiſden ſaid the plea was not good, and cited 16 Ed. 4. f. 89. and prayed Judgement for the Plaintiff. Latch of Councell with the Defendant ſaid that the Accord was executed on the Defendants part, and therefore may be pleaded in Bar. To this Roll chief Juſtice anſwered, how have you diſcharged the Accord? for you do not ſhew it. Latch took Exceptions to the Plaintiffs Declaration. 1. That the words ſet forth are not actionable, for it doth not expreſs that the Plaintiff wittingly poyſoned the Defendants Uncle, or that he did dye of the poyſon, and cited Hob. rep. 8. Miles and Iacobs caſe. and 275. Fleetwood and Caveleys caſe. 2ly. There is no Communication expreſſed in the Declaration to be of the Uncle, and it may be ſpoken of another Uncle, and the innuendo will not help it, becauſe he may have divers Uncles. Twiſden anſwered, that it is implyed in the ſence of the words, that he poyſoned him feloniouſly, and ſo conſequently wittingly. And 2ly. He ſaith that he will have him digged up, and ſo it muſt be intended that he dyed of the poyſon. Roll chief Juſtice held that the words are actionable. And 2ly. That the Defendants plea in Bar is not good, Ierman Juſtice held the plea in Bar not good; but he doubted whether the Declaration was good, for it doth not appear thereby, whether the party dyed of the poyſon, and the latter words help it not. Nicholas Juſtice, and Ask Juſtice agreed with the Roll in all, and thereupon the rule was Iudicium niſi, Lundi Suivant. Demurrer to a plea in an Action for for words. Bar. Caſe. Bar.

Cuſtodes, &c againſt *Maine* and Serjeant.

Hill. 1650. Banc. ſup.

AIoynt Enformation was exhibited againſt Main & Serjeant 2 Juſtices of Peace, for not enquiring of a Ryot, and a verdict found againſt them. Arreſt of judgment upon an information found.

The Defendants move in Arreſt of Judgement, and by Hales ſhew for cauſe that the information ought not to have bèn joynt againſt them, but ſeveral, becauſe their offences are ſeveral and not joynt, and here one of them is acquitted, and ſo judgement cannot be given againſt the other that is found guilty. Roll chief Iuſtice anſwered, That as an Attachment in a Prohibition is ſeveral, ſo the execution here may be ſeveral, and it is not materiall though one be acquitted, and the other found guilty. Ierman, Nicholas, and Ask Iuſtices to the ſame purpoſe. It was then ſaid, that it is not neceſſary that the next Juſtices only ſhould remove a force, but all the Juſtices of the County are bound to it: And theſe words in the Statute, viz. That the 2 next Juſtices ſhall do it, are put but for conveniency, and the more ſpeedy execution of Juſtice. Nicholas Iuſtice doubted of this. Judicium niſi, pro cuſtodibus.

Execution.

Force.

Ailet againſt Watleſs.

Hill. 1650. Banc. ſup.

Trin 1649. rot. 200.

In an Action of Treſpaſs and Ejectment, there was a ſpecial verdict found, upon which the caſe fell out to be this. An Infant bargains and ſells land, and is vouched to warranty, and comes in upon the Voucher, and thereupon a common recovery is had, and upon this the queſtion was, whether this be ſuch a recovery, that the Infant cannot avoid by Entry. Hales held it could not be avoided, but did bind the Infant during his life, but I could not hear his reaſons. Wild of Councel on the other ſide argued, that the Infant was not bound by the recovery, becauſe as an Infant cannot alien his lands, ſo neither can he ſuffer a common recovery, and cited 6 rep. 28. 2ly. No record made by an Infant can bind him, and for this he cited 26 Ed. 3. Fitz. per que ſerv. 24. 41 E. 3. f. 3. 44 E. 3. 10. 9 Ed. 4. 38. and though it be breve Amicabile, and by conſent, yet it binds not, and 9 Car. Newports caſe, where a recovery ſuffered by a Guardian was adjudged good, comes not to our caſe; and for the intended value in a recovery, that is not material to make it binding, for it is but a fiction, and not a real value. Roll chief Iuſtice demanded whether a fine be not breve amicabile; and yet he ſaid that that binds an Infant until it be avoided by writ of Error. And he ſaid that the Infant is not bound here, but the queſtion is whether he can avoid the recovery by Entry, or muſt bring a writ of Error to avoid it. And he held that a recovery ſuffered by a Guardian is not good, notwithſtanding the opinion in Newports caſe. Hales replyed, that the recovery here is binding till it be avoided by a writ of Error, and that the Infant cannot avoid it by his Entry, though an Infant may avoid a deed by Entry, although it be enrolled. And here appears no conſent of the parties, and the party cannot ſhew it, and here is a formal judgement given, which binds till it be reverſed by a writ of Error. Roll chief Iuſtice, An Infant may avoid a matter in pais by Entry, but not a matter of Record, and here is a proper way by the law to avoid it, namely by a writ of Error, which is alſo matter of record, and of as high a nature. Ierman, Nicholas, and Ask Juſtices to the ſame effect, and ſo judgement pro Defendente, niſi.

Special Verdict in Treſpaſs and Ejectment.

Fine. Error. Recovery.

Entry.

Powell againſt Hopkins.

Hill. 1650. Banc. ſup.

Hill. 23 Car. rot. 787.

IUdgement was given in an Action of Trover and Converſion for the Plaintif: The Defendant brought a writ of Error, and the Exception taken was to the Declaration, wherein the Plaintif among other things declared of a Trover de ducentis ponderibus æris, & ducentis ponderibus plumbi, Anglice of Braſs and Lead, and there wants an Anglice for the ponderibus, ſo it is uncertain what the quantity of either are. And upon this Exception the rule was, that the Iudgement ſhould be reverſed, niſi, &c. Error to reverſe a judgement given in a Trover and Converſion.

Denton againſt Caket.

Hill. 1650. Banc. ſup.

Trin. 1650. rot. 150.

DEnton brought an Action upon the Caſe againſt Caket for ſpeaking theſe words, He and his fellows have ſtollen her (having ſpeech of a Cow of the Defendants) and I do charge him with flat felony: By reaſon of which words he was taken and impriſoned. The Defendant pleaded an award made (by Sir John Rivers, and Sir Nicholas Miller two Juſtices of Peace) between the parties in Bar. Twiſden of Councel with the Plaintif ſaid, that the award doth not bind the Plaintif, for the award concerns only the ſpeaking of the words, and ſpeaks nothing of the impriſoment: And 2ly. the Award is not good, for there is not ſatisfaction made by it on both parties. Wild of Councel with the Defendant held, that the Declaration was not good, and that therefore he needs not to juſtifie the plea; for though it ſhould be ill, yet the Plaintif can have no judgement, and he ſaid the Declaration was naught, becauſe it alleged no day when, nor place where the Defendant charged the Plaintif with the felony, and made him to be impriſoned. Twiſden anſwered that there is a place alleged, and that though there were none, yet it is well enough for part, and judgement may be given for that. To which Roll chief Iuſtice agreed. Wild replyed, then the plea is good. But the Court anſwered, it is not, and what ſay you to the Arbitrement? Wild anſwered, it was good, to which Ierman and Ask Iuſtices aſſented. Roll chief Iuſtice anſwered, It is a benefit to the Pariſh; and ſo to the Overſeers of the poor. Nicholas Iuſtice to the ſame purpoſe. Roll chief Iuſtice ſaid, that the Declaration is ill, and the Plea alſo, for the Plea is entire, and yet goes not to all the matter alleged in the Declaration, but the plea is only to part of them, and therefore if any part of the Declaration be good, judgement ought to be given againſt the Defendant for that part, and the plea in Bar is naught, ſo judgement ought to be entirely for the Plaintif. But it is to be conſidered concerning the damages. Demurrer to a plea in Bar of an Action upon the caſe for words.

Declaration. Plea.

Ros

Roſyer againſt Langdale.

Hill. 1650. Banc. ſup.

Paſch. 1650. rot. 100.

Error to reverſe a judgement in an Aſſumpſit by an Executor againſt an Adminiſtratrix.

ROſyer an Executor brought an Action upon the Caſe upon an Aſſumpſit againſt Langdale a Feme Adminiſtratrix, and declares that the Defendant, in conſideration that he would forbear ſute until ſhe had taken out Letters of Adminiſtration, did aſſume and promiſe to pay unto him the Plaintif a certain ſum of money owing unto him by the Inteſtate. Upon Iſſue joyned, and a Verdict and a Judgement for the Plaintif, The Defendant brought a writ of Error to reverſe the Judgement. And Baldwin of his Councel took theſe Exceptions. 1. That the Plaintif had ſet forth no conſideration in his Declaration for the Aſſumpſit; for all that is alleged is, that the Plaintif ſhould forbear ſute till the Defendant had taken out Letters of Adminiſtration, which is no conſideration at all, for the Defendant was not lyable to be ſued as Adminiſtratrix, until ſhe had taken out Letters of Adminiſtration, except there were a cauſe depending, as here is not. And he cited Hob. rep. Bidwell and Cottons caſe, That if there be a ſute commenced, though there be no cauſe for it, yet forbearance to ſue is a good cauſe to ground an Aſſumpſit upon. A ſecond Exception was that the Venire facias is not awarded per Curiam, nec in Curia. Roll chief Iuſtice held the 1. a good Exception, for the Defendant was not chargeable before Letters of Adminiſtration taken forth, if ſhe do not intermedle with the goods of the Inteſtate, and it doth not appear here that ſhe did, neither is the Defendant compellable to take forth Letters of Adminiſtration, for they may be granted to the next of Kin if the Ordinary pleaſeth, according as the Statute ordains. Ierman, Nicholas, and Ask Iuſtices to the ſame intent, thereupon the rule was reverſetur, niſi, &c. But becauſe Day being of Councel on the other ſide took ſome Exceptions to the writ of Error and the return thereof, It was adjourned.

Aſſumpſit.

Staples.

Hill. 1650. Banc. ſup.

For a Superſedeas to a Scire facias.

THe Court was moved to ſuperſede a ſcire facias brought by a priſoner of the Marſhalſea, upon the late Act for diſcharging of poor priſoners, becauſe the Certificate of the cauſe for which he was a priſoner was falſe, and ſo the proceedings erronious, for the party was in execution for Treſpaſs, which is not within the Statute made for the priſoners. 2ly. Becauſe there was no due notice given to the party, at whoſe ſute he lay in execution, as the Statute doth direct there ſhould. The Court ordered to view the Certificate, and to file it, otherwiſe there ſhould be no proceedings upon the ſcire facias, and directed the party to demur upon the ſcire facias, if it be not good, becauſe the matter alleged cannot be pleaded to it.

Filing. Demurrer.

Cuſtodes.

Cuſtodes againſt Arskot.

Hill. 1650. Banc. ſup.

MAynard moved the Court for one Arskot that was outlawed for murther, and had leave to bring his writ of Error, that he may have longer time to bring it, because the King uſes to ſign the writ, and the Parliament had not ordered who ſhall do it now, and therefore the Attorney General muſt adviſe with the Parliament about it, which cannot ſpeedily be done, Thereupon time was granted till the Attorney could conveniently do it. For time to bring a Writ of Error.

Newcomin againſt Leigh.

Hill. 1650. Banc. ſup.

Paſch. 1650. rot. 52.

LEigh did aſſume and promiſe unto Newcomin, that if Newcomin would take one Loe for his Debtor, in the room of one Cooper, and would ſpare Loe until ſuch a time for the money, that then he would pay the money to Newcomin, if he did not, and upon this Aſſumpſit Newcomin brought his Action againſt Leigh. The queſtion was whether this were a good Aſſumpſit. And the Court held it was not, becauſe it is a collateral thing, and he doth not ſay that he will diſcharge Cooper, and ſo Newcomin may ſue Cooper notwithſtanding the Aſſumpſit; For though it may be it was the intention of the parties to diſcharge Cooper, yet it appears not ſo by the words of the Aſſumpſit ſet forth: And it was then ſaid by Roll, That if I promiſe to pay to John a Down a Debt which John a Stile oweth to John a Down; this is nudum pactum. Whether a good Aſſumpſit. Nudum pactum.

Bawſy and Lowdall.

Hill. 1650. Banc. ſup.

Paſch. 1650. rot. 275.

VPon a ſpecial verdict in an Action of Treſpaſſe and Ejectment, the caſe in effect was this. A man ſeiſed of Copyhold lands in fee, deviſable by Cuſtom, deviſeth them in this manner, I give and bequeath my lands, &c. to my ſon Richard, during his natural life, and after to the heir of his body for ever. Hales of Councel with the Plaintiff made theſe queſtions, 1. whether by the words of the Will a Fee-ſimple at the Common Law paſſeth becauſe there is an eſtate to Richard for life, and after to his heir in the ſingular number. And he argued that the word heir includes heirs, becauſe it is Nomen Collectivum: Next, Whether the deviſing the land to Richard for his natural life, and after to his heir for ever, makes any difference in the Caſe, and he held it did not, and ſaid, that Archers caſe that is objected by the other ſide differs much from this, for there the words are reſtrained; for it is Proximo Hæredi, and not Hæredi generally, as it is in our Caſe; and there the words next heir are not words of limitation, but of purchaſe, and to Special Verdict upon the deviſe of a Copyhold in Fee.

decipher the perſon, but not to limit the eſtate; and in our caſe if there ſhould not be a limitation, Richard ſhould only take for life, which is not the intent of the Will, as may appear by the paſſages, and clauſes of it. And Thomas and Kemiſhes caſe, in 5 Car. in this Court makes an end of our Caſe. Neither doth the adding of the word in perpetuum make a difference in the Caſe, for if the words had been omitted, the ſame eſtate had paſſed to the Tenant, Richard and his Eſtate is not enlarged by them. 2ly. The words in perpetuum relate to all the Eſtate, and not to any particular Eſtate, and ſo the ſurrender made by R. Hunt is good. Next of all, ſuppoſing that it be a limited Eſtate, and a contingent remainder, the queſtion will then be whether this contingent remainder be deſtroyed or no, and I conceive it is, becauſe the particular Copyhold eſtate, which muſt ſupport this contingent remainder is deſtroyed, and the Law is the ſame in that point in Copyhold caſes, as it is in other caſes at the Common Law, for Copyholds are directed by the rules of the Common Law, 13 Iac. Banc. Reg. It is alſo held, that there is the ſame rule to ſupport a contingent remainder of a Copyholdas there is of Land at the Common Law. Next it is to be conſidered whether the particular Copyhold eſtate, be extinguiſhed or not. And it is cléer that it is, for the cuſtomary Eſtate is in the Lord who hath the Fée ſimple, which cannot both ſtand together, and ſo there is no eſtate to ſupport the contingent remainder Copyhold, and conſequently all objections are by this anſwered. 1. That the ſurrender ſhall not do wrong. 2ly. That the ſurrender deſtroys not the Cuſtom. Turner on the other ſide argued, that only an eſtate paſſeth to Richard for life, and that the word Heir is not a word of limitation, to make the Anceſtor take a Fée ſimple, neither ſhall the word Heir be taken Collective here but ſingulariter, and ſo according to the common ſence, number, and matter ought it to be conſtrued. And Nowns Collective in the ſingular number do not ſignifie the ſame thing, that they do in the plurall number, as may be proved by other examples, and there is no proper name to ſignifie one particular Heir in Law, if the word Heir in the ſingular number ſhall not do it, Shellyes caſe, 1. Rep. f. 101. & Cooks inſtitut. f. 8. 1. Rep. Archers caſe. And there are two Judgements in the Common pleas in the very point, as I am informed by the Attorney on our ſide. In a Will the word Heir ſhall not be taken Collective, but in the natural grammaticall ſence, and not as a word of art; but it is otherwiſe taken perchance in conveyances, which are made by men of Art, and learned in the Laws, whereas wills are made commonly by lay gents, and unskilfull in the Law; And the rule is, that words ſhall be interpreted to make all the parts of a déed in which they are to ſtand together, and to bear ſence, and to be in eſſe, and effectual, which cannot be here if the word heir ſhall be taken Collective; but may be if it be taken ſingulariter. Hob. rep. Stukely and Butlers caſe. Next if the word heir ſhould be taken Collective, then the Eſtate for life would merge, 30 El. C.B. Hill. 3 Iac. C.B. Hiller and Lewis his caſe. 3ly. Rich. hath only an Eſtate for life, if it were otherwiſe the Teſtator would have otherwiſe expreſſed it and he hath well expreſſed an eſtate for life, and no other Eſtate in him. If one grant 4. parts of his manno, it ſhall paſſe 4. parts of 5. and not all. For the other poynt the contingent remainder is not here deſtroyed by the deſtruction of the Copyhold Eſtate, for Copyhold Eſtates do not depend one upon another, as Eſtates of the Common Law do, and here is one in eſſe to take the Eſtate. Another queſtion he ſpoke to, viz. whether a Leſſee at will being ouſted by a ſtranger can reenter. and he held he cannot, for he hath but a meer right, 38 H. 6. f. 27. Forteſcue and Yelverton, 3. Iac. Banc. Reg. rot. 501. Carpenter and Collins. But to this Roll chief Iuſtice, and Nicholas Iuſtce anſwered, that he may enter notwithſtanding it

Entry.

hath

hath been heretofore controverted, and the reaſon is, becauſe he hath the primer poſſeſsion. Roll chief Iuſtice enclined that the contingent remainder is not deſtroyed, becauſe it doth not here depend upon the particular Eſtate; but it ought to expect till the remainder happen; and he conceived that the word heir, and heirs, were all one here by the intent of the partyes, and the frame of the conveyance. Ask Iuſtice ſaid, that it is a good Eſtate of Fee ſimple conditionall executed in Richard. Ierman Iuſtice, The intent in a Will, if it be not contrary to Law, ought to be taken, and there muſt be words to make the intent appear, and theſe words muſt ſtand together, and ſhall not be made void, and he conceived the contingent remainder not deſtroyed. Adjourned ſtill the next Term. Poſtea.

Port againſt Midleton.

Hill. 1650. Banc. ſup.

A Writ of Error was brought to reverſe a Judgement given in an Action of debt upon an obligation, and the Error inſiſted upon was in the entring of the Judgement, which was quod recuperet Debitum ſuum, and doth not ſay prædictum. Roll chief Iuſtice anſwered, that the debt is confeſſed by the party, and the queſtion is, whether the deed was delivered as an eſcrow or not; but it was delivered to the party himſelf, and therefore could not be delivered as an eſcrow. Ierman Iuſtice ſaid, that debitum ſuum without prædictum is not good, for the word prædictum is verbum operativum. Ask Iuſtice as Roll, and there is but one debt, and the word ideo in the record implyes it to be the ſame debt. Nicholas to the ſame effect. The rule was affirmetur niſi cauſa die lunæ ſequenti.

Error to reverſe a judgment in debt

Delivery.

Eſcrow.

Implication.

Hill. 1650. Banc. ſup.

AN adminiſtrator had a Judgement againſt one to recover a debt due to the Inteſtate, and then the Adminiſtrator dyed Inteſtate, and another took out new letters of adminiſtration de bonis non of the firſt Inteſtate, and after moved the Court that he might have a ſcire facias to revive the Judgment obteined by the former Adminiſtrator. But the Court anſwered, that he could not have it; but muſt begin a new Action, for the debt againſt the party.

For a ſcire facias to revive a judgement denyed.

Scire facias.

Hill. 1650. Banc. ſup.

ONe was endicted for ſpeaking theſe words againſt a Major of a City, viz. you are a forſworn man, and have broken your oath. Hales moved to quaſh the endictment, becauſe the words have no reference to the Major in reſpect of his office. Ierman Iuſtice anſwered, that the ſpeaking of the words is a breach of the good behaviour, and thought it fit the Defendant ſhould plead to the endictment, to which the Court at firſt enclined. But afterwards ruled the other party to ſhew cauſe on Monday following why it ſhould not be quaſhed.

To quaſh an endictment.

The Counteſſe Rivers caſe.

Hil. 1650. Banc. ſup.

Arguments touching priviledge of peerage not to be arreſted.

THe Counteſſe Rivers was arreſted by a bill of Midleſex, and prayes in Court by her Councell that the Writ may abate, and the Precept, and pleads her patent, whereby ſhe was created a Counteſſe, and ſo pleads that ſhe ought not to be arreſted. Latch of Councell againſt the Counteſſe argued that her patent was not good, becauſe it wants the words of inveſtiture, which are materiall words in the making of an Earl or Counteſſe, for although the Act of inveſtiture may be omitted, becauſe ſhe is a woman and ſhe cannot be girt with a ſword, yet ſhe may be cloathed with a mantle, as it is in the Inſtitutes, f. 16. 6. and ſo was it in the caſe of Ann Bullein that was made Marchioneſs of Wincheſter by King Henry the 8. and of the Lady Finch, made Counteſſe of Winchelſea by King Iames, 6 Iac. Paſch. 1. but in this Caſe there was a non obſtante, to diſpence with the clauſe of inveſtiture, and in the viſcount Barkleys caſe, the patent whereby he was made Earl of Nottingham was adjudged naught, for want of this clauſe. 2ly. It doth not appear by the patent, that ſhe is made an Engliſh Counteſs, and then ſhe hath no privilege, 8 Rich. 2. Banc. Reg. 204. 11 E. 3. Banc. re. 473. Neither is there any relation to the patent to any place, of which ſhe is made a Counteſs. For although the patent be ſealed with the Engliſh broad Seal, this is not materiall, for outlandiſh honours may be granted by the broad Seal of England. 3ly. The cauſe that ſhe ſhall have privilege of an Engliſh Counteſſe is not material, becauſe ſhe is not made an Engliſh Counteſs, and ſhe is no Counteſs to have privilege againſt the Common Law, although ſhe may (it may be) have her privilege in point of honour in the Marſhalls Court and Heralds office, becauſe there is no publique good and ſervice in making her a Counteſs, 43 E 3. 4. for being a woman ſhe cannot be imployed in Arms, or otherwiſe for the publique. And an Embaſſador cannot have privileges granted him, which do not concern him as an Embaſſador, Dyer 60. and 11 H. 7. rot. 24 C. Banc. The King cannot grant one to be exempted from arreſting, as it is in Cooks Mag. Char. Paſc. 7 H. 8. rot. 66 C.B. for the reaſon of that clauſe of Magna charta nulli negabimus Iuſticiam. The King cannot grant a Sanctuary to protect men from the arreſts of his ſubjects, 29 Aſſ. 34. Keiw. 190. And there is no inſtance to be given of a woman made a Counteſs, that was ever free and protected from arreſting. In the Statute of 20 H. 6. C. 9. for Earls wives, and 21 H. 8. to qualifie Chaplains, there is no notice taken of Counteſſes by creation, but only of Counteſſes dowagers, or Counteſſes by deſcent, 6 rep. 63. C. de Rutlands caſe, and Ann Bullein was tryed per pares as ſhe was Queen, and not as ſhe was Marchioneſs of Wincheſter. And further the privileges of Earls and Counteſſes are now extinct, for the cauſe of thoſe privileges, viz. the King and houſe of Lords are extinct, and gone, and the priviledge of being free from arreſts is a priviledge executory, and not executed. Neither doth the ſufficiency of their poſſeſſions only give them the priviledge not to be arreſted; but their publique ſervices to the State, which is the final cauſe of the privilege, and the other was but a partiall cauſe, and not the ſole cauſe. Reliefs were payed by Barons and Earls, when Earldoms and Baronies were created; but they are not now payed as they were then, but according to the value of the poſſeſſions now, and Amercements of Earls and Barons were equall. The priviledges of Earls and Barons was derived originally from Soldiers, after it was derived to Biſhops, and great Counſellors, and ſo it appears that they were

were privileged in respect of publique imployments, and not by reason of their revenues. All the Abbots and Priors had the privilege not to be arrested, yet all were not Lords of the Parliament, 21 E. 3. Mich. 59. Tres. Mich. 7 H. 7. pl. 7. 31 E. 3 proces. 54. 27 H. 8. 7. 7 H. 6. 11. 29 E. 3. f. 30. Dyer 315. And a Judgement without a Capiatur was in Trespass against a Bishop, because the King was to have no fine, 14 H. 7. 21. But it is not so in a temporall peer, where the King is to have a fine. The privileges have severall expressions, and the reasons for the privileges of the lay peerage is fully expressed in the Writs directed to them, Regist. 287. 247. Rast. Exigent. Britton 88. 10 H. 4. 15. per Hull. 14 H. 6. 2. per Newton. 39 E. 3. f. 35. Hill. 14 Eliz. Dyer 314. 3 H 6. f. 38. 48 E. 3. f. 3. 35 H. 6. 46. for other privileges they are not allowable: And now also all tenures as well as the House of Lords is taken away by the late Act; and though her privilege do continue, yet she hath not taken the right way to have it allowed; for she ought to have brought a writ out of the Chancery to have it allowed, and not to have done it by a dilatory plea, 8 H. 6. 9 & 10. and the Patent cannot try whether she be a Countess or not, 9 rep. 31 Inst. 16 b. 6 rep. 63. And lastly mischief and misery will ensue to many, if this privilege should be allowed, and the very matter speaks for it self, and so he prayed judgement for the Plaintif. Hales of Councel on the other side prayed the privilege might be allowed, and he followed Latch in the points of this Argument: And first he said, that the thing grounded by the Patent is only in creation of the dignity, and there is no need here of investiture, for if there were, then a recital of it should be also necessary, but because it needs not, therefore it needs no recital of it in the Patent. Seldens Tit. of honour, f. 876. 21 R. 2. There is a recital of an Investiture, but there was no Investiture, and so it was not material, and a non obstante is to no purpose to dispence with the want of Investiture, if it were necessary, and the reason of the making the new Patent of the Lord Barkeley was not for the want of the Clause of Investiture, for the Investiture is a ceremony of the Heraulds, and not essential to the Honour. And although there be no certain place of denomination of the place of the Earldom, yet is the Patent good, for it may be out of England, and yet she may be an English Countess notwithstanding, Although I agree that forein honours may be granted by the Broad Seal of England; but here be sufficient words to express her to be an English Countess, & the most proper that can be, viz. the Patent. Creations of such honours have been frequent, & she hath also a sufficient estate to support her dignity: I confess that it is true that no person can be privileged from Arrest by grant; but here the privilege ensues the Patent of her Countesship by Custom and Law, as incident to it. The King cannot grant a privilege to imprison, but if he grant a Court, the power to imprison follows necessarily upon it; And the privilege which the Law gives to the person of a Countess, is that which exempts her from Arrest, as it appears in the Case of a Countess by Mariage, and a Countess by Creation is more honourable than a Countess by Mariage; and therefore ought to have as high privileges as the other; and the Statute made concerning Countesses, the wives of Earls and Barons do appertain to a Countess created; for those Statutes were but an affirmance of the Common Law, and did introduce no new Law. This privilege is not taken away, for it arose by Custom and by the Common Law, and not from Forreiners, as Latch conceives, and so the reason of that cannot be as he urgeth, but by the privilege of the person which indures as well when there is no Parliament, as when there is, and this privilege is during life, and not like to a privilege granted by reason of employment. For a Countess

Dowager hath no more reason to be privileged, in relation to military employment than a Countess by Creation, and by the late Act no employment is taken away; And for the Clergy they were privileged from Arrests, not because of employment, but by reason of the eminency of their persons. There may be an Earl or a Baron by writ or by prescription, and there it ought to be certified by writ; but here the honour being by Creation, the Patent may be pleaded to certifie it, as well as if it were certified by writ, and to plead it thus is the more proper way. A Baron ought not to be stiled Dominus in a writ, but by his Christian name, and addition of Knight, if he be one, if he have no special name of Barony in his Creation. Roll chief Justice demanded, if one be made a Baron, and be not called to the Parliament by writ, or comes thither by virtue of some clause in his Patent, shall he be exempted from Arrest? quasi diceret non. And if one heretofore had had twenty Knights fees, could he have come to the Parliament by reason of them? And held that the privilege is not allowable, for she never had reference to the Parliament, or to do any other publique service. Ierman, Nicholas, and Ask Justices agreed with Roll in all. Roll said, If the King grant a Town to be a Burrough, the grant gives it not privilege to send a Burgess to the Parliament, except there be special words in the Patent to warrant it; but if he make a County it is otherwise by Statute. Adjourned.

Privilege.

Hayward against VVilliams

Hill 1650. Banc. sup.

Hill. 1649. rot. 824.

Whether a Writ of Error well brought.

THe Case was this, A Feme was sued as a Feme sole, but by the surname of her Husband, she being Covert Baron, and Judgement was given against her, and the Baron brought a writ of Error. The question was, whether the writ of Error was well brought by the Baron. It was then said, That if a Feme Covert levy a fine as a Feme sole, if her Baron die she shall not defeat it, but the Baron may defeat it during her life. Roll chief Justice to the case at the Bar said, how can the Baron bring a writ of Error here, who is no party to the Record, neither is chargeable by the judgement? But let us see books, for the case is considerable. Postea.

18 E. 4. 40. 7.

Needler and Guest.

Hill. 1650. Banc. sup.

Trin. 1649. rot. Q.

Whether Execution may be notwithstanding a Writ of Error brought in the Chequer Chamber. Execution.

A Writ of Error was brought in the Chequer Chamber to reverse a judgement given in this Court. The question was, whether now, since the late Act, that a Writ of Error shall be no supersedeas of Execution, this Court may grant execution. Roll chief Justice said, it may, for otherwise the Act is to no purpose. Latch said, the Record is not now in this Court, and therefore there can be no Execution granted here. Roll chief Justice answered, you have confessed by your pleading, namely by your Demurrer, that the Record is here so far as to grant Execution. Therefore let there be Execution, except cause be shewed to the contrary the

Saturday

day the next term. But afterwards the Court ſaid, they would not grant it, but ſaid the party might take execution at his peril.

and Alleyn.

Hill. 1650. Banc. ſup.

A Certiorari was directed to the County Palatine of Cheſter to remove a cauſe into this Court. They make a ſpecial retorn, viz. that they have juriſdiction of the cauſe, and that therefore they are not to certifie it. Serjeant Glyn argued, that this retorn was not good, for this Court hath juriſdiction over all the Courts in England in writs mandatory, 34 Aſſ. 7. 19 H. 6. 12. And an Act of Parliament doth not take away the power of this Court, if it run not in the negative; but in writs remedial it is not ſo general as it is in this caſe, & the cauſe may be well enough tryed here, notwithſtanding it be concerning a matter which ariſeth in the County Palatine, as the Statute 9 Ed. 3. C. 6. is. 2ly. It appears that the Maior and Citizens of Cheſter are parties, and ſo they will try their own cauſe, and this appears by the Record; and this they ought not to do, 21 H. 7. f. 33. lib. Aſſ. 332. 37 E. 3. f. 7. 6 Iac. C. Banc. and Smith and Hancocks caſe, 23 Car. Banc. Reg. Roll chief Juſtice answered, If the cauſe were come to tryal this were good cauſe to remove it, but it is not ſo here. and it appears not by the retorn that the matter of the ſute did ariſe within the juriſdiction of the City, what ſay you to that? for they have not ſhewn any cauſe why they ſhould have juriſdiction. Therefore let them ſhew cauſe before the end of the Term, upon notice, why they ſhould not make a better retorn. Roll ſaid, the Action may be well brought there, although they cannot try it there, for the Original is good.

Whether a Return good out of the County Palatine of Chester.

Juriſdiction.

Return.

Tryal.

Shurlye againſt Semaign.

Hill. 1650. Banc. ſup.

The Court was moved upon an Affidavit that two writs of Execution were executed upon one Judgement, therefore it was prayed that the laſt execution might be ſuperſeded, becauſe there ought not to be two executions for one matter, but where the party is prejudiced by death, or Act of Law, that the party cannot take benefit of the former execution, 28 H. 8. Dyer, and 13 Eliz. Dyer. Roll chief Juſtice, If the firſt writ of Execution be returned and filed, there cannot be a ſecond Execution, otherwiſe it is if it be not retorned and filed. Therefore take your Courſe.

For a ſuperſedeas to an Execution.

Execution.

Coleman againſt Blunden.

Hill. 1650. Banc. ſup.

[Mich. 1650. rot. 447.

COleman brought an Action upon the caſe upon an Aſſumpſit againſt Blunden, and had a verdict againſt him; In Arreſt of Judgement it was moved that it doth not appear by the Declaration to whom the Aſſumpſit was made, but it only ſays ſuper ſe aſſumpſit, and upon this Exception The Court ruled a nil capiat per billam.

Arreſt of Judgement in an Action upon the Caſe.

Warry

VVarry againſt Bond.

Paſch. 1651. Banc. ſup.

Arreſt of Iudgement in debt upon a Bond to ſtand to an Award

IT was moved in Arreſt of Iudgement in an Action of Debt brought upon an Obligation to ſtand to an Award, that the ſubmiſsion to ſtand to the Award was conditional, viz. ſo that the Award were delivered up the 27 day of ſuch a Month: And it appears that the Action brought is for not performing an Award made the 24 day of the ſame Month; ſo it appears not whether the Award were delivered upon the 27 day, or no, and ſo it may be that the condition is not broken. Roll chief Iuſtice answered, the queſtion is whether it be an Award before the delivering it up or no. There-

Award. fore let the Iudgement ſtay till the Plaintif move, for it is worthy of Conſideration.

Harman againſt Iacob.

Paſch. 1651. Banc. ſup.

Arreſt of Iudgement upon an Endictment.

IN an Arreſt of Iudgement upon a verdict given againſt an Alien in an Endictment upon the Statute of 22 H. 8. C. 13. for uſing a Trade, exception was firſt taken, that the Endictment doth not ſay that the Defendant was born out of the power of the Common-wealth, but only that he was born out of England. To this Roll chief Iuſtice answered, if it ſay

Alien. that he is Alienigenus, that emplyes all. 2ly. The Endictment doth not ſay that he is Alienatus extra Angliam, and this was held a good Exception.

Sir Humphry Tracye againſt Bloom.

Paſch. 1651. Banc. ſup.

Arreſt of Iudgement in Debt for Rent.

IN Arreſt of Iudgement upon a Verdict given in an Action of Debt for rent upon two leaſes, one for years, and the other at will, The Exception taken was that the Plaintif declares upon a demiſe made to the Defendant the 7th. of October 1646 at will, and ſets forth that the Defendant held the lands let for 2 years, ending at Michaelmas 1648. and ſo for two years rent behind he brings his Action, whereas there cannot be ſuch a rent due for ſuch a Term; for although the rent be due for the whole year at Michaelmas, yet the term of 2 years is not ended at Michaelmas, for that is upon the 29 day of September, whereas the 2 years end not till the 6 of Octo-

Rent. ber following. Roll chief Iuſtice answered, the rent for the 2 years was due at Michaelmas, and take all the words together the Declaration is good enough, although the expreſsion be not ſo proper as it might have been. Nicholas and Ask as Roll, and ſo the rule was judicium niſi.

Shann and Shann.

Paſch. 1651. Banc. ſup.

Arreſt of Iudgement in an Action upon an Aſſumpſit.

SHann brought an Action upon the Caſe upon an Aſſumpſit againſt Shann, and declares, That in Conſideration that the Plaintif would ſurrender

to

to the Defendant, and his heirs, a Copyhold according to the cuſtom of the manor, the Defendant did aſſume and promiſe unto the Plaintiff to pay unto him 500 l. and for breach of this promiſe he brought his Action, and obteins a verdict againſt the Defendant. The Defendant moved in arreſt of Judgement, and took this exception, viz. that the conſideration on the Plaintiffs part was not performed, for the conſideration was, that he ſhould ſurrender the Copyhold to the Defendant, and his heirs, and he hath ſet forth the ſurrender to be into the hands of a Copyhold Tenant of the manor to the uſe of the Defendant, which is no ſurrender, untill it be preſented at the next Court, and ſo it is incertain, whether it ſhall take effect or no. Roll chief Juſtice ſaid, It is expreſſed to be ſecundum conſuetudinem manerii, yet this is not ſufficient, for it is not an effectual ſurrender untill it be preſented at the Court. Therefore let Judgement ſtay till the Plaintiff move. Surrender.

Lord Mont-Eagle.

Paſc. 1951. Banc. ſup.

The Lord Mont-Eagle was arreſted by a bill of Midleſex, and for want of bail was turned over to the Mareſchal of this Court, and being in Cuſtodia Mareſchalli, the Plaintiff declares againſt him in Debt upon an obligation. The Defendant pleads his peerage, and prayes to be diſcharged. The Court was moved that he might be ordered to plead in chief, and not this dilatory plea. The Court thereupon ordered that he ſhould ſhew cauſe, why he ſhould not plead in chief, and ſaid his plea was dilatory; and ſo it had been ruled lately in the caſe of the Earl Rivers. For the Defendant to plead in chief. Plea dilatory.

Fielder and Tovye.

Hill. 1650. Banc. ſup.

Paſc. 1651. rot. 430.

Fielder brought an Action of debt upon an obligation, the Defendant prayed Dyer of the Bond, and upon view thereof demurs to the Plaintiffs Declaration, and for cauſe ſhews that the Plaintiff declares for quadragint. libris, and the Bond is quadragent libris, and ſo there is a variance. To this it was anſwered by Green, that this is no material difference, for the words ſound alike, and there is more difference between dra and drin than between ginta and genta, & between dra & drin hath been held no materiall variance, and quadragent. is not utterly incertain here, for either it muſt be 40. or 400, and the condition of the obligation explains the ſum, and the Plaintiff here declares but for 40 l. and ſo it appears in the Record. In Osbornes caſe octogenta was for octogint. and yet held good, and Hob. 16. Logards caſe Trigintat inſteed of triginti, and in Walter and Pigots caſe Septingent. is uſed for ſeptuagent. and Pary and Dayes caſe quinquegent. for quinquagint. and theſe held no materiall variances. Latch on the other ſide ſaid the word in the Bond is uncertain, and the condition hath nothing in it, to reduce it to a certain ſignification, and if it make any certainty in it it muſt make it ſignifie 400 l. and then the Plaintiff hath failed in his Declaration, and Hobarts caſe differs from this, and as for Osborns caſe it is variouſly reported, and ſo not to be relyed on. Roll chief Juſtice, What ſay you to ſeſſanta? But the queſtion here is, what ſhall be meant by the word whether 40. or 400. And in Fitzherberts caſe, Judgement was gi- Demurrer to a Declaration in debt upon an obligation.

Variance. ben upon a demurrer, that gent for gint was a material variance, and our case is all one with that. If the doubt be whether it should be 40. or 400. how shall we know the intent of the partyes? and if it be certain it must be understood 400. and the Action is brought but for 40. l. 44 Eliz. Mich. rot. 1301. Gray and Davis case, Sexgint. was adjudged to be a Bond of 60 l. and not of 600 l. And it is the gent. and gint. in all the cases that makes the difference. And the case of sessanta comes not to our case, and so concluded Judgement to be against the Plaintiff. Ierman Nicholas, and Ask Iustices of the same opinion. Nicholas Iustice said, that false Latin in a Bond doth not make it naught; but he held this Bond was for 400 l. and not 40 l. and it is not incertain for the grammar rule, ginta notat decem, sed genta numero centum, doth hold here. Antea.

Gay against Gay.

Pasc. 1651. Banc. sup.

Trin. 1650. rot. 1350.

Whether an estate tail or fee conditionall. Upon a speciall verdict found in a replevin; The case was this, A man seised of a Copyhold Borough English, devised it to H. his grandchild, and to his Heirs, and if he dye during the life of his mother, the remainder to H. his younger brother, and to his heirs. The question here was whether here be an Estate tail in H. or a Fee simple executory. If it be an Estate tail, then the devise was said not good, because it is of a Copyhold, but if it be a Fee simple, then it is a good devise. Roll chief Iustice said, that a limitation of an inheritance after an absolute Fee simple is not a good limitation, for this would be to make a perpetuity, which the Law will not admit, but if it be upon a contingent Fee simple it is otherwise. Adjournatur. Postea.

Limitation.

Perpetuity.

Heale against Greene.

Pasc. 1651. Banc. sup.

Hill. 649 rot. 370.

Case upon a special verdict in tresspass, and ejectment. In an Action of Tresspass, and ejectment, upon a speciall verdict found, the case proved to be this. A man seised of a manor that had divers Tenants that held for lives by old rents deviseth it to his wife, during her life, with power to let and set, and make estates out of them, in as ample manner as the Testator might, if he were living. The questions were made by Latch. 1. Whether this power given her to set, and let, &c. doth not alter her Estate for life in the Lands devised to her. 2ly. Whether this power given her by the Will, adds any power to her estate for life, to make estates, and he held for the first, that the power given her, did not alter her Estate. And 2ly. that it adds no power unto her Estate, because the clause in the Will, is one entire clause, and not double and accumulative, and so she can make no greater Estates, than her estate for life will bear. And for the objection that is made, That then the words that limit the power to her are void, and idle. He answered, that it is not necessary that all the words in a Will should give something; but some words may be explanatory of other words, and so are these words here, and yet the

words

words here may add ſomething to her Eſtate, viz. to enable her to make Eſtates without impeachment of waſte. And the words ſhall not be intended of the time of Execution of the Eſtates made by the Feme, for then they are idle, Hill. 1 Car. Banc. Reg. Danyel and Vplins caſe. One may diſpoſe an eſtate by Will for life, with power to make Eſtates to continue after the death of the party that made them. But here the eſtate is made only out of the intereſt of the wife, which cannot endure after her life, Paſc. 44 Eliz. Bible and Dringhouſe, and ſo prayes Judgement for the Plaintiff. Hales for the Defendant made theſe queſtions, 1. What power was given by the Will; 2ly. Whether it were well executed; and he held the feme being executrix hath but an Eſtate for life; But ſhe hath a power to make eſtates, as ſhe hath done. There is no queſtion but ſuch a power may be added. The queſtion only is if this power be added here in our caſe, and he ſaid it was added by the expreſs words of the will, for elſe theſe words are frivolous, and operate nothing. In Danyel and Vplins caſe cited, which was entred, 20 Iac. Hill. 720. there is no expreſs Eſtate given to the party, but a meer power only, and it was not by reaſon of the words added, for they are only conjunctive words. And Iuſtice Whitlock held there that the firſt words gave the power; Though Iuſtice Iones differed in opinion, and that caſe is the very ſame with ours; The reaſon in our caſe, That the words give power to the feme, may appear by the comparing this part of the Will with the other parts of it. In other parts of the Will where things are deviſed to his wife, theſe words here uſed are not added, and that argues that the Teſtator intended the Feme more power, than in other things deviſed to her, and the words themſelves being a deviſe of a manor, proves by the nature of the thing, that the Teſtator intended to give power to the Feme, to make Eſtates out of the manor, And it cannot be intended, that the words In as ample maner, &c, do only give the feme power to aſſign over her term, Vaughan and Longs caſe, 24 C. the words were adjudged to be words to enlarge the power of the Legatee, and ſo are they here. And the ſubſequent clauſe during the term of her life, reſtrains not the power, for theſe words may be either referred to the Eſtates to be made, or to the time of making them, and here they are referred to the execution of the power, and this is more ſuitable to the intention of the party in ordinary reaſon, and they are added to expound the intent, viz. that the remainder limited over ſhall not hinder the feme, for he hath not barred her out, and hath impoſed this truſt in her as Executrix, and as Legatee. And for the 2d. point here is a good Execution of the power, for it ariſeth partly out of her intereſt, and partly out of her Authority, and both may well ſtand together, and the Eſtate made out of both is a good Eſtate, or if not, the Eſtate may be intended to ariſe out of the power given her to make ſuch an Eſtate, and not out of her intereſt, and the joyning of her daughter is not materiall, though no good eſtate be derived from her, and ſo he prayed Judgement for the Defendant. Roll chief Iuſtice, It is uſual in the Weſt of England to make Eſtates for lives upon the old rent; but it is not here expreſſed of what nature this manor is, or whether it uſed to be let, and here is no limitation to let for lives. But here either the latter words are idle, or elſe the Feme hath ſuch a power, that ſhe may deſtroy the remainder. And it ſh all not be intended that he truſted his Executrix with more than he gave her, and the words of the Will do not expreſs that, and the queſtion is how it ſhall be interpreted. The words may be interpreted Cumulative, otherwiſe the feme hath power to deſtroy the remainder, which would be a hard conſtruction. To which Nicholas aſſented. Roll chief Iuſtice, The intention of the Teſtator is not cleer to give this power to the Feme; but if it did appear to be his meaning, it might be otherwiſe; and here it is in a Will, An- Interpretation.

the Verdict is not well drawn up, for the Caſe might have been made better; for all the land may be in Demeſne for ought appears by the Verdict. Adjourned to be argued again, Poſtea.

VVebb againſt Wilmer.

Paſch. 1651. Banc. ſup.

Hill. 1650. rot. 309.

Arreſt of Judgement in Debt for rent reſerved upon a Leaſe for years.

VVEbb brought an Action of Debt for rent reſerved by him upon a leaſe for years made to Wilmer, and obtains a Verdict. The Defendant moved in Arreſt of Judgement, and alleged for cauſe that the Plaintif had abated his writ. The caſe was this, Webb leaſeth certain lands to Wilmer for years, reſerving a rent, with a clauſe of re-entry for not payment, the rent being behind, the Leſſor brings an Action of Debt for the rent, and pending the ſute re-enters into the land, and after the Leſſee re-enters. The queſtion here was, whether the writ once abated by the Plaintifs entry, pending the writ, were revived by the Defendants re-entry. Roll chief Iuſtice held it was not. Twiſden argued, that the writ is not abated, but only abatable by plea, and ſo this matter is not to be offered to ſtay the Judgement, 5 H. 7. f. 47. and he hath pleaded nothing in abatement, but to the Action only, and he ſaid that it now being after a verdict, it is helped by the Statute. Hales on the other ſide ſaid, that it doth here appear that the Plaintif hath no cauſe of Action, for he was in poſſeſsion when he brought the Ejectment. Roll answered, If one declare having no cauſe of Action, if there be cauſe afterward, it is well enough. But here is a departure, and the 1. Ejectment is not revived, for it is purged by the re entry. The rule was nil capiat per billam, niſi.

Reviver. Abatement.

Declaration. Departure.

The Cuſtodes Libertatis, &c. againſt Hall.

Paſch. 1651. Banc. ſup.

Error to reverſe a judgment upon an Indictment for foreſtalling.

HAll was endicted for foreſtalling of Butter, and pleaded, and had judgement given againſt him; whereupon he brought his writ of Error, and took theſe exceptions. 1. That it doth not appear that the Endictment was at the Quarter Seſsions, as it ought to be by the Statute of 5 Ed. 6. for it is only ſaid to be ad generalem Seſſionem. Roll chief Iuſtice anſwered, if it be ad generalem Seſſionem it may be intended the Quarter Seſsions. 2ly It was objected that there is no Capiatur awarded in the judgement, as there ought to be. The Court anſwered they would adviſe.

Intendment.

VVillis againſt Bond.

Paſch. 1651. Banc. ſup.

Mich. 1650. rot. 86.

Error to reverſe a judgement in debt.

BOnd an Adminiſtrator brought an Action of Debt in Briſtow againſt Willis upon an indebitatus aſſumpſit, and had a judgement: The Defendant brought a writ of Error, and took theſe Exceptions. 1. That the Plaintif declares for a thing, the conuſance whereof lyes out of the juriſdiction of the Court, for it is for wages to be paid upon the performance of a Voyage to be made in locis tranſmarinis. Roll chief Iuſtice ſaid, this

Iuriſdiction.

was

was a good Exception, for they cannot enquire at Briſtow whether the party hath performed his Voyage or not. The 2d. Exception was, that the Plaint if declares that the Defendant was indebted to him in ſuch a ſum of money, to render him an accompt. The Court anſwered, this is not good, for in ſuch caſe an Action of accompt lies, and not an indebitatus aſſumpſit, And for theſe cauſes the Iudgement was reverſed, niſi; and pronounced by Iermain Iuſtice (at the prayer of the Plaintifs Counſel) in Engliſh, being the firſt that was pronounced ſo in this Court, according to the late Act for proceedings in Law to be in Engliſh. Quod nota. Accompt. Debt.

Gowr againſt

Paſch. 1651. Banc. ſup.

IN Arreſt of Iudgement upon a Verdict found for the Plaintif, in a Trover and Converſion brought by Baron and Feme, for goods of the Feme dum ipſa ſola fuit. The Exception was, that it is not expreſſed that the goods were demanded by the Feme. Roll chief Iuſtice ſaid, the Demand of the Feme is good to found the Action, and it was then alſo ſaid, that a Trover and Converſion lies for goods found and converted, although they come afterwards to the hands of the party that loſt them. The Rule was judicium, niſi. Arreſt of Iudgement in a Trover and Converſion. Demand. Trover.

Paſch. 1651. Banc. ſup.

MEmorandum, The firſt rule of this Court made in Engliſh was between White and Keblewhite. Paſch. 1651.

Peaſe againſt Shrimpton.

Paſc. 1651. Banc. ſup.

Hill. 24 Car. rot. 191.

THe Court was informed by Councel that the Habeas Corpus and Bail-piece were loſt, and therefore it was prayed that there might be a new Habeas Corpus, and that the old Bail put in may be allowed by the rule of Court. Roll chief Iuſtice anſwered, make a new Habeas Corpus, and a new Bail-piece; but firſt let Tutt the Attorney that was Clark of the Bails attend here to be examined whether the Habeas Corpus & Bail-piece be loſt as is ſuggeſted. Habeas Corpus. Bail.

Ritch againſt Sanders.

Paſch. 1651. Banc. ſup.

Hill. 1649. rot. 758.

RItch brought an Action of Treſpaſs againſt Sanders for taking away his Corn ſet forth for tithes; upon iſſue joyned a ſpecial Verdict was found, whereupon the caſe fell out to be upon the conſtruction of the words of a will, which were theſe, I give all my free lands whereſoever Special verdict in Treſpaſs for tithes upon the words of a Will.

to my Brother John Sanders and his heirs, upon condition that he ſuffer my wife to enjoy all my Freelands in Holford for life, the Teſtator having only a portion of tithes of inheritance in Holford, and no lands. The queſtion here was, whether this portion of tithes ſhall be accompted free lands within the intent of the will, and ſo the wife be to have them during her life. Twiſden held, the tithes were not deviſed by the will to the Feme; for if I deviſe my fee-ſimple lands to John a Stile and his heirs, tithes do not paſs by this deviſe, for tithes are a collateral thing ariſing out of land, and not part of the land it ſelf. 42 Ed. 3. f. 13. 10 Iac. Moyle and Ewers caſe, 31 Eliz. Perkins and Hyndes caſe. In the will here they paſs not, for there are no words in the will to deviſe them, nor can the words be ſo expounded, and here are other lands deviſed to ſatisfie the words of the will. A term for years hath more relation to land than tithes; and a term could not have paſſed by the words of the will. Next, the ſecond Clauſe doth not paſs the tithes, for there is no ſuch thing as is expreſſed in it; but if it ſhould paſs to the wife by implication, yet it cannot paſs to John Sanders the Brother; for there are neither expreſſe words nor any implication to deviſe this portion of tithes to him, but the contrary rather is to be collected from the Will. Wadham Windham on the other ſide anſwered, that the Teſtator calls the tithes in Holford his free lands. It is true generally, that by the deviſe of lands tithes do not paſs, but in a will by the intent of the Deviſor they may paſs, and the word land includes all real things in common intention and legal conſtruction, as Lutrels Caſe is, 1 Mar. Bro. Tit. Elegit. An Elegit may be of a rent, and tithes have a nearer relation to land than rent have. 2ly. Here is an apparent intention to deviſe the tithes; for he explains his meaning in his ſecond clauſe of the Will, that he intends tithes by the word lands, 44 Eliz. Com. Banc. Gery againſt Gery, the queſtion there was, what paſſed by the word rents, whether lands paſſed. The words were, as to all my lands in Dale I deviſe my rents, &c. and here the matter comes in by a Proviſo, which enlarges the matter, Trin. 3 Iac. Fitz-Williams caſe; One deviſed all his goods, Jewels, and Plate, excepting his leaſe in C There it was adjudged that all his other Leaſes paſſed. 4 Ed. 3. Br. grants 51. Another circumſtance in the Will enforceth this conſtruction, viz. the word whereſoever, which word expreſſeth the intent of the Deviſor to be ſo, otherwiſe that word will be idle, and to no purpoſe. Hob. rep. Stukely and Butlers caſe: It may alſo appear out of the body of the Will: for it appears thereby that his Daughter was provided for in his will by his perſonal eſtate, and that the intention was to diſpoſe of his lands to the Heir, and his Copyhold lands which he had in Holford were ſurrendred at the time of the making of the Will, and ſo the deviſe cannot refer to them; and beſides this is called free lands, which diſtinguiſheth them from Copyhold lands, and ſo he prayed judgement for the Plaintif. Roll chief Juſtice, There is a Condition annexed to the Deviſe, that his wife ſhall enjoy this land, though the words in the Will are not very proper to expreſs it; but we muſt conſider them as uſed in a Will, & not in a conveyance. Nicholas Juſtice ſaid, the Deviſor himſelf calls them free-holds, and this diſtinguiſheth them from Copyhold lands. Adjourned till Saturday following to be argued again.

Condition.

Dowſe

Dowſe againſt Maſters.

Paſc. 1651. Banc. ſup.

DOwſe brought an Action of Debt upon an Indebitatus Aſſumpſit againſt Maſters for five pound, in which the Defendant pleaded that he did deliver bills to the Plaintif to the value of 6 l. in which the Plaintif was indebted to him, which bills the Plaintif did accept in full ſatisfaction; the Plaintif replyed proteſtando that he was not indebted to the Defendant, that he did not receive bills to the value of 6 l. in ſatisfaction: Upon this a Demurrer was joyned. Roll chief Juſtice ſaid, the Plea of the Defendant is ill, for he doth not ſay that he delivered the Bills in full ſatisfaction, but that the Plaintif received them in full ſatisfaction, which is not good, for the Plaintifs receiving of the Bills muſt be as they were delivered, and not other ways, and that is not expreſſed: Therefore let the Plaintif take his judgement, niſi, &c.

Demurrer to a plea in Debt upon Indebitatus aſſumpſit.

Plea.

Roſs againſt Lawrence.

Paſch. 1651. Banc. ſup.

ROſs brought an Action of the Caſe againſt Lawrence for ſpeaking theſe Welch words of him, viz. Dedingues Will Rols in mudon, which are in Engliſh, William Roſs hath forſworn himſelf, upon Iſſue joyned, and a verdict for the Plaintif, the Defendant moved in Arreſt of Judgement that the words are not actionable, as they are rendred in Engliſh, and ſo the Action lies not. Roll chief Juſtice, If the words found in Welch that the Plaintif was perjured, yet if the Plaintif do Engliſh them in Engliſh, which doth not amount to perjury, it is ill, and an action will not lie for them, Therefore let judgement be ſtayed.

Arreſt of Judgement in an Action upon the caſe for Welch words Engliſhed.

Caſe.

Peck againſt Ingram.

Paſch. 1651. Banc. ſup.

PEck brought an Action upon the Caſe upon an Aſſumpſit, and declares, that the Defendant, in conſideration that ſhe the Plaintif would leave her Fathers houſe, and come to the Houſe of the Defendant in ſuch a place, did aſſume and promiſe unto her that he would mary her, and that thereupon ſhe did leave her Fathers Houſe, and did come to the Defendants Houſe, et obtulit ſe in maritagium conjungi, and becauſe he had not performed his promiſe Actio accrevit: Upon iſſue joyned, and a verdict found for the Plaintif, the Defendant moved in Arreſt of Judgement, and took Exceptions, that the Plaintif did not ſhew in her Declaration when ſhe left her Fathers Houſe, and came to the Defendants houſe, nor that ſhe gave him any notice thereof. Wild moved for judgement, notwithſtanding the Exception; for, he ſaid, though it be not expreſly ſaid that ſhe gave the Defendant notice when ſhe came to his Houſe, yet it is ſaid, quod obtulit ſe in maritagium conjungi, which implies the Defendant had notice; and beſides here is no need of notice; for the Aſſumpſit is, that if ſhe will come to the Defendants houſe he will marry her, and it is not ſaid that when ſhe comes he will marry her, ſo that he is bound by his promiſe to take notice

Arreſt of Judgement in an action upon the caſe upon an Aſſumpſit.

of

of her coming. Roll chief Iustice answered, if all the Declaration be considered together, here is a good consideration expressed; for this is not like to the case of tender of money. And the words obtulit se in maritagium conjungi shall be intended to the Defendant himself, and then he must néeds have notice of her coming thither. Dyves of Counsel with the Defendant took this Exception, that the Plaintif in setting forth her offer of mariage doth not say tunc et ibidem, soe there is neither place nor time set forth. Roll chief Iustice answered, it is after a Verdict, and you move this Exception too late, and you have now lost the advantage of taking it. If there be a sufficient notice, it is well; if not, it is not good; for there ought to be a notice, for she may come to his house in private, so that he cannot take notice of her coming thither. The question only is this, whether notice be sufficiently and necessarily imployed in the words obtulit se in maritagium conjungi. Curia advisare vult. Postea.

Consideration.

Advantage.

Notice.

King against Weeden.

Pasch. 1651. Banc. sup.

Arrest of Iudgement in an Action upon the Case.

IN Arrest of Iudgement upon a Verdict found for the Plaintif in an Action upon the Case upon an Assumpsit brought by an Administrator, 2 Exceptions were taken, 1. That the Plaintif did not shew his Letters of Administration, and 2ly. That there is no good consideration set forth to ground the Assumpsit upon: for it is that the Defendant did promise, that if the Plaintif would forbear to take his course for the monies, he would pay them, which words are uncertain, and he should have said his course in Law, and not generally his course. Roll chief Iustice to the 1 answered, It is not necessary here to shew the Letters of Administration, for they are but inducements to the Actor, and not the ground of it; And for the second exception the consideration is certainly enough set forth, although the Latine be not very proper. Therefore let the Plaintif have his judgement, nisi, &c.

Consideration.

Sawyer against Russel.

Pasc. 1651. Banc. sup.

Arrest of Iudgement in an Action upon the Case.

SAwyer brought an Action upon the case against Russel, for taking away certain Cattel, and obtained a Verdict against the Defendant; The Defendant moved in Arrest of Iudgement, and took exception to the Plaintifs Declaration for the incertainty thereof. The Plaintif declared of a Trover and Conversion, de ducentis Averiis, viz. bobus, juvencis, Anglice Steers, Iuvencis, Anglice Runts, & Iuvencis, Anglice Heifers, which is uncertain, and so judgement cannot be given, for it is uncertain for what number of each of the Steers, Runts, and Heifers judgement should be given. Roll chief Iustice enclined that it is certain enough, and that the number may be averred, and the Cattel are all of one kind; yet, The Court would advise, afterward it was ruled, Iudicium, nisi.

Averment.

Shedlock

Shedlock and La. Pere.

Paſc. 1651. Banc. ſup.

Hill. 1650. rot. 211.

IN a Writ of Error brought to reverſe a Judgement given in an inferior Court, The Error aſsigned was, that the Judgement is quod recuperare debeat, whereas it ought to be recuperare debet. Roll chief Juſtice anſwered, That if it be ſo, there is no Judgement given, and ſo no Writ of Error lies, therefore let the writ be abated. For the Writ of Error ſuppoſeth a Judgement, for the words of it are ſi judicium redditum ſit, and in 3. Iacobi in the Exchequer Chamber the very caſe was adjudged ſo.

Error to reverſe a judgment in an inferior Court. Judgement. Error. Abatement.

Collins againſt Sillye.

Paſc. 1651 Banc. ſup.

Hill. 1650. rot. 302.

THe Caſe was this, Leſſee for years by indenture covenants with the Leſſor, that he will not aſsign over the land let, nor any part thereof, without the conſent of the Leſſor. The Leſſor during the term enters into part of the land let, the Leſſee aſsigns over the remainder of his term in the reſt of the land, without the conſent of the Leſſor, and the Leſſor thereupon brings an Action of Covenant againſt the Leſſee; the queſtion was whether it did lye in regard that the Leſſor had entred into part of the land. Roll chief Iuſtice held that the Covenant was collateral, and therefore it is broken by the aſsignment, notwithſtanding the Leſſors entry into part of the land. And the rule was judicium niſi.

Demurrer upon an entry upon Leſſee for years. Covenant.

Cuſtodes againſt Monger.

Paſc. 1651.

MOnger was endicted for forgeing a preſentment to a Jury in a Court held before Commiſsioners of ſewers, againſt Monger for caſting of 10 loads of ſoil into the Thames. Exceptions were taken that it doth not appear by the endictment, by what authority the Court was held, where the preſentment was found. 2ly. It is not averred that the preſentment did preſent the caſting in the ſoil to be any annoyance. 3ly. There doth not appear to be any proceſs in the caſe againſt the party upon the preſentment. To the firſt it was anſwered by councell on the other ſide, that it is not neceſsary to ſhew by what authority the Court was held, for their Authority is by Act of Parliament, and it is a publique Act to be taken notice of. Roll the chief Iuſtice anſwered, That it is a private Act made for the City of London, and concerned the Lord Maior, though part of it be publique, for part of an Act may be publique, and another part of it private, and of that part which is private we are not bound to take notice, and it was here ſaid that in criminal cauſes, Errors in proceedings are not helped by a verdict. Roll took an exception that the endictment was only contra pacem publicam' where-

Exceptions to the forme forth of a preſentment. Statute. Notice. Verdict. Indictme.

whereas at that time when it was preferred, it ought to have been contra pacem nuper domini Regis & contra pacem publicam nunc. Adjourned.

23 Car. in the Kings Bench.

Pasc. 1650. rot. 414.

Cremer } { Plaintiff } in a Replevin.
Burnet } { Avowant }

Whether a copyhold estate be extinct by the Kings leasing it for life.

THe Plaintiff complains for the taking of his Cattell, to wit a Horse, Colt, and three Mares, the 13 of January, 21 Car. at Chingford in the County of Essex in a close there called Pipers down.

THe Defendant avows the taking of the Cattel in loco quo, &c. as Bailiff unto Thomas Boothbye, as damage feasant in the Close aforesaid, being the soil and the freehold of the said Thomas Boothby.

Vpon the pleading, the case appeared to be as followeth.

KIng Henry the 8. being seised in Fée in the right of his Crown in the maner of Chingford Comitis in the County of Essex, of which manour a certain tenement called Lormiers alias Heriots with the appurtenances, whereof the said Close called Pipers Down was parcell, which tenement and Close were parcell of the said manour, and was then, and had been time out of mind demised, and demiseable in Fee by Copy of Court roll, of the said manour, did build a new messuage upon the said Tenement, and did afterwards by his Letters patents, under the great seal grant the office of Keeper, and keeping of the said messuage, to Iohn Gate, for term of his life, with all the Lands, Tenements, &c. thereto belonging or adjacent, and did also by the same Letters patents give and grant unto the said Iohn Gate amongst other things, the Lands belonging to the said new built messuage, whereof the said Close called Pipers down was part, for Term of his life, for the exercising of the said office, with an averment in the plea, that before that time there was no such office of the keeping of the said house, and that the King did not know, nor was at the time of the grant enformed, that the said Tenement and Lands whereof the said Close was parcell were Copyhold of the said manour. After the grant made to Iohn Gate, as aforesaid, H. the 8. dyed seised of the said manour, & of the reversion of the said Messuage and Close after the death of Iohn Gate, and thereby Ed. the 6. became seised of them in like manner, and from Ed. the 6. they came to Quéen Mary. Then Iohn Gate dyes, and after his death, Quéen Mary enters upon the said manour and Messuage whereof the said Close was a parcell, and afterwards by her Letters Patents under her broad Seal, doth grant the Manour and Messuage and Premises unto Susan Tong, and her heirs for ever. From Susan Tong by mean conveyance, the said Manour Messuage and Premises, came to Humphry White and his heirs, and afterwards Humphrey White being seized thereof in Fée, did by his indenture of lease demise the said Manour Messuage and Premises to Leigh for 60. years, to begin from Mich. before the making of the indenture, afterward Humphrey White grants away the reversion of the said Manour Messuage & Premises to Sir John Branch, afterwards Sir Iohn Branch grants this reversion to Vdall, Vdall grants it to Bathurst, and Bathurst grants it to Thomas Boothby the Ancestor of Thomas Boothby, whose Baily doth here make

make the avowry. Afterwards Robert Leigh who had the leaſe of the ſaid Manour and Premiſes as aforeſaid, for 60 years, deviſeth the reſidue of this leaſe then unexpired, by his laſt Will and Teſtament unto Robert Leigh his Son, and dyes, Robert Lee the ſon being poſſeſſed of the reſidue, or remainder of this Term for 60. years, by virtue of the ſaid Will did at his court, held for the ſaid Manour of Chingford, grant the ſaid Meſſuage with the appurtenances, and Lands thereunto belonging, whereof the ſaid Cloſe was parcell, unto Edmund Lee his brother, to hold of the ſame Manour in Fee, at the will of the Lord by Copy of Court Roll of that Manour, Edmund Lee was thereupon admitted accordingly. Afterwards the ſaid leaſe for 60. years made by Humphrey White unto Robert Leigh, the Father, expires: Afterwards Thomas Boothby, who had the reverſion of the ſaid Manour and Premiſes as abovelaid, entred as in his reverſion upon the ſaid Manour and Premiſes, and dyed ſeiſed thereof, leaving iſſue Thomas Boothby his Son, Thomas Boothby the Son enters into the ſaid Manour and Premiſes, and claims the ſaid Meſſuage with the apurtenances with the lands thereunto belonging, whereof the Cloſe called Pipers down was parcell, (and was granted by Robert Leigh unto Edmund Leigh by Copy of Court Roll as aforeſaid,) as parcell of the demaines of the ſaid Manour of Chingford, and doth deny it to be Copyhold, and to the intent to try the title thereof, did by the Avowant his Bailiff diſtrein the Caſtel in the ſaid Cloſe, as damage feaſant in his ſoil and Freehold.

This Caſe was argued firſt by Arthur Harris of Lincolnes Inn, who argued for the Plaintiff, viz. he that brought the replevin, and in his argument, he made the generall queſtion in the Caſe to be whether the cloſe called Pipers Down in which the diſtreſs was taken, were at the time of the diſtreſs taken demiſeable by Copy of Court Roll, or whether the Cuſtom was not deſtroyed, and he held it was demiſeable, and that the cuſtom was not deſtroyed, and hereupon he made four queſtions. 1. Whether the grant of the new houſe to Sr. Iohn Gate per nomen officii of keeper thereof were a good grant. 2ly. Whether the King not being enformed at the time of the grant, that the houſe was Copyhold tenure, he was not deceived in his grant. 3ly. Whether by this grant the Cuſtom was not deſtroyed. 4ly. Whether the Kings Patentee hath not the ſame privilege to grant this houſe, &c. again by Copy of Court Roll after the death of Sr. Iohn Gate, And as to the 1. of theſe 4. queſtions, he cited 8 E. 4. by Chock, and 21 E. 4. 79. and Mich. 5 Car. Banc. Reg. Monſons caſe, and Paſc. 14 Car. Banc. Reg. Meſſand and Butterfields Caſe, and 5 E. 4. f. 8. and Dyer 269. Savages Caſe. To the 2d. queſtion he held, that the King was not here enformed of his right, and conſequently he was deceived, and therefore ought not to be prejudiced by his grant, which he ſhould be if he had not liberty to demiſe this houſe again by Copy of Court Roll, after the death of Sr. Iohn Gate, and he ſaid that there are two rights in the King, 1. At the Common Law, and 2ly. a cuſtomary right, and of this Cuſtomary right, or his jus concedendi he was not enformed, and he cited theſe books, 3 H. 7. 10. rep. 49. 8 H. 6. 25 Br. Ayd 45 4. H. 6. 1. 2 R. 3. Hunſons Caſe, and he ſaid that the book of 5 H. 7. f. 1. which is objected is not to purpoſe, for the proteſtation is not well taken, 19 H. 6. a proteſtation is to ſupply a matter, which is not ſo here. 41 E. 3. Fitzh. proteſt. 9. 22 H. 6. 27. Br. proteſtation 6. Plowd. Coment. Gresbrooks and Foxes Caſe, and 20 Eliz. Burrell and Holcrofts Caſe. 2ly. The King is not enformed here in his grant in matter in Law, as he ought to be, and therefore his grant ſhall not turn to his prejudice, 1 rep. 52. 18 H. 8. Lovels Caſe, Paſc. 2 Eliz. Sr. Thomas Mores Caſe, 1. rep. 63. 16. Jac. Needlers caſe; and whereas it is ſaid that the words ex certa ſcientia in the patent do declare that the King was enformed, I anſwer, that thoſe words do intend no more

but that the
Law, ar . King was enformed of matters of fact, and not of matters in
whereas . the Kings grant ſhall only be taken ſecundum intentionem; and
Iohn C . it may beobjected that by the granting of the Eſtate for life unto Sr.
the J ate, the cuſtom is deſtroyed, I anſwer, that this being in the Caſe of
the K ing, it is an extraordinary Caſe, and not to be meaſured by ordinary
R es of Law. And 2ly. Antient grants are to be conſtrued as the Law
was at that time when they were made, 9. rep. 27. 6. rep. 48. 1 H. 7. 23.
14 E. 3. Fitzh. Scire facias 23. and the King is not bound by a general cu-
ſtom as Common perſons are, 35 H. 6. 29. by Priſot, 22 Ed. 3. The King
ſhall not pay a heriot upon the purchaſe of heritable Lands, and we ſhall
find that many maxims of Law upon ſerious ſcanning of them, are not ſo
certain to be relyed on, as they are commonly held to be, 5. rep. Knights
Caſe, Paſc. 3 Eliz. B. R. Conisby and Risby, Dyer 10 Eliz. and the paten-
tee of the King ſhall have the ſame privilege, that the King ſhould have had
if he had not granted the Letters patents, 27 Eliz. Stubs and Rigfords caſe.
At another day Arthur Harris ſpake again to the point, that the King had
no legall intent to deſtroy the Copyhold Eſtate by his patent, and there-
fore it ſhould not be deſtroyed, and cited Grotius de jure belli et pacis, 343.
and that no ſuch intent can appear in the words of the patent, and cited 7.
rep. Inglefields Caſe, and 17 E. 3. f. 19. and Cooks Inſtitutes 373. and 1.
rep. 46. and Plow. 333. and as to the laſt point he argued, that the Paten-
tee of the King, ſhall be in the ſame condition, as to the reviving of the Co-
pyhold Eſtate, as the King ſhould have been if he had not made the grant,
becauſe that the King hath the Fee, and he may grant it as he pleaſeth,
Dyer 16 Eliz. 337. 1. rep. 31. 10 Eliz. Dyer 266. 24 Ed. 3. Fitz. Tit. guard
27. and no priority can be pleaded againſt the King, nor againſt his Pa-
tentee, Hill. 30 Eliz. Stubs and Rightwayes Caſe, an Action of Accompt a-
gainſt Executors doth lye only for the King. It is true that prerogatives
inſeparable, and annexed to the perſon of the King, cannot be granted away
by the King, but prerogatives ſeparable may be granted away 12 H. 4.
Fitzh. guard 81. The Grantee of the Grantee of the King ſhall have the
prerogative of the King, by reaſon of the thing granted by the King, Brook
prærog. 17. 21 H. 7. 2. Br. entre congeable 40. The King may diſtrein for
a rent ſeck; but not his Grantee, becauſe it is a prerogative executory,
and not executed, for in ſuch caſe it is otherwayes; and as to the objection
to the cauſe of the demurrer ſet forth, that the Conceſſit is not anſwered,
becauſe it only ſayes mentionat. eſſe conceſſum, I hold it well enough; but
if it ſhould not be, yet it is helped, for both partyes do agree in the ſetting
forth of the Letters Patents, 34 Eliz. B. R. in Hart and Smiths caſe, and the
grant is confeſſed in our rejoynder, and though the demurrer ſhould not be
good, yet the Avowant cannot have Judgement, for he hath not entitled
himſelf to the Action as appears by his grant, for his grant is void, and can-
not take effect, rep. 46. 8. rep. 201. 39 Eliz. in the Chequer Chamber.
Where 2 Manours are granted by the name of one of them, the grant is not
good. And in our caſe Thomas Boothby had nothing in the land at the time
of making of the deed of Covenant to ſtand ſeiſed to uſes as it appears by
the Avowants own pleading, and the poſtea cannot help it, Dyer 111.
Clarks Caſe, Hill. 15 Iac. entred Trin. 15 Iac. rot. 29. Deſmons caſe, 20 H.
615. Hales on the other ſide argued for the Avowant, and prayes a re-
turn of the Cattel diſtreyned; firſt, he put the Caſe at large. And he ſaid
that the Plaintiff hath not well ſet forth the Kings grant in his bar, and
ſo it is all one, as if he had not ſet it forth at all, Plowd. 563. and he hath diſ-
puted that which we have not alleged, and the ſur rejoynder is but ar-
gumentative, and not poſitive, and nothing appears to the Court, and he hath
quite miſtaken his courſe and way. But admitting the caſe, and the points to

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be as they are made, viz. 1. Whether the new Office be well granted, becauſe the word Conſtituimus is omitted. 2. Whether the grant for life be good. 3. Whether the grant of the Copyhold for life be a ſuſpenſion of the Copyhold eſtate, or an extinguiſhment of it, which is the great queſtion in the Caſe.

For the 1 point I hold that here is a good grant of this new Office, and that the word Conſtituimus is not neceſſary, becauſe that there are ſpecial fees alſo newly granted. 2ly. This is not an Office in groſs, conſiſting and reſting upon it ſelf; but it is a relative Office or an imployment incident to the intereſt of the houſe granted, and therefore the word Conſtituimus is not here neceſſary, Dyer 200. 3ly. If it be not a formal Office, yet here is a good grant of an employment, to which a recompence may be added, although an Aſsize cannot be brought for it. 3 Aſſ. Trin. 6 Jac. Abercromies Caſe: And here the proteſtation that the King was not informed that this was Copyhold land is unneceſſarily alleged, and therefore it is not of neceſsity it ſhould be anſwered; and if it be not well ſet forth it is not material. For the 2 queſtion whether the King was deceived in his grant, he ſaid that the King needed not to take notice of any former eſtates, and that the Statute expreſſeth, that it is not neceſſary to recite them, 24 H. 8. 21. To the 3 point & the chief queſtion, whether the Copyhold eſtate be ſuſpended or extinguiſhed, he held it was extinguiſhed, and cited Knights caſe, & Alton woods caſe, and ſaid, that the rules of the Civil Law ought not to be applyed to the Common Law, nor to be cited to perplex the proceedings thereof, and were this in the caſe of a Common perſon, without doubt the Copyhold eſtate would be deſtroyed, 20 Eliz. by Popham and Fenn, and the King here hath the Fee-ſimple, and there is no difference between the caſe of the King, and of a Common perſon in this regard; a thing which will not paſs by the King without notice, will not paſs with notice, and here is no prejudice to the King in not taking notice whether by the Patent the Cuſtom to grant Copyhold eſtates be deſtroyed or not; and here is a neceſſary conſequence in Law, that the cuſtom is deſtroyed, becauſe the King that had the fee in the Manor hath ſuſpended the Copyhold by his grant. All the Arguments uſed on the other ſide are to deſtroy the Kings grant, and the caſes put do all differ from our caſe, and do ſtand upon their own bottoms: Nor ſhall the King be intended to be miſ-conuſant of his particular grant, ſuch as this is, although he may be in a general grant, lib. Aſſ. 21. pl. 19. Paſch. 12 Car. C. B. Glover and Edgars caſe, and it would be a great miſchief if the Copyhold eſtate ſhould be revived. As to the laſt point, whether the Patentee ſhall be in the ſame condition as the King was, he ſaid that it is not material whether he be or no, as to the Caſe in queſtion, and reſted upon the 3 queſtion. If the King hath free-warren in land, and grants the land, and mentions not the warren, yet the warren paſſeth by the grant: And here our Avowry ſtands pro confeſſo, becauſe the Plaintiff hath made no title. A grant of a Manor per nomen maneriorum is a good grant of the Manor, and here is a good grant, and if not, yet it is helped by the Statute of 3 & 4 Phil. & Mar. C. 1. 1 H. 7. f. 28. and the Poſtea here refers not to the grant of the Copy, and here is no ouſter alleged, and if there be, there is no diſſeiſin, but it paſſeth an eſtate for will between the parties. Roll chief Juſtice, It would be dangerous to make the Patent void, becauſe the King took no notice of the Copyhold eſtate, and this point is not fit to be argued: A thing not materially alleged in pleading is not neceſſarily to be anſwered, and it is not neceſſary to create ſuch an Office as this is, for it is but an employment. The great queſtion is, whether after the death of Sr. John Gate, the Copyhold eſtate can be revived or not in the caſe of the King. It may be dangerous whether it be one way, or the other. As to the pleading we will not make it ill, if it may be

good. Argue the great point again, for it is a difficult point, and of great conſequence. Ierman Iuſtice to the ſame effect, and enclined, that the King had no intent to deſtroy the Copyhold, and he held that the Office was well granted, becauſe it was but an imployment. Nicholas Iuſtice inclined, that the Copyhold was deſtroyed. At another day Wadham Windham argued for the Plaintif; and firſt he put the caſe at large, and then ſaid, that 1. It appears by the replication that the Avowant hath no title. 2. He confeſſeth that the Plaintif hath a Title. Queen Mary ſeiſed of the Manor of Chingford Comitis, whereof Pipers Down is parcel, grants it per nomen duorum illorum maneriorum, and it is not averred that ſhe had two Manors. Firſt, it is conſiderable, whether the Patent be good by the Common Law, 2ly. Whether, if not, yet it be made good by the Statute of H. 8. and he held, 1. That it is not good at the Common Law, becauſe it is incertain, and wants ſufficient words, and here is an apparent falſity, for ſhe hath two Manors, and ſhe grants but one; and if the King have two Manors, and grant them per nomen Manerii, this is not a good grant; As tithes belonging to a Rectory cannot paſs by the name of a portion of tithes, neither do all the Statutes of Confirmation of Patents, confirm leſs or greater values granted, than are compriſed in the Letters Patents, 41 Eliz. Paſons caſe in the Exchequer. A preſentation to a Rectory where it ought to be ad Medietatem Rectoriæ is not a good preſentation, 3 rep. Dodingtons Caſe, Dyer 331. An ill grant is not helped by the Statute, becauſe it is not named. 2ly. A falſe ſuggeſtion is not helped by the Statute of 34 H. 8. 3 Car. Sir Hatton Farmers caſe, and in our caſe here is a miſtake of a thing, and not of the name, for it is a Manor for Manors, and ſo there is no true meaning, and therefore it cannot be helped by the Statute, Paſch. 1 Iac. rot. 216. C. B. Dawſon againſt Pickering. The Queen was ſeiſed of two Manors, viz. of Ruſhworth, and of Dale, and granted the Manor of Ruſhworth, habendum the Manor of Ruſhworth, with the Manor of Dale, and it was held an ill grant at the Common Law, and not helped by the Statute. But it is objected that this Manor may be known by the name of two Manors, and ſo in our caſe, although the King was ſeiſed of one Manor, and granted this Manor habendum per nomen duorum Maneriorum, this is good, Mich. 22 H. 6. pl. 16. f. 13. To this the anſwer is, that it cannot be pleaded per nomen without an averment that there are two Manors, 2 Ed. 4. f. 28. the laſt caſe: There is a difference between a feofment and a releaſe, a feofment may be pleaded per nomen without an averment; but a releaſe cannot be ſo pleaded, for in a feofment the livery operates to paſs the land, 22 H. 6. Hill. f. 39. pl. 9. 13. and Dyer, the Serjeants Caſe; where there is certainty there needs no averment; but it is not ſo in our Caſe 1 H. 7. f. 28. and it is a forein intendment to ſuppoſe that one Manor of Chingford Comitis ſhall be known by the name of the two Manors of Chingford Comitis, and we need not plead by a non conceſſit, becauſe the Avowant hath made no title, and ſo he can have no return, 1 H. 7. f. 28. 6 H. 7. f. 6. and here is no certainty added to make it certain by the words illorum quod nuper perquiſivimus de, &c. To the ſecond point, The Avowant hath confeſſed the Plaintifs title, for he hath confeſſed, that K. H. the 8th. hath made it a Copyhold, and if the Copy be good, our title is good. As to the queſtion, whether when a Copyhold comes to the King, and he leaſeth it, this doth not ſo deſtroy the Copyhold, that when the leaſe is out it may not be Copyhold again. I hold, that if a Common perſon leaſe a Copyhold, the Copyhold is deſtroyed; but it is not ſo where the King leaſeth it, as it is in our caſe, which ought not to be meaſured by the Common rule of Law, for the Law of the Crown over-rules the Common Law, and the Law of Cuſtom, 22 E. 3. The King is not bound by Cuſtom

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as a common person is, 35 H. 6. The King having Gavelkind lands may destroy the Custom which runs with such lands pro tempore only, and the Kings grant shall not enure to a secondary operation, as Knights case is; and here is no prejudice to any person that the Copyhold estate should be revived, here the consequence may be severed, and it is not necessary; and therefore the lease of the Copyhold, not naming it Copyhold, is good. As to the Objection made, that it is no benefit to the King to make it Copyhold again; the answer is, That it is a prejudice to take away a mans privilege and liberty, if there were no other inconvenience; but here is more, for there may be prejudice by losing the Common, &c. And the rule, that a Custom is an entire thing and cannot be apportioned, shall not bind the King, although it do bind common persons, and the Statute makes not the grant good as to the reversion. The Copyhold is demised, and yet shall be demisable hereafter, and so it may be pleaded, for pleading follows the Law: A Custom interrupted in the right is gone for ever; but if it be interrupted but in part, it is not so, as it is in the case cited, where the King hath Gavelkind lands, Com. Plowd. 114. and so prays judgement for the Plaintif. Adjourned. Latch at another day argued for the Avowant, and said, that the Plaintif in his rejoynder hath made no title unto Susan Tong, from whom he claims. It is objected, that by the grant of the Manor of Chingford Comitis per nomen duorum illorum maneriorum, &c. that Tong cannot be intituled. It is answered that the other side hath confessed, that Tong hath a title, for they derive from her also, and the contrary doth not appear to the Court, and it being agreed, the Court will not make a doubt of it. He made 3 Questions, 1. Whether the Manor of Chingford Comitis passeth per nomen duorum illorum maneriorum de, &c. 2ly. Whether if the grant be ill it be aided by Statute. 3ly. Whether it be helped by the Averment. For the 1. he held, that here is a good grant, without any averment or aid of the Statute; for if the King grants two Manors one shall pass, and e converso, it shall not be so in the Case of the King, but it is good in the case of a Common person with an Averment. The grant of the Manor of Saperton cum Rippen is an ill grant for the incertainty of it; but here is no such incertainty, here is no non nomer of the thing, for the word nomina requires not a proper name; but it is all one, as if it had been expressed by words comprehending it, and the word Manors doth comprehend it. If the King grant his two Acres of Land lying in a Common field, although but one Acre is to be found, yet the grant is good, and it is not like to the grant of a Manor with the Advowson, where the King hath but a moyety of the Advowson, or a moyety of the Manor, for the Moyety is not actual in the whole, but one is actually in two, and so it is well named here. 2ly. Whether it be good, without an averment that the land was in the Lord Darcy, and he held it was. If the words were general in the grant, all of them ought to be true, otherwise nothing will passe by the grant, as Dedingtons case is; but here is a proper name to express it, and therefore the grant is not destroyed, although the latter description do not agree to it, 10. Rep. Harpers Case. 2 H. 4. f. 2. If the King grant all the lands in the Patent annexed, bearing date 10 of June, though the Patent bear date the 10 of July, yet is the grant good; for veritas nominis tollit errorem demonstrationis; and if the grant should not be good at the Common Law, yet it is ayded by the Statute of 3 & 4 Phil. & Mar. and here is a full and a strong averment in the pleading, for it is Manerium prædictum, and not Manerium generally, and here is not only a possibility, but also a facility for it to pass, and it may be called Manor, or Manors: and in a feofment a thing may pass per nomen, because that the livery passeth it, where one pleads per nomen, he is to make the Plea agree with the Record or specialty, otherwise per nomen

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men ſhall not be pleaded, and Newtons opinion againſt this is but a ſingle opinion, 33 H. 8. Br. Averment 42. The word prædict. makes an averment in the name of the Feoffor, 24 H. 4. 30. 22. H. 6. 40. Barton and Eſcott, & here is alſo a full averment of the thing granted, & this is in grants, 7 E. 4. 24. 33 H. 6. f. 22, 26 Aſſ. 2. 24 Aſſ. 6. ſo in Letters Patents, Dyer 86. the Serjeants caſe, and if this be authority it is in the very point, Dyer 207. prædict. per nomina is a good averment, Paſch. 7. Iac. Rot. 430. B. reg. Stonehouſe and Reeds caſe, where there was not ſo much as a per nomina, but only decimas prædict. and yet adjudged to be a good intitling, by the word prædict. becauſe it was held a good averment, although it was not led on by a per nomina, and there admitted to be clear if it had been with a per nomina, as the Caſe here is, & ſo Tong is well intitled. 2ly. The Plaintiffs title is well avoided, and we have well deſtroyed his Copy; without doubt if a Common perſon had granted the Copyhold for life, the Copyhold had been thereby extinguiſhed, and our caſe is not a prerogative caſe, for the King is bound by the Cuſtom of the Manor, and the Cuſtom is here deſtroyed, and the prerogative cannot create the Cuſtom anew, and it is againſt the Kings Prerogative to have things drawn out of the King, without matter of Record; and it is prejudice to the King to have the Cuſtom revived, for the lands are now made free, and ſhall never return again to the Maſſalage. The Kings Prerogative exalts him above a Common perſon, but this cuſtom makes him equal to a common perſon. 2ly. The Cuſtom here cannot be ſuppoſed; but here is an abſolute extinguiſhment of the Copyhold, ſo that it cannot be regranted. The law will confirm things neceſſary to the grant of the King in ſome caſes where it is prejudicial to the King, 16 H. 7. f. 8. Nicholas caſe Plowd. 489. The king ſeiſed of a donative makes it preſentative, if he do but once preſent unto it, ſo if he turn an Annuity into a rent charge by taking a diſtreſs: And the nature of this Cuſtom here ought not to be examined with other Cuſtoms, for it is more ſtrict than in other caſes, for if it be once deſtroyed, it is always deſtroyed, and cannot be ſuſpended, and it is not for the Kings diſ-advantage to have the Copyhold deſtroyed; but it is for his advantage and conveniency, and ſo he prays judgement for the Avowant. Roll chief Iuſtice, All will come and reſt upon the laſt point, for all the other things are admitted: The grant is good by the per nomen, and it is only nominal, and doth not imply that there are two Manors, and it may ſtand well enough with reaſon that it may be known per nomen: But the laſt point is conſiderable; he enclined to Latch. Nicholas Iuſtice to the ſame effect, and that the prædict is a good averment. The laſt point is conſiderable, but prima facie, here the cuſtom is not deſtroyed. Ask Iuſtice to the ſame effect, and that it appears that the King intended to grant but one Manor. Roll, We will take time till the next term to ſpeak to the laſt point, which is only doubtfull, and to deliver our opinions. Ierman Iuſtice, the pleading of the party per nomen helps not the Patent, if it be not good in it ſelf. The next Term Roll chief Iuſtice for himſelf and the reſt of the Judges, who he ſaid concurr'd in opinion with him, delivered the opinion of the Court to this effect. 1. That they were agreed that the grant of the Office of the Cuſtody of the houſe is a good leaſe for life, notwithſtanding it was Copyhold, and it is not neceſſary to recite in the grant that it is Copyhold. 2. That after the eſtate for life is determined, the King may grant the houſe and land again by Copy of Court Roll, becauſe the Kings grants ſhall be taken favourably, and not extended to two intents, where there is no neceſsity for it, as there is not here, and we are not here to intend a collateral intent, and ſo the Copyhold is not deſtroyed: for the Law takes care to preſerve the inheritance of the King for his Succeſſors,

ſors, and it may be a benefit to the King to have it continue Copyhold, viz. to have Common, &c. and his election is alſo deſtroyed, if he may not have it Copyhold. So Iudgement was given for the Plaintif, niſi.

Pawſey and Lowdall.

Paſc. 1651. Banc. ſup.

Paſc. 1650. rot. 275.

IN this Caſe formerly argued, Roll chief Iuſtice, and Nicholas and Ask Iuſtices agreed, that the deviſe of the Copyhold here is a deviſe to the Heirs of the Father, and ſo a Fee-ſimple, and that the party comes not in as a purchaſer, and for this cauſe the Iudgement was reverſed, niſi. As to the other point, whether the ſurrender of a Copyhold by a Tenant for life be good in this caſe, the Court delivered no opinion, Antea. 249. Iudgement reverſed upon a ſpecial Verdict touching a Deviſe of Copyhold lands.

Trundall and Trowell.

Paſch. 1651. Banc. ſup.

Hill. 1650. rot. 670.

IN this Caſe it was held that Tenant in antient Demeſn cannot after imparlance plead antient Demeſn, for he hath made a full defence, for he ſays Defendit vim et injuriam quando, &c. which implyes all the reſt, Mich. 22 Car. Banc. Reg. Yet it was ruled to be again ſpoken to. Where antient Demeſne cannot be pleaded.

Peck againſt Ingram.

Paſch. 1651. Banc. ſup.

THis Caſe formerly ſpoken in was moved again, and Latch held, that the words obtulit ſe in maritagium conjungi, was a good notice upon the whole matter, and therefore that the Action did well lye. Roll chief Iuſtice anſwered, this is a perſonal thing, and ought to be offered to the party himſelf, otherwiſe it is no notice, and that doth not appear here, and if there be no notice implyed, then the Action lies not; and Holmes and Twiſts caſe is, that there ought to be notice if the thing be to be done by the party himſelf, otherwiſe if it be to be done by a ſtranger, ſo is it here; but the queſtion only is, if notice be implyed here or not? Ierman Iuſtice ſaid, there is no tender of mariage if the other party be not there. The rule was for the Plaintif to take his Iudgement. ante 263. Whether a good notice.

Rooke againſt Smith.

Paſch. 1651. Banc. ſup.

ROoke brought an Action upon the caſe againſt Smith for ſpeaking theſe words of him, Thou art a poor fellow, and art not able to pay 2 s. in the pound, and art not able to pay thy debts. Upon an Iſſue joyned, and a Verdict for the Plaintif, the Defendant moved in Arreſt of Iudgement, that the words are not actionable; for 1. the Plaintif is not by them charged Arreſt of Iudgement in an Action upon the Caſe for words.

with the crime of being a Bankrupt, and ſo there is no particular loſſe to him. 2ly. It is not ſhewed that the Plaintiff got his living by buying and ſelling, or that he is indebted, and 11. Iac. Brook and Clarks caſe, was cited. Twiſden on the other ſide anſwered, that the Plaintiffs credit was impaired by the words, and by his credit his livelyhood is in part mainteyned. And he cited Viccary and Barns caſe. Adjourned to the next Term. Wild afterwards moved again for Judgement, becauſe the words being ſpoken of a tradeſman, he conceived them to be actionable. Maynard on the other ſide held them not actionable, becauſe there is no particular damage alleged to grow to the Plaintiff by ſpeaking of them, and becauſe there is no crime objected againſt the Plaintiff; for poverty is no crime; but a man may be poor and honeſt at the ſame time, and he cited two caſes to be adjudged, that a particular damage ought to be alleged. And ſaid that theſe Actions are not favoured in Law, and therefore if the words be not clearly Actionable, it was not reaſon to make a forced conſtruction of them to make them ſo. Next the Plaintiff hath not averred, that he was able to pay all his debts for all the things bought; but only of a debt contracted by the buying of the Oyl mentioned. Twiſden denyed the caſes put by Maynard of the particular damage, and held the words actionable. Roll chief Iuſtice ſaid, a man may be a Bankrupt, and yet be honeſt, for he may become ſo by accident, and not of purpoſe to deceive his creditors. But here is no need for the Plaintiff to ſhew he had a particular loſſe by the words, for it is enough that he is generally ſcandaliſed by them, neither is it neceſſary for him to averr, that he was able to pay all his debts as Maynard hath alleged, Therefore let the Plaintiff have his Iudgement niſi. Antea.

Averment.

Owen againſt Jevon.

Trin. 1651. Banc. ſup.

Paſc. 1651. rot. 211.

Arreſt of judgement in Action for words.

OWen brought an Action of the caſe againſt Ievon for ſpeaking theſe words of her, viz. This is the whore that my man Cowell begat a baſtard on, and ſpent all my mony upon, and the quean hath been too long in Town to my eaſe; Upon an iſſue joyned, and a verdict for the Plaintiff, Twiſden for the Defendant in arreſt of Iudgment urged that the words are not actionable, becauſe there is no ſpecial loſſe or damage alleaged by the Plaintiff hapning to her by reaſon of the words, & ſaid that in one Lighfoot and Pigots caſe it had been ruled that an Action lies not for ſaying a woman had a Baſtard, and he cited alſo Winter and Barnards caſe, Trin. 1650. in this Court. Vpon theſe reaſons Iudgment was ſtayed till the other ſide ſhould move.

Iay againſt Iay.

Trin, 1651. Banc. ſup.

Trin. 1650. rot. 1350.

Argument in a ſpecial verdict touching the conſideration of the words of a will.

THis caſe formerly put and ſpoken to, was again ſpoken unto by Latch, wherein he made this queſtion, viz. whether the limitation to I. and his Heirs were good or not? and he held it was not good; for he ſaid that ſuch limitation in caſe of a freehold is void. He confeſſed that in the caſe of Pell

and

and Brown 17 Iac. rot. 44. the contrary was adjudged; but that there did appear such apparent inconvenience in it, that upon it the Court was afterwards divided, and 21 Iac. in the Serjeants case it was made a flat quære, and ever since it hath been disputable, whether a contingent devise be good or not, and in Iacob and Tellings case it is not determined, and Hanbury and Cookrells case is not adjudged; but if it be, it is on my side, and Mich. 37 & 38. C. B. rot. 1149. It was adjudged upon solemn argument at the Bar, and on the Bench, contrary to the Judgement in Pell and Browns case, if lands be devised to one and his Heirs, and if he dye without issue, that the land shall be to another, and his Heirs, this is no Estate tail; for it cannot stand with the rules of Law to devise such an Estate, for it is but a possibility, and if it should be more, it must be a Fee upon a Fee, and so a perpetuity, and it cannot be known within what bounds it shall end, either in case of years, or life, or other contingencies; and the comparison of Lamports case is not like to this case, for that was of a Term, but this is of a freehold, and a contingent devise of a freehold is not good since the Statute of 32 H. 8. and Brook tit. devise, 2 Dyer, 28 H. 8. f. 37. is not an opinion against this. And though there could be such a devise of other lands, yet Copyhold lands cannot be so devised as the case is here, for there cannot be so much as a possibility of reverter, for there is no custom to warrant it, Hill. 5. Car. King and Leyden in this Court, and Dyer 364. and though there might be a reverter, yet he cannot devise it by will, and if he could, yet here the conveyance is made up by surrender, admittance, and devise, and the party is here in by the surrender, and not by the devise; and so is a Copyholder in by Act executed, and not upon the contingency, and the will is but to direct; and though all this be otherwise, yet the Plaintiff cannot have Judgement, for it appears not that the surrender is presented at any Court at all, and here is nothing but a recitall found. Herman Iustice said by the Common Law there ought to be a presentment at the next Court. Roll chief Iustice, and Nicholas Iustice, There is no certain time for the presentment; but it is according to the Custom of the Manor, so that it be within the life of the Tenant. Roll chief Iustice said, it is an inconvenience to devise such a contingent Estate. Nicholas doubted, for he said it would shake many wills, if it might not be, and so said Hales. The Court would advise. Hales confessed the verdict was imperfect, but prayed it might be amended; But Latch answered it is good enough for us the Defendants, for we have primer possession. The Court answered it would be good to have it amended, and not to have a venire de novo, for that will be chargeable; but if the verdict be imperfect to bring the matter in Law in a question, we can grant a new venire, although it hath been heretofore doubted. Therefore be advised, so that it may be argued. Antea. Venire.

Heal against Green.

Trin. 1651. Banc. sup.

Hill. 1649. rot. 370.

The case between Heal and Green upon a special verdict formerly argued by Latch was again spoken to, and argued by Twisden, and he held that the Feme had power by the Will to make the lease, notwithstanding that she hath but an Estate for life, and cited 11 Car. Br. Hill. rot. 810. Iob and Whites case, and 21 Iac. Danyel and Vgnel, and he said that the remainder limited to the daughter doth not hurt, for it may very well Argument upon a special verdict upon construction of words of a Will.

ſtand with the will, and the intent of the Teſtator appears upon the whole to be to give ſuch a power to his wife to make this leaſe, and cited 8 Car. Perd and Benſams caſe. And there is a clauſe in the will that ſhews that the Teſtator did intend to advance his wife by this devise. And the Feme ſhall be in by the power, which ſhall make the eſtate of the leaſe good, and it is not neceſſary to recite the power, as it is held in Rogers caſe. Maynard on the other ſide ſaid, he would not diſpute the power; but here is no ſuch power given to the wife as it appears by the expreſſe words of the Will, which doth only deſcribe that ſhe ſhall only make Eſtates but for her life, otherwiſe ſhe might make Eſtates in Tail, or in Fee, and if this ſhould be the laſt part of the Will, which doth limit, the remainder would be deſtroyed, and generals in a Will ſhall not revoke an expreſs devise; but they ought ſo to be conſtrued that all the Will may ſtand together, as Bonhams caſe is 8. rep. Roll chief Iuſtice, It is a difficult thing to ſhew the meaning of the Teſtator here, but the general muſt not deſtroy the particular devise to which Nicholas Iuſtice aſſented, and Roll enclyned that the Feme had power by the Will to make this Eſtate, otherwiſe the words of the Will muſt be ſole, and void, and it may be the Baron intended to give his wife ſuch a power, that ſhe might deſtroy the remainders, and otherwiſe there cannot be any conſtruction made of the Will. Ask Iuſtice differed in opinion, and ſaid it was unreaſonable the remainder ſhould be deſtroyed, which is expreſly limited by the Will, and a Will doth differ from a conveyance Nicholas Iuſtice ſaid, that the words ſhall be expounded to ſhew his bounty to his wife; but not to give her power to deſtroy the remainder. Ierman Iuſtice, There are expreſſe words, for the Feme, and the daughter and the Feme hath a power; but not to deſtroy the Eſtate of the daughter. Curia adviſare vult. Antea.

Booth againſt Lambert.

Trin. 1651. Banc. ſup.

Hill. 1649. rot. 201.

Argument and judgement upon a ſpecial verdict, the queſtion whether dower well aſſigned or not.

Upon a ſpeciall verdict upon theſe words, viz. I do endow you of a third part of all the lands my Coſen I. S. your husband dyed ſeiſed of. The queſtion was whether the feme were well endowed by theſe words, becauſe he doth not ſay that he endows her by metes and bounds, Chaſe held ſhe was not well endowed, and cited 8 Ed. 2. 15. and ſaid that here is incertainty which begets diſſention, which ought not to be, and the thing is not here entire; but may be devided. And this is an aſsignment of dower, which differs from a demand of dower, for a demand may be general as in the caſes of Thyn and Thyn in this Court, and of Fairefax and Fairefax, and ſo the book of 8 E. 2. entry congeable (S) 5. which ſeems to prove the contrary, that is not to our caſe, for it differs from it. Merifield of Councell on the other ſide held the feme was well endowed, and agreed the caſes put by Chaſe. That of Common right a feme ought to be endowed by metes and bounds, yet ſometimes it is otherwiſe, as 3 Eliz. Dyer 27. a feme endowed in Common. And the feme that is to be endowed, and the party who is to aſsign the dower, may agree that the dower ſhall be aſsigned without bounding it. For conſenſus tollit errorem; But dower ad oſtium eccleſiæ muſt be more certain, Mich. 43, & 44 Eliz. Bullock and Finches caſe, Hill. 4 Iac. C. B. Roll chief Iuſtice, Of Common right a feme ought to be endowed per metas & bundas, where the Sheriff aſsigns dower, who

Dower.

who is an officer of the Law, and ought to prevent incumbrance, and diſputes; But it may be aſsigned generally of the third part in ſome caſes, and the partyes may agree againſt Common right, and here both partyes agreed to take dower in this Manor. And though here the termer for years of the land who is a third perſon, be prejudiced by this aſsignment, yet this alters not the caſe, becauſe it is only an eſtate for years, and toucheth no freehold. Nicholas and Ask Iuſtices as Roll. Ierman Iuſtice, If dower be of a third part, it ought to be by metes and bounds generally; but if it be of a moyety it is not ſo, or if the partyes conſent it ſhall be otherwiſe. Roll If the Sheriff aſsign dower and do it not per metas & bundas it is Error, if it might have been ſo aſsigned, and where a feme cannot be endowed per metas & bundas ſhe may enter without aſsignment. Iudgement was given for the Defendant niſi, &c.

Conſent.

Error.

Smith againſt the Earl of Dorſet.

Trin. 1651. Banc. ſup.

SMith moved the Court againſt the Earl of Dorſet, for an attatchment for diſturbing of him in the poſſeſsion of certain Lands, contrary to the rule of this Court, for the Plaintiff to have poſſeſsion. The Court anſwered that for only diſturbing his poſſeſsion, there ought not to be an attatchment granted; but if he be put out of poſſeſsion, he ſhall have an attatchment. The Councel replyed that the partyes cattel were driven off from the land, which they conceived was an ouſting of the party from his poſſeſsion. To this the Court anſwered, that this ſeemed to be a putting out of poſſeſsion, And therefore ordered that the Defendant ſhould ſhew cauſe why an attatchment ſhould not be granted.

Motion for an attatchment for diſobeying a rule of Court. Attatchment.

Owen againſt Ievon.

Trin. 1651. Banc. ſup.

Paſc. 1651. rot. 211.

THis caſe formerly ſpoken unto in arreſt of Iudgement, and then ſtayed, was again moved, and Iudgment prayed for the Plaintiff by Serjeant Glyn, who argued that the words were actionable, becauſe if they were true, the party of whom they are ſpoken is puniſhable by the Statute of 7 Iac. with corporal puniſhment, and beſides the words were ſpoken ſince the laſt Statute made againſt Adultery, which doth aggravate the words and make them more actionable. Iudgement was given for the Plaintiff, niſi. In this caſe it was ſaid by the Court, that it was adjudged in one Thecker and Duncombes caſe, that a woman may have a child in 38. weeks, and that a woman by cold, or hard uſage, may go with child above 40 weeks. Antea.

Iudgement prayed in an Action for words.

Nelſon againſt Tompſon.

Trin. 1651. Banc. ſup.

Trin. 24 Car. rot. 343.

Demurrer in an Act on upon the Caſe upon a promiſe.

NElſon brought an action of the Caſe againſt Tomplon, and did declare that the Defendant, in conſideration that the Plaintif would ceaſe to proſecute a ſute in Law againſt him, did aſſume and promiſe unto the Plaintif that he would pay unto him 8 l. & the charges of ſute which he had been at, & for breach of this promiſe Actio acrevit, & ſets forth his damage. To this Declaration the Defendant demurs in Law, & takes this Exception, viz. That there is no time nor place ſet forth where or when he did forbear to ſue the Defendant, as it ought to be, becauſe it is a traverſable matter. But Roll chief Iuſtice anſwered, It is not neceſſary to allege a place of a negative thing to be done, viz. to ſay that he did not proſecute the ſute in ſuch a place, or at ſuch a time, for he ought to surceaſe proſecution in all places, and at all times. Therefore let judgement be ſhewn for the Plaintif except better matter be ſhewn Friday next.

Lyda'e and Lyſter.

Trin. 1651. Banc. ſup.

Mich. 1650. rot. 387.

Iudgement in Debt upon a Bond reverſed.

AN Action of Debt was brought upon an Obligation made to a Biſhop and his Commiſſary for the payment of Debts and Legacies, the Action was brought by an Executor, and judgement given by Default againſt the Defendant, the Judgement was reverſed by a Writ of Error becauſe the Action was brought in the Debet and Detinet, whereas it ought to have been brought in the Detinet only, becauſe it was brought by an Executor.

Saunders againſt Ritch.

Trin. 1651 Banc. ſup.

Hill. 1649. rot. 758.

Special Verdict in Treſpaſs and Ejectment.

IN an Action of Treſpaſs and Ejectment upon a ſpecial verdict found. The Caſe fell out to be this. A man by his laſt Will and Teſtament deviſed all his Fee ſimple land whereſoever to his Brother, upon condition that he ſuffer his wife to enjoy all his free lands in Holford during her life; and the jury found that the Teſtator had only a portion of tithes in Holford: The queſtion was, whether the portion of tithes did paſs to the wife by this deviſe. Merifield held, That the Tithes paſſed not by the deviſe, becauſe the word lands cannot extend to tithes, for that would be a very forced conſtruction, and cited Trin. 17 Iac. Banc. Reg. Knight and Knights caſe, and Mich. 39 & 40 Eliz. Entred 38 Eliz. rot. 269. Yow and Hardings caſe Banc. Reg. That Houſes are not deviſable by the name of lands, and he ſaid, that the word whereſoever makes no difference, as to make the tithes paſs;

and

and though there be an implication and an intent in the Teſtator here to devise the tithes, yet that will not ſerve, becauſe there wants words to expreſs this intent, and though this be in a will, yet there muſt be words uſed to ſupport the intent of the Teſtator, for wills muſt be ruled by the rules of the Common Law. Aſhinghurſt and Curtice his caſe, Mich. 7 Iac. Hob. rep. 34. the laſt Edition. Mich. 42 & 43 Eliz. Banc. Reg. a deviſe of Lands extend not to tithes, for tithes are not lands, but a meer collateral thing to them, and have no relation to them, Mich. 1. Iac. rot. 192. Mills and Hides caſe, Banc. Reg. 11 Rep. Bridle and Napers caſe, f. 13. b. Trin. 42 Eliz. B. Reg. Sherwood and Winſton held, that tithes cannot be appendant to a Manor, 1 Rep. 111. Albanies caſe, and here are no words in the Proviſo to paſs the tithes. It is true that tithes may lie in tenure, and that an Action of debt lies for them, but that is by the Statute 19 Eliz Dyer f. 354. The word land in a will doth not extend to tithes, and heirs ought not to be diſ-inherited by doubtfull and ambiguous words, as it muſt be here, if theſe tithes ſhould paſs. Next, as to the verdict, he ſaid, that it is not thereby found that the Teſtator died poſſeſſed of the tithes, as it ought to have been, as it hath been adjudged 43 Eliz. and ſo he prayed judgement for the Plaintif. Maynard of Counſel with the Defendant argued, That the tithes did paſs by the Will, otherwiſe part of the Will muſt be void, which ought not to be, if all parts may be ſo conſtrued that they may ſtand together, and he agreed that lands and tithes are diſtinct things; but in Wills it is not to be ſo much conſidered whether the words of them be proper, but what was the intent of the Teſtator in them, and whether they do declare his meaning or not; and here by conſtruction of the words by free-lands inheritance is meant in oppoſition to Copyhold lands, or terms for years. 2ly. Here is a poſitive aſſertion of the Teſtator himſelf, that in his underſtanding he had free lands in Holford, for he had no other lands there, 35 Eliz. Robinſons caſe, rot. 504. Banc. Reg. by a will things of one nature may paſs by words which are proper to paſs things of another nature, 44 & 45 Eliz. rot. 125. A deviſe of lands and tenements will paſs leaſes for years, if there be no other lands, to paſs by thoſe words in the place expreſſed in the Will, and ſo prayed Judgement for the Defendant. Roll Verdict. chief Iuſtice asked what he ſaid to the exception, that it is not found that the Teſtator dyed ſeiſed of the tithes, without doubt it had been ill upon a Demurrer, therefore ſee if you cannot help it by the notes by which the Verdict was drawn up. But for the matter in Law, me thinks it is a ſtrong caſe that the tithes do paſs, for we are in the caſe of a Will, where the meaning of the party ſhall be obſerved, if it may be found out by any means, though it cannot be collected ex vi Terminis, and ſhould it not be ſo here, part of the Will would be void, which may not be, if we can make it otherwiſe by a reaſonable conſtruction. But I will conſider of the Verdict, and do you conſult with your notes. Ierman Iuſtice, The Verdict ought to find the dying ſeiſed, and till I am ſatisfied from the Notes I will deliver no opinion. Nicholas Iuſtice held both the deviſe good, and the Verdict alſo, but ſaid it had been otherwiſe upon a Demurrer. Ask Iuſtice to the ſame intent. Demurrer. Ierman Iuſtice, It is clear that the Teſtator intended to deviſe the lands in Holford, and it is a good deviſe, but if the Verdict be imperfect it is for the Plaintif, but if otherwiſe it is for the Defendant. The Court would adviſe touching the Verdict.

Hay-

Hayward againſt VVilliams.

Trin. 1651. Banc. ſup.

Hill. 1649. rot. 824.

Who may bring a Writ of Error, who not.

THe Caſe was this, a Feme was ſued as a Feme ſole, but by the Sirname of her Huſband, ſhe being then Covert. The Feme appears and pleads, and Judgement is given againſt her, and the Baron and Feme joyn in a writ of Error to reverſe this judgement: The queſtion was, whether the Baron, who was a Stranger to the Record, might joyn in the writ to reverſe the Judgement? It was moved divers times, and the Court adviſed, and at laſt they ſaid, that a Stranger to a Record may not bring a writ of Error to reverſe it, but that is only where he may have another remedy to avoid the prejudice he may receive by it; but in this Caſe the Baron hath no other remedy, for his Wife is taken in Execution, and by this means he ſhall loſe her ſociety; And therefore reverſetur, niſi, Antea.

Shann againſt Bilby.

Trin. 1651. Banc. ſup.

Hill. 1650. rot. 1065.

Arreſt of Judgement in an Action upon the Caſe upon a promiſe.

SHann brought an Action upon the Caſe upon a promiſe againſt Bilby, and declares, that in conſideration that the Plaintif ſhould ſurrender a Copyhold unto I. S. and his heirs, according to the Cuſtom of the Manor, the Defendant did aſſume and promiſe to pay unto him 100l. and that he did ſurrender the Copyhold into the hands of a Cuſtomary Tenant of the Manor, according to the Cuſtom of the Manor, to the uſe of I. S. and his heirs, and that the Defendant had not paid the hundred pound according to his promiſe, and declares to his damage, &c. Upon non Aſſumpſit pleaded, and Iſſue thereupon joyned, a Verdict was found for the Plaintif. It was moved in Arreſt of Judgement by Latch of Councel with the Defendant, that the Declaration is not good. 1. Becauſe it doth not ſet forth to whom the promiſe was made, and if it do not appear to be made to the Plaintif, it is nudum pactum, for the promiſe here is the conſideration. 2ly. The Conſideration is Executory, and the Plaintif doth not ſhew that he hath performed it, and then he hath no cauſe of Action; The Conſideration was, that the Plaintif ſhould ſurrender a Copyhold to I. S. and his heirs, according to the cuſtom of the Manor; and he only ſhews that he did ſurrender the Copyhold into the hands of a Cuſtomary Tenant, according to the Cuſtom of the Manor, to the uſe of I. S. and his heirs, and doth not ſhew that this ſurrender was preſented at the next Court, and ſo it appears not to be a good ſurrender, for it is uncertain whether it ſhall be preſented or no, and till it be preſented it is imperfect: To which the Court aſſented, and ruled againſt the Plaintif a Nil capiat per Billam, niſi, &c. In this caſe it was ſaid that if a man covenant to convey lands, it ought to be done at the charge of him that covenanteth to do it, except the contrary be agreed; And that if there be a double conſideration alleaged for a promiſe, if one of them be good, and the other be not, yet an action will lie upon the promiſe that is broken, which was grounded upon theſe conſiderations.

Surrender.

Covenant.

Conſideration.

Bac-

Barcock againſt Tompſon.

Trin. 1651. Banc. ſup.

Mich. 1650. rot. 444.

A Writ of Error was brought by the Bail to reverſe a judgement given againſt him upon a ſcire facias, & the Error aſsigned was, that there was no Capias taken out againſt the principal, and therefore the ſcire facias againſt the Bail is not good. Hales anſwered, that it was too late to urge this now for Error; for the judgement is upon two nichils returned, and cited 21 E. 3. f. 13. Roll chief Juſtice ſaid, that two nichils is as much as a ſcire feci returned, and it is no Error to give judgement upon it; but it had been a good plea upon the ſcire facias to ſay that there was no Capias againſt the principal, but now there is a Judgement well given, and it is too late to aſsign it for Error. But the Court adviſed. Poſtea. Error brought by the Bail. Plea.

Kerman againſt Iohnſon.

Trin. 1651. Banc. ſup.

Trin. 1649. rot. 153.

KErman brought an Action of Treſpaſs and Ejectment againſt Iohnſon, and upon a ſpecial Verdict found the Caſe was this. A man deviſed to I. S. his whole eſtate, paying his debts and Legacies, and dies poſſeſſed of Goods and Chattels, to the value of five pounds only, and dyed alſo ſeiſed in fee of divers lands, and was indebted forty pounds at the time of his death. The queſtion was, whether the lands paſſed by the Deviſe? Barry of Councel with the Plaintif argued, that the lands did paſs, becauſe that Wills ought to receive a favourable conſtruction; And 2ly. The intent of the Teſtator is to be conſidered, who by the words all his eſtate, did mean to comprehend as well his land as his goods and chattels, for there is no reſtraint of the words here, 7 Ed. 3. 10. The word eſtate is a word of large extent, and extends as well to the real as perſonal eſtate, if it were in Caſe of grant, much more in the caſe of a Will. And there is another word uſed here to explain the Teſtators meaning to be to deviſe his lands as well as his goods, and that is the word All, which comprehends all manner of eſtates, without exception. Next if the land ſhould not paſs, his debts and Legacies cannot be paid, according to the expreſs intent of the Teſtator, and the intent of the party ought to be ſatisfied, although the words be not proper, becauſe it is in a will, though it might be otherwiſe in a grant. And whereas it is objected that the Juries finding of the value of the debts and Legacies, is to no purpoſe, becauſe the will cannot be helped by the averment of the Jury. I anſwer that averments if they ſtand with the will, may be received to make the Teſtators intent to appear. But beſides this is not an averment only, but a true ſtating of the Caſe, to the intent to find out the Teſtators meaning. 3ly. The deviſee of the land is not made Executor but Truſtee, or Deviſee, & this is ſince the Statute of Deviſes 32 H. 8. The 2. queſtion is, what eſtate the Deviſee hath in the lands? & I conceive he hath Fee-ſimple, becauſe he hath all the Eſtate, which muſt be the largeſt, and that is Fee-ſimple. Hob. rep. pl. 280. The word whole goes both to the quantity and quality of an eſtate alſo. And here the conſide- Specialverdict in Treſpaſs and Ejectment.

ration that he is to pay all his Debts and Legacies, is a good conſideration to paſs the fee-ſimple of his lands, and though there may be a ſurpluſage after the Debts and Legacies paid, this hinders nothing; for it is his intent that the Deviſee ſhall have that ſurpluſage, and ſo he prayed Judgement for the Plaintif. Twiſden for the Defendant argued, that either nothing paſſeth by the Will, or if any thing, then only an eſtate for life paſſeth. He agreed that improper words may ſometimes paſs things, yet ſometimes proper words will not paſſe things; viz. if the intent of the party appear to be contrary, 24 Eliz. in the Earl of Northumberlands caſe. A Deviſe of all his Jewels, did not paſs his Collar of Eſſes, and his Jewels annexed to his Parliament Robes, and the words here are not that he deviſeth all his eſtate in his lands, but his whole eſtate generally, and if the words here ſhould paſs the lands, yet the fee-ſimple paſſeth not, but only an eſtate for life in the lands, which do paſs; nor do the words paying his Debts and Legacies cauſe the Fee-ſimple to paſs, for here is no likelyhood of any loſs to the Executor; for the words are not, that he ſhall pay all his Debts and Legacies; and if he be an Executor, as the contrary appears not, he ſhall not be charged with more than the perſonal eſtate will diſcharge. The words do amount to a Condition, and it is not found that there are any Debts or Legacies paid, and ſo it is not performed, and the heir may well enter into the lands in queſtion, for the Condition broken. 2ly. The Verdict doth not find how the lands are held, whether in Socage, or by Knights ſervice; and ſo it appears not whether they can be deviſed or no, and they ſhall not be intended to be Socage lands, Dyer, f. 207. Hill. 32 El. rot. 2. and Pell and Browns caſe. 3ly. It is not found that the Teſtator dyed ſeiſed of the lands, as it ought to have been, and he prayed Judgement for the Defendant. Roll chief Juſtice to the ſecond Exception to the Verdict anſwered, that in a Special verdict it is not neceſſary to find whether lands be held in Socage, or by Knights Service, and he ſaid that the words in the Will do goe to the nature and extent of the eſtate, as Barry urged, and he doubted how the verdict ſhall ſupply the Will if it be defective, for that is only to make the intent of the Will certain. Adjourned to be argued again. Poſtea.

Special Verdict.

Marſhal againſt Ledſham.

Trin. 1651. Banc. ſup.

Arreſt of Judgement in Debt.

MArſhal as Adminiſtrator brings an Action of Debt for rent; and upon a Verdict found for the Plaintif, the Defendant moved in Arreſt of Judgement, and takes exception, that the Plaintif had not ſhewn by whom the Letters of Adminiſtration were granted unto him, as he ought to do, but only ſays that the Adminiſtration debito more commiſſa fuit. But it was anſwered that it is too late to move this Exception after a Verdict, for the Jury have now found that the Adminiſtration was duly granted, and the Letters of Adminiſtration were produced in Court, and therefore not neceſſary to ſhew who granted them; and it was ſaid, that in a Declaration it is not neceſſary to ſhew by whom Letters of Adminiſtration are granted, or to ſay they were granted by him, Cui pertinuit, or per loci illius Ordinarium: But in a Plea in Bar it is otherwiſe, for this is not the cauſe of the Action, and effect of the ſute, but to ſhew they have been in the Spiritual Court. Judicium niſi pro quærente was afterwards given: Antea.

Declaration.

Plea.

Giles

Giles againſt Timberley.

Trin. 1651. Banc. ſup.

Mich. 1650. rot. 176.

AN Ejectione firmæ vi et armis was brought in the Common Pleas, and a judgement given for the Plaintif upon a nihil dicit, and in a writ of Error brought in this Court to reverſe the judgement, the Error aſsigned was in the judgement, which was entred thus, Ideo conſideratum eſt quod recuperet, and the word Capiatur was omitted, which ought not to be, becauſe the Action is a Treſpaſs vi et armis. Roll chief Iuſtice ſaid, It is an ill courſe they uſe in the Common Pleas, to enter the judgement ſo in this Action, for by this courſe the Plaintif ſhall gain his poſſeſsion of the land, and the Defendant cannot bring his writ of Error until the writ of Enquiry returned, and the Judgement perfected, which it may be will never be; for when the Plaintif hath gotten poſſeſsion of the lands he will little regard the damages. Therefore let the judgement be reverſed. Antea.

Er or to reverſe a judgement in an Ejectione firmæ.

Iudgement.

Error.

Elyott againſt Blague.

Trin. 1651. Banc. ſup.

ELyott brought an Action upon the Caſe againſt Blague for ſpeaking theſe words of him, viz. Thou art a Baſtard getting Rogue, and hadſt a Baſtard at Oxford, and art a pocky rogue, and for ought I know thou haſt filled my Bed full of the French pox, and no ſuch pocky rogues ſhall lie with me: Upon not guilty pleaded, and a Verdict found for the Plaintif. it was moved in Arreſt of Judgement that the words were not actionable, becauſe ſome of them were adjectivelp ſpoken, and others uncertain, and ſome of them clearly not actionable: But Twiſden anſwered, that if the words were taken together as they were ſpoken, they were very ſcandalous and actionable, and cited one Colyers and Lydyers caſe, 1 Car. To which the Court agreed, and ruled the Plaintif to take his judgement except better cauſe ſhould be ſhewn.

Arreſt of Iudgement in an Action for words.

Cuſtodes againſt Ginkes.

Trin. 1651 Banc. ſup.

SErjeant Bernard moved to diſcharge an Order of Seſſions made againſt a Feme Covert, to keep a Grand child of hers; becauſe a Feme Covert was not bound by ſuch an Order. Roll chief Iuſtice anſwered, that her Husband is bound to keep his wifes Grandchild by the Statute; but in regard that the Husband is not charged by the Order, but the wife who is covert is only charged, Therefore let the Order be quaſhed.

To diſcharge an Order of Seſſions.

Order of Seſſions.

Trotman againſt Standard.

Trin. 1651. Banc. ſup.

Trin. 1650. rot. 1768.

Special verdict in an action on the caſe.

IN an Action upon the caſe a ſpecial verdict was found, upon which the caſe fell out to be this. Two being ſeiſed of lands in Fee, did make a charter of feoffment unto two others, and to their heirs, and in the deed was a letter of Attorney to enter into the lands in the name of the feoffors, and make livery and ſeiſin according to the effect of the deed, and livery of ſeiſin was made to one of the Feoffees by the Attorney in the abſence of the other Feoffee. The queſtion was, whether here were a good livery and ſeiſin, or not? 2ly. Whether the letter of Attorney was good or no, in regard it had falſe latin in it, for the letter of Attorney was made by two, and the words of it are pro me, & in nomine meo to make livery which are words of the ſingular number, whereas they ought to be of the plurall? Hales as to the 2d. queſtion held the letter of Attorney good enough, becauſe the authority given to the Attorney proceeds from both the Feoffors, and therefore the words ſhall be intended to be the words of both of them, as ſpoken by them ſeverally. And he alſo argued that the letter of Attorney was well executed to both the Feoffees, becauſe it was by deed, and he cited 15 E. 4 f. 18. and he ſaid, if the livery had been made by the Feoffor himſelf it had been good without queſtion, and there is no difference between that and our caſe, becauſe it is made according to the effect of the deed, and the Feoffee who is preſent is Attorney for the Feoffee that is abſent to receive livery for him, and the effect of the letter of Attorney is executed, although the words are not, Cooks Lit. f. 5. and Foxon and Polts caſe, in the Exchequer, 34 Eliz. Boltons caſe, Livery made to the husband, was held a good Livery to the wife alſo. Latch of Councel on the other ſide made two queſtions. 1. Whether here was a good authority? 2ly. Whether it was well executed? For the firſt he argued, that here was no authority given to the Attorney to enter into the lands in the name of both the Feoffors, for the words are that he ſhould enter in nomine meo, which cannot comprehend both of them, the words being in the ſingular number, and he agreed that Livery made by the Feoffor himſelf to one, in the name of both had been good; but here the livery is by Attorney, and an Attorney hath nothing but a bare authority given him, which ought to be ſtrictly purſued, eſpecially it being to paſſe away an Eſtate. He alſo took exceptions to the ſpecial verdict, and ſaid that the tryal upon which the verdict was found, was directed out of the Chancery to diſcover a fraud, and the verdict finds nothing according to the direction, and ſo it ought to be ſet a ſide, beſides the verdict in it ſelf is incertain, for it is of 300 Acres of land generally, which is incertain, and ſo the Plaintiff can have no Judgement, for the Declaration warrants not the verdict, for the Declaration mentions Houſes, and Cottages, beſides the 300 Acres of land. 2ly. The verdict doth not find the date of the Indenture, and the Title to the land is to commence a die datus. Hales anſwered 1. It ſhall be intended the day of the date. 2ly. It ſhall take effect after the delivery, if there be no day of the date expreſſed. And to that exception to the verdict, that there are not ſo many Acres conteined in it, as are expreſſed in the Declaration; he anſwered that the Judgement ſhall go to all which is land in kind only, and ſhall not extend to Houſes, and Cottages, and there appears to be a re-

reſiduum, or ſurpluſage. Roll chief Iuſtice ſaid, that it is incertain by the verdict what lands are meant, for there are 400 Acres of land, and four meſſuages, and four Cottages, and 40 Acres of medow in the Declaration, and ſo there appears to be a reſiduum, beſides the land found in the verdict, which makes it to be incertain what is found. And though it ſhould be a verdict for part, and be uncertain for the reſt, although the Plaintiff will relinquiſh his damages for the reſt, this will not help it, for there muſt be two Iudgements, and the verdict is ill as to that which is found, yet he held that it might be good without relinquiſhing the damages at all, becauſe the verdict is good for ſo many Acres as are in the Declaration, and it ſhall be intended that the Jury miſtook the number of the Acres, and intended by the verdict no more than the arrable land. Ierman and Nicholas Iuſtices doubted whether there be a verdict at all, becauſe the Jury have not found the things conteyned in the Declaration. Roll chief Iuſtice, and Nicholas, mutat opinione, held the verdict good; but ſaid it would have been otherwiſe upon a demurrer, and it was ſaid that if one declare for 40 l. and the verdict finds 100 l. the Plaintiff may relinquiſh 60 l. and have Iudgement for the reſt. Ask Iuſtice ſaid that his opinion was, that the verdict is incertain, and conceiveth that the Jury intended all in the Declaration. The Court took time to adviſe. Afterwards Iudgement was given for the Plaintiff. Verdict.

Fitton againſt Richardſon.

Trin 1651. Banc. ſup.

The Court was moved for a prohibition to the County Palatine of Cheſter, upon a ſurmiſe that they did proceed in the Court of equity at Cheſter touching the payment of rent reſerved upon a leaſe for years, which is a matter tryable at the Common Law, and not in a Court of equity. The Court anſwered we will ſee the Bill, whether there be any matter of equity laid in it or no; for if there be we will not grant a prohibition, and let us alſo ſee ſome preſidents if there be any, for granting of a prohibition in ſuch caſes. Powis who moved for the prohibition replyed, That in Cheſter they hold two Courts, one for matters of Common Law, and another for matters of equity, and ſo they ought to obſerve the due proceedings in each Court, according to the nature of the cauſe, 2ly. This Court of the upper Bench is the ſuperintendent Court over all other Courts, and a writ of Error lyes out of this Court to Cheſter, and by conſequence a prohibition alſo to reſtrain the Court of equity there, if they ſhall proceed irregularly. 3ly. There would otherwiſe be a failer of juſtice, for the Court of Chancery here cannot grant a prohibition, becauſe the matter they proceed in there is no matter of equity, Nat. brev. f. 44 H. 1. Cook rep. Corbets caſe, Hob. rep. caſe 98. Owen and Holts caſe. And though a writ from hence doth not run there nor in Wales, yet a prohibition is grantable to Wales, and therefore why not to Cheſter, Mich. 2. Jac. B. R. a habeas corpus was granted to the County Palatine of Durham; and to Barwick, and Trin. 1650. C. B. rot. 1966. in Iones and Lennards caſe a prohibition was granted to Cheſter. Nicholas Iuſtice cited a caſe to be adjudged in this Court by Cook chief Iuſtice that it will not lye de brevi ordinario; but in Wales it will ly. Hales anſwered, that there is more here than matter of equity, and writs mandatory will lye in all places. Roll chief Iuſtice ſaid that Cheſter hath a Court of upper Bench, and they may grant a prohibition there, and it appears not to us whether they will grant it or not, For a prohibition to the County Palatin of Cheſter. Prohibition.

ſo that we know not whether we need to intermeddle. Hales repliyed, that every one is bound by the Common Law, and therefore writs mandatory at the Common Law, which generally concern men as ſubjects, and not concerning private things. And 1. It is to be conſidered that Cheſters juriſdiction is derived from this Court, and ſo it is ſuppoſed to be ſubordinate to it, and is to be regulated by it. 2ly. When the matter concerns common right, it is not affixed to Cheſter, becauſe it concerns men as ſubjects at large, 20 Iac. Grigs caſe, C. Banc. And this Court ſat in Cheſter in the 22 year of Ed. 1. as may appear by the roll, Hill. 31. Mich. 29. E. 3. rot. a habeas corpus was granted to Durham, and the liberty ſeiſed into the Kings hands for diſobeying it, and this Court is the conſervator of the liberties of Cheſter. Roll chief Iuſtice demanded, can we grant a prohibition to the Court of equity in Ireland? If there did appear to be any failer of juſtice here, we would grant a prohibition; but there appears not any failer, for it may be the party may have a prohibition in the upper Bench there. Therefore it is good for us to hear the other party, and in the mean time we will adviſe, and then let us ſee the bill in Chancery. In this caſe Hales ſaid that a prohibition had been granted to the Lord Majors Court of London.

Prohibition.

Style againſt *Tullye*.

Trin. 1651. Banc. ſup.

Hill. 24. Car. rot. 587.

Error to reverſe a Judgment in debt upon an obligation.

Sir Humphrey Style brought a writ of Error to reverſe a Judgement given againſt him in an Action of debt upon an obligation in the Common pleas for Tullye and Acton Executors of the laſt Will and Teſtament of one William Tullye. The caſe was this, Sir Humphrey Style, and one Thomas Brook were joyntly and ſeverally bound unto William Tullye, in an obligation of 120 l. for the payment of 60 l. at a certain day. After the day of payment, and the mony not paid, Thomas Brook makes his Will, and makes Mary Brook his wife his Executrix, and dyes, afterwards William Tullye makes his will, and makes Tullye and Acton the Defendants in the writ of Error his Executors, and dyes, and by his will he releaſes unto Mary Brook all the debts, which Thomas Brook her husband, did owe unto him at the time of his death. Tullye and Acton prove this will, and after bring an Action of debt againſt Sir Humphrey Style in the Common pleas, upon the obligation of 160 l. Sir Humphrey Style demurs to the Declaration, and for cauſe ſhews that William Tullye by his will, had releaſed the Debt to Mary Brooks, and upon this demurrer Judgement was given againſt Sir Humphrey Style, and thereupon he brings his writ of Error; wherein the queſtion was, whether the debt was releaſed by the will or no? Latch of Counſel for Sir Humphrey Style argued, that here was an actual releaſe, and he cited 21 E. 4. f. 8. and a caſe Trin. 10. Car. and ſaid that a will amounts to a releaſe, although it be not made of incorporeal things, and the aſſent of Mary the Executor is not neceſſary here, for this is not like the aſſent to the accepting of a Legacie, and a debt due upon an Obligation made to the Teſtator, is not aſſets in the hands of an Executor, untill it be recovered, and this is more than in the nature of a Legacy, and here was a great perſonal Eſtate, and no other creditors are deceived by this releaſe, and a devaſtavit cannot be here ſuppoſe, 19 H. 8. Dyer 8 E. 4. f. 5. Dyer 139. Cranmers Caſe, and here is only an exoneration of a thing,

and

and no donation of any thing by this releaſe, Serjeant Hen. Clark of Councel on the other ſide argued, that the debt was not diſcharged by the will, becauſe this releaſe made by the will cannot take effect till after the death of the Teſtator, and ſo not at all, and ſuch a releaſe was revokeable by the Teſtator during his life, and therefore it cannot be ſaid that it was ever an abſolute releaſe; But if this releaſe had been in the realty, it might peradventure have been otherwiſe; but it is not ſo here; for the debt now reſts in the Executor, and it is a devaſtavit in the Executor to releaſe it, for this is but a Legacie, and it may be there are debts owing, which are to be paid before Legacies, and here doth not appear to be any aſſets in the Executors hands, beſides this debt, and if the Teſtator would have releaſed it, he ought to have done it by a deed. Roll chief Iuſtice, What ſhall the Executor do in this caſe? I conceive it is a ſtrong caſe for the Executor, and that it is very unreaſonable that the Teſtator ſhould make ſuch a deviſe, and here is no conſent of Mary the Executor expreſſed to this releaſe, beſides a will cannot releaſe a thing created by deed, and ſo diſcharge Creditors. Nicholas and Ask Iuſtices concurred; But Ierman Iuſtice doubted. For a fault in the writ of Error, and imperfection in the record certifyed, the Iudgment was not then affirmed. Afterward Sir Humphrey Style preferred his bill in Chancery to be relieved herein, and obteyned an injunction till hearing; but upon a hearing at the Rolls could get no relief; but was ordered to pay 100 l. or elſe the injunction to be diſſolved. Q. Nota.

Hamond againſt Ward.

Trin. 1651. Banc. ſup.

Paſc. 1650. rot. 58.

AN Action of debt was brought againſt the Defendant, upon an inſimul Computaverunt, and a verdict and a Iudgement given againſt him, whereupon he brought his writ of Error, and aſsigns for Error, that the Action was brought againſt him for rent as a Tenant of land, and not as a receiver, and that therefore an accompt did not lye. Roll chief Iuſtice cited 20 H. 6. that rent alone lyes not in accompt, becauſe rent is a certain thing, and it is alſo in the realty; but if rent be mixed with other things an accompt will lye; but here it appears the Action is brought againſt the Defendant as a receiver, and if one receive mony due to me upon an obligation, I ſhall have either an Action of accompt, or an Action of debt againſt him, ſo if he receive my rents without my conſent. Therefore let the Iudgement be affirmed.

Error to reverſe a judgment in debt upon an inſimul computaverunt.

Accompt.

Debt.

Alleyn againſt Holden.

Trin. 1651. Banc. ſup.

Entred Paſc. 1650.

AN Action of debt was brought againſt an Heir, who pleads riens per diſcent, & Iudgment was given againſt him upon a nihil dicit, & a writ of enquiry was awarded without the prayer of the party, and a ſpecial Iudgement thereupon given againſt the Defendant. Upon a writ of Error brought

Error to reverſe a judgment in debt againſt an Heir.

to reverſe this Judgement, it was alleaged for Error, that the Judgement ought to have been a general Judgement, and there ought not to have been a writ of enquiry, except the party had prayed it, and to this the Court enclined, and Roll chief Iuſtice ſaid, that it is otherwiſe in an Action againſt an Executor, for there aſſets may be found. At another day Roll chief Iuſtice ſaid, if the Heir plead riens per diſcent, and if it be a falſe plea, a general Judgement ought to be againſt him, and there ſhall be no writ to enquire what lands he hath, and it is not neceſſary, as here it is, to have a ſpecial Judgement, that the Plaintiff ſhall recover of the lands diſcended, for the Judgement ought to be that the Defendants body and goods be lyable, and half his lands, and not as it is here a writ to enquire, and find what lands he hath by diſcent. Reverſet. niſi.

Writ of inquiry.

Iudgement.

Barcock againſt Tompſon.

Trin. 1651. Banc. ſup.

This caſe was again ſpoken unto, which was this, A Judgement was given in the Comon pleas againſt the principal without an original, & upon this Judgment there iſſued out a ſcire facias againſt the Bail, & two nichils returned, and thereupon Judgment was given againſt the Bail, & a writ of Error was brought by the Bail to reverſe this Judgment. And it was now argued by Hales of Councel for the writ of Error, that the Judgment was erroneous, becauſe it being given upon a ſcire facias, which is a judicial writ, it ought to be grounded upon an original, and it not being ſo here, it is Error in fact, although it be not Error in Law. To this it was anſwered, that two nichils returned upon a ſcire facias, amount to a ſcire feci, and a judgment given thereupon is good, and therefore it is too late now to ſay, that the ſcire faci s was not well executed. Brook Sc. fac. 96. 28. 17 Car. C. B. To this Hales ſaid, there was a Judgement againſt us in the Common pleas, ſo that we could urge nothing againſt the ſcire facias there; but here we may. Roll chief Iuſtice anſwered, it is to ſome purpoſe to make up the record upon the two nichils, otherwiſe there would be no end of things, and the Judgement is well given by the Judges, and how can you now make Error in it? and if you be inconvenienced by the Judgement, you are not without remedy, for you may bring an Audita querela, and you might have pleaded to the ſcire facias, nul tiel record, for it is not matter of fact. And therefore ſhew better matter why the Iudgement ſhall not be affirmed, and take liberty to bring an Audita querela. Antea.

Error brought by the Bail to verſe a judgment given againſt the principal.

Iudgement.

Error.

Audita querela.

Tucker againſt Coſh.

Trin. 1651 Banc. ſup.

Entred Trin. 1650. rot. 388.

Tucker brought a replevin againſt Coſh, for diſtreining his Cattel. The Defendant makes conuſance as Baily to I. S. and upon the Avowry the caſe fell out to be this. A tradeſman, in conſideration of mariage, made a conveyance of his lands to the uſe of himſelf, and of his wife, and afterwards becomes a Bankrupt, and a commiſsion of Bankrupt is taken out againſt him, and the lands of the Bankrupt are ſold by the Commiſsioners to the avowant that took the diſtreſs. The queſtion here was, whether

Special verdict in a replevin.

whether this conveyance made by the Bankrupt of his lands was within the Statute of fraudulent conveyances or not, and the sale made by the Commissioners of this land were good. Maynard for the Plaintif argued, that it is not within any of the Statutes of Bankrupts. The Deed here is without fraud; and so it is not within the Statute; for a valuable consideration is only expressed in the Statute, and not a conveyance upon consideration of marriage, as it was in our case. 2ly. The Feme is but one person with her Husband. 3ly. By comparing the Statutes together it appears that the wife is not comprised within the Statute of 1 Iacobi, which looks back to other Statutes touching Bankrupts, for the wife is not named in the Statute of 1 Iacobi, but only children and other persons, otherwise the words of the Act which do enumerate children, and other persons, would be frivolous and idle. Roll chief Iustice said, the Case is of great consequence, and Crisp and Prats case doth somewhat resemble this. The Law intends a Bankrupt which is so by fraud, as well as a Bankrupt who becomes so by accident, and for this cause is he called an Offender in the Statute, and here the year of our Lord 1637. is the 13 year of the late King; & the recovery suffered by the Bankrupt was then, and within half a year after the recovery, he became a Bankrupt, so that me thinks there plainly appears to be fraud in the Conveyance, but the fraud is not expressed in the pleading, as it might have been. The Statute of 1 Iac. is somewhat doubtfull as I conceive, and I do not see any provision made in it against the wife, if fraud do not appear, for here is no valuable consideration mentioned. Nicholas justice said, it is doubtfull, yet he conceived it within the Statute of 1 Iac. which ought to receive a large construction, because it was made for the good of the Commonwealth. Ierman and Ask agreed with Roll in omnibus. Roll, Here the matter in dispute is not in a special Verdict, but comes in question upon point of pleading, which shall be taken most strong against him that pleads it, and he hath not expressed any valuable consideration, as he might have done, by saying in consideration of a portion, or in recompence of marriage, or in performance of Articles made upon marriage, or that the wife had joyned in selling some part of the land. The Court would advise, but enclined judgement ought to be for the Avowant. Afterwards judgement was given accordingly, for the Court held the wife was within the Statute of 1 Iac. and the providing for wife and children to be providing for himself.

Bankrupt.

Fraud.

Pleading.

Chapman against Brook.

Trin. 1651. Banc. sup.

Trin. 1650. rot. 200.

IN an Action upon the Case the Plaintif declared upon a Custom of commoning in such a place. The Defendant demurred to the Declaration, and for cause shews that the Custom was not well laid; for the Plaintif declares of a Custom of commoning, pro averiis, viz. pro equis, bobus, equabus et pullis, and the word pullis is of an uncertain signification, for it may signifie a Calf, a Lamb, or any other young Beast or Foul, and 23 Car. Segar and Dyers Case was cited. The Court held the exception good, and said, that it is incertain what is meant by the word pullus, and said, that if the prescription had been pro omnibus averiis, it had been good, and the viz. should have been void; but here it is only pro averiis. Therefore, nil capiat per billam.

Demurrer to a Declaration in an Action on the Case.

Prescription.

Newton againſt Godard.

Trin. 1651. Banc. ſup.

Error to reverſe a judgement in debt.

A Writ of Error was brought to reverſe a judgement given in an Action of Debt at Ipſwitch. The Caſe was this. There iſſued out a Capias againſt the Principal, and a judgement was given againſt him; and after a ſcire facias iſſued out againſt the Bail, and a judgement thereupon was given againſt the Bail; Then the Plaintif takes out an Execution, viz. a fieri facias againſt the Principal, and Bail, upon both the judgements, to levy the debt recovered upon the goods and chattels of the Principal and Bail, or either of them. It was alleged that the execution thus taken out was not good, for there ought to have been ſeveral executions upon the ſeveral judgements, and not one execution, and to this the Court agreed, and ordered the Defendant in the writ of Error to ſhew cauſe why the judgement ſhould not be reverſed. In this Caſe Roll chief Iuſtice took an exception to the ſcire facias, becauſe it was ſcire fac. with a dash, which might be as well ſcire faciatis as ſcire facias.

Execution.

Abreviation.

Spittlehouſe againſt Farmery.

Trin. 1651. Banc. ſup.

Hill. 1650. rot. 43.

Error to reverſe a judgement given in an Action of Accompt.

An Action of accompt was brought againſt a Feme Covert an Adminiſtratrix and her Husband in the Common Pleas, and judgement given againſt the Defendants quod computent. The Feme dies, and the Husband brings a writ of Error in this Court to reverſe this Judgement. Roll chief Iuſtice held, that the writ of Error did not lie, becauſe the Record cannot be removed by it, for that would diſturb the proceedings in the Common Pleas, and the party would have no fruit of his ſute, if the Record ſhould be removed, nor any remedy to recover the arrears due unto him: Yet the Original is determined by the Judgement given quod computent, and a ſcire facias lies by the Executor, as the caſe here is. Ierman Iuſtice to the ſame effect, and cited 1 H. 7, f. 2. Nicholas Iuſtice to the ſame intent; and ſaid, he did not much regard the Book of 21 Ed. 3, becauſe there are other Books againſt it. Ask Iuſtice ad idem. Roll chief Iuſtice put theſe caſes. A judgement was given in Dower for the Demandant, and another judgement that ſhe ſhall recover her damages, and this ſecond judgement for the damages was reverſed by a writ of Error, becauſe ſhe did not aver that her Husband died ſeiſed, in which caſe ſhe is to have no damages; yet the firſt judgement for the Dower ſtood unreverſed, and Hill. 43 Eliz. C. B. in one Williams and Whites caſe, in an Action of Accompt 2 judgements were given, and the ſecond was reverſed, and the firſt ſtood unreverſed. In the principle caſe the rule was judicium, niſi.

Original. Scire facias.

Iudgement

VVallis againſt Bucknal.

Trin. 1651. Banc. ſup.

Trin. 1649. rot. 600.

VPon a ſpecial Verdict the caſe fell out to be this. One ſeiſed of Copyhold lands of inheritance made a Letter of Attorney unto two joyntly and ſeverally, to ſurrender the lands after his death to certain uſes, according to the Cuſtom of the Manor. The queſtion was, whether this was a good Cuſtom or no. Ellis of Councel with the Plaintif argued, that it was not a good Cuſtom, becauſe a Cuſtom ought to be reaſonable, but this Cuſtom is unreaſonable, becauſe it is not only againſt a particular Law, but it is againſt the general rule of Law to paſs eſtates of inheritance in ſuch a Manor; and although particular Cuſtoms may be againſt publique intereſt pro bono publico, yet this is nothing to our caſe, for this is not for the publique good, and therefore it is not good. 2ly. An authority ought to be countermandable, and to determine by the death of the party that gives the authority; but here it is not ſo, but it is to continue after his death. Next, no man can give authority to another to do a thing which he himſelf could not do, but here it is otherwiſe, and therefore it is not good. Alſo by the death of the Copyholder the Law ſettles the lands in the heir, and an authority cannot diveſt them out of him; this is not like to the ſurrendring of Copyhold lands into the hands of the Lord, for ſuch a ſurrender cannot be revoked, but this authority may be revoked: But which is more, the Verdict here doth not find that the two Attorneys are cuſtomary Tenants of the Manor, but only by way of recital, which is not good, for they ought to have been found ſo directly; nor doth it appear that they were cuſtomary Tenants at the time of the admittance of the party, neither is there any poſſeſſion or title found in the Defendant, and ſo the Plaintif having primer poſſeſſion, the Defendant is culpable; neither is it found that the Cuſtomary Tenant, who gave this authority, had an eſtate in fee-ſimple in the lands, and if he had but an eſtate for life, he could not make ſuch a Letter of Attorney; neither is the authority given warranted by the Cuſtom, and ſo he prayed judgement for the Plaintif. Wilmot for the Defendant, As to the authority, he ſaid that it was good, and did well enough ſurvive the party that gave it, becauſe it is ſupported with a ſpecial direction from the party that gave it. 1 H. 7. 8. and this is the reaſon that an Executor may ſell lands of the Teſtator after his death, viz. becauſe his authority is ſo ſupported, 21 E. 4. f. 8. 31 E. 1. Fitz. Grants 45. And here in our caſe the heir hath neglected his advantage, and therefore ſhall not now be admitted to take it. But beſides the authority here given is more than a bare authority, for it is backed with the circumſtances of time, perſons, and of a Cuſtom, which is not of a ſlight eſteem in Law, and by ſuch a Cuſtom which is very reaſonable; for it is but to enable the party to diſpoſe of his own lands; and far more unreaſonable Cuſtoms than this are allowed in our Law, as that in Kent for an Infant of 15 years of age to have power to ſell his lands; neither is this Cuſtom contrary to any poſitive rule of Law; for it is here to create the authority to begin after the parties death that created it, and ſo it is not to determine with his death, for till then it begins not, and the Cuſtom here is but to alien lands, which is no ſtrange thing, and this Cuſtom extends but within the Manor, which is but to a ſmall compaſs of ground; and ſo

Special verdict upon a Cuſtom of a Manor.

the publique is not much concerned in it, and the caſe of 17 Car. in this Court, Bambridge and Whaddons caſe differs from our Caſe; for that was not ſupported with a cuſtome as this is. And it doth appear by the Record, that Dalby the Attorney is a cuſtomary Tenant, and the admiſsion is alſo found by the Verdict to be ſecundum conſuetudinem Manerii, and ſo that is well enough, and then one cannot gain a Copyhold eſtate by diſſeiſin, and ſo no primer ſeiſin ſhall be intended, as was urged on the other ſide, and it is alſo found that the Copyholder was ſeiſed. Roll chief Iuſtice, It will be a hard matter to maintain the Cuſtom, if it be not found that the Copyholder was ſeiſed in fee of the Copyhold lands. 2ly. It is not here found that the land is demiſable, according to the will of the Lord, and ſo it may be free land, and then the cuſtom doth not extend unto it, nor is it found that the parties to whom the Letters of Attorney were made were Copyhold Tenants. And the primer poſſeſsion will make a diſſeiſin here by the Defendant, if the cuſtom be not well found, and ſo judgement muſt be for the Plaintif. And I cannot ſee how the Cuſtom can be good, it being againſt the rules of Law. A man cannot deviſe Copyhold lands, and this caſe is worſe, but he may ſurrender to the uſe of his laſt Will. If you will not conſent to a new tryal we will adviſe, for it is a hard caſe, and my Brothers have not been attended with Books. Mich. following Iudgement was given for the Plaintif, niſi. It was moved again, and the Court would adviſe. Poſtea.

Cuſtom.

Diſſeiſin.

Deviſe.

Surrender.

Batchelour againſt Parſons.

Trin. 1651 Banc. ſup.

Mich. 1652. rot. 381.

Batchelour brings a writ of Error to reverſe a Iudgement given againſt him for Parſons in an Action of Debt in the Common Pleas, and the Error aſsigned was, that there are two Declarations in the Record, one in the Emparlance Roll, the other in the Plea Roll, and the Original certified upon the writ of Error doth not warrant the firſt Declaration, for it was filed after it. Hales anſwered, that the Record is good enough, if the Original do warrant the laſt Declaration, for this is the common courſe uſed in the Common Pleas, as the Clarks there do inform me, & there are many Caſes like this in the Common Pleas. Wild of Councel on the other ſide anſwered, that this is a ſtrange courſe, for they ought firſt to file the Original, becauſe it is the beginning and ground-work of the ſute; and it not being ſo done here, the Iudgement is given without an Original, & this is a iudgement by default, and the imparlance is part of the ſute. Roll chief Iuſtice, The Imparlance Roll is the principal part of the ſute, and to confound things by intendment, that the imparlance may be touching another ſute, is not good, and it matters not what the Cuſtom is in the Common Pleas, if it be againſt Law, and both Rolls ought to be certified here. Ierman Iuſtice ad idem. Roll chief Iuſtice, All the Record in the Common Pleas, which is in the cuſtody of the chief Iuſtice there, ought to be certified by him upon the Return of the Writ of Error, and here the Imparlance Roll is in his cuſtody, and therefore he ought to certifie it; and if there be two writs of Error, and one is good and the other naught, we will take the beſt to affirm the iudgement. The Original ought not to be fitted to the Declaration, but the Declaration to the Original, becauſe the Original is the foundation of the ſute, and therefore the courſe uſed in the

Error to reverſe a iudgement in debt.

Imparlance.

Intendment.

Certiorari.

Error.

the Common Pleas is a preposterous course, viz. to declare against the Defendant, and after to file an original against him, to warrant the Declaration. It is here certifyed to be one Record, and how can we take the emparlance Roll to be part of the Record, it being not certified with it: and if there be variance between the emparlance Roll, and the plea Roll, it is Error. We will advise; but we must not suffer new wayes, yet we are loth, notwithstanding to reverse Judgements given in the Common pleas. Therefore shew cause next term, why the Iudgement should not be reversed. Original. Variance.

Kirman against Iohnson.

Trin. 1651. Banc. sup.

IN an ejectione firmæ brought by Kirman against Iohnson a special verdict was found, and upon it the case fell out to be thus, A having lands in fee simple, and also goods and chatels to the value of 5 l. only in Taveslock made his Will, and devised to his wife totum statum suum, viz. his whole Estate paying his Debts, and Legacies, and his Debts and Legacies did amount to the value of 40 l. Hales made 2 questions, 1. Whether the lands passe to the wife by the Will or not. 2ly. If they do, what estate passeth to her in the Lands. For the first he argued, that the lands do passe to the wife. 1. Because the generality of the words do include the lands, as well as the goods, for the words are his whole Estate, so that nothing is excluded, 9 E. 4. a release of all Actions, is held a release of all Actions that the party had in all his capacities. 2ly. The ordinary maner of speech doth shew that he intended to devise his lands, as well as his goods. Riches case, Mich. 45. Eliz. C. Banc. A devise of all his rents was held to passe all the partyes lands. Also the subject matter in fact doth prove this to be his intent, and although here is not a collateral averment to prove the intention, but a collateral proof to declare the Testators intent, this may be admitted to ascertain the Court of his meaning, as it is in the case of proving an Act of Parliament. In the Lord Cheneys case, an averment standing with a Will was accompted allowable, though an averment against a Will be not; In Cooper and Lanes case, 35 Eliz. a devise seigniori puero, where the Testator had a Son, and a Daughter, was held a good devise to the Son, although puer signifies as well a Daughter as a Son; and the Daughter there was elder than the Son, and Hill. 8. Car. In Bartlet and Rodes case in B. R. a devise of all his lands in Dale, if he had leases, as well as lands, there passed not the leases. For the 2d. point he argued that a fee simple passed. 1. Because his whole Estate is devised, and that is to be applyed as well to the lands, as to the goods. 2ly. Because in regard that there is a consideration for it, to wit that the wife shall pay his Debts, and discharge his Legacies; and whereas it is objected, that it is not said she shall pay all his Debts, I answer, that it shall be so intended. Here is land and goods mentioned, and not land only, and it is found that the goods only are not sufficient to pay the Debts, and also the goods were liable to the payment of the Debts, without this expression in the Will, and therefore the land must be intended to be devised. And for the verdict it is not material to find the lands to be held in socage, for they shall be intended to be so held, because it is the most antient Tenure, for where the Law creates a Tenure, it shall be socage Tenure. 2ly. Lands may possibly be deviseable, although they be not held in socage, for if they be neither held by socage, nor chivalry, yet they are deviseable, Dyer 307. Special verdict in an ejectione firmæ.

Neither is it material to find the Debts, and Legacies paid, for it is a condition here, and not a limitation, and there is a perſon to take advantage if the condition be broken, & this is a ſpecial verdict, & the breaking of the condition if it had been broken, would have appeared upon evidence, & therefore it is not neceſſary to aver it, & it is in caſe of a Fee ſimple, which is an Eſtate intended to continue. Roll chief Juſtice held, that the lands did paſſe, for ſo he ſaid the common underſtanding imports, and the words do go to the value of the eſtate. 1. It comprehends the thing, to wit the land. 2ly. The extent of the Eſtate given, viz. Fee ſimple; and ſo it ſhall be here intended, and the words paying his Debts and Legacies doth enforce this conſtruction, for they are to be paid preſently, which cannot be, if the lands paſſe not in Fee, and ſo the averment it is but to ſupply the meaning of the Teſtator, and ſtands very well with the Will, and is not ſo collaterall, as it is in Cheyneys caſe. And for the verdict the lands ſhall be intended to be ſocage lands, as being the moſt Common Tenure, except the contrary were ſhewed on the other part, Denham and Bakers caſe, Mich. 24 El. entred Trin. 23. rot. 12. 80. and the words paying his Debts, and Legacies, are words of condition, and not of limitation. Ierman ad idem, and ſaid, when we ſay a man is a man of a great Eſtate, we mean his Eſtate in lands, as well as goods. Nicholas and Ask Iuſtices to the ſame effect; but Ask ſaid he doubted of the verdict, becauſe no Legacies are found, and this is part of the caſe. Iudicium pro querente niſi, Antea.

Deviſe.

Intendment.

Condition. Limitation.

Pickering and Emma.

Trin. 1651. Banc. ſup.

For a ſuperſedeas upon an audita querela. brought.

EMma obteined a Judgement againſt Pickering, and had ſatisfaction upon it, and gave a releaſe to the Defendant, yet afterwards takes out a capias ad ſatisfaciendum againſt him, whereupon he brings his Audita querela, and moves the Court that he may have a ſuperſedeas to the capias ad ſatisfaciendum. The Court deſired to ſee the releaſe, and upon view thereof, The rule was, that the party ſhould proceed in his audita querela; but ſaid they would grant no ſuperſedeas, becauſe the releaſe was ambiguous.

Cuſtodes &c. againſt Rivett.

Trin. 1651. Banc. ſup.

Cauſe why an Attatchment ſhould not be granted.

UPon a rule of Court to ſhew cauſe why an Attatchment ſhould not be granted againſt one, for proceeding to a tryal in an inferior Court, notwithſtanding a habeas corpus directed to remove the cauſe, An Affidavit was made, that the proceeding to tryal was, becauſe it was ſuppoſed the habeas corpus was againſt the Statute of 21 Iac. The Court anſwered, you ought to have returned this matter upon your return, and not to have proceeded againſt the habeas corpus; but let the Secondary examine the matter, and then move again. But it is dangerous to execute the Iudgement; if the Statute be not againſt the habeas Corpus.

Return.

The

The Cuſtodes againſt my Lord Morley.

Trin. 1651. Banc. ſup.

The Court was moved on the behalf of the Lord Morley for a Certiorari to remove an Endictment preferred againſt him at the Seſſions of Peace at Hicks Hall upon the Statute againſt hearing of Maſs. The Court anſwered, that they would adviſe, but that they did not ſee how a Certiorari could be granted at the prayer of the party, but they ſaid, at the prayer of the Councel for the State it may be granted.

For a Certiorari to remove an Endictment.

Baker againſt Smith.

Trin 1651. Banc. ſup.

Baker brought an Action upon the Caſe againſt Smith, and declared that whereas there was a ſpeech concerning mariage between her the Plaintif, and Smith the Defendant, in conſideration that ſhe the Plaintif would marry the Defendant, the Defendant did aſſume and promiſe to her the Plaintif, that he would marry her, and that afterwards the Defendant, in conſideration that the Plaintif would diſcharge the Defendant of this promiſe, the Defendant did aſſume and promiſe that he would pay unto her the Plaintif, a thouſand pound, and that ſhe did diſcharge the Defendant of his promiſe of mariage; and yet the Defendant had not paid the 1000 l. according to his promiſe. Upon non aſſumpſit pleaded, and a verdict found for the Plaintif, It was moved in Arreſt of Judgement that there is mention of two promiſes in the Declaration, and that it is incertain to which promiſe the Declaration relates. 2ly. That there is no temporal conſideration alleged, but only a promiſe to diſſolve a Contract of Mariage, which is a thing illegal, and ſo no conſideration. Roll chief Iuſtice anſwered, that here is a mutual promiſe made by both parties, and there have been divers actions of late times brought for this cauſe, and they have been adjudged good, and the engagement to marry is not meerly a a ſpiritual matter, and this Action is not to compell the mariage upon the Contract, but to recover damages for not doing it, and it is like to a wager, and here is a temporal loſs, and therefore a temporal Action doth lie. But it was adjourned till next Term to be argued again, and then judgement was given for the Plaintif, for the Court held, that the diſ-engagement ſhall be intended to the party himſelf, and here is no need to expreſſe notice given of it. Poſtea.

Arreſt of Iudgement in an action upon the Caſe upon an Aſſumpſit.

Promiſe: Caſe.

Kenedy againſt Fiſher.

Mich. 1651. Banc. ſup.

Kenedy declared in an Action upon the caſe againſt Fiſher for ſpeaking theſe words of him, he loſt his Feet by the Pox, innuendo the French Pox: The Defendant demurred to the Declaration, and after imparled, and then pleaded a plea of privilege. Hales deſired the opinion of the Court, whether this plea were now allowable, becauſe the Books differed about it. Roll chief Iuſtice anſwered, that the plea is not allowable, becauſe there is but a privilege claimed by it, and the Plea goes not to the juriſdiction of the

Whether a Plea of privilege was to be allowed.

the Court, Therefore let the Defendant plead in chief.

Starkey againſt Mill.

Mich. 1651. Banc. ſup.

Entred Trin. 1651. rot. 170.

Arreſt of Iudgement in an Action upon an Aſſumpſit.

Starkey brought an Action upon the Caſe againſt Mill upon two ſeveral Aſſumpſits, and obtains a Verdict upon both, and entire damages are given: It was moved in Arreſt of Iudgement, that one of the promiſes was not good, becauſe there was no conſideration to ground it upon; and ſo the damages being intire upon both the Aſſumpſits, & one failing, judgment cannot be given. The caſe was this, The Father gave goods to his Son, in conſideration that the Son ſhould pay the Plaintif in this action 20 l. It was urged that this can be no conſideration for the Plaintif to bring his action, becauſe here is no debt due to him, but only an appointment for the Son to pay money to him, in conſideration of the goods given him by his Father. But Hales on the other ſide ſaid, that if there may be a debt by any intendment due to the Plaintif, then the Aſſumpſit is good, and here is a debt due to him, therefore the Aſſumpſit is good. Roll chief Iuſtice held, that it is good as it is, for there is a plain Contract, becauſe the goods were given for the benefit of the Plaintif, though the Contract be not between him and the Defendant, and he may well have an Action upon the Caſe, for here is a promiſe in Law made to the Plaintif, though there be not a promiſe in fact, & there is a debt here; and the Aſſumpſit is good. Ierman and Ask Iuſtices agreed, but Nicholas doubted. But Iudgement was given for the Plaintif.

Conſideration.

Caſe.

Creſsit againſt Burgis.

Mich. 1651. Banc. ſup.

Arreſt of Iudgement in Debt upon the Statute of 2 Ed. 6. for tithes.

An Action of Debt was brought upon the Statute of 2 Ed. 6. for tithes, Upon nil debet pleaded, and a verdict and damages given for the Plaintif, it was moved in Arreſt of Iudgement that the damages given are for tithes growing upon 71 Acres of land, whereas the Plaintif in his Declaration declares but for tithes growing upon 70 Acres of Land, ſo that the damages are given for more than is declared for, and contrary to the demand. To this it was anſwered, that this is but the miſ-counting of the Iury, and is not material, becauſe by the whole Declaration it appears there was but 70 Acres, and this is but a deſcription by the Iury how the ſeveral parcels of land were ſown, viz. with what Corn. Roll chief Iuſtice ſaid, The Declaration is that the Defendant was ſeiſed of 70 Acres of Arable land, and that ſo many Acres were ſowed with Wheat, ſo many with Oats, ſo many with Peaſe, ſo many with Beans; and as to the 5 Acres reſidue ſowed with Barley, which all amounts to 71 Acres; and it ought to have been as to 4 Acres reſidue, ſo that this is but a miſ-counting of the Iury, for the Iury cannot be deceived, for the land is called but 70 Acres in the Declaration, and no damage ariſeth to any by this miſtake. To which the reſt of the Iudges agreed, and judgement was given for the Plaintif, niſi.

Damages.

Mich.

Mich. 1651 Banc. ſup.

The Court was moved to reverſe an Outlawry for want of Proclamation; the queſtion was whether it may be done by Attorney, the party himſelf, by reaſon of infirmity of body, being not able to come in perſon: Upon view of the Statute, Roll chief Juſtice ſaid, he muſt come in perſon, otherwiſe it cannot be done; yet the Court would adviſe. Afterwards it was over-ruled, that it could not be reverſed except he come in perſon. Motion to reverſe an Outlawry. Apparence.

Drinkwater againſt Pack.

Mich. 1651 Banc. ſup.

DRinkwater brought an action upon an Eſcape againſt Pack one of the Sheriffs of London, and obtains a Verdict againſt him. It was moved in Arreſt of Judgement, that the Plaintif declares that the party was in the cuſtody of both the Sheriffs, and yet the Action is brought againſt but one of them, the priſoner that eſcaped being in Ludgate, in the cuſtody of the Defendant Pack. Latch anſwered, that the Exception is not good, becauſe in Law the priſoner that eſcaped is in the cuſtody of both the Sheriffs. Hales on the other ſide ſaid, that it doth not appear upon the Record, that he was in the Cuſtoſtody of both the Sheriffs, and it ſhall not be ſupplyed by a forein intendment, and the party ſhall be intended to be in cuſtody, according to the Cuſtom of London, and not by the Common Law. Roll chief Juſtice held the Declaration good, for the priſoner was in cuſtody of both the Sheriffs, although he was in the Cuſtody of Pack, and it ſtands well enough with the Record, and the words ut præfertur do not hurt the averment, and the words exiſtent. in cuſtodia is a good averment, that he was in cuſtody, as in an endictment, Tunc exiſtens tenementum is good; and it is alſo here found by the Jury that he was in cuſtody; for how elſe could they find for the Plaintif. Ierman ad idem: But becauſe the two other Judges had no Books delivered them, they would deliver no opinion then. Afterward Iudgement was given for the Plaintif. Arreſt of Iudgement in an Action for an eſcape. Declaration. Averment.

Cottrell and his VVife againſt Theoballs.

Mich. 1651 Banc. ſup. 313.

COttrell and his Wife brought an Action upon the Caſe upon an Aſſumpſit againſt Theoballs, and declared that the Defendant, in conſideration that the Plaintif would marry A. that is now the Plaintifs wife, did aſſume and promiſe to the Plaintif to make good a Legacy given unto her by her Fathers Will, and would alſo give unto her 40 l. more out of his own part given unto him by the ſaid Will, at her age of 18 years, and declares further, that thereupon he did marry her, and that the Defendant had not performed his promiſe, and ſo concludes, to his damage ſo much. Upon non aſſumpſit pleaded, and a Verdict for the Plaintif, the Defendant moved in Arreſt of judgement, and took divers Exceptions, but the Court inſiſted but upon one of them, and that was held material, and it was this, That the Wife did here joyn in the Action with her Husband, which ſhe ought not to do, becauſe the promiſe was made to the Husband only, and for his benefit, and the ſole conſideration for the promiſe doth Arreſt of judgement in an Action upon an Aſſumpſit. Action.

ariſe from the Husband, namely his marying the Feme; And Baſield and Collins his caſe, 22 Car. and Cheeſman and Wats caſe 23 Car. were cited, and Roll chief Iuſtice put this caſe. A promiſe was made by one to a Feme Covert, that if ſhe will procure her Husband to levy a fine of ſuch lands, that he would give her a riding ſuit; And it was adjudged that the Baron and Feme cannot joyn in an action for breach of this promiſe; and he ſaid that in the caſe at Bar it was a meer covenant, and no duty grew thereby to the Feme. Poſtea. 313.

Caſe.

Goodyer againſt Shaw.

Mich. 1651. Banc. ſup.

Mich. 1650. rot. 633.

Demurrer to a plea in an Action of Treſpaſs.

GOodyer brought an Action of Treſpaſs for an Aſſault and Battery, and wounding of his Servant, and taking away 12 plate locks, againſt Shaw. The Defendant Shaw pleaded not culpable to the Aſſault and Battery, and wounding, and as to the taking away of the locks he pleaded a ſpecial plea of juſtification, by vertue of Letters Patents of incorporation granted to the Lock-ſmiths of Durham by Cuthert Biſhop of Durham, who had jura regalia within the County Palatine of Durham, and that by vertue of this Charter the locks being not good, he as Warden of the Company did take them. To this Plea the Plaintif demurred, and for cauſe it was ſhewed, that it appears not by the Plea that the Black-ſmiths are a Corporation created by the Biſhop, but only that the Cuſtoms uſed amongſt them in Order to the regulating of their Trade were confirmed by the Biſhop, which doth not make them a Corporation, Plow. f. 199. Long quint. f. 40, 41. 2ly. It doth not appear by the Charter that they have any authority to take away ill made locks; and therefore judgement was prayed for the Plaintif. Roll chief Iuſtice ſaid, That here doth not appear any Order made by the Corporation to take away the Locks, and therefore it was done without warrant, though the Corporation had ſuch a power; But beſides it will be very hard to maintain the Lock-ſmiths to be a Corporation, becauſe the Biſhop confirmed their Orders. Therefore let the Plaintif have his judgement, niſi.

Corporation.

Biſhop againſt Fitzherbert.

Mich. 1651. Banc. ſup.

Arreſt of Iudgment in an Action for words.

BIſhop brought an Action upon the Caſe againſt Fitzherbert, for ſpeaking theſe words of him, thou art a Theef, and haſt ſtollen Horſes: Upon not guilty pleaded, and a verdict found for the Plaintif, It was moved in Arreſt of Judgement, that as the words are laid in the Declaration they are not Actionable, for it is incertain of whom they were ſpoken: The Declaration was thus, That the Defendant Colloquium habens cum querente in the preſence of others, dixit, meaning the Plaintif, Thou art a Theef, and haſt ſtollen Horſes. The Court at the firſt moving of this Caſe enclined the words were actionable, becauſe it ſhall be intended they were ſpoken of the Plaintif, though it be not directly ſaid ſo; And afterward it being moved again, the Court held the words well enough laid to bear an Action, becauſe upon the whole Record the words plainly appear to be ſpoken of the Plaintif, and therefore Iudgement was given for him.

Free-

Freeman againſt Childereſs.

Mich. 1651. Banc. ſup.

Entred Trin. 1651. rot. 45.

FReeman brought an Action upon the Caſe againſt Childereſs for ſpeaking theſe words of her, She is a Whore, and I will prove her a Whore, and an arrant Whore. Upon not guilty pleaded, and a Verdict found for the Plaintif, it was moved in Arreſt of Judgement that the words are not actionable, becauſe they are but words of choler, and ſpoken in paſſion, the judgement at the firſt moving of it was ſtayed, yet it was then doubted whether the words did not import more in them than to ſay barely of a woman, ſhe is a whore: But afterwards it being again moved, Roll chief Juſtice ſaid, that the words were too generally ſpoken to be actionable, and that they are but words of paſſion, and that before the Act made againſt Adultery, prohibitions have been granted to the Prerogative Court for libelling againſt perſons, for calling of women whores, and therefore Nil capiat per Billam, niſi. Arreſt of Judgement in an Action for words. Prohibitions.

Preſton againſt Mortlock.

Mich. 1651. Banc. ſup.

AN Action of Treſpaſs was brought againſt 4 Defendants, and before a Verdict one of them dyed, and the Verdict was found againſt the Defendant: Twiſden prayed the Plaintif might have judgement againſt the other three. Roll chief Juſtice anſwered, If you will relinquiſh your damages as to the perſon that is dead, you may have judgement againſt the reſt. Judgement.

Davis againſt the Lord Foliot.

Mich. 1651. Banc. ſup.

THe Court was moved to grant the good behaviour againſt the L. Foliot, becauſe he was endicted for a foul Battery at the Seſſions in London and the Bill was found againſt him. But Roll chief Juſtice anſwered, It cannot be granted upon a motion; but you muſt prefer Articles againſt him here upon Oath, and then you may move for it, and if there appear cauſe in the Articles it ſhall be granted. Motion for the good behaviour. Good behaviour.

Mich. 1651. Banc. ſup.

THe Court was moved for a writ to ſwear one in the Office of a Major, to which he was elected for the Borough of Trevenny in Cornewall, becauſe the old Major did not ſwear him in due time as he ought to do, but did adjourn the Court before it was done. Roll chief Juſtice anſwered, that there is no preſident to ſwear ſuch an Officer, yet ordered, that notice ſhould be given to the Town, and preſidents to be brought into Court, if any were to warrant it. For a Writ to ſwear one in the Office of a Major of a Town.

Whitway againſt Pinſent.

Mich. 1651. Banc. ſup.

Paſc. 1651. rot. 61.

Demurrer to a plea in Covenants.

A man made a leaſe of lands for years by deed, and covenanted that the Leſſée & his Aſsigns ſhould enjoy them during the Term, the Leſſor made the Defendant his Executor & dyed. The Leſſee aſsigns over his Term, a Stranger enters upon the Aſsignee, the Aſsignee takes 40 l. in ſatisfaction for his being ejected of the Aſsignor, and afterwards brings an Action of Covenant againſt the Executor of the Leſſor the Defendant. The Defendant pleads the acceptance of the 40 l. of the Aſsignor in ſatisfaction of the wrong done him in Bar of the Action, and to this plea the Plaintiff demurred. The queſtion here was, whether the Action of Covenant did lye againſt the Defendant, ſince that the Plaintiff had received 40 l. of his Aſsignor in ſatisfaction. Roll chief Iuſtice ſaid, that here is a double Covenant, one of the Leſſor, and the other of the Aſsignor, and therefore the party may have two Actions, and therefore he is not here barred, to bring this ſecond Action, though he have barred himſelf by the acceptance of the 40 l. from bringing an Action againſt his Aſsignor, and the Defendant hath not pleaded that the 40 l. was given in ſatisfaction of both the Covenants, for then it had been otherwayes. Ierman Iuſtice to the ſame effect, That they are ſeveral Covenants, by ſeveral deeds, and both the parties are ſeverelly bound, and ſatisfaction given by one of them, is not the ſatisfaction of the other. And he ſaid if Leſſee for years aſsign over his Term the Leſſor having notice thereof, and he accept the rent from the aſsignee, he cannot demand the rent of the Leſſee afterwards, yet he may ſue other Covenants conteined in the leaſe againſt him, as for reparations or the like. The rule was for the Plaintiff to take his Iudgement, niſi.

Bar.

Action.

Mich. 1651. Banc. ſup.

For a certiorari to remove an endictment.

Serjeant Glyn moved for a certiorari to remove an endictment of forcible entry that was once before removed hither, and after ſent down by a procedendo, becauſe the Iuſtices below will not grant reſtitution. Roll chief Iuſtice anſwered, There is a plea put in, and in ſuch caſe it is not uſual to grant a certiorari, yet it may be that it may be granted, therefore let the other ſide ſhew cauſe on Monday next why it ſhould not be granted.

Cantrell againſt Stephens.

Mich. 1651. Banc. ſup.

Arreſt of judgement for an Action upon the caſe for ſtopping a way

Cantrell brought an Action upon the caſe againſt Stephens for ſtopping his way in a Meadow called Madbrook in the pariſh of Redriff in Kent; upon not guilty pleaded, and a verdict found for the Plaintiff, It was moved in arreſt of Iudgement that the Plaintiff as Leſſee, to the Haberdaſhers company of London, claimed to have a way for them, whereas they having let the land cannot have the way, but the Leſſée in poſſeſsion. 2ly. The

The preſcription is not rightly applyed, for it ought to be for them to have a way pro tenentibus et occupatoribus ſuis, which is not ſo here. Twiſden anſwered it ſhall be intended Tenants, and Occuppyers to the Haberdaſhers, though it be not ſaid ſuis. Latch ſaid that a preſcription per que eſtate is good in an Action upon the Caſe, becauſe no land is claimed, and Green on the ſame ſide ſaid, the exception taken was helped by the verdict. Wild on the other ſide ſaid, that it doth not appear that the Tenant who brings the Action, comes in by the Haberdaſhers who claim the way, and ſo he cannot preſcribe to have it, and the preſcription ought to be laid pro tenentibus & ſubtenentibus, which Roll chief Juſtice denyed, and ſaid that it is laid that the Haberdaſhers were ſeiſed in Fée, & poſtea huc uſq;, and ſo they have the Fée at the time, and may preſcribe; but it had been better for the party to have ſhewed that he was their Tenant; but it being after a verdict, the queſtion is whether it be not helped. Upon reading the Record, Roll chief Juſtice obſerved, that it appeared not whoſe Occuppyer and Tenant the Plaintiff is; but only by way of argument; but ſaid the queſtion is whether the verdict do help it, and he inclyned it did not, becauſe the Action is brought by the Tenant, who hath not entitled himſelf to the Action, for he hath made only a title to the way in the Haberdaſhers; but hath derived no Eſtate from them to himſelf. At another day Roll chief Juſtice ſaid, we muſt not take things by intendment, and here is a faiſer in the very giſt of the Action, for the Plaintiff hath not entitled himſelf to the Action, for he hath no intereſt, for it appears not how he is Occupyer of the land, for he doth not ſay he is Ocupator ſuus, and as he hath laid the Declaration, the Company ought to have brought the Action. Ierman Juſtice to the ſame effect, and ſaid that upon a demurrer it had been cleerly naught and the verdict here doth not help it, for no title appears for the Plaintiff, and the verdict cannot give him that he had not before. Nicholas and Ask Juſtices to the ſame effect. Roll, If it had been Ocupator ſuus, I doubt it would not make the Declaration good, becauſe it ſhews not by what title. So The rule was nil capiat per billam, niſi.

Preſcription.

Verdict.

Title.

Tayler againſt Web.

Mich. 1651. Banc. ſup.

Hill. 1650. rot. 240.

IN an ejectione firmæ upon a leaſe for 7 years there was a ſpecial verdict found, and the queſtions in the Caſe grew upon the words of a Will that were falſe orthography, viz. I do make my Coſen Giles Bridges my Solle Ayeare and my Yexecutor, meaning my ſole Heir, and Executor. Powis of Counſel with the Plaintiff held, that the Will was good to make Giles Briges the Teſtators Heir and Executor, notwithſtanding the miſwriting of the words, and that by the Will the Land and perſonal Eſtate paſſed unto him, for he ſaid, If by my Will I make one my Heir, This is a deviſe to him of all my Lands in Fee, for the Deviſee is put in loco hæredis, and ſhall be like an Heir by deſcent, for he is hæres factus, although he be not hæres natus, Mich. 31 & 32 Eliz. rot. 235 Godfreys Reports, Hob. rep. f. 34. b. Coundens caſe, Hob. new edition 75. Spark againſt Burrell, the very caſe in point adjudged, 7 E. 6. Br. Done 44. and Deviſe 48. and in this Caſe the Deviſee had annuities to pay, and monies for Legacies, which ſhews the intent of the Teſtator to be, that he ſhall have his Lands and Goods, neither ſhall the miſſpelling of the word Heir hurt the Will, for

Special verdict in an ejectione firmæ.

the intent of the Teſtator ſhall be followed, if it may be known, as it may well be here, Hob. f. 32. 15 H. 7. f. 12. Cooks Lit. f. 323. Dyer 325. 2ly. Miſnaming in a Will ſhall not hurt the Will, Dyer 323. 21 Rich. 2. Fitzh. deviſe 27. 10. rep. 57. 3ly. False Latin ſhall not deſtroy deeds nor pleadings, though it will abate writs, a fortiori falſe Engliſh ſhall not deſtroy a Will, 9 H. 7. 16. 10. rep. Osborns caſe, Hob. 227. 10. rep. 133. a. 9 H. 6. 7. a. and here is only vitium ſcriptoris, and that cannot deſtroy a Will, Hob. f. 16. Walkers caſe, f. 104, & 104. 9. rep. 48. a. Dyer. 17 Eliz. f. 342. Digbyes caſe. Another reaſon is, the word Heir is here written according to the pronunciation, and ſound of the word, though it agree not in letters, and H. that is left out is no letter, but an aſperate note, and the language in England as it differs in time, ſo it differs in place, for men ſpeak not, nor write, Engliſh in all parts of England alike, and a Will in latin or greek is a good Will within the Statute, ſo that it is not neceſſary for a Will to be good Engliſh, and the Teſtator was bred in France, and could neither write nor ſpeak good Engliſh, and his Will ſo much the rather is to be favoured. And falſe Engliſh hath been allowed in a Bond, viz. ſenteen for ſeventeen pounds, 9. rep. 48. a. much more may it be in a Will, and ſo he prayed Judgement for the Plaintiff. Latch for the Defendant argued that the Will was not good, he conſidered 2. points. 1. When a man makes one his ſolle Ayeare and Executor what conſtruction the words ſhall have. 2ly. What Eſtate is conveyed by them. And firſt he ſaid that Roberts Caſe cited by Powis was not to the purpoſe. 1. Becauſe it is not the principal caſe. And 2ly. It is but an opinion there, and an Heir may be without land. And for Counden and Clarks caſe that was cited, as it was urged, it is for me, and not againſt me, and there can be no authority cited, that if one make a man his Heir, that his lands are thereby conveyed to him in Fee ſimple. But in our caſe there can be no certain intent of the Teſtator found out, and the making of one his Heir in France where the Teſtator was bred, according to the Civil Law there uſed, is but to make him his Executor, and ſo the Teſtator might mean it. And if one in his Will ſay, I make one of my Daughters my Heir, and do not ſay of his Lands, this ſhall not diſinherit the other Daughters, and if there ſhould be any Eſtate conveyed here, it cannot be but an Eſtate for life. Brook Done 44. 8 Jac. C. B. Inkerſalls caſe. 3ly. The ill orthography here makes the Will naught, for a Will cannot be made good by conjectures, Hob. 34. Mich. 23 Car. Robinſons caſe, the Judgement was reverſed for writting the word Aeris inſteed of æris with a dipthongue. Trin. 17 Car. C. B. rot. 74. and in Skirret and Skinners caſe libis with a dash over put for libris was adjudged ill, and in our caſe here are divers words miſwritten. And for the variation of our Engliſh dialect which is objected it is to no purpoſe, becauſe this Will was lately made & the dialect alters not in ſo ſhort a time, and the dialect of the County where the Will was made, viz. Gloceſter Shire agrees not with the Will. And Hill. 6. Car. this Will came in diſpute in the Court of wards, and a decree there paſſed againſt the Will in this point. Will. The Court ſaid, the caſe is doubtful, becauſe the Will doth not ſay, I make him heir of my Land, but generally my heir and Executor, but the falſe writting hurts not a Will, if the Teſtators mind may be found out. Adjourned to be argued again.

Wood

Wood against Topham.

Mich. 1651 Banc. sup.

WOod brought an Action of Trespasse upon the case quare filium & hæredem rapuit et maritavit, against Topham, upon not guilty pleaded, and a verdict found for the Plaintiff, the Defendant moved in arrest of Judgement, and takes these exceptions to the Declaration, 1. That the Plaintiff doth not say cujus maritagium ad ipsum pertinet. 2ly. That he doth not say that the Heir was within age; and Maynard of Counsel with the Defendant said that the exceptions are not to the writ, but to the Declaration, and the Action being a Trespasse to recover the Damages, the Plaintiff ought to entitle himself to the mariage for the losse whereof he would recover damages, for the Heir it may be is not Heir apparent to him, and then is no mariage due to him, and here is a special Declaration, for the losse of the mariage. Roll chief Justice answered, the writs are good both wayes, and so may the Declaration be either with those words, or without them, and he makes not the ground of his Action, to be that the mariage belonged to him; but of Common right it doth belong to him, and the words are used to be alleged, only to increase the Damages, and the ground of the Declaration is only quare filium suum & hæredem rapuit, and for this the Plaintiff ought to have his Judgement. Ierman Justice differed, and said, the Plaintiff doth not shew he had any damage by the mariage, if it may be that he had been maryed before, or was of full age & so no cause of Action. Nicholas Justice, as Roll, and said, that by the Law the mariage belongs to the Father, and it may prove a dishonour to the family to have his son taken away, and maryed without the Fathers consent. Ask Justice to the same effect, and so Iudgement was given for the Plaintiff, nisi. Antea.

Arrest of judgement in an Action on the case.

Dost 246. 227. 235.

Writs.

Declaration.

Common right.

Mich. 1651. Banc. sup.

THe Court was moved to mitigate fines, that were to be set upon rioters that were found guilty upon an information exhibited against them, for the riotous cutting down of wood. But Wild on the other side prayed there might be good fines set upon them according to the fact found upon the Record, because it was a foul riot. The Court answered, they are found guilty of the riot, and therefore the fine cannot be lesse than ten pounds at the least for the principal, there being a verdict in the case, and so let it be, and 4. marks a piece for the rest. For we must preserve the peace of the County.

Motion to mitigate fines for riots.

Fine.

Baker against Smith.

Mich. 1651. Banc. sup.

THe case of Baker and Smith formerly spoken to was again moved, and Maynard answered the exceptions offered in arrest of Judgement. 1. It was objected that here was not a mutual promise set forth between the partyes, for there is no agreement made by the Feme, for it is only said, that she consented to marry the party, which is not a binding agreement. To this he answered, here was a mutual, and binding agreement, though it be-

In answer to a matter spoken in arrest of judgement.

be not ſo plainly expreſſed in words as it might have been, 3 H. 6. 36, 37. A verbal promiſe may be diſcharged by words, and ſo it is here, London and Stokes caſe, Trin. 10 Car. rot. 236. Next it is not neceſſary here to give notice of the diſcharge of the promiſe, though if there be notice it is well enough, becauſe the thing to be done upon it, to wit the payment of the 1000 l. is certain, and the diſcharge ſhall be intended to be in the preſence of the party to whom it is given; for the Declaration is exoneravit ipſum, which ſhall not be intended in his abſence. Paſch. 10 Car. Harvy and Inglethorps caſe, and Mich. 8 Iac. Martin and Wilbie, Hodges and More, Paſch. 1 Car. Banc. Reg. 7 Iac. Bradlyes caſe, 14 Iac. Beedly and Goodroſe. Latch on the other ſide argued, that here is no binding promiſe on the behalf of the woman to marry with the Defendant, and ſo the diſcharge of it can be no conſideration; for this is not a reciprocal, but a bare acceptation of the promiſe made by the other; and an action of the caſe lay not againſt her if ſhe had refuſed to marry with the Defendant, becauſe here is no repromiſsion made by her. 2ly. It appears not that the diſcharge was in convenient time, for it was 2 years after; but admitting that to be ſo, yet here is no notice of the diſcharge, and that is neceſſary to be given, and it ſhall not be intended to be given without ſhewing it, for the Declaration ought to be certain, and here is no inducement in it that there was any notice given in his preſence, and if it were given in his abſence, he ought to have notice given him of his diſcharge, elſe how ſhould he know it? and it were unreaſonable to charge him if he had no notice, and by a third perſon he cannot receive notice, as it is in the Caſes put by Mr. Maynard on the other ſide. In the Caſe of Peck and Ingram in this Court adjudged that the party ought to have notice when the Feme left her Fathers Houſe and came to ſuch a place. Roll chief Iuſtice ſaid, here are two promiſes, 1. The Feme aſſumed, that if the Defendant would marry her, ſhe would conſent to him; and here is a conſideration, although there be not an abſolute mutual promiſe, for it is a promiſe in law, and the Action may be laid by way of conſideration, or by way of mutual Contract. 2ly. Here is but a promiſe de futuro, and there may be a temporal loſs, although the thing to be done, viz. the mariage, be ſpiritual; And the diſengagement of the party doth not imply notice; yet the demand of the 1000 l. now implies a diſcharge, nor can the party here take notice of a third perſon, and therefore it is neceſſary to give him notice; for where the party cannot take notice from any but the party himſelf, there notice muſt be given him. Ierman Iuſtice held, here was a good mutual promiſe to raiſe a conſideration, and by the words exoneravit ipſum, it ſhall be intended to be to the perſon himſelf, & this implyes a notice, eſpecially it being after a verdict. Nicholas Iuſt. much to the effect as Roll chief Iuſt. but he doubted whether the words do imply a perſonal notice, for it may be it was in his abſence, and the verdict will not help it, and ſo there can be no judgement. Ask Iuſtice ſaid, here was a good promiſe, but the words exoneravit ipſum do not imply a notice, ſo the Court was divided, and would adviſe.

Conſideration Promiſe in Law. Mutual Contract. Implication. Notice.

Hume againſt Hinton.

Mich. 1651. Banc. ſup.

Arreſt of judgment in an Action upon the caſe upon a promiſe.

HUme brought an Action upon the Caſe againſt Hinton, and declared, That whereas the Son of the Defendant did in his life-time owe unto the Plaintif 8 l. and dyed inteſtate, the Plaintif did demand the ſaid 8 l. of the Defendant, being Mother to the inteſtate; whereupon ſhe being ſatisfied of the juſtneſs of the debt, did aſſume and promiſe unto the Plaintif, that

that if he would ſtay for the money till Mich. next, that then ſhe would pay it. Upon non Aſſumpſit pleaded, and a verdict found for the Plaintif, the Defendant moved in Arreſt of Judgement, that here was no conſideration to ground the Aſſumpſit upon, becauſe it was not the debt of the party that aſſumed to pay it, neither was ſhe Executor or adminiſtrator nor conſequently lyable any way by law to pay it, and therefore an Aſſumpſit to pay a remedileſs debt, if the Plaintif would ſtay for it, is no good Aſſumpſit, as in 6 Car. in this Court, in Morgans Caſe. An Aſſumpſit to pay the rent of the land behind, if the party would forbear to diſtrein Corn in the ſhocks, was adjudged no good Aſſumpſit, becauſe ſuch Corn is not diſtreinable, and it appears not here what perſon the Son was, or where he lived, or that he either had or left any goods, and the meer ground of the Action is the piety of the Mother, and no other matter. And here appears no perſon liable to pay this debt, neither plainly, nor by intendment, and the Ordinary is not chargeable if no goods come to his hands. And 2ly. There is now no Ordinary, for it is taken away by the Parliament, and 9 rep. Bains caſe is not like to this caſe, neither is Iones and Smiths caſe, Trin. 8 Iac. rot. 192. like to this caſe, for there was a perſon liable to be ſued, but it is not ſo here, ſo that this is a ſtronger caſe. But if there ſhould be a good conſideration, yet the averment of the performance of it is not good, for it is not certain how he ſtayed. Wild for the Plaintif held, that here is a good conſideration, becauſe the Plaintif is hereby tyed not to ſue any perſon whatſoever for the debt till Michaelmas, and ſo it is a prejudice to him to forbear: And it ſhall be intended here that the Inteſtate did leave ſufficient goods to ſatisfie the debt; and though there be no Ordinary, yet the party that takes the goods may be ſued, and the Caſe of Homes and Smith cited is for the Plaintif in my Report, and the judgement is not there entred in the Roll, but in the Margent only, it is entred pro Defendente, and the caſe of Hill and Baily is ſince that, and that is with me, and is to be preferred before the other, becauſe it is a later judgement. 2ly. The averment is good in ſubſtance, although it be not ſo expreſs in words as it might have been, and it is now after a Verdict. The Court for the firſt point held, here was a good conſideration, for it is that the Plaintif ſhall forbear to ſue for the money generally, which goes to all the world, and it is not only to forbear to ſue a particular perſon, but to forbear to ſue for the money; and this forbearance may be a prejudice to the party, and a loſs in not ſuing till that time. But for the latter exception Roll chief Iuſtice ſaid, if the breach be not well aſsigned the verdict will not help it; and you ſay that you ſtayed in expectation of the money, and do not ſay abſolutely that you ſtayed. Therefore let us ſee a book, and ſpeak to the laſt point again on Saturday next. In this caſe Roll chief Iuſtice ſaid, where there is no body elſe to be ſued for a Debt, the Ordinary is to be ſued, although he is not to be charged, if he have no goods, and in London it is uſual to do it; and now Sir Nathaniel Brent is in place of the Ordinary throughout all England. Afterward judgement was given for the Plaintif, becauſe the conſideration and the averment were held both good.

Conſideration.

Breach.

Ordinary.

Debt.

Mich. 1651. Banc. ſup.

One Harding was endicted 21 Car. for an Aſſault and Battery made in Weſtminſter hall, and the party found guilty: the Court was moved for a rule to enter judgement againſt him, becauſe it was ſo long ſince the Verdict. But the Court ſaid, if you may do it by the rules of the Court enter it, for we will make no rule without hearing the other ſide, therefore give notice, & then move it again.

For a rule to enter judgement.

Mich. 1651. Banc. ſup.

Demurrer to a Declaration in Debt upon an Obligation to perform Covenants. Diſcontinuance.

AN Action of Debt was brought upon an Obligation of 2000 l. for performance of the Covenants of an Indenture. The Defendant demurs to the Declaration, and the Plaintif joyns in the Demurrer; and after reading of the Record, and the Exceptions opened, Twiſden moved the Court for the Plaintif, that he might diſcontinue his action, becauſe there was a fault in the laying it. Roll chief Juſtice ſaid, Let it ſtay as it is this Term, for this is in our diſcretion, and it is but a ſlip in pleading, and in the mean time we will adviſe.

Barnard againſt King.

Mich. 1651 Banc. ſup.

Paſch. 1651. rot. 467.

Demurrer to a replication in Debt upon an Obligation to ſtand to an Award.

BArnard brought an Action of Debt upon an Obligation of 500 l. to ſtand to an Award. The Defendant pleaded nullum arbitrium. The Plaintif replies that the Umpire made the award, and ſets it forth, and aſſigns a breach: To this Replication the Defendant demurred, and takes exception, that the Plaintif ſets forth that the Arbitrators could not agree, and after they had denied to make the Award, the ſame day the Umpire made the Award. Latch of Councel with the Defendant held this Award ſet forth in the Replication to be naught, becauſe the ſubmiſſion was, that if the Arbitrators ſhall not make the Award to morrow, then the Umpire ſhall make the Umpirage; and here the Umpirage is made upon the ſame day that was given to the Arbitators to make the Award, and they have the whole day by the ſubmiſſion to make it in, and although they cannot agree to make it one part of the day, they may agree afterwards the ſame day to make it, and this diſagreement is not a giving up of their authority, and Wood and Clements caſe, 24 Car. is not againſt this. 2ly. It is not ſaid that the arbitrement was delivered. 3ly. The matter awarded is not within the ſubmiſſion, namely the payment of the rent expreſſed. Hales on the other ſide argued, that the Umpire might make the Award upon that day that is ſet forth; and the Condition here is all one, as if it had been ſaid, if the Arbitrators make the Award to morrow, or if the Umpire make the Award to morrow. Paſch. 14 Iac. Barry and Fells caſe. And the words here Poſtquam denegaſſent, et deſeruiſſent is a direct averment that the Arbitrators could not agree to make the Award; and Arbitrators may make an award after they have choſen an Umpire; and although the Umpire had power to make the Umpirage a day after they made it; yet if it be made before it is a good Umpirage, if the Law permit it, and the Umpirage here is well delivered, for the ſubmiſſion is not that it ſhall be delivered to both parties, but generally that it ſhall be delivered, and therefore it is well if it be delivered to one, it being ready to be delivered to the other: And for the payment of the rent, although it be a future Act, yet being matter of ſatisfaction, it is good, although it be not expreſſed in the ſubmiſſion. Roll chief Juſtice ſaid, for the laſt matter the words ſuper præmiſſis brings the payment of the rent within the ſubmiſſion, otherwiſe the awarding of the payment thereof would not be good by way of ſatisfaction: But here the Controverſie is for the land for which the

Subm. ſi.

rent

rent is to be paid, and the matter doth not appear to be out of the ſubmiſſion, and it is not neceſſary to aver that the land was in Controverſie. 2ly. For the delivery of the Award it is well enough as it is, for it is not ſpecified to whom the Umpire ſhall deliver the Umpirage, although it be expreſſed to whom the Arbitrators were to deliver their Award, if they had made it. But the main queſtion here is, if the Umpire could make the Umpirage the day it was made; and for that I hold he could not, becauſe the authority given by the ſubmiſſion to the Arbitrators was not determined when the Umpirage was made; and by the ſubmiſſion the Arbitrators have no authority to make an Umpire, for then it had been good, and it appears not that the Umpire had concurrent authority with the Arbitrators; for it is not ſaid if the Arbitrators make no arbitrement then the Umpire ſhall make it; but here is a Condition for the Arbitrators to have all the day precedent to make the arbitration in, and no concurring power is given to the Umpire that day, for the Arbitrators have all of it to agree in, and till it is ended the Umpire hath no power at all, otherwiſe the ſubmiſſion would be repugnant in it ſelf. The reſt of the Judges concurred in all, and ſo ruled, That the Plaintif nil capiat per billam, niſi.

Averment.

Umpirage.

Award.

Theobalds againſt Newton.

Mich. 1651. Banc. ſup.

One was ſued upon the Statute of Inmates, and the diſtringas jurata bare date on a Sunday, and out of Term, and ſo is erroneous, The queſtion here was, whether it be not helped by the Statutes of Jeofails, of 18 Eliz. and 21 Iac. Roll chief Juſtice held, that the Statutes extend not to penal Laws, although it be ambiguouſly penned, nor to any proceſſes grounded upon them, for the Proviſo exempts the Original action, and by conſequence all proceſſes depending upon it are excepted, ſo that here is no good tryal, but there ſhall be a venire de novo, niſi.

Jeofails.

Venire de novo.

Tayler and Webb.

Mich. 1651. Banc. ſup.

The Caſe of Tayler and Webb which aroſe upon a ſpecial verdict upon theſe words of Will, viz. I make my Coſen Giles Bridges my ſoll ayere and yexecutor, was again moved and argued by Hales, and he made three queſtions. 1. Whether any eſtate paſſeth by the words of the will. 2ly. If any, what eſtate paſſeth. 3ly. Whether the falſe Orthography doth hurt the Will. For the firſt he ſaid, that by making one his ſole heir his land paſſeth to him. The word heir is to be conſidered either in relation to an Anceſtor, and ſo one cannot make one his heir, or it may be conſidered in relation to a thing to be inherited, to wit lands or tenements, and ſo one may make another his heir, and thus a Cuſtom may make one a mans heir, as it is in Borough Engliſh; and an accident may thus alſo make one a mans heir, as it is in the Caſe of poſſeſſio fratris, Coundens caſe, Hob. Rep. Caſe 947. And here it is all one to make one his heir, and to make him heir of his lands; and the reaſons are, Firſt, the word heir here cannot have any other relation than to the Teſtators lands, for he cannot make him his heir otherwiſe, and the words may be more reaſonably intended ſo. 2ly. The words carry in them the plain intention of the Devisor, that the party ſhould have his lands, although the words are not very proper

Special Verdict upon the words of a Will.

2 H. 7. A deviſe of lands to his ſon after the death of his wife, paſſed an Eſtate for life to the wife, although no ſuch Eſtate was expreſſed in the Will; ſo here, although no expreſſe Eſtate of land be deviſed, yet the Deviſee ſhall have the lands by the intent of the Deviſor. 3ly. In ordinary ſpeech, if one make ſuch an one his Heir, it is intended that he gives him his lands, 8 Car. in the C. B. in Spurt and Bents caſe. A deviſe of his inheritance, was held a deviſe of his lands, and Trin. 3. Iac. in Terryes caſe, A deviſe of all his rents in tayl paſſed his lands, becauſe in vulgar acceptance it is the rents of lands, and in Pits and Sands caſe in this Court, A deviſe of all his free lands in Holford did paſſe a portion of Tithes, and in the caſe of one Johnſon, a deviſe of all his eſtate paſſed all his lands. And the words cannot bear the ſence to make him Executor, according to the Civill Law, as hath been objected, for the Will ſhall be intended as it is, to be an Engliſh mans Will, and ſo the word Heir in it ſhall be interpreted according to our Law, and not the Civill Law, and even in the Civill law to make one his Heir doth convey unto him all his lands, for he is hæres teſtamentarius, although not hæres legitimus. And in this Will here are two expreſsions, for the party is made Heir and Executor, which two words cannot ſignifie one thing, for that would be an idle expreſsion. 4ly. There are ſome clauſes in the Will, which ſhew the intent of the Teſtator was to convey his lands, if it were needful to make uſe of them. 1. There are ſeveral annuities for the Deviſee to pay. 2ly. He directs him where the conveyances and aſſurances of his lands were laid up, which plainly ſhew he meant he ſhould have his land. 3ly. The words Heir and Executor are joyned together, to ſhew that he gives him all his lands and goods, elſe one of the words muſt be imperfect, and ineffectual, which ſhall not be intended. For Authority 7 E. 6. Br. deviſe 38. by deviſing that one Son ſhall be Heir to the other, it ſhall be intended of lands, ſo in conſtruction of law it ſhall be here intended that the Deviſor made him Heir of his lands, Hob. Reports, in Sparkes and Purnells caſe, William and Anthony ſhall be each others Heir, and it is not ſaid of land, yet adjudged that it ſhall be ſo meant, and ſo is it in our caſe, and if I have lands in fee ſimple, and make one my heir, it ſhall be intended that he ſhall have my lands in fee ſimple, although I ſay not that I make him Heir of my lands. For the ſecond queſtion, the reaſons before expreſſed do alſo ſhew that the lands are paſſed in Fee, as it is in Purnells and Hambletons caſe, for the word Heir ſhall relate to the ſame Eſtate, that the party had in the land, who makes the other his Heir, 8. Iac. Inkerſals caſe. For the 3d point, whether here ſhall be any good deviſe at all, by reaſon of the falſe Engliſh, he ſaid it was all one, and to as good effect as if the words were all true Engliſh, and neither the incongruity, nor the inſufficiency of the words ſhall hurt the Will, as it is pretended. For 1 This is not in caſe of pleading or of writs; but in conveyance of lands. It is true that in the former it doth hurt, becauſe writs and pleadings may be amended, if they be naught; but it is fatal in conveyances, for they cannot be amended, as in Trotman and Standards caſe, Trin. 1651. in this Court it was held that impropriety of words ſhall not hurt, if they can admit of a good conſtruction. Deſinet in piſcem mulier formoſa ſuperne. 2ly. This is in a Will, which is ſuch an inſtrument, that is much favoured in Law, and therefore to be favourably conſtrued. 3ly, This is an Engliſh Will, and admits of much variety of dialects, and therefore is not to be critically interpreted. Neither are there here any inſignificant, or miſsignificant words, as hath been objected, but ſignificant, for the ſound of the word as it is written is the ſame as if it had been rightly ſpelled, for Ayer and Heir ſound both alike. As in 3 H. 4. f. 4 Baxter and Bixſter ſounded alike. 2ly. If the word Heir might

might receive any other sence, yet it cannot do so here, because there are other words joyned to it, to declare and signifie that the Testator meant Heir of his Lands, and not the element of Ayre, or a year, as hath been strangely objected, and would prove a ridiculous construction. Osborns case 10. rep. in Thyns case in this Court a demand of dower de capella, although the word were of doubtfull construction in it self, yet by the subject matter, it was held to be made certain enough, so the word Ayeare here shall receive construction according to the subject matter, and the coupling of it also with the word Executor, which is also falsely written, shews the Testators intent. For answer to the main objection, viz. that in 6 Car. there was a decree made in the Court of wards, by advise of the Judges, that this was a void and senceless Will, I say that that decree is not of so great waight, as is a Judgement given in a Court of judicature at the common Law, and this was but an opinion delivered in Court, where the Judges were not Judges, and the decree was made as I am enformed, because they believed the Will to be nonsence, the contrary whereof doth appear by my argument. The Court enclyned strongly that the Testator intended to make the Devisee Heir of his lands, and that the words can receive no other construction, for other constructions would be very strange, and forced, and the party that made the Will, is to be considered as one that was inops consilii, and also that wanted a scribe, and his intent seems plain, and shall not be taken according to the Civill law, and if it should, the word Heir will as well extend to the lands as goods. Adjourned to be argued again.

Heir.

Will.

Kymlock against Bamfield.

Mich. 1651. Banc. sup:

Mich. 24. Car. rot. 592.

KYmlock brought an Action upon the case upon an indebitatus assumpsit against Bamfield, for making of apparel. The Defendant pleaded, that he became bound in a Bond of 60 l. to the Plaintiff in satisfaction of the Debt, and that the Plaintiff accepted of it, the Plaintiff replyed that he did not accept of it, to this replication the Defendant demurred, & shews for cause, that the Plaintiff had tendred an issue upon the non acceptance of the Bond, whereas it should have been that the Defendant non devenit tentus. On the other side it was said that it is well enough, & that it is sufficient to say non accepit, and it is not necessary to say he refused the obligation, and though the replication be not good, yet the plea is also naught, and therefore no Judgement can be for the Defendant. The plea is quod deveniſſet tentus, whereas it ought to be devenit tentus. And 2ly. He shews not in what sum or place, nor that he became bound in satisfaction. Roll chief Iustice said, that by entring into Bond the former contract is gone, if you do not refuse it, and it is not sufficient to say you did not accept of the Bond, for you may yet accept it if you please, and the party cannot plead non est factum, if you bring an Action upon it, until it be absolutely refused, and the contract here is turned into a Bond, and the law determines the contract, and it is not all one with pleading of the acceptance of a horse in satisfaction, or or any other thing as a collateral satisfaction, and the Plaintiff ought to shew that he refused the Obligation, and doth yet refuse it. And here is a negative preignans, for you imply by saying that you accepted not the Obligation in satisfaction, that he gave you the obligation, and you might have said

Demurrer in an action on the case upon an indebitatus assumpsit.

Contract.

Plea.

Negative preignans.

Diſcontinuance

ſaid, Non devenit tentus, and for the other exceptions they are to no purpoſe, And therefore Iudgement ought to be given againſt you; but by the favour of the Court we can give you leave to diſcontinue your Action.

Harding againſt Freeman.

Mich. 1651. Banc. ſup.

Arreſt of Iudgement in an Action upon the caſe upon the ſale of a Horſe.

HArding brought an Action upon the Caſe againſt Freeman, and declared againſt him, that the Defendant did ſell unto him a Gelding, and upon the ſale did falſely affirm unto him, that the Gelding was his own Gelding, and that he bred him of a Colt, whereas he bred him not of a Colt, neither was it his own Gelding, but another mans Gelding, and ſo concludes to his damage. Upon not guilty pleaded, and a Verdict found for the Plaintif, the Defendant moved in Arreſt of Iudgement, 1. That in this ſale of the Gelding, the Defendant had made no warranty of him; and therefore though the ſale were not good, yet the Action lies not. 2ly. The Plaintif doth not declare that the Defendant knowing the Gelding to be another mans, did affirm him to be his own, and ſo here doth not appear to be any fraud in the ſale. Twiſden anſwered, that the words are ſufficient to imply a diſceit, though they expreſs not, that he knowing it to be another mans horſe did make that affirmation, for the words are that he did it falſo et fraudulenter, and affirmed the Horſe to be his own. But the Court ſtayed the Iudgement, for they ſaid, that here is no direct affirmation, but only an intendment that ſcienter fecit, yet afterwards judgement was given for the Plaintif.

Davis againſt the Lord Foliot.

Mich. 1651. Banc. ſup.

For a new writ of Enquiry of damages.

Damages increaſed by the Court.

DAvis brought an action of Aſſault and Battery and wounding againſt the Lord Foliot, and had a verdict againſt him, and a writ of enquiry of damages, and upon the writ of Enquiry 200 l. damages were found. The Plaintif moved the Court for a new writ, becauſe by reaſon of the wilfulneſs of the Jury the damages were found too ſmall. Twiſden on the other ſide urged, that it could not be, becauſe there was no miſcarriage proved in execution of the writ, but it appears to be well executed. Roll chief Iuſtice anſwered, though we grant not a new writ, yet we can increaſe the damages upon view of the wound, and here appears to have been a foul Battery by the dagger produced in the Court, and by the party himſelf that is wounded, and it is not fit that a wilfull Jury ſhould prejudice the party, therefore either conſent to a new writ, or elſe bring your witneſſes on both ſides and we will hear the motion again. At another day Wild ſaid, the Court cannot increaſe damages upon a view of the party, if he be not maimed, and here is no maiming, but only a Battery and wounding: But the Court anſwered that they would adviſe upon that point, for it ſeems there is the ſame reaſon for encreaſing of damages in both caſes. At another day Green moved for increaſe of damages upon the view, and urged 9 H. 4. f. 1. 3 H. 8. 4. 10 H. 4 and Bret and Middleton caſe in this Court. Twiſden on the other ſide confeſſed the Books were ſo, but here the Battery is not apparent, and the wound is internal, and not to be viewed by the Court. Roll chief Iuſtice ſaid, 3 things are conſiderable, 1. whether the Court can increaſe the damages, 2ly. Whether

ther the wound be apparent? and 3ly Whether the damages given be too small? The Court upon view of the party, and examination of Chirurgions and Witnesses on both sides upon Oath, did conclude that they might increase the damages, and that the wound was apparent, and that the damages were too small, and therefore they increased them to 400 l. and said they would not encrease them more, because they could not inquire into all the circumstances of the fact, as the jury might, but they thought fitting to encrease them in some proportion, because the offence was great, and such outragious Acts are not to be slightly punished.

VVallis against Bucknal.

Hill. 1651. Banc. sup.

VPon a special verdict found in an Ejectione firmæ the case fell out to be this: A Copyholder of inheritance made a Letter of Attorney to two joyntly and severally to surrender his Copyhold lands in Fee to certain uses, after his death, according to the Custom of the Manor. The question made by Ellis of Councel with the Plaintif was, whether the Custom was good or not? he argued, that it was not a good Custom. In Sir Iohn Davis Reports it is said, a Custom must be reasonable, and a Custom may be reasonable, when it is but against a particular Law, and not a general Law; but the Custom here thus to convey land, is against a general Law. Particular Customs may be against publique interest, pro bono public. but if they be not, as in our case they are not, they are not good. Next an authority given ought to be Countermandable, and to determine at the death of the party; but this is not so, and therefore it is no good authority, 19 E. 3. f. 5. 2ly. None can give an authority to another to do a thing which he could not do himself; but here it is otherwise, and therefore it is not a good authority. 3ly. By the death of the Copyholder the lands are setled in the heir, and this authority given shall not devest them, and this is not like the surrendring of lands into the hands of the Lord; for a surrender cannot be revoked, but this authority is revokable. Next, the Verdict doth not find that the 2 Attorneys are Customary tenants, but only by way of recital, which is not good; nor doth it appear they were customary tenants, at the time of the admittance; and here is not found any possession or title in the Defendant, and so the Plaintif having primer possession, the Defendant is guilty; neither is it found that the customary Tenant had fee-simple in the land; And if he had but an estate for life he could not make such a letter of Attorney. Also the authority given is not warranted by the Custom set forth. Wilmot of Councel with the Defendant, said, That this authority here is supported with a special direction, which may survive the party that gives it, 1 H. 7. 8. And an authority may survive the party that gives it; else how can an Executor sell lands by the authority given unto him, 21 E. 4. f. 8. 31 E. 1. Fitzherb. 45. and as for the heir he hath neglected his advantage, if he had any, and cannot now take it: But besides, the authority here given is more than a bare authority, for it is backed with circumstances of time and person; and here is also a Custom to support it, and this Custom is a reasonable Custom, for it is but to enable a man to dispose of his own lands: and there are far more unreasonable Customs than this allowed in our law, as the Custom of Kent, for one of the age of 15 years to be enabled to sell his lands, and this Custom is not against any positive rule of Law, for the custom is, to create the authority to begin after his death, and so it is not to determine by his death; for till then it begins not; and the Custom here is but to alien lands, which is no strange thing, any

Special Verdict in an Ejectione firmæ.

Pro bono publico.

and it is extended but within a ſmall compaſs of land, and ſo cannot be very prejudicial to the publique. And Bambridge and Whaddons caſe 17 Car. in this Court, cited on the other ſide doth differ from this caſe, for there was no Cuſtom to ſupport it. And it doth appear here by the Record, that Dalby the Attorney is a cuſtomary Tenant, and the admiſsion here is found to be ſecundum conſuetudinem Manerii. And one cannot gain a Copyhold eſtate by diſſeiſin, and ſo here can be no primer ſeiſin intended, and it is found the Copyholder is ſeiſed. Roll chief Juſtice ſaid, It will be hard to maintain the Cuſtom, if it be not found that the party was ſeiſed in fee of the Copyhold lands. But 2ly. it is not here found that the land is demiſable, according to the will of the Lord, and ſo it may be free land, & then the cuſtom doth not reach it. Neither is it found that the 2 Attorneys were Copyhold Tenants, and the primer poſſeſsion here will make a diſſeiſin by the Defendant, if the Cuſtom be not well found, and then it is for the Plaintif, and I cannot ſee how the Cuſtom can be good, it being againſt the rules of Law; for a man cannot deviſe a Copyhold, and here the caſe is worſe, but he may ſurrender to the uſe of his laſt Will and Teſtament. At another day Wilmot to the Exception taken, That it is not found that the two Attorneys were Tenants of the Manor, ſaid, there is ſo much found as ſhall make them be preſumed to be Tenants of the Manor, for it is found that the party is admitted ſecundum conſuetudinem Manerii, which cannot be a good admittance if they were not Tenants. Roll chief Juſtice anſwered, to be admitted ſecundum conſuetudinem, goes to the Admittance, not to the Letter of Attorney: But we will adviſe. At another day Twiſden prayed judgement for the Plaintif, and inſiſted upon the Exception that the two Attorneys were not found cuſtomary Tenants; for one of them is not mentioned at all, and the other is found ſo only by way of rectal, and ſo they have not entitled themſelves to the Cuſtom, and then the Defendant hath no title. The Court ruled to ſhew cauſe Saturday following why the Plaintif ſhould not have judgement. Antea.

Cuſtom.

Deviſe.

Cuſtodes againſt Tawny and Norwood.

Hill. 1651. Banc. ſup.

Endictment for ſpeaking blaſphemous words.

TAwny and Norwood were jointly endicted for blaſphemous words ſeverally ſpoken by them, upon the late Statute made againſt blaſphemy, and were convicted, the parties being removed hither by Habeas Corpus. It was urged that the Endictment was not good, becauſe it was joynt, whereas the words being ſpoken by them ſeverally, they ought to have been endicted ſeverally; for the words ſpoken by one of them cannot be ſaid to be the words of the other. But Roll chief Juſtice ſaid, The Endictment was good enough though it be joynt, as it is in the caſe of ſeveral perjuries, and ſeveral batteries, where a joynt Endictment doth lie, although it do not for ſeveral felonies, and here the Endictment is upon one and the ſame Statute, and for one and the ſame offence, and therefore the judgement given upon it is alſo good, and it ſhall be taken reddendo ſingula ſingulis (i.) the words to each of them as they ſpoke them.

Floyd

Floyd againſt Morgan.

Hill. 1651. Banc. ſup.

A Writ of Error was brought to reverſe a Judgement given in an Action of Treſpaſs, for taking away divers goods, and the Error was that there was the words inſtrumentum ferri uſed in the Declaration to expreſs divers things, viz. de quodam inſtrumento ferri, Anglice a Gridiron, & de quodam inſtrumento ferri, Anglice a Brandiron, et de quodam inſtrumento ferri, Anglice a Mortar, whereas there are proper Latin words for them, & therefore are not to be ſo uncertainly deſcribed. Darcy againſt the writ of Error ſaid it was certain enough as they were deſcribed, & cited the Reg. f. 45. and ſaid, if it be not certain in the Latin deſcription, yet the Anglice helps it. Roll chief Iuſtice demanded, what ſay you to the Caſe of inſtrumentum ferri, Anglice a Horſe-lock, adjudged naught lately in this place? and there are proper Latin words for the things you deſcribe, which you ought to have uſed, therefore this deſcription is not good; for where a Latin word ſignifies many things, there an Anglice is proper to be added to it, otherwiſe not, and if there be no Latin word to expreſs a thing, one may invent a word, and interpret it with an Anglice, but it is not ſo here, therefore let the judgement be reverſed, niſi, &c. Poſtea.

Error to reverſe a judgement in Treſpaſs for taking away goods Anglice.

Deſcription.

Keightley againſt Nodes.

Hill. 1651. Banc. ſup.

Trin. 1651. rot. 869.

A Writ of Error was brought to reverſe a judgement in a Treſpaſs vi et armis at Doncaſter, And the Error aſsigned was, That the Plaintif declared that the Defendant took certain Cows of his out of the Jurisdiction of the Court, and brought them within the jurisdiction, and there diſpoſed of them to his own uſe, In which caſe, in regard that the taking of the Cattel, which is the ground of the Action, was without the jurisdiction of the Court, although the diſpoſing of them was within, yet the Court had no jurisdiction of the cauſe. To which Roll chief Iuſtice agreed, and ſaid, if the Action had been a Trover and Converſion it had been good, but being a Treſpaſs vi et armis it is naught, and therefore let the Judgement be reverſed, niſi.

Error to reverſe a judgement in Treſpaſs vi et armis.

Trover.

Cottrell and his VVife againſt Theoballs.

Hill. 1651. Banc. ſup. 297.

This caſe was again moved, & ſpoken unto by Turner, who prayd judgment for the Plaintif, becauſe, as he conceived, the Action was well brought by the Husband and Wife, and to prove it he cited theſe books, 39 H. 6. f. 45. 9 H. 6. f. 4. Nat. Brev. 131. 28 H. 8. Dyer f. 21. Paſch. 5 Car. Brown and Floyds caſe, Paſc. 13 Car. Oldhams caſe, and ſaid, That the conſideration here did move from both parties, and not from the Husband only. 2ly. It is not neceſſary to give the Defendant notice that his wife had attained to the age of 18 years, at which time he was to pay the money;

Iudgement prayed in an Action upon a promiſe.

So for

for he might take notice of it himself. Larch on the other side prayed that the Judgement might be arrested, because the promise was made to the Husband only, that he would make good the Legacy given to his wife by her Father, and give 40 l. more to the Baron and Feme, and the Husband is only to have the benefit of the promise, and the consideration, namely the marriage, moved only from the Husband, and therefore the Action is to be brought by the Husband only, and not by the Husband and his wife, and this promise is not like a promise made to a servant to pay money to the use of his Master, and it is not here laid that the promise was made to both, as it might have been, and it is not reasonable to turn over the wives portion, for which the Husband hath made her a joynture unto the Feme; for if it should have been so, the wife might have released it before the marriage, and the Case cited of Rippon and Norton was otherwise laid, 37 Eliz. Banc. Reg. 2ly. Here ought to be notice given when the Feme came to her age of 18 years; for here the Assumpsit is to make good a Legacy, which was to be paid to her at such an age, and he ought to give notice of her age as he ought to an Executor, and this case is not like as where one binds himself in an Obligation to pay another such a sum when he comes to such an age, and the legacy here is to be made good in that manner as the Executor is to pay it. Roll chief Justice said, that the party is not bound to give notice, but the other must take notice at his peril. But the promise is here laid to be made to the Husband only, and though the money is to be paid to both, yet it would be inconvenient to intitle the Feme to it, and here it was the folly of the Husband to joyn his wife in the Action, for he might have brought it alone if he would, for he hath alleged that the promise was made to him alone, and therefore the Action is not well brought; and it appears by the Declaration that the Feme was of age before the mariage, and so the notice is out of Doors: The rest of the Judges agreed with Roll chief Justice in all, and so the Court ruled a nil capiat per Billam nisi. Antea, 297.

Notice.

Joyning in Action.

Hill. 1651 Banc: sup.

To quash an Endictment for a private Tresпass. Endictment.

THe Court was moved to quash an Endictment, because it was for a private Tresпass, viz. for stopping an antient water-course, and the Endictment doth not conclude ad commune nocumentum, but ad grave damnum, which shews it to be no publique nusance, & so he is not to be endicted. But Roll chief Justice answered, A man may be endicted for a private Tresпass, but the party here hath made himself no title to the water-course, and therefore let the Endictment be quashed.

Comport against Beech.

Hill. 1651. Banc. sup.

For a reference touching a Tresпass.

THe Court was moved on the Defendants behalf, That he was a very poor man, and in making of a Ditch for another man, he had unwillingly committed a Tresпass against the Plaintif, in taking away 2 or 3 wheele-barroughs of Earth of the Plaintifs soil, and therefore it was prayed that the matter might be referred to the Secondary to tax the damages and Costs for the Tresпass, which he was ready to pay, & that the proceedings might be stayed. But Roll chief Justice answered, It cannot be, but you may confess the Action.

Reference.

Hele

Hele againſt Green.

Hill. 1651. Banc. ſup.

IN an Ejectione firmæ a ſpecial Verdict was found, upon which the Caſe fell out to be this, A man being Leſſee of a Manor for 199 years, devi- Special Verdict in an Ejectione firmæ.
ſeth the Term to his wife for life, with power to make ſuch eſtates in as ample manner as he himſelf might have done, during her life, and the remainder in Tail to his Daughter, and dies, the Feme proves the Will and accepts of the Legacy, and after makes a Leaſe for 99 years, and dies, and the daughter brings an Ejectione firmæ againſt the Leſſee of the Feme. The queſtion was, whether this Leaſe made by the Feme were a good Leaſe or not. Merifield argued, that the Leaſe was not good after the death of the Feme, becauſe ſhe having but an eſtate for life, and the Leaſe Leaſe.
for 99 years being derived out of it, when the eſtate for life ends, the eſtate derived out of it muſt end alſo. And 2ly. If the Feme had any power to diſpoſe of any part of the Term longer than for her life, by the ſame reaſon ſhe might have diſpoſed of all of it, which cannot be intended; for the Teſtator did not mean that ſhe ſhould have power to deſtroy the Entayl made upon his Daughter. And as to the Objection that ſhe hath diſpoſed of but part of the Term, and therefore hath not deſtroyed the Entayl: I anſwer, It matters not what ſhe hath done, but what ſhe might have done, for by the ſame reaſon that ſhe diſpoſed of part ſhe might have diſpoſed of the whole; The reſt of the Argument I could not hear. Henage Finch on the other ſide argued, That the Leaſe made by the Feme continues after her death, becauſe the Feme had a power given her to make ſuch a Leaſe, and by vertue of that power the Leaſe continues; for the power given unto her relates to the Eſtates to be made by her, and not to the continuance of her life. And here the intent of the Teſtator is to be conſidered, which was, that his wife ſhould have the power to diſpoſe of all the Term if ſhe would, for he truſted her with it, becauſe ſhe was his Wife, and Mother of his Daughter, to whom the Entayl was made, and the very ſubject matter ſhews his intent to be ſo, and becauſe there is no other power expreſſed againſt this in any other part of the Will, and the words that give her this power would be idle and trifling if they ſhould receive any other Conſtruction, 2 Car. Banc. Reg. Danyel and Ogleys caſe, and Gibs and Whites caſe, 1 Car. nor does the aſſent of the Feme to the Legacy, to have the Term for life, deſtroy her power to make eſtates. 2ly. She hath well executed this power, for the Jury have found that it is the Leaſe of the Feme, 9 Iac. Suckham and Hawkins caſe, a power given to an Executor may be executed by parts. Roll chief Juſtice held, the Leaſe Leaſe.
was good; for a Will ought to be ſo interpreted, that all the parts of it may ſtand together, and if the Feme here have not power to make this Leaſe, the Clauſe of giving her this Leaſe is idle, and the meaning is ſo, without doubt the Feme hath the ſole eſtate in Law in her, and the power given here is but a reſtoring to her of that, which ſhe had before by the Law, and her conſenting to the Legacy, doth not take away her power to make Eſtates. And this limited power, and the remainder to his daughter may ſtand together, for it might be that the wife would not make ſuch a leaſe, and then the daughter ſhould have had the land in tayl; but if ſhe diſpoſe of it the daughter ſhall not have it. Jerman as Roll, Nicholas Juſtice held, that the Feme could only diſpoſe of the land during her life, and that the Teſtators intent by the words was, that the Feme ſhould not be

tyed to occupy the lands her ſelf during her life; but might diſpoſe of them. Ask as Nicholas, that ſhe can diſpoſe of the lands only during her life, for the power is only given during her life, and this interpetation will make all parts of the Will ſtand together, better than the other interpretation. Adjourned. Antea.

Dekins againſt Latham.

Hill. 1651. Banc. ſup.

Entred Hill. 22 Car. rot. 946.

Special verdict in an ejectione firmæ.

IN an ejectione firmæ a ſpecial verdict was found, upon which the Caſe fell out to be this. One ſeiſed of lands covenanted to levy a fine to the uſe of himſelf, and his wife for life, and after he leaſed the lands for 21 years, for 3 l. rent per annum by equal portions, and after the death of I. S. to pay a groſs ſum of 125 l. by way of fine, payable by 5 l. a year quarterly, with a proviſo in the Indenture, that for default of payment of the rent or fine, or for want of reparations, it ſhould be lawfull for the Leſſor to re-enter. After the Leſſor levyes a fine, and aſsigneth over his intereſt in the reverſion. The queſtion here was, whether the condition of entry be transferred over to the Aſsignee, by the transferring over of the reverſion. Hales of councell with the Plaintiff held that the leaſe proceeds from the Husband only, and not from the Baron and Feme, and the condition is transferred over, for the condition runs jointly as well to the fine reſerved, as to the rent, and is as it were a ſeveral condition in Law, although it be compriſed but in one clauſe, and not ſeveral clauſes, and the condition as to the rent is transferred, though not as to the fine. In 19 E. 4. f. 7. The law makes a ſeveral diſtribution of one præcipe, and ſo may it do here of one condition, and Rawlins caſe in the 3 d. rep. cited againſt this comes not to this caſe, for there the queſtion was of the ſuſpenſion of a condition; but here it is of the transferring over of a condition. 2ly. If it be but one condition, yet it is well transferred by the Statute of 32 H. 8. C. 14. an extinguiſhment in part, is not extinguiſhment of all, although a ſuſpenſion of part be a ſuſpenſion of all, and the Grantee of the reverſion ſhall have advantage of the condition, becauſe 1. He is within the words of the condition as to the condition. 2ly. The clauſe of re-entry is within the words of the Statute; and Knights caſe objected comes not to this caſe, for there was a grant but of part of the reverſion of the land, which caſe comes not within the Statute, for the Grantor cannot have advantage by the Statute, where he grants but part of the reverſion, and it is not literally without the Statute, and therefore it is within the equity of it, otherwiſe it would be miſchievous to the Grantor, and here is no diſadvantage to the Leſſee by the transferring of the condition, for the ſame Statute that gives benefit of the condition, gives benefit of the Covenants, and the Grantee of a reverſion ſhall have benefit of a Covenant to be transferred, although they are entire in words at the beginning, and hath one common concluſion. Wild of Councel on the other ſide, held the condition to be entire, according to Rawlins caſe, and goes to payment of the rent, and the fine, and reparations alſo, and the reverſion being aſsigned with which the rent paſſeth, the condition is gone alſo to the fine, Dyer 309. and this is a ſtronger caſe than that to deſtroy the entire condition, by grant of the reverſion, 17 El. Brightmans caſe, C. B. The fine here is a ſum collateral, and is not incident to the reverſion, and ſo the condition is collateral, and cannot be apporti-

portioned, 5. rep. Spencers case, 34 H. 8. Br. Cov. 93. 2ly. The Statute of 32 H. 8. cannot help it, for the purview of the Statute explains the large preamble of the Statute, and shews the intent of the makers of it to be, for forfeitures incident to lands, and reversions, and a covenant is here as general as a condition, and the Statute extends not to a collateral covenant, and therefore not to a condition collateral, 35 H. 6. f. 56. and the cases put on the other side come not to our case. And as for the mischief which may ensue by this it matters not, for it might have been prevented by providence of the partyes, and the inconveniences which may happen to them must not alter the Law. Roll chief Iustice said, if he release the fine, the condition will not stand as to the rest, otherwise if the fine expire by effluxion of time, or if he release the reparations the condition is gone as to the rest, for the condition here is entire, and goes in the destruction of the Estate, and it is the Act of the Lessor himself to assign over the reversion, and by that all is passed away that is incident to it, and by consequence the condition. Ierman Iustice demanded, What if the Lessor shall pay all the fine presently? Roll chief Iustice answered, it may be it will destroy the condition. Nicholas Iustice said, the condition is odious in Law, because it goes in destruction of the Estate. Adjourned to be argued again, because held a case of consequence. At another day the case was moved again, and argued by Latch for the Plaintiff, who made the question to be whether the condition as it is penned may be severed or no, and said, that as it respects the rent, it is not a condition in grosse; but as it respects the fine, it is a condition in grosse, and a condition which is entire in words, may by acts of Law receive distributions. Where the penalty of a condition is intire, there the condition cannot be apportioned; but the condition is not so here, and therefore may be apportioned, Dyer 306 Knights case, 7 H. 7. 6. Perkins. 162. 7. H. 7 Kelm 60. Dyer 334. Popham in Dumports case is contrary to Dyer, Cook. Lit. 203. 2ly. It is questionable whether the Statute may help in our case, and he said it doth, for the name of rent is not altered, nor the condition attending upon it, nor any thing done to alter the execution of the condition. 3ly. By the assignment there is no injury done to the Lessée, for by it here is a freeing of a thing to be done, and the Statute is a favourable Statute, and to be extended with indifferency. Finch on the other side argued much to the same effect as he did formerly. Roll chief Iustice said, it is not necessary for the party to express how the condition relates to all, viz. the re-entry for non payment of the rent, and of the fine, and for not repairing, and he said a man cannot by his own Act divide a condition, for we must keep the rule of law, which is, not to divide a condition, which goes in destruction of an Estate, and this case is not within the Statute of 32 H. 8. All the rest of the Iudges concurred with Roll, and so the rule was judicium pro defendente, nisi.

Condition.

Brown against Nelson.

Hill. 1651. Banc. sup.

Trin. Hill. } 1650 rot. 897.

An Action of Debt upon the Statute 7 Ed. 6. for selling of wine without licence, was brought against 2. Defendants, they both plead nil debet, whereupon issue being joyned, a special verdict was found, viz. that as to one nil debet, and that as to the other he had drawn a pint of wine

Whether a Iudgement given against one of two Defendants were good,

wine without licence, and upon this Judgement was given against him that was found culpable, It was questioned whether this were a good judgment. But Roll chief Iustice concluded it was a good Iudgement, and cited many cases adjudged in point to prove it, and one in particular in an action upon the Statute for dying with Logwood, and he took a difference between an action grounded upon a joynt contract, or a joynt trespasse, and an Action brought joyntly upon a Statute against two, or for a tort done by two, as this is upon the Statute. In the first case Judgement cannot be given against one of the contractors, in the other it may.

Weld against Rumney.

Hill. 1651 Banc. sup.

Hill. 1650. rot. 1193.

Error to reverse a judgment in an action on the case.

A Writ of error was brought to reverse a Iudgement given in an Action upon the case against two Executors, and the error assigned was a matter in fact, viz. that one of the Defendants was within age at the time of the Action brought, and did appear, and plead by his Attorney, whereas he ought to have done it by his guardian. Twisden for the Defendant in the writ of Error said, that it is not all one to appear within age in his own right, and in anothers right, for where he appears in his own right, he ought to appear by his guardian; but where he appears in auter droit as he doth here being an Executor, he may appear by Attorney, and

Appearance.

cited Draytons case 9 Car. But Roll chief Iustice denyed the difference, and said, it may be that the Executor may be charged of his proper goods, as in case he have wasted the Testators goods, and then it is not reason but he should plead by his guardian, and he is not within the Statute of 21 Iac. for that Statute was made for the Plaintiff, and this is in case of a Defendant, therefore he should have appeared by his guardian, and therefore let the Iudgement be reversed, nisi.

Fortune against Johnson.

Hill. 1651. Banc. sup.

For an attachment for putting one out of possession.

The Court was moved for an attachment against Iohnson upon an affidavit, that he had ejected one out of possession, that was put in by a habere facias possessionem, and that in a very riotous manner, and had imprisoned the party, so put out of possession, and others. Windham on the other side by way of answer said, that the party came into the land by virtue of an elgn Judgement, and an extent upon it. Roll chief Iustice answered, here is title against title, therefore take your course in law, for we will make no rule in it.

Crosthwayt and the Hundred of Lowdon.

Hill. 1651. Banc. sup.

Arrest of Iudgement in an Action upon the Statute of Winchester for robbery.

Crosthwayt brought an Action upon the Statute of Winchester of robberyes, against the Hundred of Lowdon, for being robbed of 160 l. and had a verdict against the Hundred. It was moved in arrest of Judgement, that the Action upon the Statute, did not lye for the party that brought it,

for

for it appears that he was not robbed; but that the mony was taken out of a portmantle, which was carryed by the postboy, and that only the Plaintiffs hand was upon one end of the portmantle, so that the post-boy was robbed, and not the Plaintiff. But Roll chief Iustice answered, there is no question but that this was a robbery of the Plaintiff, and it is all one as where my Servant is robbed in my presence, and there the goods shall be said to be in my possession, and so is it here, and therefore let Iudgement be entred, nisi. Robbery. Possession.

Tayler and Web.

Hill. 1651 Banc. sup.

THis case formerly argued at the Bar, and broken on the Bench, and some opinion delivered in it, was again moved by Maynard, and argued by him. And he said that by the Will no land passeth, because lands are not mentioned in it, neither is there any necessary implication, that the Testator intended to devise his lands, for the making one his Heir, and enjoyning him to pay an annuity doth not convey the lands to him, and the Will doth not say that he makes him his Heir of his lands, but generally his Heir, which by the civill Law may be of goods; and for the enjoyning him to pay the annuity, this may be out of other lands in consideration of the personal estate given unto him. In Danyel and Vblies case, a gift made by a Feme coparcener of her purparty of land, did not convey the lands in Fee. In Marshes case, the Father gave his lands to his two Sons to be equally divided, it was adjudged there, that only an Estate for life passed, and here is nothing at all expressly given. In Gilbert and Withers case, Mich. 20 Iac. It was adjudged that there ought not to be made such a construction of a Will, as is not agreeable to Law. And this is only a logical Will by way of argument, and not a grammatical, and positive Will. Roll chief Iustice answered, to make a construction of a Will where the intent of the Testator cannot be known, is intentio cæca & sicca; but here although the words of the Will be not proper, yet we may collect the Testators meaning to be, by making of the party his Heir, that he should have his lands, and it is all one as if he had said Heir of his lands, and here he not only makes him his Heir, but his Executor also, and therefore if he shall not have his lands, the word Heir is meerly nugatory, and to no purpose, for by being Executor only, he shall have the goods, and as it hath been observed, he is in this case hæres factus, though not natus. Ierman Iustice to the same effect, and said that the word Heir implyes two things. 1. That he shall have the lands. 2ly. That he shall have them in Fee simple. Nicholas and Ask Iustices concurred, and so it was ruled that Iudgement should be given for Sir Iohn Bridges the Devisee, nisi. Special Verdict upon the words of a will. Construction or Interpretation. Will.

Lockoe against Palfriman.

Hill. 1651 Banc. sup.

Hill. 1651. rot. 1002.

VPon a special verdict found in an ejectione firmæ, the case fell out to be this, Tenant for life, the remainder to Baron and Feme, and their Heirs, Baron and Feme suffer a recovery, The question was, whether the Special verdict in an ejectione firmæ.

the Heirs of the Feme were bound by this recovery, becauſe the Feme being covert it was conceived ſhe was not Tenant to the præcipe, becauſe it appears not ſhe was examined, and ſo nothing was recovered from her. It was argued that this recovery did bind the Feme. 1. becauſe if a præcipe be brought againſt one who hath nothing in the land, the writ only is abatable, Fitz. Tit. Droyt 29. Next an Eſtople with recompence excludes not only parties and privies, but alſo ſtrangers, as it is in Shellyes caſe, and 3 Iac. C. B. in Duke and Smiths caſe, 15 E. 4 f. 28. In 43 Ed. 3. f. 48. was the firſt mention of examination of a Feme upon a Recovery, and ſhe ſhall be intended to be examined here, if it be requiſite; for it is not found ſhe was not examined, and in Br. Abridg. recovery in value 27. 23 H. 8. It is held that a Feme Covert is barred by a Common recovery, and this hath been the continual practice ſince that time; and whereas it is objected, that a colourable recovery doth not bind a Feme Covert, it is anſwered, that this is not a colourable recovery, but a judicial matter of Record, and is brought upon an original, and there is an intended recompence to the Feme, and to urge that there is no Tenant to the præcipe, is an objection which reaches to the common practice of aſſurances, and therefore not to be admitted, and in time they might have counterpleaded the voucher; but now they cannot avert this matter againſt the Record, 19 E. 3. eſtople 9. and though the Feme be not examined, yet ſhe ſhall be bound by this recovery, though in a fine it is otherwiſe, where there is no recompence in value, as here there is, and in a fine the Judge ex officio is bound to examine the Feme, but not in a recovery, nor is there any practice of it in Law, 13 Ed. 3 Iudgement 29. A partition made by writ ſhall bind a Feme Covert, becauſe ſhe hath a recompence, ſo is it upon a partition made upon Record in Chancery. And by the Barons ſurviving the Feme here, the recompence doth not ſurvive to the Baron, but ſhall go to the Heirs of the Feme, Br. recovery in value 2. 2 Iac. C. B. here is a reall Eſtate in the Baron and Feme. Hales on the other ſide made the queſtion to be, whether by a recovery had where the Feme being Covert is not Tenant to the præcipe, ſhe ſhall be bound by it, and he ſaid ſhe is not In other caſes the party may be bound by eſtople, namely where he might have pleaded to the writ, or might have counterpleaded the voucher; but here the Feme is not ſubject to be admitted to theſe things, 17 E. 3. f. 37. and the Feme Covert here, is not ſo concluded by her admiſſion, that ſhe ſhall not be admitted to ſpeak againſt this recovery if ſhe ſurvive her husband, neither are her Heirs concluded if ſhe do not ſurvive, although peradventure as to the warranty they may be concluded, 20 Aſſ. pl. 7. 11 E. 3 Fitz voucher 143 2 E. 3. Fitz. eſtople, 246. 21 E 3 13. and the recovery here, is not duely had, becauſe there is no tertenant. Roll chief Iuſtice ſaid, it is not to be queſtioned whether a recovery bind a Feme, for it is the Common practice. 2ly. It is not neceſſary to examine a Feme Covert upon ſuffering a recovery, although it be a prudentiall thing to do it; but if it be not done, it is not averrable that it was not done; but the ſingle queſtion material here, is whether the Feme be Tenant to the præcipe or not, ſo that ſhe ſhall be eſtopped to ſpeak againſt the recovery, and he held ſhe was eſtopped, for ſhe joyns in the recovery with her Husband, and here is no default made by the Baron, and now the record is perfect, and a thing contrary to it ought not to be averred againſt it; but before the Record was perfect ſhe might have pleaded, and the recompence in value here ſhall go to the Heirs of the Feme, and the Tenant for life is alſo bound by this recovery, and the Feme is party, and alſo privy to the recovery, and therefore if it will bind her, it will bind her Heirs alſo. If a ſtranger had been Tenant to the præcipe, and the Baron and Feme had

Recovery.
Examination.
Averment.
Feme Covert
Plea.
Party and privy.

had been vouched, the Feme had been bound, and this is a ſtronger caſe, and this caſe may concern many mens eſtates, and therefore ſuch recoveries are not to be queſtioned. Therefore let the Plaintiff have his Iudgement, niſi.

Hill. 1651 Banc. ſup.

ONe Turner and Marian were Bail for one by the names of Turner and Mary, the Court was moved that the name Mary might be made Marian. But Roll chief Iuſtice anſwered, let the party come and find other Bail, for upon the matter this is no Bail. Motion to alter the name of a Bail. Amendment. Bail.

Hill. 1651. Banc. ſup.

AN Endictment was removed by a certiorari into this Court, and the Court was moved for a procedendo, becauſe no Bail was put in here. Roll chief Iuſtice anſwered, If no Bail be put in, you may proceed below without any procedendo. For a procedendo.

Hill. 1651. Banc. ſup.

THe Court was moved to ſuperſede an Execution againſt one, quia erronice, becauſe he was taken in Execution, whereas there was no declaration given againſt him in the Term time as it ought, becauſe the party was in cuſtodia, and the Declaration againſt him was upon the by, viz. at another mans ſute, and not at his at whoſe ſute he was in cuſtody. Roll chief Iuſtice anſwered, if it be a Declaration on the by, it ought to be given in the Term time. To ſuperſede an execution.

Hill. 1651. Banc. ſup.

VPon a rule to ſhew cauſe why an attatchment ſhould not be granted againſt Cox an Attorney of this Court, and Mayor of Newberry, for iſſuing out of Execution upon a iudgement given there, after a writ of Error brought, and allowed there, Wild ſhewed for cauſe that the Mayor was enformed by Counceil, that the Record was not removed thence, becauſe the writ of Error was not good. This was allowed for cauſe, and the former rule diſcharged, quod nota. Cauſe why no attatchment.

Hill. 1651. Banc. ſup.

LEtchmore moved the Court that the word publicæ might be put into an Endictment which was removed hither by a certiorari. But the Court anſwered it could not be; but becauſe the endictment was of another Term, the Clark of the peace was fined at 10 l. for his careleſſeneſſe, and groſſe overſight. To mend an endictment. Amendment. Fine.

Paſch. 1652. Banc. ſup.

For a habeas corpus for one committed by an order of Seſſions of the peace. Surety.

The court was moved for a habeas corpus, for one that was committed to priſon by an order of Seſſions of the peace, untill he ſhould find ſufficient ſuretyes for the peace, whereas he had tendred ſuretyes which would not be accepted; but extraordinary ſuretyes were required, ſuch as he was not able to procure. Roll chief Iuſtice anſwered, a thouſand pound bond may be required, for the keeping of the peace as, the caſe may ſtand, viz. if the party to be bound be a dangerous perſon. Yet take a habeas corpus, but be ſure you bring good ſuretyes.

Paſch. 1652. Banc. ſup.

Wager of law waived and a plea put in.

An action of debt was brought againſt one for 50 l. due for divers pieces of linnen cloath ſold to the Defendant. The Defendant was ready at the Bar to wage his Law; but the Court being enformed that the Defendants wife kept a ſhop, and uſed to buy and ſell by her husbands privity and allowance, and that theſe parcells of cloath were bought by her to furniſh her ſhop, and that the Defendant her husband, although he was a Sea man, and medled not in buying and ſelling of any of the wares in the Shop, yet his wife did it by his allowance; Roll chief Iuſtice adviſed the Defendant to take heed he waged not his Law, for that he could not do it with a good conſcience, becauſe his allowance of his wifes buying the wares was all one, as if he had bought them himſelf, and counſelled him to plead, to which the Defendant conſented, and the ley gager was waived by conſent of the partyes, and an emparlance given till the next Term.

Emparlance.

Dudley againſt Born.

Paſc. 1652. Banc. ſup.

Motion to put in ſecurity for coſts denyed.

The Court was moved on the part of the Defendant that in regard, the Plaintiff had obteyned the cauſe between them to be tryed at the Bar, that therefore he might be ordered by the Court, to give ſecurity to pay the coſts, in caſe the tryal ſhould be againſt him; But the Court would make no ſuch rule; but ſaid, if he will not pay the coſts in caſe the verdict be againſt him he ſhall take no benefit here, afterwards upon it.

Garland againſt Yarrow.

Paſc. 1652. Banc. ſup.

Hill. 1651. rot. 1295.

Arreſt of Iudgment in an Action for words.

The Plaintiff brought his Action upon the caſe againſt the Defendant for ſpeaking theſe ſcandalous words of him, viz you are a knave, and keep a bawdy houſe; after a verdict for the Plaintiff it was moved in arreſt of Iudgement that the words are not actionable. 1. Becauſe the words ſpoken are of ſpiritual conuſance, and puniſhable in the eccleſi-

Eccleſiaſtical Court, and not at the Common Law. 2ly. The party may keep a Bawdy Houſe, and not know it to be ſuch, and then he is not puniſhable for it, and ſo cannot be prejudiced by the ſpeaking of the words. 3ly. There is no Statute againſt keeping of a Bawdy houſe as the Declaration lays it, but for keeping of a Common Bawdy houſe. But Ierman, Nicholas, and Ask Iuſtices, (Roll chief Iuſtice being abſent) held that the words are actionable, for the keeping of a Bawdy houſe is an offence puniſhable at the Common Law, as being a miſdemeanor and breach of the peace, and therefore ordered judgement to be entred, except cauſe ſhould be ſhewn to the contrary Saturday next. Caſe.

Green againſt How.

Paſch. 1652. Banc. ſup.

Entred Hill. 1651. rot. 1295. Q.

PAnel moved for How the Defendant to arreſt judgement after a verdict given againſt him for Green the Plaintif in an action upon the Caſe brought, for ſpeaking theſe words of her, viz. You are a Whore and a Iade, and a ſtrumpetly Whore, and I will prove you a Common Whore; his Exception was, that the words are not in themſelves actionable, for they are but words of choler and heat, and the Plaintif is not brought within danger of the late Statute made againſt whoredom, by the ſpeaking of them, and he cited for authority Freeman and Childers caſe, Trin. 1651. rot. 45. where theſe words, viz. You are a Whore, & I will prove you an arrant Whore, were adjudged not actionable. The rule was to ſtay judgement till the Plaintif ſhould move.

Barcock againſt Tompſon.

Paſch. 1652. Banc. ſup.

Mich. 1650. rot. 444.

IN an Audita querela the Caſe was this, An Action of Debt was brought againſt the Principal, and a judgement upon a nihil dicit obtained, but no capias ad ſatisfaciendum iſſued forth againſt him; Afterwards 2 ſcire facias were taken out againſt the Bail, and 2 nichils thereupon returned, and thereupon judgement was given againſt the Bail, who thereupon brings his Audita querela. The Queſtion was, whether the Audita querela did lie or not, in regard that the ſcire facias iſſued forth againſt the Bail before any capias ad ſatisfaciendum was taken forth upon the judgement, upon the nihil dicit againſt the Principal. Green of Councel with the Defendant held, that the Audita querela did not lie, becauſe that the party hath other remedy to relieve himſelf, and therefore the Audita querela lies not, for that is given only where the other party hath no other remedy, 21 E. 3. f. 14. Brook Audita quer. 18. And beſides here are two nichils returned againſt the party, which do amount to a ſcire feci, and ſo the party is warned, and therefore he comes now too late to have his Audita querela, for here is as much as a judgement by default after an appearance, and here is no releaſe, and there is a judgement executed and in force, and not reverſed by the Principal, Green and Le Grices caſe, Paſch. 39. Sir Francis Mores Reports. Wild for the Plaintif held, that the Audita querela did Where an Audita querela lies for the Bail upon an erronious judgement againſt the principal.

well lie, becauſe that no ſcire facias ought to have iſſued againſt the Bail, before a capias ad ſatisfaciendum taken forth againſt the Principal: And an Audita querela is in the nature of a ſute in Chancery, and the party comes ſoon enough here to be relieved, though the ſcire facias be returned, for the return thereof ſhall not bar him from his Audita querela, although it be now too late for him to reverſe the judgement by a writ of Error, and the books 21 E.3.13. and Kelw. 23,24. are in the very point. And the party by the return of the 2 nichils is not in Court; And in Mores Reports, in Hobs and Todcaſters caſe 38 Eliz. it is adjudged that an Audita querela doth lie. Roll chief Iuſtice, when one is Bail in the Common Pleas, he is bound to bring in the body of the Principal, or to pay the debt: And Pomeroys caſe is, that until a Capias be returned againſt the Principal the Bail cannot forfeit his Recogniſance, for the non-appearance of the Principal, for the filing of the Capias is not ſufficient, but it muſt be returned. And this was the antient courſe there, and the Law ſo held to be; but by uſage of later times and out of indulgence ſhewed to the Bail it hath been held ſufficient for the Bail to bring in the principal after the return of the Capias, and now at this day, out of greater indulgence afforded unto the Bail, it is well enough if the Bail bring in the Principal at any time before the return of the ſecond ſcire facias, but after it is returned, then it is too late for him to bring him in, and that is the reaſon that in ſuch Caſe a writ of Error lies not for the Bail to reverſe the judgement againſt the Principal. If a ſcire facias be brought againſt the Bail, and he pleads that the Principal dyed before the return of the Capias againſt him, it is adjudged to be a good plea for the Bail to diſcharge himſelf; but to plead he dyed after the return, is not good: And it is a good plea for the Bail in a ſcire facias brought againſt him to ſay, that no capias was returned againſt the Principal; And here is a good diſcharge in Law againſt the Bail. But the queſtion here is, whether the return of the two Nichils be not a Bar to him now, and that he hath not thereby loſt his advantage to bring his Audita querela, becauſe by the return thereof the party is ſuppoſed to have notice, and therefore a writ of Error clearly lies not to reverſe this judgement, though it be upon a nihil dicit. And as to that, in as much as the party hath no other remedy to help himſelf, and it is apparent that he is damnified by an undue judgment, it is reaſon he ſhould bring his Audita querela. Barns and Corbets caſe. The Bail cannot ſay the Principal hath paid the money, if he have not an acquittance or matter of Record to prove it; and in Sir John Mounſons caſe upon two nichils returned adjudged, that the party might have his Audita querela, and therefore the Plaintif ought to have his Judgement. Ierman Iuſtice diſſented. But Nicholas Iuſtice, abſente Ask, agreed with Roll and ſaid, that for want of the return of the Capias the judgement was erroneous, and the 2 ſcire facias might be returned behind the parties back, & therefore it could not be ſaid to be all one, as if the party had appeared, for if he had appeared the Caſe would have been otherwiſe, So Iudgement was given for the Plaintif, niſi, &c.

Bail.

Recogniſance. Forfeiture.

Error.

Plea.

Audita querela.

Paſch. 1652. Banc. ſup.

One brought by Habeas Corpus from the Fleet remanded.

MEmorandum, One was brought into the Court by the Mareſchall of the Fleet, by vertue of a habeas Corpus directed to him out of this Court, and becauſe it did appear upon Record that the party was charged with divers debts, when he was turned over to the Fleet, he was not ſuffered to put in Bail here, but was remanded.

Goſ.

Goſſage againſt Tayler.

Paſch. 1652. Banc. ſup.

Hill. 1650. rot. 117.

IN an Ejectione firmæ upon a Leaſe for years of a Meſſuage, and certain lands in Hatfield Broad-Oak in the County of Eſſex, upon a ſpecial verdict found the caſe fell out to be this, Rich. Frank ſeiſed amongſt other lands and Tenements of the Meſſuage and lands in queſtion, upon the mariage of his Son Leventhorp Frank with Suſan. Cotele, levies a fine of the lands to the uſe of himſelf during his own life, and the life of Leventhorp his Son, and after during the life of Suſanna Cotele the wife of Leventhorp, the remainder to the uſe of the heirs to be begotten upon the body of Suſanna by Leventhorp her Husband. The queſtion here was, whether the word heirs ſhall be intended the heirs of Leventhorp and Suſanna his wife, or whether the eſtate ſhall be intended to be limited to the heirs of Suſanna only, and that Leventhorp ſhall have barely an eſtate for life in the lands. Serjeant Glyn of Councel with the Plaintiff held, That Suſanna Cotele hath an eſtate tayl executed in the lands, and that the word heirs ſhall relate only to the heirs of Suſanna, and not to the heirs of Leventhorp, 1. Becauſe that here is an eſtate limited for life unto Suſanna by an expreſs limitation, and her heirs ſhall take immediately after the eſtate for life ended, and they ſhall not come in as purchaſors. By expreſs Terms the word heirs is not limited to any perſon, but it is left to the conſtruction of the Law, and that doth apply it to Suſanna, as to a perſon to whom Richard that ſetled the lands hath expreſſed moſt affection, as appears by the Deed, Lit. f. 6. Sect. 28. There is an expreſsion of the party to whom the word heirs ſhall relate, but ſo is not here, and therefore the caſes differ. In 3 Ed. 3. f. 31, 32. It is ruled that both parties have an eſtate tayl, becauſe the eſtate is limited to both, but ſo it is not in our caſe, ſo thoſe books are not againſt me. In our caſe, it doth not appear that Richard did intend to advance the Husband of Suſanna, and therefore it is not reaſon that the word heirs ſhould relate to him, but to Suſanna his wife only, for in caſe of limitation of eſtates the intention of the party is to be conſidered, and doth direct the matter, and the preceding limiting of the eſtate to Suſanna, and not to Leventhorp, doth ſhew that the party did mean to promote the heirs of Suſanna. Lit. Sect. 37. Dyer 27. A ſecond reaſon is drawn from the penning of the deed, which in the limitation of it doth encline more, that the word heirs ſhould be applyed to Suſanna than to Leventhorp; for the words upon her is as much as to ſay of her, and then it is the ſame caſe with Littletons caſe. 3ly. The Intention of the Donor appears to be ſuch by the circumſtances of the entire limitations, which do ſhew that he did intend that Leventhorp ſhould not have ſuch an eſtate whereby it ſhould be in his power to deprive his iſſue, and therefore the word heirs are to be applyed to Suſanna, and not to Leventhorp; for if it ſhould be applyed to both, then Leventhorp might deſtroy the eſtate of the iſſue, contrary to the Donors intent; And whereas Dyer 99 is objected againſt me, I anſwer, that caſe is not againſt me, for there the word heirs is expreſly limited to a certain perſon, viz. to the heirs of the body of both of them, but ſo it is not in our caſe; and whereas Hill. 13 Iac. Lane and Panels caſe in this Court is alſo objected againſt me, I anſwer, that that caſe is in effect the ſame caſe with Dyer, and the queſtion in our caſe came not in diſpute. And the will of the Donor in deeds is to be obſerved. Lit.

Special verdict in Treſpaſs and Ejectment.

22. C. Tayl. 1. rep. Shelleys caſe 103. Notwithſtanding in gifts in tayl this rule holds not, ſo that a gift in tayl may be limited contrary to the rule of the Common Law. And I know not of any authority in print, or writing againſt me; but in 13 Ed. 3. Fitz. tit. variance 81. there is an expreſſe authority for me, and 4 H. 4. Fitz. br. 448. & in my experience I have known many eſtates limited as this is in the Southern parts, & held good eſtates tayl, & if it ſhould be otherwiſe, many eſtates would be ſhaken. Roll chief Juſtice. We have delivered our opinions before, againſt you, viz. that it was not the meaning of the donour, to apply the word Heirs to the body of Suſanna only, for this conſtruction would offer violence unto the words, as appears by Littleton, who interprets that they are to be applyed to the Heirs of both the partyes, and your reaſon is founded upon a wrong ground, and expreſſly againſt Littletons caſe; and for your ſecond reaſon it is of no waight, for the words are all one as if he had ſaid to the Heirs of the Husband and wife, begotten upon the wife. 3ly. We are not to frame a meaning againſt plain words, which ſhew the Donors intent to be againſt you. And the Baron cannot bar the Eſtate tayl as you ſuppoſe, for the Feme hath an Eſtate for life, and if ſhe ſurvive ſhe may revive the remaining Eſtate, and we muſt not conſider of inconveniences, which poſsibly may happen againſt the expreſſe words of the deed, and the multitude of conveyances made in this manner, are of no force to alter the Law. Ierman Juſtice as Roll, That the word Heirs ſhall be applyed to the Heirs of both partyes, becauſe voluntas donatoris ſecundum formam chartæ expreſſa eſt obſervanda. Nicholas and Ask Juſtices of the ſame opinion.

Tayl.

Garland againſt Yarrow.

Paſc. 1652. Banc. ſup.

Arreſt of Judgement in an Action for words.

This caſe being in arreſt of Judgement (formerly ſpoken unto) in an Action upon the caſe for theſe words, you are a knave, and keep a Bawdy houſe, was again moved by Chriſt. Turner, who held that the words are not actionable. 1. Becauſe they are of ſpiritual cogniſance. 2ly. It is not ſaid that he kept a common Bawdy houſe. 3ly, here is no ſpecial damage laid, 10 Car. Theſe words he is a pimp adjudged not actionable in Lewis and Whittons caſe. 4ly, It is not alleged that he willingly kept a Bawdy houſe, and then he is not puniſhable. Pepes on the other ſide held the words to be actionable, and cited Hill. 3 Car. Elſey and Hariſons caſe, thou art a whore, and a Bawd to thy daughter, and keeps a Bawdy houſe, which words were adjudged actionable, 24 H. 6. 14. 38, 39. Eliz. In the Lady Barkleys caſe, the keeping of a Bawdy houſe is an offence puniſhable at the Common Law, and therefore the words ſpoken are actionable. Roll chief Juſtice, To call one whore in London is Actionable, And the words here are actionable, for the keeping of a Bawdy houſe is a crime puniſhable at the Common Law, for the party may be indicted for it, and it ſhall be intended to be a common Bawdy houſe, although it be not ſo expreſſed, and the Plaintiff is ſcandaliſed by the ſpeaking of the words. Ierman Nicholas and Ask Juſtices were of the ſame opinion. Iugdement was given for the Plaintiff, niſi.

Caſe.

Indictment.

Snelgrave

Snelgrave and Boſvile.

Paſc. 1652. Banc. ſup.

Mich. 1651. rot. 200.

BOſvile brought an Action of debt againſt Snelgrave, as Heir unto his Father, upon an Obligation entred into by him unto the Plaintiff, the Defendant pleads riens per diſcent jour del bref. the Plaintiff replyes, that he had lands by deſcent, and upon this an iſſue is joyned, and the Jury find he had lands by deſcent, and name them particularly, and upon this a Judgement is given for the Plaintiff in the Common pleas, that he ſhall recover his debt of the lands deſcended, upon this Judgment a writ of Error was brought here, and the Error aſsigned was, that the Judgement ought to have been given generally againſt the Defendant, and not particularly of the lands deſcended. 2ly the Jury ought not to have found what lands particularly the Heir had by deſcent; but generally that he had lands by deſcent, becauſe the iſſue is general, whether he had lands by deſcent or not, and therefore the Judgement given upon this ill verdict is not good. Roll chief Iuſtice, The Judgement is unwarrantable, for the verdict is againſt the iſſue joyned, and the Judgement here ought to have been generall of all the lands and goods, and againſt the perſon of the Heir for his falſe plea, and not particular to recover of certain lands, as it is here, for this is not ſo good a Judgement for the Plaintiff, as the general Judgement is, and this Judgement may be againſt the Plaintiffs mind, for any thing doth appear to the contrary, and a like Judgement was reverſed in Alleyn and Holdens caſe in this Court. Ierman Nicholas and Ask of the ſame opinion. And thereupon the Iudgement was reverſed.

Debt againſt an heir upon an obligation

Iudgement. Verdict.

Error.

Floyd againſt Morgan.

Paſc. 1652. Banc. ſup.

A Writ of Error was brought to reverſe a Judgement in an Action of Treſpaſſe, for taking away of certain Houſhold ſtuff, and the Error aſsigned was, that the Declaration was incertain, for that it wanted latin words to expreſſe the things, for which the Action was brought, for the Declaration is for the taking away of quoddam inſtrumentum ferri, Anglice a gridiron, et quoddam inſtrumentum ferri Anglice a morter et quædam inſtrumenta ferri Anglice brandirons, which are words utterly incertain for the generality of them, what they may ſignifie. Roll chief Iuſtice, My Judgement is that the Judgement is erroneous, for we muſt not take meanings; becauſe we are bound up to proceed by the rules of the Law, and Statutes, and we are to conſider here whether there be Latin words in the Declaration, as there ought to be to expreſſe the things, for which the Action is brought, and certainly this word quoddam inſtrumentum ferri is too general to expreſſe any thing, and the Anglice added to it will not help it; for if the word precedent, in it ſelf, be not fit Latin to expreſſe the thing the Anglice ſubſequent is litle to be regarded, and theſe words being incertain the Declaration muſt be incertain, and ſo the Defendant cannot know what to anſwer to it, or how to defend himſelf as he ought to do, which may prove very prejudicial to him. Ierman Iuſtice, That iſſue cannot be certain, if the Declaration be incertain, and by the Common

Error to reverſe a judgment, a treſpaſſe for taking away of goods.

Anglice. Declaration.

Iſſue.

Common Law and Statute Law our pleadings muſt be Latin, and where there are not elegant Latin words to expreſſe things, we may uſe thoſe which they call barbarous words, if they be known, for uſe makes a language, and where there are no Latin words, we may coyn words, and add an Anglice to them, and here the Declaration is as incertain alſo, for the number of the things, as for the nature of them, for here is quædam inſtrumenta ferri, which may ſignifie any number be it more or leſſe, Nicholas and Ask ad idem. And ſo the Iudgement was reverſed, niſi, Antea.

Brian againſt Twite.

Paſc. 1652. Banc. ſup.

Arreſt of Iudgement in an Action for words.

AN Action upon the Caſe was brought for ſpeaking theſe words of the Plaintiff; you are a whore, and have plaid the whore with ſo many men you cannot number them; upon not guilty pleaded, and a verdict for the Plaintiff, it was moved in arreſt of Iudgement that the words are not actionable, for the ſaying the party had plaid the whore are words incertain, and do not enforce any Act of whoredom to be done by her; but Ierman Iuſtice abſente Roll chief Iuſtice gave Iudgement for the Plaintiff, for he ſaid the words ſhould be conſtrued to a common intendment.

Motion for Iudgement denyed.

THe Court was moved for Iudgement, upon a verdict given 2 years ſince, and the cauſe ſtayed till now by the Committee of indempnity; but it was denyed, becauſe it was the laſt day of the Term. Nota.

Paſc. 1652. Banc. ſup.

Certiorari to remove an endictment.

IT was ſhewed for cauſe why a certiorari ſhould not be granted to remove an indictment of battery, againſt an Attorney of his Court, preferred at a Seſſions of the peace in the Country, that the bill was found there, and the party hath entred into a recogniſance there to go to a tryal the next Seſſions. Roll chief Iuſtice, The recogniſance may be alſo removed by the certiorari, and what hurt can it be if the endictment be removed, and the tryal had at the aſsiſes, and if it be removed hither, we will not quaſh the endictment; but the party ſhall plead and carry it down, and try it at the next aſsiſes at his own charge.

Byron againſt Stonehowſe.

Paſch. 1652. Banc. ſup.

Trin. 1651. rot. 1658.

Error to reverſe a judgment in dower in the common pleas.

A Writ of Error was brought to reverſe a Iudgement given in a writ of dower in the Common Pleas, the Errors aſsigned were, that the Iudges of the Common Pleas had ſet aſide the verdict taken by default by the Iudge of aſsiſe, becauſe it ought not to have been taken, but a petite cape of the lands awarded, whereas though this was a fault in the Iudge to take the verdict, yet this is to be amended by a writ of Error, for the Iudge of aſsiſe, and the Iudges of the Common pleas in this caſe are but as one Iudge, Dyer f. 194. f. 76. and here is a waiver of the default, becauſe the enqueſt was taken at the prayer of the party, 27 H. 8. f. 18. 10 H. 7. f. 21:

And

And the Demandant may releaſe the default either expreſly, or implicitly, 3 H. 6. f. 48. 10 H. 7. f. 21. 3ly. Here is a diſcontinuance which is not helped, becauſe the Enqueſt is taken, by default, and the Tenant by the Judges taking advice is out of the Court, 7 H. 4. f. 14. pl. 13. Here is day given in Court to the Demandant, but not to the Tenant, and the Judges cannot adviſe afterwards. And here the judgment is given upon a default after a default, whereas the 2d. default was the ſame day with the 1. & not at another day, as it ought to have been. Hales on the other ſide held that the judgment was not erroneous, for here is no judgement, but only an awarding of the Enqueſt, and if it be not good, it is done by thoſe that had no power to doe it, and ſo not material, and the Judges of the Common place have a diſtinct authority from the Judge of the niſi prius. 2ly. Here is no releaſe of the default nor Enqueſt, nor can the Judge of the niſi prius take a releaſe of the Default; for by awarding the default the power of the Judge of the niſi prius is determined: And the releaſe ought to be of the default, upon which the judgement ſhould be given, and it is not ſo here. Next here is no diſcontinuance, for it is not neceſſary to give day to the Tenant by the Curia adviſare vult, for then there could be no petite Cape; And the judgement here is good, for there is no other day of default. Roll chief Iuſtice, The Judge ought to have called the Tenant, or to award a petite Cape of the land, and not to have taken the Enqueſt by default; but here the Judge of Aſsize did not award a petite Cape. For the 1 Exception The Judge of the niſi prius had no authority to take the verdict, and ſo that is done coram non judice, and ſo the nullo habito reſpectu to the Enqueſt by the Judges of the Common Pleas is good enough, and ſo they may in that Court award a petite Cape, and they may alſo adviſe, and there is no need for them to give a day of continuance to the party, for that were to take away that of which they would adviſe, and the ad alium diem is alſo good, and ſo there is no Error in the judgement. Affirmetur niſi.

Verdict by default.

Petit Cape.

Error.

Doctor Trigg againſt the College of Phyſicians.

Trin. 1652. Banc. ſup.

Hill. 1651. rot. 1145.

A Writ of Error was brought to reverſe a judgement given in the Common Pleas for the College of Phyſicians againſt Doctor Trigg in an action of debt brought upon the Letters Patents, and Stat. of 3. H. 8. for practiſing Phyſick without licence. The 1 Error aſsigned was, that it is ſaid that quidam Willielmus Trigg, and ſo it may be intended another party, and not the ſame, whereas it ought to have been prædictus Willielmus Trigg. But to this Roll chief Iuſtice anſwered, that the party came in and pleaded, and ſo he muſt néeds be the ſame party. The 2 Error was, that the Judgement was wholy given for the Preſident of the College of Phyſicians, whereas it ſhould have been given part for the Preſident, and part for the King. Hales in maintenance of the judgement anſwered, that the judgement is to be given for the party who brings the Action, and if the Action had been brought by the King only, Judgement ſhould have been given for him only, yet the money recovered ſhall be diſtributed as the Statute directs. Roll chief Iuſtice, The King may be better truſted than a Common Informer; So the Caſe is not alike, where the King brings the Action, as where the Informer brings it, for the

Error to reverſe a judgement for practiſing Phyſick without Licenſe.

King may receive all the money, and the Informer may have his part by Petition to the King, and here neither the Information nor the Verdict is purſued, for that is tam pro Domino Rege quam pro ſeipſo, &c. and here the Judgement is only for the Informer. The King may if he will, ſue alone and have Judgement for all, if he begin his ſute before the Informer, but if he begin it afterwards, the Informer ſhall have his part. And if the King do inform tam pro ſeipſo, as for the College, there the College ſhall have its part. For theſe reaſons the Judgement is not good, Therefore let it be reverſed, niſi.

Judgement.

Trin. 1652. Banc. ſup.

To vacate a Latitat. Superſedeas.

The Court was moved to vacate a latitat that iſſued out of this Court erronice, for that it was made returnable two days before the Term ſeem in Juſtice, Take a ſuperſedeas.

Godwin againſt Batkin.

Trin. 1652. Banc. ſup.

Hill. 1650. rot. 1477.

Error to reverſe a judgment in an Action upon a promiſe.

A Writ of Error was brought to reverſe a Judgement given in an Action of Treſpaſs upon the Caſe in the Court at Burton upon Trent, wherein the Plaintif declared, that the Defendant, in conſideration that he was indebted unto the Plaintif in 20 l. did aſſume and promiſe to deliver divers Cattel to I. S. to the uſe of the Plaintif, and for non performance of this promiſe he brought his Action, and had a Verdict and a Judgement. But the Judgement was reverſed, becauſe the Court held that here is no conſideration expreſſed which can relate to the diſcharging of the debt of 20 l. and ſo the promiſe is but nudum pactum, and the Plaintif is, notwithſtanding the promiſe, at liberty to bring his Action againſt the Defendant for the money.

Conſideration. Nudum pactum.

Child againſt Sir Iohn Lenthall.

Trin. 1652. Banc. ſup.

Arreſt of Judgement in an Act on for an eſcape.

An Action of Eſcape was brought againſt Sir Iohn Lenthall as Mareſchall of this Court, wherein the Plaintif declared, that whereas I. S. was indebted unto him by Obligation in a certain ſum of money, and was thereupon by a latitat out of this Court arreſted, and did thereupon put in Bail, and did appear to the Action, and the Plaintif obtained a judgement againſt him, who thereupon in diſcharge of his Bail did render himſelf to Sir Iohn Lenthall in Execution, and that afterwards Sir Iohn Lenthall had ſuffered him to eſcape, per quod, &c. to this Declaration Sir Iohn Lenthall pleaded, and a Verdict was had againſt him. Wild in Arreſt of Judgement takes theſe Exceptions to the Declaration. 1. It ſaith that the Principal rendred himſelf in Execution to diſcharge his Bail, and ſaith, that afterwards he eſcaped, whereby he could not have him in Execution, which ſeems contradictory to what he formerly ſaid. 2ly. He ſaith that he rendred himſelf to the Mareſchall, whereas he ought to ſay that he rendred himſelf to the Court; for it is the Act of the Court that turns him over to the Mareſchal. Roll chief Juſtice, He cannot ren-

der

der himſelf to Sir John Lenthal in diſcharge of his Bail; for only a Judge can take and diſcharge a Bail, and not Sir John Lenthall; but here it is that he did it in Court, and therefore it is well enough; for he may render himſelf to Sir John Lenthall in Court, though out of Court he cannot, and therefore let the Plaintif have his Judgement. Bail.

Rogers and Done.

Trin. 1652. Banc. ſup.

Paſch. 1652. rot. 354.

IN an Action of Trover and Converſion for 3 Cart loads of Oats, Barlie and Peaſe, The Defendant pleaded a ſpecial Plea to this effect. That the land where the Trover was ſuppoſed to be is 5 acres of land lying in B. and that is within the County Palatine of Cheſter and that he holds the land for term of years, and by vertue thereof did ſow and take the Corn thereupon growing, and traverſeth the Converſion out of the County Palatine, and avers that there are Courts of Juſtice held within the County Palatine, ſo that Juſtice may there be had, and ſays, that he ought to be ſued within the County Palatine, and not elſewhere, and therefore demands Judgement if he ought to be ſued in this Court. To this plea the Plaintif demurred, and ſhewed for cauſe, that the Action being for a tranſitory matter, it may be tryed out of the County Palatine as well as within, although if it were for a local matter it would be otherwiſe, and the party here hath pleaded not guilty, which may be tryed any where, Cooks Inſtit. 282. In ſome Caſes an Obligation bearing date at Cheſter may be ſued in another place, 19 E. 3. Fitz. Gar. 29. 45 Ed. 3. Fitz. viſne 50. 9. Iac. C. B. Richardſon and Meares, a Battery in Cheſter tryable out of it, 11 H. 4. f 40. Crompton Iuriſdiction of Courts, f. 213. Tranſitory things emergent in the County Palatine of Cheſter may be tryed elſe-where, 45 E. 3. f. 17. And ſo it was prayed the Defendant might plead over. Serjeant Glyn on the other ſide held, that this plea was a good plea to the Juriſdiction of the Court. Here are many matters of fact confeſſed, and the matter in Law is, whether the title of the land within Cheſter ſhall be tryed out of that juriſdiction. In 31 Ed. 1. in the Exchequer it is clear they have conuſance of Pleas. Roll chief Iuſtice to that answered, but it is not that they ſhall be removed thence; Serjeant Glyn proceeded and ſaid, that alſo upon a reference to 4 Judges by Queen Elizabeth, it was certified, that all Actions real and perſonal ariſing in Cheſter are tryable there, and not elſewhere, 22 E. 4. Fitz. Iuriſd. 61. 21 H. 7. f. 23. 1 H. 7. 26. 10 H. 6. 14. 2 H. 4. f. 25. As to the Objection, that this is a clear perſonal Action, and therefore tranſitory. 1. I deny the authority of Cook in his 4 Inſtitutes cited on the other ſide. Next the Action here by the pleading of it is made real, and then though Cooks opinion ſhould be Law, it comes not home to our caſe, and a tranſitory action may be made real by the pleading of it, 27 H. 6. f. 1. Hill. 38 Eliz. Banc. ſup. Hill. 2 Car. in Belamy and Bolthorps caſe in this Court, 6 rep. 14. A thing is tryable there where the beſt conuſance of it may be had, 6 H. 7. 2ly. The averment of the party here is, that all actions perſonal and real within Cheſter are tryable there, and this being matter of fact is confeſſed by the Demurrer, 9 H. 7. Porter & Nicholls in the Exchequer 10 Car. And it would be a great inconvenience to try the title of lands lying within Cheſter out of it, for ſo all cauſes real may as well be tryed in forein Counties, even through all England, which would be very miſchie- Arguments upon a Demurrer to a Plea to the juriſdiction of this Court.

Tryall. vous. Roll chief Iuſtice, If we can avoid it, it is not good to try cauſes in forein Counties; but here you have by your demurrer confeſſed, that all cauſes real and perſonal ſhall be tryed there, and what ſay you to that?

Traverſe. Waiver. Iſſue. 2ly. It is to be conſidered whether your Traverſe be not repugnant to your Plea, for you have waived the plea to the juriſdiction of the Court, and put your ſelf upon an iſſue by the traverſe, which you ought not to have done; but you ought to have relyed upon your plea to the juriſdiction of the Court, for as the traverſe is taken, untill a tryall be had in the cauſe, we cannot tell whether the Trover and Converſion be within the County Palatine, or out of it, and this is matter of ſubſtance, and tryable, and therefore it would be hard to maintain your plea. At another day the caſe was argued again, and firſt by Twiſden for the Plaintiff, and he took three things into conſideration. 1. Whether the plea were a meer plea to the juriſdiction. 2ly. Whether it be made good by the demurrer. 3ly. Whether the traverſe have not ſpoiled the plea. 1. He held the plea was not good, becauſe the Action is meerly tranſitory, and may be laid in any place, 2. Mar. Br. traverſe 983. Cooks Lit. f. 202. and the Defendant cannot plead that the cauſe of Action lyes in any other place, than where the Plaintiff layes it, Cooks Juriſd. of Courts is full authority in point, what ever is objected againſt it, 30 H. 6. f. 6. I admit of the juriſdiction of the County Palatine; but yet it muſt not entrench upon the Common Law, and I admit all the books cited; but they are of other local matters, or of things tranſitory, which are fixed to Cheſter by the pleading of them, and Dyer 122 comes not to our caſe nor croſſes the caſe of 10. Iac. 3. rep. Ridgwayes caſe, and here it ſhall be intended that the Jury may there have beſt conuſance of the matter where the Action is laid, and not elſe-where, although the Action do ſavour of the Land. For the ſecond matter the demurrer makes not the plea good, for the law ſayes it is not good, and the partyes cannot alter the Law, Burtons caſe, 5. rep. f. 59. 5 H. 7. 1. 3ly. The traverſe makes not the plea good, for the traverſe is waived, and he relyes upon another matter, 5. Car. rot. 817. Burton and Corniſh, the traverſe taken, took away the juſtification before pleaded, ſo doth it here, and the traverſe here is not good, becauſe it is in a tranſitory matter. Where one juſtifies a thing done, it ought to be confeſſed that he did it, ſo if he traverſe that he hath not done a thing here, it implyes it is done ſome where elſe. Latch for the Defendant made this queſtion, whether upon the matter as it is here pleaded, the juriſdiction of this Court be taken away, and he held it is. It is the honour of this court to maintain the juriſdiction of all other Courts and therefore I hope, it is not misbeſeeming me to put it in mind of this honour that belongs to it, I believe that according to the antient Law of the land, actions ought not to be laid elſe-where, then where the matter that cauſed them did ariſe, although that now by cuſtom it is grown otherwiſe. Although the Plantiff may fix a tranſitory Action, where he pleaſeth in ordinary matters, yet he cannot do it where the matter ariſeth within a ſpeciall juriſdiction, as the caſe here is. It is not a good allegation that binds up the juriſdiction of this Court, except where it appears that the allegation is true, & the allegation here may well ſtand with law, it being in the Caſe of a County Palatine, which hath ſuch a juriſdiction incident to it, & this Court Ex Officio ought to take notice of the Juriſdiction of the County Palatine and that they have authority to hold pleas, 45 Ed. 3. f. 10. 50 E. 3. pl. 10. 10 H. 6. 16. The averment is, that the party remains within the juriſdiction of Cheſter, that there may not be intended to be a failer of juſtice, by the parties going out of the Juriſdiction where the offence was done, 44 & 45 Eliz. Criſp and Decro. Neither is the plea

plea by the traverſe become ſo vitious, as to retain the Juriſdiction of this Court thereby; For the County Palatine cannot give up their juriſdiction to this Court, as antient Demeſn Courts, and other Courts may by the miſpleading of the parties, for their pleading is coram non judice, 10 H. 6. 13. b 9 H. 7. 12. 45 E. 3. f. 7. 22 E. 4. 23. 31 H. 6. 11. Nor doth the traverſe here waive all the precedent matter, but ſtands with it although it be made narrower by it; but nothing is here waived, Dyer 165 Here is an iſſue in ſubſtance, which is good, although not in the letter, and the ſtraightning of it ſhall not hurt, and the Court is neither inveigled, nor the party wronged by it, Dyer 369 Hob. 119. This traverſe binds not the other party to joyn iſſue upon it; but there may be a traverſe upon a traverſe, and he may plead another plea, Hob. 18. Newmans caſe. Roll chief Iuſtice, In your preſcription you have averred that he was an inhabitant; but you have not averred that they ought to hold plea of tranſitory matters, if the party inhabit out of the juriſdiction, and here the party ought to be ſummoned, and if he dwell out of the juriſdiction, what remedy can be had againſt him then, for how can he be ſummoned? And we cannot judge of the juriſdiction; but by your pleading, and by your traverſe you have tripped up your own heels. Tryall. The reaſon why tranſitory actions may be laid in any County is, becauſe that otherwiſe juſtice might fail, for the party may do a fact in one County, and then remove to another, ſo here the party may do wrong within the County Palatine, and then go out of it to avoid juſtice. At another day Wild argued for the Plaintiff, and Shafto for the Defendant. Wild held that the plea was ill, 1. In the inducement 2ly. It is ill in the ſubſtance of it, 3ly. The traverſe is not good. The inducement is ill, becauſe it doth not confeſs a converſion; but here is a general iſſue only pleaded, 9 E. 4. 5. 12 E. 4. 12. It is ill in the ſubſtance, becauſe the uſage pleaded is againſt Law, and will cauſe a failer of juſtice, which ought not to be, for the Law leaves no perſon wronged without a remedy, 19 E. 3. 29. Fitz. Iuriſdict. 50 E. 3. pl. 10. 44. 45 Eliz. Criſp and Verols caſe, 2 R. 3. 4. Harid and Paytons caſe, 24 Car. 48. 2. inſtit. 4. Cook juriſdict. 213. 14 E. 4 25. Next the traverſe hath waived all the matter pleaded before, and becauſe the plea was good before, there was no neceſsity to take it, 20 E. 4. 2. and the traverſe is alſo too ſtraight, for it hath tyed up the matter to Wellington, and ſo he prayed a reſpondes ouſter. Shafto on the other ſide held the plea good, and argued much to ſhew the juriſdiction of the County Palatine, and cited Cook juriſdict. f. 219. 22 E. 4. 34. per collow, Dyer 156. Hill. 8 H. 7. rot. 228. and he ſaid the plea is good, though it be not confined to the inhabitants within Cheſter, for there was no neceſsity to plead thus, and it had been enough to have pleaded generally, becauſe this Court takes notice of the juriſdiction of Cheſter, 11 Rich. 2. Fitz. breif. and the pleading hath alwayes been in this maner, as may appear by the Book of entrys, 1 E. 4. f. 11. and this cuſtom by conſtruction of law, is neceſſarily to extend to the inhabitants within the juriſdiction, 21 H. 7. 40. Dyer 46. Raſtall 128, 129. the privilege of Cheſter follows the perſons of the inhabitants, and ſo there can be no failer of juſtice as is objected. And for the traverſe, though it be ill, it ſhall do no hurt in this caſe to take away the cuſtom, for upon the entire retorn, it doth appear that the Action lyes within the juriſdiction, and if Judgement be given here, it is coram non judice, and ſo the traverſe is not material, 9 H. 7. 12. 37 H. 6. f. 26. Cooks Mag. Char. cap. 24 Mag. Char. f. 241. Weſtm. 1. C. 35. Bract. 260. Hill. 7 Iac. Dymocks caſe in this Court. Nicholas Iuſtice anſwered the Juſtices of this Court are not bound to take notice of the cuſtom of Cheſter, otherwiſe than as it is alleged. Roll chief Iuſtice, The matter is whether we can take notice of your caſe, otherwiſe than you Notice.

have pleaded it, and your plea is naught, and the party may demurr upon it, for it appears not whether the cuſtom extends to Wellington where the trover was, becauſe it appears not whether Wellington lie within the County Palatine of Cheſter or no, and the Plea cannot be good in part, and ill in other part, as is ſuppoſed. Ierman Juſtice, The Declaration here is good, and if the plea be not good to anſwer it then it is ill. Nicholas Juſtice, The Plea is contrary to law and reaſon, and Common ſence, and there ought not to be a failer of Juſtice. Ask of the ſame mind. Roll chief Juſtice, We muſt take all the matter as it is pleaded, and if the Plea be ill, the other party ſhall not be ſaid to confeſs any thing. And here you have pleaded a plea in Bar, viz. Not guilty, and you have alſo Pleaded to the juriſdiction of this Court, which cannot be; and we are not now to examine the juriſdiction, but the pleading. Therefore, ſhew cauſe Monday next why you ſhall not plead in Chief.

Plea.

Confeſſion.

Griffith againſt Thomas.

Trin. 1652. Banc ſup.

Mich. 1651. rot. 340.

Error to reverſe a judgement in acb in the C. B.

A Writ of Error was brought to reverſe a Judgement given in the Common Pleas in an Action of Debt upon an Obligation to ſtand to an Award, and the Errors aſsigned were, 1. That whereas the Award was to pay a certain ſum of money, at or before the 25 day of December, the breach aſsigned is, that he paid it not at the 25 day. 2ly. Whereas there are 2 parties of one ſide, and one on the other ſide that ſubmitted to the Award, The Award is that one party ſhall not proſecute the other. 3ly. The Condition is that the Award ſhall be made the 20 day of ſuch a month, and it is ſet forth that the Award was made before the 20 day, and doth not ſay what day it was made; But the Councel relyed upon the 1 Exception; And to that Latch on the other ſide anſwered, That if it be paid before the 25 day, it is then payed at the 25 day. 2ly. The Condition requires the award to be made under their hands, & the ſubſequent averment is to no purpoſe, And as to the 3. the words Alter partium extends to all parties, and beſides, the breach is not aſsigned upon that. Roll chief Juſtice, If it be paid before the day, it is paid at the day, and ſo that is certain enough. 9 H. 7. Another exception was taken, that the condition was that the Arbitrement ſhould be put in writing by the Arbitrators, and it is not ſo here expreſſed, but only generally that it was put in writing. Roll chief Juſt. It is not to be neceſſarily underſtood that it muſt be put in writing by the Arbitrators themſelves. Another Exception was taken that here is an Outlawry after judgement, & there is a fault in the Outlawry, for in the Writ to the Sheriff it is præcipipimus vobis, inſtead of præcipimus vobis, & the year of our Lord is in Figures. And 2ly. it is ſecundum conſuetudinem regni Angliæ, whereas it was in the time of the Keepers of the Liberty of England. Roll chief Juſtice, If the word be præcipipimus, then there is no command to the Sheriff, for that word ſignifies nothing, Therefore let the Outlawry be reverſed, and judgement affirmed.

Award.

Trin.

Trin. 1652. Banc. ſup.

IN an Action upon the Caſe, the Plaintif declared, that in ſuch a High-way the Defendant digged a hole, and that by reaſon of that hole, as he was travelling in the way with his Gelding, his Gelding did fall and hurt himſelf, to his damage, &c. Upon not guilty pleaded, and iſſue joyned, at the Tryal, this evidence was given to the jury, namely, That the Plaintifs Servant was driving his Maſters Gelding in the way, being loaden with Lead, and that by reaſon of the hole he fell, &c. To this evidence it was demurred, and for cauſe it was ſhewed, That by the evidence it neither is proved that there was ſuch a way, nor what perſon digged the hole, both which are part of the iſſue to be tryed, and ſo the evidence proves it not, and therefore is not good to find the Verdict for the Plaintif, as the Jury have done. Roll chief Juſtice, This evidence is no more than a ſpecial Verdict, and it ought to find the way and the hole digged, and all the matter conducing to the iſſue, and therefore it is not good as it is, Therefore let the Verdict be quaſhed, and a new Venire awarded. Demurrer to an evidence. Verdict. Venire.

Heard againſt Read

Trin. 1652. Banc. ſup.

IN an Action upon the Caſe for words, the Caſe was this, the Defendant being brought before a Juſtice of Peace to anſwer a crime objected againſt him, the Plaintif appeared as a witneſs to teſtifie againſt him; whereupon the Defendant to weaken his Teſtimony did ſpeak theſe words of the Plaintif before the Juſtice of Peace, Thou haſt been a contentious man this 30 years, and a Breeder of ſtrife, and haſt taken a falſe Oath againſt my Brother and Siſter in a matter of incontinency, and haſt taken 20 s. for it, and I will ſhew it upon Record. Upon not guilty pleaded, and a Verdict for the Plaintif, It was moved in Arreſt of Judgement, that the words were not actionable, becauſe it is not ſaid that he is perjured in any Court of Record, but, that he will ſhew it upon Record, And 15 Car. Morton and Clapams caſe was cited; but on the other ſide it was ſaid, that take all the words together they are actionable, and Trin. 22 Car. Osborn and Brookes caſe was cited. Roll chief Juſtice, The words are ſaid to be ſpoken falſo & malitioſe, and it is not ſaid in the Record that the party ſpoke them in his own defence, and it may be they were ſpoken by the by, and not in the judicial proceedings, but it appeared upon reading of the Record, that they were ſpoken to diſable the Plaintifs teſtimony: Whereupon Roll chief Juſtice ſaid, That the Action did as well lie in this caſe, as it doth lie for endicting one falſo et malitioſe, for Endictments are more favoured in the Law than private matters between parties. Therefore let the Plaintif have his Judgement, niſi. Arreſt of judgement in an Action for words. Caſe.

Cuſto-

Cuſtodes againſt Howell Gwinn.

Trin. 1652. Banc. ſup.

Arreſt of Judgement in an Endictment for perjury.

HOwell Gwinn was endicted of perjury, for taking of a falſe Oath in an Affidavit made before a Maſter of the Chancery, and was found guilty. It was moved in Arreſt of Judgement, 1. That it doth not appear by the Record that the Oath made was any thing material to the ſute depending in that Court, and ſo it is but an extrajudicial Oath, and is not perjury either by the Common Law, or by the Statute. 2ly. It doth not appear that the party took a falſe Oath, for it appears not whether the Maſter of the Chancery had any power to take this Oath, and if he had not, then it cannot be perjury. Latch enforced the 2 Exception, and ſaid, That a Maſter of the Chancery hath not power ex Officio to take an Oath, and therefore the party ought to ſhew that he had power to take this Oath; but if he hath power he ought not to take it upon the holy Evangeliſts, as it is here expreſſed, but it ought to be upon the holy Evangely, for the form is ſuper ſacro ſancto Evangelio, and not Evangeliſtis. Maynard on the other ſide prayed judgement, and that the party may be fined, and anſwered, that it doth well appear that the Oath was made touching the cauſe in queſtion, and the Endictment is here laid at the Common Law, and not upon the Statute. Next it is not neceſſary to ſhew that a Maſter of the Chancery hath authority to take an Oath, for it is the common courſe and practice of the Court of Chancery for the Maſters to take oaths, and the Chancery being a Court of Record here, this Court is bound to take notice of the Cuſtoms uſed in it. 3ly. The taking of the Oath upon the Holy Evangeliſts, and the taking of it upon the Holy Evangely is all one in effect. Roll chief Iuſtice, The moſt material Exception is, whether a Maſter of the Chancery hath authority ex Officio to take an Oath, and certainly antiently he had not, and therefore you ſhould have expreſſed that he had authority to take an Oath. At another day Hales ſaid, that it doth well appear by the Record, that the Maſter had authority to take the Oath of the perſon, and many preſidents are, as our Caſe is. Roll chief Iuſtice, The Preſidents are, that he hath authority to take an Oath prout per Recordum, &c. but it is not ſo expreſſed here. Nicholas Iuſtice, A Maſter of the Chancery of common right hath no power to take an Oath, and therefore in this Caſe you ſhould have pleaded preciſely that he had authority, otherwiſe it cannot be good. Hales at another day anſwered another Exception taken, that it did not appear that the Affidavit in which the falſe Oath was made, was filed, and then it was not upon Record, and ſo could be no perjury, and ſaid it is all one whether the Affidavit be filed or not, for the forſwearing is before the filing, & the party who takes the oath may chooſe whether he will file it or no, and therefore it is not neceſſary in the pleading to ſay, as it appears by the Record. Green on the ſame ſide, It may be that it was filed, and afterwards taken off from the file, and then he cannot ſay as it appears by the Record, and it would be miſchievous if the party ſhould not be puniſhed for the perjury, becauſe the Affidavit was not filed. Serjeant Glyn on the other ſide ſaid, that the Preſidents which are ſhewn to prove that a Maſter of the Chancery may take an Oath, are, that the party hath made an Affidavit, as it appears by the Record, and this is not ſo pleaded here, and therefore the Preſidents make for us. An Endictment cannot be at the Common Law for perjury in an Affidavit, if it be not filed, for the filing of it makes it a ground to frame the Endictment

Oath.

Filing.

ment upon, and ſo is it in other Courts, for the filing of it gives power to the Court to make rules, and orders upon it. Wild on the ſame ſide ſaid, that it appears not here poſitively, that the Affidavit was made in this cauſe alleged, but only by way of argument, which is not good. Roll chief Iuſtice, If it be in the ſame buſineſſe, it ſhall be intended to be between the ſame parties: Perjury at the Common Law is intended to be in ſome Court, and legal proceedings, for a falſe oath made before us not touching the matter in queſtion between the parties, an endictment of perjury lies not, and it appears not here, that the Chancery took notice of this Affidavit, for nothing was done upon it, and the words as it appears by the Record are material words, and do make up the buſineſſe, but they are here omitted. If one make a falſe oath, the party is puniſhable for it by an action upon the caſe, in caſe it be not perjury, for which he may be endicted for it. A falſe oath is one thing, and perjury is another thing, for one is judicial, and the other is extrajudicial. And the Law inflicts greater puniſhment, for a falſe oath made in a Court of juſtice, than if it be made elſe-where, becauſe of the preſervation of juſtice. Ierman Iuſtice ſaid, that perjury takes its name from perverting of juſtice, and therefore it is intended to be in a Court of juſtice. The Court held the endictment ill, and gave Iudgement againſt the Cuſtodes. Poſtea.

Perjury. Endictment. Caſe. Falſe Oath.

Trin. 1652. Banc. ſup.

VPon a return of the Coroner of an enqueſt found before him, that one had killed another man with a gun by miſadventure, The queſtion was whether the party might plead the general pardon. Thereupon Roll chief Iuſtice ſaid, if one kill another by doing an act which was needleſs for him to do, it is manſlaughter, and ſo was it adjudged in Sir John Chicheſters caſe lately, who killed his man by miſadventure in fencing with him; but if he kill another in doing an act which belongs to his calling, it is not manſlaughter, therefore men muſt be wary not to do things, which concern them not to do. And therefore this Act is not within the generall pardon; but he muſt purchaſe his pardon.

Whether one might plead the general pardon. Manſlaughter Pardon.

Williamſon againſt Norwitch.

Trin. 1652. Banc. ſup.

Hill. 1651. rot. 1668.

I S was indebted to Williamſon the Plaintiff by a contract, and to Norwitch the Defendant upon an obligation, and dyes inteſtate, Norwitch intermedles with the goods, Williamſon brings an Action of debt againſt him as Executor of his own wrong, Norwitch takes letters of adminiſtration of the Goods, and Chatels of I. S. and then pleads that I. S. was indebted unto him by Obligation, in the ſum of 50 l. and that he had taken out letters of adminiſtration of the Goods and Chatels of I S. and by virtue thereof doth retain Goods and Chatels of I. S. to the value of the ſaid debt, and beſides thoſe hath nulla bona, &c. To this plea the Plaintiff demurred, and the queſtion here was whether the Executor of his own wrong, afterwards taking out letters of adminiſtration pendente lite, may retain the goods of the inteſtate, to ſatisfie his own debt due upon Bond, or ought to ſatisfie the Plaintiffs debt due by contract. It was urged that he could not plead this plea, and theſe books were cited, 5. rep. Cowkers caſe,

Demurrer to a plea in debt againſt an Executor de ſon tort de meſn.

and 21 H. 6. f. 8. and 38 Ed. 3. f. 17. and it was ſaid that this caſe is ſtronger, becauſe the adminiſtration was taken pendente lite, 5. rep. Midletons caſe, 2 E. 4. 7. Latch on the other ſide held the plea good, and agreed Cowlters caſe 5. rep. and that the taking of letters of adminiſtration ſhall not deſtroy the Plaintiffs writ; but here is a legall adminiſtrator, and he might have reteyned the goods if he had been Debtor but in equal degree with the other; but he is a Debtor of a higher nature than the other, for his debt is by Bond, and the others but by contract, and the law requires his debt to be firſt ſatisfied, 2 H. 4. 21. Coment. 545. If he have more goods than will ſatisfie himſelf, he ought to make election what goods he will have, and alter the property; but where there are not more goods, it is not neceſſary to do it. And the law ſhould do wrong, if he ſhould not be firſt ſatisfied, for now he is a lawfull adminiſtrator, and alſo a creditor of a higher nature than the other, and becauſe he cannot bring an Action againſt himſelf for his debt, therefore he may by law retain the goods in ſatisfaction. And he may ſatisfie a debt upon a ſpecialty, before a debt due upon a contract, although a ſute were commenced for the debt due upon the contract, ſo here he may retain the goods. Roll chief Iuſtice, Why ſhall not here the adminiſtration purge the wrong which he did as Executor of his own wrong? It is true indeed that he ſhall not abate the writ, by taking letters of adminiſtration; but he may plead this plea in bar of the Action, and here it doth not appear but he is rightly Executor, without doubt the plea here pleaded, had been good to a ſtranger without letters of adminiſtration, and the law ſhall ſupply the retainer to him here, and there is no wrong to the Defendant; at another day it was moved again, and the Court held the plea good, and ordered Iudgement for the Defendant, niſi.

Abatement. Bar.

Strode againſt Homes.

Trin. 1652. Banc. ſup.

Hill. 1651. rot. 999.

Arreſt of iudgement in an Action for words.

STrode brought an Action upon the caſe againſt Homes, for ſpeaking of theſe words of him in relation of his office, he then being Churchwarden of St. Clements Pariſh in Oxford; Thou art a cheating knave, and haſt coſened the Pariſh of 40 l. Upon not guilty pleaded, and a verdict for the Plaintiff. It was moved in arreſt of Iudgment, that the words were not actionable, becauſe here was no ſpecial loſſe alleged by the Plaintiff, nor is he in any danger of corporal puniſhment, by ſpeaking of the words, Paſc. 10. Iac. Hopper and Baker. Roll chief Iuſtice anſwered, the matter is not ſo much the loſſe of his office, as the loſſe of his credit in being accompted a cheater. At another day Crook Senior moved for Iudgement for the Plaintiff, and ſaid the words are actionable, for a Church-warden is not meerly a ſpiritual officer, but an officer by the Common Law, and alſo by the Statute, Yarly and Ellis caſe, Sir Miles Fleetwoods caſe, Hob. rep. Bray and Haynes. Crook Iunior on the other ſide urged that this is not an office of profit, but of trouble and burden, and no ſpecial loſſe is alleged. Roll chief Iuſtice, Officers which have no benefit by their offices have more need to be repaired, if they be ſcandaliſed in their Execution of them, and here the ſcandal is great loſſe, to an honeſt man, and what other remedy can he have to repair himſelf, but by his Action on the caſe? Ierman Nicholas and Ask of the ſame opinion. And ſo Iudgement was given for the Plaintiff, niſi.

Caſe

Trin.

Trin. 1652. Banc. ſup.

VPon an Affidavit read in Court made by divers priſoners in the upper Benc h, priſon againſt Colonel Keyes a priſoner, that he is very unruly, & abuſeth his fellow priſoners, it was moved he might be removed to Newgate; But Roll chief Iuſtice anſwered, if he be unruly, the Gaoler muſt put on irons upon him, and keep him ſafely there, for this is no cauſe for us to remove him, for he lyes there under many actions, and we muſt not remove him to another priſon. Motion to remove a priſoner out of the upper Bench priſon to Newgate denyed.

Trin. 1652. Banc. ſup.

THe Court was moved that the party might not have a tryal at the Bar untill he had paid coſts upon being nonſute in a former action for the ſame lands. Roll chief Iuſtice, He ſhall not proceed to another tryal, untill he have paid his coſts, for by this means we ſhall incourage men to be vexatious. Againſt a tryal at the Bar till coſts paid upon a former nonſute. Coſts.

Freind againſt Baker.

[Trin. 1652. Banc. ſup.

VVIld moved to amend a Record wherein a Iudgement was given in the Common Pleas, after the Record was removed by a writ of Error into the Chequer Chamber, the fault to be amended was, that there is day given over to the parties from Eaſter Term to Michaelmas Term, and ſo Trinity Term is left out, which he conceived was but a miſpriſion of the Clark, and but a miſcontinuance in giving a wrong day to the parties, 2 H. 7. 11. 22 E. 4. 3. But Roll chief Iuſtice anſwered, that this is the act of the Court, and by your reaſon you may skip over 3 or 4 Terms one after another, without any continuance. The giving of a day more than is neceſſary, is no diſcontinuance, but here wants a day, which makes it not a miſcontinuance, but a diſcontinuance, and ſo was it adjudged, 1 Car. at Reading Term. Nicholas Iuſtice cited 21 H. 6. f. 16. to be adjudged that it is a diſcontinuance. Roll chief Iuſtice, A miſcontinuance is where one proceſſe is uſed for another, and ſo the proceſſe is miſtaken; but this is a diſcontinuance, and cannot be amended. For this is not upon a writ of Error out of the Common pleas as we ſuppoſed it to be, and that the Record had been amended there, for then we would have adviſed whether we would amend it here; but it is upon a writ of Error brought in the Chequer Chamber upon a Iudgement given here. For amendment of a record denyed. Diſcontinuance. Amendment. Miſcontinuance.

Brock againſt Vernon.

Trin. 1652. Banc ſup.

BRock brought an action of Debt againſt Vernon as an Executor upon a bond entred into by Vernon unto the Teſtator of the Plaintiff, the Defendant acknowledgeth the bond, but ſayes that he gave another bond in ſatisfaction of that Bond unto the Teſtator, which the Teſtator did Arreſt of judgement in debt upon a Bond.

Plea. Thing in Action.

accept of in ſatisfaction. The Court held this plea ill, and that the party might have demurred upon it, and needed not to have joyned iſſue, and put it to the Jury, for it is no good plea to ſay, that one did accept of one thing in Action, in ſatisfaction of another thing in Action, and here the Defendant hath confeſſed the debt, and therefore his plea being ill, Judgement ought to be againſt him, and Iudgement at another day was given accordingly.

Buckſtone againſt Shulock.

Mich. 1652. Banc. ſup.

Entred Trin. 1652. rot. 177.

Error to reverſe a judgment in the Common Pleas upon an information for ſelling of Wine without licence.

A Writ of Error was brought to reverſe a Judgment given in the Common Pleas upon an information, for ſelling of Wine without licence, contrary to the Statute. The Error aſsigned was, that the information was brought in the Court of the Common Pleas, which is in the County of Middleſex, whereas the offence is alleged to be done at Lambeth in the County of Surry, which ought not to be, as Daviſons caſe is in Hob. rep. Roll chief Iuſtice, How do you prove this to be within the Statute of 7 Ed. 6. If the Statute give liberty to Iuſtices of peace, and Oyer and Terminer, or Iuſtices of aſsiſe to enquire of this offence, then an information cannot be preferred in a County where the offence was not done, and the meaning of the Statute, 21 Iac. is not to put the party without remedy, and if he cannot ſue by the Statute of 7 Ed. 6. in the County where the offence was committed, then this Statute of 21 Iac. bars him not to prefer an information in another County. Latch of Councel againſt the enformer ſaid, that by the Statute of 7 Ed. 6. an information lyes before Iuſtices of Peace, or Aſsiſe, or Gaol delivery. Roll chief Iuſtice, I deny that by the Statute of 7 Ed. 6. the information could not have been brought in any other place, but in the Courts at Weſtminſter, and therefore that it is not neceſſary to bring it in the County where the fact is done, notwithſtanding the Statute of 21 Iac. & it is reaſon it ſhould be ſo, becauſe that no juriſdiction is given by the Stat. of 21 Iac. to Iuſtices where they had no power before. And the Court of Record expreſſed in the Stat. of 7 Ed. 6. ſhall be intended one of the Courts at Weſtminſter, and not a Court of Record elſe-where. Therefore ſhew cauſe why the Iudgement ſhall not be affirmed.

Tench and Hubriſon.

Mich. 1652. Banc. ſup.

The Court of the Admiralty cannot proceed criminally.

In the Caſe of Tench and Hubriſon upon a motion for a prohibition to the Court of Admiralty, It was held by the Court, that the Court of Admiralty cannot proceed criminally againſt one that is in contempt to that Court. Yet the Court ſaid, they would here the Civilians if they would ſpeak in it Saturday following.

Cydall

Cydall and Spencer and others.

Mich. 1652. Banc. ſup.

IN the Tryal between Cydall and Spencer and others, in an Ejectione firmæ it was ſaid by the Court, That if one do diſſeiſe me of part of a houſe, and I am in poſſeſsion of the reſt of it, It is at my election whether I will admit my ſelf out of poſſeſsion of the houſe or not. Where one may have Election.

Long and Hebb and others.

Mich. 1652. Banc. ſup.

IN a Tryal between Long and Hebb and others, it was ſaid by Roll chief Iuſtice, that Letters of Adminiſtration do relate to the time of the death of the Inteſtate, and not to the time of granting of them, and therefore an Adminiſtrator may bring an Action of Treſpaſs or a Trover and Converſion for goods of the Inteſtate taken by one before the Letters granted unto him, otherwiſe there would be no remedy for this wrong done. To what time Letters of adminiſtration ſhall relate. Relation. Treſpaſs. Trover.

Mich. 1652 Banc. ſup.

THe Court was moved to change the Venue in an Action brought for an eſcape: But Roll chief Iuſtice ſaid, it ought not to to be changed, for an eſcape is not local but tranſitory, for an eſcape in one place is an eſcape in all places. Where the Venue may not be changed.

Sidenham.

Mich. 1652. Banc. ſup.

IN the Caſe of one Sidenham Roll chief Iuſtice ſaid, It had been a queſtion, Whether if one plead payment at a day, he ſhall be admitted afterwards to plead another plea. Where one may vary from his plea.

Watts and Lowth.

Mich. 1652. Banc. ſup.

AN Action upon the Caſe was brought upon divers Aſſumpſits, and a Verdict given for the Plaintif. It was moved in Arreſt of judgement that the Jury had given more damages than were laid in the Declaration, whereas it was but a miſ-caſting in the quæ in toto attingunt. Roll chief Iuſtice ſaid, That the miſ-caſting is nothing if the damages given by the Jury be not more than the Plaintif hath laid in his Declaration. And therefore let him have his judgement. Arreſt of Iudgement in an Action upon an Aſſumpſit. Verdict.

Gough and Cann.

Mich. 1652. Banc. ſp.

Arreſt of Judgement in an Action for a Reſcous.

IN an Action brought for a Reſcous, and a Verdict found for the Plaintif, theſe Exception were offered in Arreſt of Judgement, 1. whereas he ſpeaks of the next Court, he doth not ſhew where that next Court was held. 2. The time of the Arreſt is not ſhewed, upon which the Reſcous is ſuppoſed to be made. 3. It is not ſhewed that the party reſcowed was in cuſtody of the Serjeant from whom he was reſcowed. 4. It is not ſhewed before whom the Plaint was, upon which the Arreſt was made. 5. The venire is ill awarded, for it is to the Coroners, where it ought to be to the other Sheriff, if one be a kin to the party, and Latch offered this Exception, that the Declaration ſounds in Treſpaſs, which Action doth not here lie for the party. But to that Roll chief Iuſtice anſwered, that it is in the election of the party to have an action upon the Caſe, or an Action of Treſpaſs; for an Action of the Caſe, or an Action of Treſpaſs lies at the election of the party againſt one for taking away his Wife. And he demanded whether the two Sheriffs of Briſtow where the Reſcous was brought were not one Sheriff, and whether the venire was not helped by the Statute. And it does alſo appear that the party was in cuſtody by vertue of the Proceſs, and it is now after a Verdict: And he ſaid, that if one reſcue the party who is arreſted at my ſute, becauſe that after the party is arreſted I have an intereſt in the body of the party, this Reſcous is a Treſpaſs to me, for which I may well maintain an Action of Treſpaſs. And Ierman Iuſtice ſaid, that the body of the party arreſted for debt is a pledge for the debt it ſelf. Iudgement was given for the Plaintif.

Election. Treſpaſs. Caſe.

Reſcous.

Pledge.

Liniſton and Maurice.

Mich. 1652. Banc. ſup.

Arreſt of Iudgement in an Action of Treſpaſs for not carrying away tithes.

THe Caſe was this, An Action of Treſpaſs was brought againſt a Parſon for not carrying away his Tithes in due time. The Defendant pleads that the Plaintiff gave him noe notice to fetch away his Tithes; the Plaintif replies that he did give him notice, but doth not ſhew where he gave him notice, and upon this Exception Iudgement was ſtayed: Afterwards Baldwin of the Inner Temple moved for Iudgement, and alleged that the not alleging the place was no Error. Nicholas Iuſtice, what ſay you to Durdens Caſe? Roll chief Iuſtice, There are many caſes where the place is not material, yet it muſt be alleged for the Venue. If Debt be brought againſt an Executor, and he plead fully adminiſtred; if the Plaintiff reply that he hath aſſets, he ought to allege the place where he hath aſſets: And I conceive that there ought to be a place alleged here, that a Jury who are neareſt the place, and ſo may have the beſt knowledge of the matter, may try it, although it may be tryed in another place; but if the tryal be ill the Verdict will not help it, but there muſt be a new tryal, Therefore it were good to replead as to the place.

Place.

Repleader.

Mich.

Mich. 1652. Banc. ſup.

One took out a Latitat out of this Court and arreſts the party, and refuſeth to take Bail of him, but carryed him into another liberty to charge him with an Action there; Upon this the Court was moved for an Attachment, for abuſing the proceſſe of this Court, And it was granted, niſi, &c. Attachment for abuſing the proceſſe of the Court.

Mich. 1652. Banc. ſup.

In a tryal at the Bar between Cheeſman and Turner and others in Treſpaſs and Ejectment, Roll chief Iuſtice ſaid, That if there be divers Executors of one Will, and one of them refuſe to prove the Will, he may plead ne unques Executor. And that a Will in writing may be revoked by parol, and revived again by parol. Where ne unques Executor is a good Plea. Revocation, Reviver.

Theoball and Conqueſt.

Mich. 1652. Banc. ſup.

Trin. 1652. rot. 1999.

After a Verdict in an Action of Treſpaſs and Ejectment it was moved in Arreſt of judgement, that the Leaſe was altered after pleading. On the other ſide it was moved for judgement. 1. Becauſe the Leaſe was only amended in matter of form, and not in ſubſtance 2ly. Becauſe by the rule of Court the Defendant is to confeſſe the Leaſe, and ſo it is not material whether the Leaſe be good or no. But Roll chief Iuſtice anſwered, that the Leaſe was amended in matter of ſubſtance, and if the Leaſe be defective we can give no judgement, and by your own ſhewing it is not good, and the rule of the Court doth not bind the Defendant to confeſſe the Leaſe otherwiſe than you have made it, and therefore let the judgement be ſtayed. Arreſt of Iudgement in Treſpaſs and Ejectment. Amendment. Iudgement. Confeſſion.

Fowke and Boyle.

Mich 1652. Banc. ſup.

Trin. 1652. rot. 460.

The Plaintiff brought an Action upon the Caſe for ſelling unto him falſe Bills of publique faith to the value of 800 l. knowing them to be falſe, with an intent to deceive him: The Defendant demurs upon the Declaration, And Babington of the Inner Temple offered theſe Exceptions to it. 1. That the Ordinance of Parliament for the bringing in of money & plate into Guildhall, and giving the Commiſsioners authority to give theſe bills to them that brought it in for re-payment thereof with intereſt at 8 l. per centum, per annum, was miſ-recited; for it is ſaid that the Ordinance was made by both Houſes of Parliament, whereas it ſhould be by the Lords and Commons in Parliament, for the Houſes are the places where they ſit, and can make no Ordinances, and he cited Mich. 13 Car, Tydalls caſe. Demurrer to a Declaration in Action upon the caſe.

caſe. 2. The Aldermen that are the Commiſſioners are not called by their Chriſtian names, as they ought to be, but only by their Sirnames. 3ly. It is not ſhewed in what manner the Bills were aſsigned to him, but he ſays only that they were aſsigned in due form of Law, which is too generally expreſſed, and to this he cited Mich. 10 Iac. Banc. Reg. Glaſs and Gowes caſe. To theſe exceptions Latch anſwered, That the mentioning of the Ordinance of Parl. and of the Aldermen, is but by way of inducement to the Action, and nothing to the ground of it, and therefore there need not be ſo punctual a recital as is furniſhed, neither is it neceſſary to ſhew how the Bills were aſsigned, and they are the Defendants own words, nor is it material how the money was to be paid. Roll chief Iuſtice, The ground of the Action is the deceit in aſsigning over falſe Bills, and affirming them to be true, and the other matters are meerly matters of inducement, and uſed only by way of recital, and not material to the Action. And you have confeſſed the deceit for which the Action is brought by your generall demurrer upon the Declaration. And therefore let judgement be for the Plaintif except better matter be ſhewn. Poſtea.

Judgement. Confeſſion.

Wood againſt Holland.

Mich. 1652. Banc. ſup.

Trin. 1652. rot. 1061.

Demurrer to a Replication in Treſpaſs and Ejectment.

WOod brought an Action of Treſpaſs and Ejectment againſt Holland, The Defendant pleads that the Plaintif did diſſeiſe I. S. of the Land, and then made a leaſe of it to him, and that afterwards the land did deſcend to the Plaintiff, The Plaintiff replyes that he was ſeiſed of the lands, and traverſed the diſſeiſin ſuppoſed to be made to I. S. And to this the Defendant demurs, and for cauſe ſhews that he ought to have traverſed the deſcent, and not the diſſeiſin. But Roll chief Iuſtice ſaid, That the traverſing of the diſſeiſin makes an end of all, and therefore it is well taken, as being the moſt material matter, although that the deſcent might have well enough been traverſed. And therefore let the Plaintif have Iudgement, niſi.

Traverſe. Seiſin. Deſcent.

Reckwitch and Moyle.

Mich. 1652. Banc. ſup.

Trin. 1650. rot. 503.

A writ of Error to reverſe a judgement given in an inferiour Court.

A Writ of Error was brought to reverſe a judgement given in an Inferiour Court, and the Writ of Error was to remove a Record, quod coram vobis reſidet de placito in Curia manerii de Cuttingbye, whereas the Record was, de placito in Curia Cuſtodum libertatis Angliæ auctoritate Parliamenti de Cuttingbye. And therefore againſt the writ of Error it was objected, that there was a variance between the writ of Error and the Record, and therefore that the writ of Error was not good; But againſt this was cited Lodge and Goodales Caſe in this Court 23 Car. that it is not neceſſary to recite in a writ of Error all the words of the deſcription of a Court, and here the writ is not to remove a Record out of an inferiour Court, but the writ of Error is to reverſe a judgement in a Record, quod coram vobis reſidet. Hales anſwered, That here is a right deſcription

tion of the Court, in regard of the place where it was held, and of the Judge of it, but not in regard of the Lord of it, and therefore he conceived it a material objection, because a part of the stile of the Court is mistaken, & not only an additional description of it. Roll chief Iustice answered, If it be but an additional addition or description, it is well enough as it is; but we will see what hath been done in like Cases heretofore; but me thinks that it shall be intended here to be Curia Custod. libertatis Angl. &c. for here it is in a Writ of Error which will not lie if it be not a Court of Record. But Nicholas and Ask Iustices said, It cannot be intended a Court of Record, but a Court Baron, and so the stile implies common ~~th~~ intendment. The Court advised till the next Term. This Case was afterwards moved by Latch, who said, That here is no variance between the Writ and the Record, although the Writ be not so full as it might have been to describe the Record, and it is agreeable to the antient and usual practice at this day, and cited the old book of Entryes 171. and said, that in Paytons case the Record was in Curia Domini Regis Civitatis, and the writ of Error was in Curia Civitatis Gloceſtriæ, Mich. 23 Car. Banc. Reg. rot. 569. and all Courts of Record are originally the Kings. Hales on the other side said, that the writ of Error ought to shew whose the Court is, and the rather, because it is said to be Curia Manerii. Wadham Windham, The Register is both ways, and by direction of Parliament the Common Pleas is stiled Curia de Communi Banco. But here the Record appears to be Custodum, &c. Civitatis, and the Writ doth not mention that. The Court would advise of the Presidents. This case was again moved, and Lodge and Woodhalls case, 22 Car. urged, that the Return of the Certiorari upon the writ of Error was not good for the variance formerly alleged, but Wadham Windham held it good enough, and relyed upon Presidents shewed to Hern the Secondary, as the Court had directed. Hales on the other side urged that the variance made it not good, for it cannot be intended the same Court. Roll chief Iustice, here is no direct opposition between them, for they may both stand together, and the writ of Error intends it to be a Court of Record, and yet it is the Court of the Manor also, and therefore it is good in substance, De facto it is the Court of the Lord of the Manor, but virtually and in dignity it is the Court of the King; but the Venire is clearly vitious, and therefore let the Iudgement be reversed for that cause. Variance.

Jervis and Lucas.

Mich. 1652. Banc. sup.

THe Court was moved for one Iervis, that the Court might view his wound, and increase the damages given him by the Jury, because they had given him but twelve pence damages for his wounding, whereas the parties Arm was broken, and he was in great danger still to lose the use of it. But Roll chief Iustice answered, it appears not by his Declaration what manner of wounding it was he received, as it ought to have been, and how can we know how he was wounded? But we will advise, and hear Councel on both sides. At another day Serjeant Parker moved the same matter again, and cited 3 H. 4. f. 4. and 18 H. 4. f. 23. and Dyer, to prove the Court might increase the damages. Twisden answered, That the wounding ought to have been particularly expressed in the Declaration, that the Court might judge of it by the Record, and the party is not to Motion for the Court to view a wound to encrease damages.

be viewed by the Court upon the bare averment of the party made at the Bar. To which Roll chief Iuſtice agreed, and ſaid, how can it appear to us that he was wounded ſo as you aver by this Battery? for it may be he was wounded ſince your action, neither can you now diſcontinue the Action, becauſe it is after a verdict, ſo that you are now without remedy.

View.

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Diſcontinuance.

Mich. 1652. Banc. ſup.

Motion for a Prohibition to the Prerogative Court.

THe Court was moved for a prohibition to the Prerogative Court, becauſe they do proceed to examine witneſſes there, to diſprove a will that was proved there 20 years ſince, by which Will lands were deviſed, and the lands are ſold, and this they do to prevent a tryal at Law touching the title of the land directed out of the Chancery. Roll chief Iuſtice anſwered, they may examine the probate there; for you have libelled there to take benefit of the probate, and therefore the other party may diſprove the probate if he can, as far as concerns any goods deviſed by the will, And therefore we will grant no prohibition.

Mich. 1652. Banc. ſup.

Motion to make Scavengers execute their Office. By-laws. Mandamus.

THe Court was moved for the Pariſhioners and Officers of the Pariſh of Clarkenwell, to make Scavengers that are elected in that Pariſh to ſerve the Office. Roll chief Iuſtice anſwered, It is marvel that the City of London do not look to this, for they have power by their by-laws to make men ſerve ſuch offices, yet take a mandamus for them to be brought hither to ſhew cauſe why they will not execute the Office.

Acton and Ayres.

Mich. 1652. Banc. ſup.

Error to reverſe a judgement in the Common Pleas in an Ejectione firmæ. Iudgement.

A Writ of Error was brought to reverſe a judgement given in the Common Pleas in an Ejectione firmæ, and the Error aſsigned was, that the judgement was quod querens recuperet, & the words quod defendens capiatur are omitted. And upon this Exception the Court reverſed the judgement, for they ſaid in this judgement thus entred there is no return of damages, nor a Capiatur, and ſo the Common-wealth is cozened of the fine, and the Defendant barred from bringing his writ of Error.

Dawkes and Coveneigh.

Mich. 1652. Banc. ſup.

Hill. 1650. rot. 653.

Special Verdict in an Action of Treſpaſſe quare clauſum fregit.

COveneigh was endicted for felony for breaking the houſe, and taking 250 l. out of the houſe of Dawkes, and found guilty, and was burnt in the hand, afterwards Dawkes brings an Action of Treſpaſſe quare clauſum fregit, and for carrying away the 250 l. againſt Coveneigh, who pleads not guilty, and thereupon a ſpecial verdict was found to this effect, that the Defendant did feloniouſly break the houſe, and carry away the 250 l. and was endicted for it, and was found guilty, and burnt in the hand for it, and

if

if upon the whole matter, &c. The queſtion upon the ſpecial verdict was, If after the Defendant was endicted and found guilty, and burnt in the hand for this fact at the ſute of the keepers of the libertyes of England, &c. an Action of Treſpaſſe quare clauſum fregit, and for carrying away the mony, be maintainable by the party, whowas thus robbed againſt the partythat robbed him or no. Latch of Counſel with the Plaintiff held, that the Action did well lye, and that the Plaintiff ought to have Judgement, and that this ſpecial matter found by the Jury, is no bar to the Action, for if he had been attainted for another Felony, it would not have barred the Plaintiff from his Action, after he had been diſcharged; but otherwiſe it is if the party bring his Action, whilſt the party ſtands attainted, or the party be attainted pending the Action of Treſpaſſe, 33 Eliz. Wade and Preſcots caſe in this Court, and 34 Eliz. Truſſels caſe in this Court, and 6 Ed. 4. 4. and in our caſe the Action was not brought till after the party tryed; But it is objected, that the Treſpaſſe here is brought for the ſame fact for which the party was tryed, and therefore it is unreaſonable that he ſhould be doubly puniſhed for it. To this I anſwer, that it was at the parties election at the beginning either to endict him, or to bring his Action of Treſpaſſe, Hudſons caſe, 4. rep. 43. And here the party hath made no election, for the party was endicted at the ſute of the Common Wealth, and not at the proſecution of the party, and ſo he hath made no election untill now. And if the Action might not be brought, it might prove very miſchievous, for the party might get himſelf indicted, and ſo couſen him that is robbed of this mony, Dyer 50. 8. rep. 13. And the highneſs of the nature of the endictment doth not drown the Action of Treſpaſſe, although that treaſon doth drown Felony, 1 R. 3. 1. 6 H 7. 5. And although the monies here ſtollen be forfeited to the State, by the conviction of the Felon, yet an Action of Treſpaſs lyes againſt the Felon to cauſe him to render damages pro tanto, although he cannot recover the mony in ſpecie. And the ſpecial verdict doth not find, that any evidence was given for the Plaintiff upon the endictment, but only for the State. And for authority he cited Markham and Cobs caſe, Trin. 2 Car. Entred 1 Car. rot. 112. Roll chief Iuſtice ſaid, That Iuſtice Doderidg, and Iuſtice Whitlock held, that the Treſpaſs lyes; But Iuſtice Iones held the contrary, becauſe if the party robbed might have his election, either to endict the Felon, or to bring his Action of Treſpaſs, many Felonies would be ſmothered, and this would prove very dangerous, and though the party robbed had endicted the Felon he might have had his goods, or he might have brought an appeal againſt him, and ſo there is no inconvenience to him, 4 Iac. In Higgins caſe it was adjudged where an Action of Treſpaſs was brought by the Husband for beating his wife, by reaſon whereof ſhe dyed, that the Action did not lye, becauſe it was Felony. Ierman Iuſtice differed from Roll chief Iuſtice, and ſaid, that the inconvenience on the other ſide would be greater than is alleged, if the Felon ſhall ſo take advantage of his one wrong, and in 2 Car. it was held that the Action doth lye. Roll chief Iuſtice ſaid, if the Felon have not waſted the goods, when he is hanged the party ſhall have reſtitution, but if he have waſted them, and hath other goods, he ſhall have reſtitution in value. But let Wild argue it again the next Term. Accordingly it was again ſpoken too by Wild, who argued that the Action of Treſpaſs did not lye, firſt becauſe the party did not make freſh ſute after the Felon, according to the Statute, 21 H. 8. which was made to encourage the proſecutor; but the party hath not proſecuted here, and it is all one to recover damages for the goods, and to recover the goods themſelves, ſo that I conceive that is no difference. And the great inconvenience which might come to the Common-Wealth if the Action ſhould lye, doth counterbail the damage that may accrew to the party,

Treſpaſſe.

Reſtitution.

if the Action lye not, And it matters not that it is ſaid the Treſpaſs is a diſtinct offence from the Felony, for it is drowned in the Felony, and therefore the party can have no ſatisfaction for it, Mich. 21 Iac. Ayers and Higgins caſe, C. B. 31 H 6. Br. 15. treſpaſſe 415. 4. Iac. Higgins and Butchers caſe, B. R. Roll chief Iuſtice, This is after a conviction, and ſo here is no fear that the Felon ſhall not be tryed; But if it were before conviction the Action would not lye, for the danger the Felon might not be tryed. And there is no inconvenience if the Action do lye, and ſince he could not have had his remedy before, he ſhall not now loſe it, and now there is no danger of compounding; for the wrong the reſt of the Iudges agreed with Roll, and ſo Iudgement was given for the Plaintiff.

Ellis and Pipin.

Mich. 1652. Banc. ſup.

Motion to diſcharge an outlawry.

THe Court was moved that an outlawry might be diſcharged, becauſe it is now pardoned by the Act of oblivion, for notwithſtanding it were not pardoned if it were an outlawry after Iudgment, except the monyes due, for which the party is outlawed, be payed to the party, as the book of 6 H. 7. f. 21. is, yet outlawryes before Iudgment are pardoned, and beſides the parties here did ſubmit to an arbitrement, touching the matters in difference between them, and an award is made. But the Court anſwered, that the outlawry cannot be diſcharged untill the party have brought his ſcire facias upon the Act, and it was alſo ſaid, that the party at whoſe ſute another is outlawed, hath an intereſt by the outlawry, as well as the State.

Scire facias Intereſt.

Prior and Hale.

Mich. 1652. Banc. ſup.

A letter of Attorney by paroll good to ſome intent.

A Letter of Attorney for one to appear to an Action is good enough by paroll to ſupport a Iudgement given thereupon. By Pinſent protonotarie of the Common Pleas. Nota.

Fowke and Boyle.

Mich. 1652. Banc. ſup.

Demurrer to a Declaration in an Action on the caſe.

FOwke brought an Action upon the caſe againſt Boyle, for ſelling of falſe bills of publique faith unto him, to the value of 800 l. the Defendant demurred to the Declaration, and took theſe exceptions to it. 1. That the ordinance of Parliament, upon which theſe bills of publique faith were grounded was miſrecited, for it is ſaid, to be made by both houſes, whereas it ought to be by the Lords and Commons. 2ly. The Aldermen who were authoriſed by the ordinance to give theſe bills of publique faith, are not named by their Chriſtian names, but only Alderman ſuch a one, naming the ſurname. 3ly. There is 70 l. expreſſed to be paid, as is mentioned in the papers, and it is not expreſſed at what time or place, as it ought to have been, 16 E. 4. f. 3. and 28 H. 6. f. 3. 4ly. Here is an aſsignment ſet forth to be made in due form of Law; but doth not ſhew in what maner, 10. Iac. Mich. Glaſs and Gower in this Court. Latch on the other ſide ſaid, that the mentioning of the ordinance, and of the Aldermen was but inducement to the Action, and there is no neceſsity to call the Aldermen by their Chriſtian names, but as they are called in the Ordinance; nor is it neceſſary to

ſhew

ſhew how the aſsignment was made, and theſe words are the words of the party; nor is it needfull to ſhew how the monies were to be paid. Roll chief Iuſtice, The cauſe of the Action is the deſceit in aſsigning the falſe bills and affirming them to be true, and all the other matters are but matters of inducement, and by way of recital, and not material, and you have confeſſed the deceit by your demurrer, and therefore let the Plaintiff have his Iudgement, niſi. Upon which rule Babington at another day moved the matter again, and urged that here was an aſsignment of papers mentioned, which could not be, for that it is a thing in Action, which is not aſsignable, nor can the Ordinance of Parliament give authority to aſsign a thing in Action. Roll chief Iuſtice, The ordinance of Parliament doth give authority to aſsign the papers. Latch the paper may be aſsigned. Green, The Action is brought for the deceit grounded upon the ordinance, and it is not neceſſary for the Ordinance to name the Aldermens Chriſtian names, and theſe may be true bills though not ſubſcribed, which is the deceit here alleged. Twiſden on the other ſide ſaid, that the acquittance is in nature of a bill, according to the intent of the Ordinance, for it is not only an acquittance of diſcharge, but to recover monies upon them, and ſo the Defendant calls them, and by the aſsignment the paper is aſsigned, and the Action is grounded on the deceit, and not upon the Statute. Iudgement was given for the Plaintiff.

Inducement.

Aſsignment.

Burcher and Orchard.

Mich. 1652. Banc. ſup.

Arreſt of judgement in an Action on the caſe for words.

BUrcher brought an Action upon the Caſe for words, againſt Orchard and his wife, the Jury find that the Baron was guilty, but that the Feme was not guilty, Wadham Windham moved in arreſt of Iudgement, becauſe that the Action is joynt, and one of them is found not guilty, and ſaid, it might have been otherwiſe if the Feme had been found guilty, and the Baron not guilty, and cited 9 Ed. 4. f. 51. Yard on the other ſide ſaid, that the verdict hath made this exception good, and if the Defendant would have taken any advantage of it, he ſhould have demurred to the Declaration. Roll chief Iuſtice denyed the difference taken by Windham, and ſaid, if any of the Defendants ſpake the words and be found guilty, the Action will well lye, and it is all one here, as if the Defendants were two ſtrangers, the Action being joynt; but the doubt is, whether it being after a verdict, this matter may be offered in arreſt of Iudgement. At another day Hales moved for Iudgement and ſaid, it was all one if any of the Defendants be found guilty, as if both of them were found ſo, and although it do appear by the Declaration, that the Action could not be brought joyntly againſt them both, becauſe the wrongs are ſeveral, and now one is found guilty, and the other is acquitted, and damages are aſſeſſed againſt one only. And now the verdict hath made the Declaration good, otherwiſe it had been if both had been found guilty and entire damages given againſt both joyntly. Latch on the other ſide ſaid, that the ſpeaking of the words cannot be a joynt Act, and therefore ought not to be ſo laid in one Declaration, for they are ſeverall Acts, and ſeverall offences, as the words do proceed from them ſeverally, and this caſe is not like the caſe of a decies tantum, nor the caſe of a joynt endictment againſt two, for a joynt endictment ſhall be accompted as ſeverall endictments, and here if the Feme had been found culpable, perchance it might have been good, becauſe though the wife only ſpeak actionable words, yet the

8 Ed. 4. f. 21. 11 H. 4. f. 5. 9 E. 4. f. 1.

Action ought to be brought against the Husband and the Wife. Roll chief Iustice, The Declaration is not well laid, for this cannot be a joynt speaking of the words by the Husband and Wife, and therefore they ought not to be joyned in the Action, therefore there ought to be several judgements and damages if you recover, viz. One against the Husband, another against the wife, but here is a verdict found which helps it, and this case is all one with the Case of 9 Ed. 4. for there the Declaration was not good as it is not here, and here is not a verdict against both, but only a discharge, and he cited Rethorick and Chappels case, where an Ejectment terræ & hæredis did not lie, yet there by releasing of damages to the heir judgement was given for the land, and here might have been a release of damages as to the wife if both had been found guilty, but here in effect is a judgement but against one of the Defendants. Ierman, Nicholas, and Ask Iustices to the same effect, and so judgement was given for the Plaintif.

Luddington and White.

Mich. 1652. Banc. sup.

Mich. 1651. rot. 458.

Demurrer to a plea in debt upon a Bill.

LUddington brought an Action of debt upon a bill against White, the Defendant pleaded, that after the money became due, he and the Plaintif did by parol submit to an award, and that there was an award made, that the Defendant should pay 8 l. to the Plaintif at such a house, and thereupon the Plaintif should give him a general release, and accordly he tendred the money; to this plea the Plaintif demurred, and for cause shewed that here is a submission by paroll pleaded after the day of payment expressed in the Bill, which is not good being by paroll, to discharge a debt due by specialty. But Wild answered, here were other things submitted besides this, and that may make the submission good. Roll chief Iustice, I see not what authority you have for this, nor how it can be, and 4 H. 6. if one be awarded before auditors to accompt, this cannot be referred, and here would be an inconvenience to take away a duty created by bond by paroll, therefore let the Plaintif have his Iudgement.

Discharge.

Reference.

Neve and Cros.

Mich. 1652. Banc. sup.

Arrest of Judgement in an Action upon the Case in nature of a Conspiracy.

NEve brought an Action upon the case against Cros for charging him with felony, and causing a Constable to carry him before a Iustice of Peace, and accusing him to the Iustice in these words, viz. He did come to my door, and set a Pistol to my Brest, and demanded money of me, and I for safegard of my life did give him what money he desired. Upon not guilty pleaded, and a Verdict for the Plaintif, it was moved by Fletcher of Lincolns Inn, that the words were not actionable, and therefore that the Plaintif ought not to have judgment, and that for these reasons, 1. Because there is but a matter of Trespass alleged in the words. 2ly. They are but argumentative, and do not charge the Plaintif directly with felony, and it may be the money demanded was due to the Defendant, and the Jury have found all that which sounds to charge the party with felony a-

gainst

gainſt the Plaintif. Twiſden on the other ſide ſaid, that the words ought to be taken together, and ſo they are actionable, and ought not to be ſevered; And the ground of the Action is for charging him with felony, and bringing him before the Juſtice, and ſpeaking the words there. Roll chief Juſtice, If the words ſound to charge him with felony, the Action will lie, and we cannot conceive otherwiſe but that he would have robbed the party, and we ought not to divide the words, for this were to argue a male diviſis, And you might have pleaded ſpecially, or have given the ſpecial matter in evidence. Ierman Juſtice differed, but Nicholas and Ask Juſtices agreed with Roll, and ſo judgement was given for the Plaintif, niſi, &c. Caſe.

Smith and Ward.

Mich. 1652. Banc. ſup.

IN an Action of debt upon an Obligation to ſtand to an award, and a verdict for the Plaintif, it was moved in Arreſt of Judgement that the Award was not good, 1. Becauſe here is money awarded to be paid to Baron and Feme, whereas the Feme is no party to the ſubmiſsion. 2ly. Here is 50 l. awarded to be paid, but it is not expreſſed for what, or that it is to be paid in ſatisfaction of any thing. 3ly. The ſubmiſsion is of all matters in difference till April 1652. and the Award is of all matters till December following. Latch anſwered, as to the 1 Exception, That the Baron did ſubmit to the Award, as well for his wife as for himſelf, and the Award is to make an end of matters which doe concern the Baron and Feme. 2ly. It is not requiſite to ſhew why the 50 l. is to be paid, yet it is ſhewed here, viz. for the ending of all differences. 3ly. It doth not appear by the Record that any matter is awarded but what is ſubmitted. Roll chief Juſtice, The Husband may ſubmit for his Wife, and here is an Award on both ſides, and if the Award be good in part it is well enough, nor is it neceſſary to ſhew why the money is to be paid, for all differences are to be concluded upon payment of the money, and the releaſe is to be made after this, therefore let the Plaintif have his judgement, niſi. Arreſt of Judgement in an Action of Debt upon an Obligation to ſtand to an Award. Submiſſion. Award.

Mich. 1652 Banc. ſup.

THe Court was moved for a Certiorari to remove divers informations preferred by an Informer at the Seſsions held at the Guildhall in London upon the Statute of primo Iac. concerning Leather. Roll chief Juſtice, The Informations were exhibited before the Juſtices of Peace, but it is a queſtion whether the Defendant cannot remove them, I believe there are preſidents to prove he may, otherwiſe the Defendant might be prejudiced; but enform us what the courſe is in the Common Pleas in ſuch caſes, In the mean time we will adviſe. Motion for a Certiorari.

Wall

VVall and his wife againſt Bye.

Mich. 1652. Banc. ſup.

Paſch. 1652. rot. 70.

Iudgement in an Action upon the Caſe for words reverſed. Error.

IVdgement was given for the Plaintiffs in an Action upon the Caſe brought in Briſtow for theſe words ſpoken of the Wife: She is Lews Reads Whore, and he knows her as well as her Husband. This Iudgement was reverſed upon a writ of Error brought in this Court, becauſe it did appear by the Record that the words were ſpoken before the late Act made againſt adultery and incontinency, before which time ſuch words had not been actionable.

Iennings and Downs.

Mich. 1652. Banc. ſup.

Trin. 1652. rot. 546.

Error to reverſe a Iudgement upon a non ſum informatus in an Ejectione firmæ. Certiorari.

A Writ of Error was brought to reverſe a Iudgement ſur non ſum informatus given in the Common Pleas in an Ejectione firmæ. The Error aſsigned was, that it appeared by the Record that the Declaration was before the Plaintif had any cauſe of Action. Wild anſwered, It doth not appear ſo, but if it do, then we ſay that there is a wrong original certified, and we pray that we may have a new Certiorari to have the true original certified. Roll chief Iuſtice, Take it, for it is in affirmance of a Iudgement, which ought to be favoured.

VVebb and VVaſhborn.

Mich. 1652. Banc ſup.

Arreſt of Iudgement in Treſpaſs.

VVEbb brought an Action of Treſpaſs for entring into his houſe and taking away divers goods againſt Waſhborn, and obtains a Verdict againſt him. It was moved in Arreſt of Iudgement, and theſe Exceptions taken to the Declaration, Firſt, That the Plaintif had declared for the taking away of a Trunk with writings, and doth not ſhew what the writings were. To this Wadham Windham anſwered, that the Declaration was good notwithſtanding, and cited a Caſe adjudged, where an Action was brought for taking away of two Trunks with Cloaths, and it was not ſaid what Cloaths, and yet held good: And a Caſe in 43 Ed. 3. 24. Another Exception was taken, That the Plaintif declared for the taking away of a great Beam, Scales and weights generally, and ſhews not what weights. To this Windham anſwered, that was well enough, becauſe the Beam and the Scales and Weights do all go to the making up of one and the ſame thing, and have all a relation one to the other, as an Action of Treſpaſs brought for the taking away de Caruca cum apparatu is well brought, as appears in the old Book of Entries. Latch on the other ſide ſaid, that the Declaration is uncertain, and that it is not like the caſe of the Treſpaſs de Caruca cum apparatu, for the Weights are nothing tending to make the Beam perfect, and it is as incertain as to bring an Action

for

for the taking away of five locks and keys, which hath been held to be naught. Hales on the other side said, that there is certainty enough, because it is all one to say a Beam with Scales and Weights, which makes all but one thing, as to say a Beam, Scales and Weights, or as to say a Ship with Anchors and Cables. Roll chief Iustice, How can we reduce the Weights to any certainty as the Declaration is laid? and if the Declaration had not been with the word and, it would not have helped it, for it may be there were a hundred weights, or a thousand weights. And therefore let the Iudgement be arrested nisi. Another Action of Trespass was brought by the same party, wherein he declared for the taking away of two great Trunks locked, full of Linnen, Woollen, Pewter, & amongst other things, for 4 pair of hangings, against which also, exception was taken in Arrest of Iudgement for the incertainty. Roll chief Iustice, I conceive that four pair of hangings is certain enough, but here is no vi et armis mentioned in the Declaration, which ought to be in an Action of Trespass for entring into his house, and taking his goods, as the case here is, and therefore for this cause let the Plaintif shew cause why a nil capiat per billam shall not be entred against him. Postea.

Incertainty.

Declaration.

It was said by Roll chief Iustice, That if one find my goods, and refuse to deliver them to me, an Action upon the case lies against him; although he convert them not to his own use.

Action on the Case for goods found.

Bond and Martin.

Mich. 1652. Banc. sup.

BOnd brought an Action of Debt upon a Bond given unto him as Sheriff to save him harmless, The Defendant pleaded a special plea, which amounted unto no more than that he had saved him harmless; to this Plea exception was taken, because he did not shew how he had saved him harmless. To this Wadham Windham answered, If it be that he hath from time to time saved him harmless, it is well enough. Roll chief Iustice, It is not so here, and therefore let the Plaintif have judgement, nisi.

Special plea to an Action of debt upon a Sheriffs Bond.

Mich. 1652. Banc. sup.

IT was said by Roll chief Iustice, that in an Action of Trespass quare vi et armis, &c. There ought to be an express averment in the Declaration of the force, and it ought not to be expressed with a whereas there was such a force.

Where an express averment ought to be.

Averment.

Baynton and Cheek.

Mich 1652. Banc. sup.

Trin. 1651. rot. 574.

BAynton brought an Action of Accompt against Cheek, as his receiver. The Case in sum was this, Baynton deposited two hundred pounds laid upon a horse-race in the hands of Cheek, to be delivered to the party that should win, according to Articles made betwixt the parties. Baynton supposing he had won the money, demands it of Cheek, who had delivered over the money to another whom he supposed had won the wager, and

Plea to an Action of Accompt.

the money being not delivered to Baynton, Baynton brings this Action against Cheek; Cheek the Defendant, as to one hundred pounds pleads, Ne unques receptor, upon which plea he was adjudged to accompt before Auditors, and before the Auditors he pleads in discharge of the accompt, that he had delivered over the money to another that won the wager. The Plaintif replyed, That there was foul play used by the other party, in striking one of the horses that ran the race upon the Nose, which was foul play, and against the Articles made betwixt them, and so he ought not to have delivered the money. The question was whether this was a good plea in discharge of the Accompt before the Auditors. Roll chief Iustice said, The plea was not good, in regard that the Defendant was adjudged to accompt, which doth imply that the money was fairly won by the Plaintif. Latch on the other side urged, that the replication was not good, but is impertinent, and therefore that the Plaintif can have no Judgement though the plea in Bar be not good, but that there ought to be a Repleader. At another day Green moved for Judgement for the Plaintif, and cited Hob. 132. Tarkers case, That an issue joyned upon impertinent matter is not helped by the Statute, and Kent and Halls case in Hob. Rep. but here is only an informal issue, which is helped by the Verdict, as are Rawden & Tues case, and Napper and Dawkes case in Hob. Reports, and Mich. 2 Car. Giggon and Purchases case, and said, that at the Common Law a Tryal upon a double issue was good, Broke Issue 30. 21y. This plea of the Defendant ought to have been pleaded in bar of the Action, and not in discharge before the Auditors, 1 Ed. 5. 2. Brook Accompt 83. and Dyer 196. Hungerfords case. Latch on the other side said, that the Replication is imperfect, and that the Verdict helps it not, the Defendant alleges the Articles made upon the wager, and the replication is about striking of the Horse, and answers not the matter pleaded in Bar, for the Act of the Rider, viz. the striking of the horse is not the Act of Bish, who made the Articles, and besides here is no breach of Articles, for they doe not prohibite to strike the Horse, or to ride foul, according to the Laws of a Horse-race, and the Rider doth not appear to be Bish his Servant, but a third person, and an Action of the Case lies against him, and not against Bish, who for ought appears hath done nothing against the Articles, and the matter in bar of the Accompt is well pleaded, and could not be otherwise, as the Case is, and it is well enough, though it be not pleaded in bar of the Action, for he could not have pleaded ne unques receptor pur accompt render, 9 E. 4. 16. Dyer 19 H. 6. 5. As he could not have pleaded the general issue, and given the special matter in evidence; And he cannot plead thus in bar of the Action of Accompt, and there is not one book that says otherwise, 41 E. 3. 31. 5 H. 5. 5. 19 H. 6. 5. 22 H. 6. 49. 21 E. 4. 67. 5 H. 5. 1. 5 E. 4. 41. 1 E. 5. 2. 27 H. 7. 35. Which books do shew it may be as well pleaded before the Auditors, as before in bar of the Action, 14 E. 3. Fitz. Accompt 68. 21 E. 4. 54 By these books he is compelled to plead these matters before Auditors; and the other books are not expresly against it: And in this case here is not a bailment purely to deliver over, but there is subsequent matter which directs how it shall be delivered over, and this matter he must plead. But admitting the Bar to be ill, if the replication be impertinent, and that he hath confessed that he hath no cause of Action, then it is with us, and here is no pertinent matter pleaded to avoid the matter confessed, and so the Judgement ought to be against the Plaintif, 3 Report, Ridgeways Case is, That if impertinent matter be in a replication, which answers not the bar, Judgement ought to be given against the Plaintif, and the matter confessed is not in bar of the Action of accompt as is objected. 1 H. 7. 2. 21 H. 6. 26. Hales, The matter of delivery makes not the matter. The subsequent

Plea.

ſequent matter is grounded upon the Condition made upon the delivery, Dyer 169. and here is an inſufficient bar, and the matter of the replication is good, according to the matter alleged in the bar, for the Articles ought to be interpreted according to the intention of the parties, which was, that the race ſhould be fairly won, which is not ſo here, 18 E. 4. 4. matter of Covenant by deed may be diſcharged by ſubſequent matter of fact; and the Riders here ſhall not be accompted meer ſtrangers, for they are Inſtruments made by the parties, and there is confidence put in them to perform the act of riding, and their acts ſhall be the acts of the parties; And here is nothing ſhewed in the replication which deſtroys the Action. Roll chief Iuſtice, If you have confeſſed the Articles, and alleged impertinent matter in the replication, how can you take advantage of an ill bar, and how can you interpret the intent of the Articles otherwiſe than is expreſſed by them? And how can we take notice here, that there was not fair play in the running of the race? and I doubt of the books cited by Latch, for where matter may be pleaded in Bar, the party ſhall not be compelled to come before Auditors, for that were unreaſonable. If I deliver goods to deliver over, and the party do it not, he is accomptable to me, but if he deliver them over, he is not, for he may plead this in bar of the Action, and ſo is it in the Caſe at the Bar, and you might have given the ſpecial matter in evidence here by the meal Act, and this plea here before the Auditors is cleerly void. The main doubt here is, whether there be apparent matter to the Court to hinder the Plaintiff from his Judgement, I conceive the Articles ſhall be interpreted fairly, and that there ought not to be foul play according to Common intendment, and it is material to ſhew there was foul play in the replication, and ſo the iſſue is well joyned, and Iudgement ought to be for the Plaintiff. Ierman and Nicholas Iuſtices to the ſame purpoſe as Roll.

Bar. Auditors Accompt.

Plea.

Mich. 1652. Banc. ſup.

IT was moved for Coronel Baxter, that he was elected high Steward of the Town of Colcheſter in Eſſex, and therefore that the Court would grant a mandamus to be directed to the Maior there to ſwear him in that place. Roll chief Iuſtice, If he be duely elected, and he refuſe to ſwear him, take a mandamus.

Morton for a mandamus to Colcheſter to ſwear the high Steward there.

Iaques.

Mich. 1652. Banc. ſup.

IN the caſe of one Iaques in an Action of Treſpaſs quare vi et armis, for the entring into his Land, It was ſaid by Roll chief Iuſtice, That if in an Action of Treſpaſs vi & armis for entring into land, the Defendant plead his entry by virtue of a leaſe for years, this amounts to no more than not guilty, and the Plaintiff may demur upon the Plea, and ſhew it for cauſe of demurrer, that it amounts to no more.

What plea amounts to not guilty.

Demurrer.

Mich. 1652. Banc. ſup.

Where one cannot be declared againſt in Cuſtodia.

IN the caſe of one Poynes Mawrice it was ſaid, that if one be committed to the upper Bench priſon, for a miſdemenour, and not for debt, one cannot declare againſt him, as againſt one in Cuſtodia.

Mich. 1652. Banc. ſup.

Motion for a certiorari to remove endictments.

THe Court was moved on the behalf of the Defendant, for a certiorari to remove certain endictments preferred againſt him in London, for ſelling of leather, to the end he may have an indifferent tryall, notwithſtanding the Statute, which directs that the endictment be preferred in the County, were the offence was committed. Roll chief Iuſtice, The Statute was made for the eaſe of the Defendant, and therefore he may remove the endictment, otherwiſe he ſhall be in worſe caſe than he was before the Statute. Therefore take a Certiorari.

Yongue and Petit.

Mich. 1652. Banc. ſup.

Paſc. 1652. rot. 159.

Demurrer to a repiication in debt upon a Bond.

YOngue brought an Action of debt againſt Petit upon an Obligation and declares, that whereas at the requeſt of the Defendant he did become bound with a third perſon, for the payment of a certain ſum of mony unto I. S. at a certain day, the Defendant became bound in an Obligation to the Plaintiff, the condition of which Obligation was, that if the Defendant did pay the mony unto I. S. at the day limitted, for which the Plaintiff was bound, and in the mean time ſhould ſave him harmleſſe, that then the Obligation ſhould be void, and for not performing this condition he brought his Action. The Defendant pleads that he cauſed the party, with whom the Plaintiff was bound, to ſubmit himſelf to Priſon, and that the Plaintiff was not damnyfied. The Plaintiff replyes, and denyes not the Bar; but ſayes that a latitat was ſued out againſt him, and that he feared to be arreſted, and upon this replication the Defendant demurs, and theſe exceptions were taken to it. 1. That he doth not ſay he took out a latitat prout patet per recordum. 2ly. It was queſtioned how the words in the mean time ſhall be underſtood. For the firſt exception Latch held it not material, and for the ſecond he held that they refer to the whole condition. Roll chief Iuſtice ſaid, it is not neceſſary here to plead non damnificatus if the party be in priſon, and the words in the mean time refer to the laſt words only of the condition; But one hath pleaded an ill plea, and the other hath alleaged an ill breach, therefore nil capiat per billam, niſi. Yet we will adviſe.

Relation.

Mich. 1652. Banc. ſup.

Endictment quaſhed.

AN endictment was quaſhed for not repairing a highway, becauſe it did not ſet forth from what place to what place the way did lead.

The

The Maior and Commonalty of London against Hatton.

Mich. 1652. Banc. ſup.

THe Maior and Commonalty of London brought an Action of Covenant againſt Hatton, for not paying a rent reſerved by them upon a leaſe for years made unto him of the Garblers office. The Defendant pleaded that this office was an office of truſt repoſed in the City of London, and could not be let for years, and conſequently there was no ground of Action. To this plea the Plaintiff demurs. Hales held that this office may be let for years, becauſe the Maior and Commonalty of London have a Fée ſimple in the office by their charter, and that they have not only a meer truſt repoſed in them to execute it. And 2ly. If it could not be granted, yet here is no forfeiture, for this leaſe ſhall be accompted but a deputation, and not a granting over of the office. And 3ly. The Leſſees covenant ſhall bar him from pleading this plea. Wadham Windham prayed a day to be heard. Roll chief Iuſtice, It will be hard for you to maintain the Defendants plea, For without doubt the Maior may make a Deputy to execute this office; But here he hath a Fée ſimple in it, and may thereby make a leaſe of it, and the Leſſees Covenant will bind him to pay the rent. Iudicium pro querente, niſi, &c. At another day Wadham Windham put the Caſe, and argued that the office of Garbler is not grantable, becauſe that this office is an office of truſt repoſed in a corporation, and it is ſo repoſed for the publique good, and the office it ſelf is not veſted in the Maior, and therefore he cannot grant it, although he may make a Deputie to execute it, for there the Acts of the Deputie do light upon the Maſter to be anſwerable for, 29 H. 6. 44. Dyer 238. a Maior of a Town may make a Deputie; but he cannot grant this office or make a revenue of it. Roll chief Iuſtice, It is conſiderable in regard it is an office of truſt, whether it may be leaſed out, although he may make a Deputy. Therefore argue it again the next Term.

Demurrer to a Plea in Covenant.

Deputation. Leaſe.

Baker and Andrews.

Mich. 1652. Banc. ſup.

Trin. 1650. rot. 1469.

BAker brought an Action of Treſpaſs, quare vi & armis clauſum fregit, and for taking his Cattel; the Defendant as to the force and arms pleads non cul. and as to the reſt he juſtifies that the Cattel went in through the defect of the Plaintiffs incloſures; the Plaintiff replyes that the Cattel came in through another mans fence into his ground; to this replication the Defendant demurs, & ſhews for cauſe that the Plaintif doth not aſsign where the place of the other Cloſe lyes, through which the Cattel came through. Yard ſaid it is not neceſſary to ſhew where it lyes, for they went not in where the Defendant hath alleged, & ſo the traverſe is well taken. Wadham Windham on the other ſide anſwered, here is a new aſsignment, and he anſwers not the Treſpaſs for which the Action is brought, and becauſe it is a new aſsignment, we muſt give a new anſwer; and therefore you muſt ſhew the place where your new aſsignment lyes. Roll chief Iuſtice, He pleads no more but that the Cattel came in at another place, than is pleaded

Demurrer to a replication in Treſpaſſe vi et armis.

Plea. ded, and he needs not ſhew the place, But here the Defendants plea is not good, for he pleads a preſcription where it ought to be a cuſtom, that the occuppers of the land ought to make the fences, and he ought not to preſcribe in the perſon. Iudgement for the Plaintiff, niſi.

Mich. 1652. Banc. ſup.

Who may take advantage of a fault in a Plea. Advantage. BY Roll chief Iuſtice, If there be a fault in a plea in matter of form, and after there is a fault alſo in the replication, and the Defendant demurs to it, but ſhews no cauſe of demurrer, he ſhall take no advantage of this fault in the replication; but he who joyns in the demurrer ſhall take advantage of the ill plea, and ſo was it adjudged, Paſc. 1. Car. in this Court in Prat and Thimblethorps caſe, and he ſaid that all faults in pleading are incurable at the Common Law, and therefore thoſe that are not helped by Statutes are left as they were at the Common Law.

Mich. 1652. Banc. ſup.

Motion to quaſh an order of Seſſions. ONe was made Conſtable by order of a quarter Seſſions, but the party refuſed to ſerve, and removed the order hither by Certiorari, & moved to quaſh the order but the Court would not do it although ther were material exceptions taken againſt it, but ordered him to plead, becauſe they perceived the party was ſtubborn, and they would not give encouragement to ſuch perſons.

Heath and Vdall.

Mich. 1652. Banc. ſup.

Arreſt of Iudgement in an Action upon the caſe Declararion. HEath a Carver brought an Action of the Caſe againſt Vdall, and declares among other things for plundering of him of viginti fardellas Anglice packs, and in arreſt of Iudgement it was moved that the words viginti fardellas Anglice packs is uncertain; But Maynard argued that it might be good, becauſe the Carver could not declare otherwayes, for he could not know what was in the packs, and he cited one Bedingfields caſe, Trin. 10. Car. where an Action was brought for a library of books, and for apparell, and adjudged good; But Roll chief Iuſtice ſaid, it could not be good for the apparel. Wadham Windham on the other ſide held the words uncertain as they are, and ſaid he ought to have ſhewed that they were packs with goods, or have ſhewen what was in them, for a pack is but a meaſure of a thing. Roll chief Iuſtice anſwered, if it be but a meaſure of a thing, then no damages are given for them, and then the Action is good for the reſt; But we will adviſe. Afterwards in the ſame Term Maynard moved for the opinion of the Court, and thereupon the Court held, that the words are uncertain as they are, for he ought to have expreſſed what was in the packs, and ruled a nil capiat per billam to be entred.

Levingſton

Levingſton and Crompton.

Mich. 1652. Banc. ſup.

LEvingſton brought an Action in this Court againſt Crompton, The Defendant pleads that he is a Clark of the Chancery, and that all Clarks of the Chancery ought to be ſued in the Chancery only, and not elſewhere, and demands judgement if he ought to make any other anſwer in this Court. Two Exceptions were taken to the plea, 1. He ſaith, That all Clarks of the Chancery have uſed to be ſued in the Chancery, and not elſewhere, and doth not ſay, nor any of them have been uſed to be ſued elſewhere, and though all of them have not been uſed to be ſued elſewhere, yet that hinders not but that ſome of them have been ſued elſewhere. 2ly. He pleads that he is a Clark of the Chancery, and ought to be impleaded in the Chancery held at Weſtminſter, before the Keepers of the liberty of England, &c. time out of mind, which is not true. Hales anſwered, That this Court ought to take notice of the privilege of Chancery, although it be not well pleaded; But Roll chief Iuſtice denied that they ought to do it, and ſaid, That it is the Cuſtom for the Clarks of the Exchequer, when they plead their privilege, to bring the red book wherein their privileges are written into the Court, and upon ſight of their privilege there written, it is uſed to be allowed, but it is not ſo of the privileges of the other Courts, but they muſt be pleaded, and ſo here, And becauſe it is not well pleaded here, therefore ſhew cauſe why you ſhould not plead in chief.

Exceptions to a plea of privilege.

Notice. Privilege.

Pitton and Rey.

Mich. 1652. Banc. ſup.

PItton appeared to an Action brought againſt him at the ſute of Rey, but no declaration was put in againſt him. Upon an Affidavit that the Defendant was a Merchant, ſpeedily to go to Sea, It was moved for him that the Plaintif might forthwith declare againſt him, that thereby he might direct his Attorney what to plead, and might have his liberty to be gone. Roll chief Iuſtice, By the courſe of the Court he hath three terms liberty to declare, but this is an extraordinary Caſe, Therefore let him declare Thurſday next, otherwiſe he ſhall not declare till he come back. Nota.

Motion for the Plaintif to declare ſpeedily.

Mich. 1652.

BY Roll chief Iuſtice, A private Seſſions of the Peace is not ſaid to be held for the County.

Staples Caſe.

Mich. 1652. Banc. ſup.

A Rule was read on the Capital ſide for Staples a Iuſtice of Peace of Suſſex, to ſhew cauſe why an Attachment ſhould not be granted againſt him for proceeding upon an Endictment of forcible entry, and fining the party, after a Certiorari was delivered unto him to remove the Endictment

Cauſe why no Attachment againſt a Iuſtice of Peace.

ment into this Court, and thereupon it was prayed that it might be granted, and Sir Tho. Styles, and Sir John Sidleys case 8 Caroli was urged, where an Attachment was granted in the like case. Wild on the other side prayed it might not be granted, because the parties endicted did not tender sureties to proceed to a Tryal upon the Endictment, as the Statute directs, and because the fine was set upon the parties before the Certiorari was delivered, and it is in the election of the Justice to set a fine upon the party, and refuse to admit the party to his traverse, as some do hold. Roll chief Justice, Upon view of the force the Justice may set a fine upon the party, and refuse to admit the party to his traverse, or plea, at his pleasure; but the case is not so here; and in 15 Car. it was resolved, that if a Certiorari be brought to the Sessions to remove an Endictment of forcible Entry preferred against divers persons, if some of them come in and find sureties for the damages, it is good for them all to remove the Endictment for the rest, else it would be mischievous for them that find the sureties. And he said, that if any thing be done at a private Sessions of Peace, it ought to be returned to a Quarter Sessions, or into this Court. Upon view of the force the Justices of Peace are Judges, and may set a fine, and if there be Error a writ of Error may be brought. The rule was, that Staples be examined upon interrogatories, and make a return of the Certiorari Monday next, and that he restore the fine to the party.

Fine. Traverse Plea.

Error.

Wood and Mountney.

Mich. 1652. Banc. sup.

Bail not discharged by the death of the Principal Bail.

IN the Case of VVood and Mountney, Roll chief Justice said, That if the Plaintif in a writ of Error die before the matter be determined, yet his Bail are not thereby discharged.

Webb and Washborn.

Hill. 1652. Banc. sup.

Arrest of Judgement in a Trover and Conversion.

THe Action was an Action of Trover and Conversion for divers goods; The Defendant pleaded not guilty, and upon issue joyned, a Verdict was found for the Plaintif. It was moved in Arrest of Judgement that the Plaintif amongst other things had declared for a Trunk with writings, which is uncertain. Wadham Windham for the Defendant said, the Declaration is certain enough, and cited a Case where an Action was brought for two Trunks of Cloathes, and doth not say what Cloaths, and yet adjudged good. Another Exception was taken. That the Plaintif declares for a great Beam, Scales, and Weights, which is also incertain. To this Windham answered, It was certain enough, because they all make but one thing, by reason of the relation they have one to the other; And in the old Book of Entries we find, that an Action of Trespass was brought pro Caruca cum apparatu, and adjudged good. Latch on the other side, as to the last Exception said, It is not answered, for the words are very incertain, and it is not like the case of the Trespass cited, de Caruca cum apparatu, for the Weights go not to the perfecting of the Beam, as the apparatus doth of the Plow, and it is as uncertain as to bring an Action for five Locks and Keys, which is not good. Hales answered, it is certain enough, for it is all one as if he had said, A Beam, Scales, and Weights, which is as certain as to say, a Ship with Anchors and Cables. Roll chief Justice, How can we reduce the Weights to any certainty as the Declaration is laid? and if the word and had been added it would not have helped,

ed, for they may be a hundred Weights, or a thousand. Another Exception was taken that the Plaintiff in another Action had declared for four pair of Hangings, which is uncertain: But Roll chief Iustice said, That that might be well enough understood. Green at another day insisted, that four pair of hangings is very uncertain, but if it had been said four suites it had been well; Besides, the very word hangings is a doubtfull word, for it shews not whether the hangings were Silk or Stuff, or what else they were made of, as it ought to be. He also took an Exception that the Plaintiff had only shewed that here was a denyal and refusal to restore the goods, but no conversion of them is shewed. To this Hales answered; That the Action being an Action upon the Case, It is not necessary to shew the Conversion, and for the four pair of hangings it is well enough, for a pair is a couple when the word is used of dead things, and not like a pair of tongues which make but one thing nor is it material to expresse of what the hangings are made, as it is not in an Action brought for divers pair of stockings material to say, whether they were of thread, silk, worsted, or wollen, as hath been adjudged, and the word hangings is certain, for any one will conceive them to be meant of hangings of a room. Roll chief Iustice, The Action is an Action upon the case, and it is not necessary to shew a conversion, for the Action is not brought for the conversion, and if it were so, if a demand, and a denyal be proved, doth not this prove a conversion? As an Action of the case lyes for keeping one out of possession, although the party doth enter afterwards; and the four pair of hangings is certain enough, and it is not like as where Latin words are mingled with English in a Declaration, and the words being taken in the English construction shall be understood to be eight hangings. Nor is it material to expresse of what the hangings are made; But the great doubt is, whether the words be meant of hangings for a room or not; and I suppose they cannot be meant of other hangings, the words being in English, and not in Latin with an Anglice, and I believe you cannot shew me any thing else, that the words can by common intendment signifie. Iudicium nisi. The case was again moved at another day by Latch, who urged that four pair of hangings are words incertain; but if it had been four suits it had been well, so that here is a misaplication of words to expresse the thing meant, and he might as properly have said a suit of Shoes, or a suit of Conies. If one say he hath lost a hanging, this is incertain of it self, for it is the predicament of situs and not of substance, for a hanging is a posture, and the word pair makes it more incertain than it was without it. Hales answered, that it is certain enough, for the word hanging is used here substantively, and not as a participle, and the common use of the word is only applicable to the hangings of a room, and the four pair shall be understood eight hangings. Roll chief Iustice, A pair is properly when one of the things so called, cannot be properly used without the other; but yet the words may be also understood so many couple, and here you cannot intend the words to mean so many suits of hangings, and you might have expressed your meaning by so many pieces of hangings, and therefore it seems doubtfull. Ierman Iustice, Here the words do not expresse the number of the things, as they do when you say a pair of Oxen or the like. Nicholas as Ierman, Ask Iustice, A pair is incertain, for that word may be meant more than two in number, as when you say a pair of cards, and a pair of hangings in some places is meant a suit of hangings. Roll chief Iustice, If it be so, then it is more incertain, the word hangings may be good enough; but how can the number be known? Curia advisare vult. Afterwards the Court moved the Defendant to suffer the Plaintiff to amend his Declaration, and to plead anew, and to consent to a new tryall.

Case. Trover and Conversion.

Askwiths Caſe.

Hill. 1652. Banc. ſup.

Motion to quaſh an order of Seſſions.

THe Court was moved to quaſh an order of Seſſions made at Durham againſt Askwith, for not ſerving the office of a Conſtable, or finding an other able perſon to ſerve the place for him, being elected according to the cuſtom of the place where he was elected to ſerve. The Exception taken was, that it is not ſhewed that he was elected at a Court Leet, and the Seſſions have no power to elect a Conſtable. Roll chief Juſtice, He is a Conſtable elected by a by-Law, it is not neceſſary there ſhould be any other election then according to the cuſtom, and he muſt ſerve in his turn, or contribute to the charge for another to ſerve for him, and this is a good cuſtom & uſed in many places, and I do find one my ſelf in my turn in one place, and make no uſe of my privilege to avoid it. Another exception was taken, that the complaint made of the party was, that he would neither ſerve the office, nor contribute for another to ſerve it, and the order is only that he refuſed to contribute and ſo is not warranted by the cuſtom, by which he hath an election to ſerve or contribute. Quaſhed, niſi, &c.

By Law.

Cuſtom.

Hill. 1652. Banc. ſup.

Creditor examined upon oath if his debt were reall.

A Priſoner was brought into Court (by a habeas corpus) out of the Fleet to the intent to turn him over to the Marſhalſea to charge him with an Action here, whereupon the creditor was examined upon his oath whether the debt was real, for which he furniſhed he would bring his Action, and upon making oath thereof the Priſoner was turned over accordingly. Nota.

Smith againſt Holyman.

Hill. 1652. Banc. ſup.

Arreſt of Judgement in Aſſumpſit. Falſe Engliſh

IT was moved in arreſt of Judgement in an Action upon the caſe upon an Aſſumpſit, and Exceptions taken. 1. That the Defendants Chriſtian name was miſtaken. And 2ly. That the jurata was erroneous, for it ſays in a plea of dept, inſtead of a plea of debt, and the Judgement was arreſted for dept written with a P. is no word, though it ſound like debt written with a B.

Cuſtodes and Howell Gwin.

Hill. 1652. Banc. ſup.

Judgement againſt one convicted of forgery.

HOwell Gwin was brought to the Bar being convicted for forgeing of a deed, and was demanded what he could ſay why Judgement ſhould not be given againſt him. Boyſton of Councel with the Priſoner moved the Court, that in regard there was an information of perjury depending here againſt the witneſſes, upon whoſe Teſtimony the Priſoner was convicted of the perjury, and that the Priſoner doth endeavour to proceed with all the ſpeed that is poſſible againſt them in this information, that the judge-

Judgement may be ſtayed in the mean time againſt him. Roll chief Iuſtice anſwered, if they be found guilty of the perjury, they ſhall be punished; but we will give Iudgement againſt your Clyent in the mean time, which was done accordingly in theſe words following, viz. you are convicted of forgeing a deed, by putting a dead mans hand unto it, therefore the Court gives this Iudgement againſt you, that you are fined at a hundred pound, and ſhall ſtand on the pillory two hours before the Hall dore, with a paper on your head ſhewing the nature of your offence. Memorandum the party cut off a dead mans hand, and put a pen, and a ſeal in it, and ſo ſigned, and ſealed, and delivered the deed with the dead hand, and ſwoze that he ſaw the deed ſealed and delivered. Iudgement for forgery.

Mich. 1652 Banc. ſup.

MRs. Lucy Fotherby was brought into Court to be turned over into the Marſhalſea out of the Fleet with an intent to charge her with an Action of debt. Againſt this it was urged that ſhe was a Priſoner in the Fleet, committed thither by an ozder of the Court of Chancery. But Roll chief Iuſtice anſwered, this ozder is nothing to hinder her turning ober, if the debt be reall, and ſo upon proof that the debt was reall ſhe was turned over. A Priſoner turned over. Priſoner.

Locky and Dumiloe.

Hill. 1652. Banc. ſup.

Hill. 1650. rot. 1462.

VPon a ſpecial verdict in an ejectione firmæ, the caſe fell out to be this, I. S. ſeiſed of lands in Fée makes a leaſe of it to I. D. at Will, A. B. puts the Tenant at Will out of poſſeſsion, and after the Tenant at Will enters, and takes a leaſe at Will of him that put him out of poſſeſsion, the queſtion was, whether he ſhould hold the land by virtue of his firſt leaſe, oz by virtue of his ſecond agreement. To this Roll chief Iuſtice ſaid, if one make a leaſe at Will to one, and he be ouſted, and then enter again and take a new eſtate, the Will is determined; but a ſtranger cannot determine his Eſtate without his conſent; but here he hath determined his firſt Eſtate by his new contract with the diſſeiſoz of his Leſſoz. And he ſaid, if Livery and Seiſin be made upon one Acre of land in the name of two Acres, it is good foz both the Acres, foz it is not neceſſary that the party that gives the livery ſhould go to all the land mentioned in the deed of Feoffment. And he alſo ſaid, that if Tenant at Will cuts down a tree upon the land, which he holds at Will, by this Act he hath determined his Will. Special verdict in an ejectione firmæ. Will. Determination. Livery and Seiſin.

Drake and Drake.

Hill. 1652. Banc. ſup.

DRake brought an Action againſt Drake foz theſe wozds, viz. Thou haſt preached lyes in the Pulpit; the Plaintiff being a maſter of Arts, and incumbent of a living. Wadham VVindham held the wozds actionable, becauſe they were ſpoken of the Plaintiff in relation to his profeſsion Arreſt of Iudgement in an Action for words.

ſion, and cited one Hinkes caſe, where theſe words ſpoken of the Plaintiff being a Brazier were held actionable, viz. Thou haſt cozened me of a Pan. And if one ſay to another, Thou haſt poiſoned a man, If the man be dead, the words are actionable, although he doe not ſay that he did it wilfully. The Court enclined the words are actionable, becauſe they are ſcandalous. And the rule was Iudicium niſi, &c.

Hill. 1652. Banc. ſup.

Motion for a Certiorari to remove an Endictment.

WAdham Windham moved for a Certiorari to remove an Endictment preferred againſt one in Newgate. Roll chief Iuſtice, He lies there for murder, and is outlawed thereupon, yet take a Certiorari to remove the Record, for his fact was the ſtabbing of a man, and ſtabbing is in its nature but felony, and is not murther, although the party cannot have his Clergy for it, by reaſon of the Statute made by King Iames againſt Stabbing, elſe by the Common Law he might have had it.

Felony. Murther.

Aſhworth and Sir Tho. Stanley.

Hill. 1652. Banc. ſup.

Arreſt of Iudgment in an Ejectione firmæ. Damages. Ejectione firmæ.

VPon a Verdict given for the Plaintif in an Ejectione firmæ, It was moved in Arreſt of Iudgement, That the Ejectment is laid to be of three Meſſuages or Tenements, and a Toft, which as to the Meſſuages or Tenements is incertain. Roll chief Iuſtice, You move too ſoon, for it may be the Plaintiff will releaſe the damages as to the Meſſuages or Tenement, and take his judgement only for the toft, and the Action lies well enough for that.

Hill. 1652. Banc. ſup.

Motion to diſcharge recognizances of the peace.

TWiſden moved to diſcharge Sir Thomas Revell and others of their recogniſances for the peace in which they were bound the laſt Michaelmas Term, becauſe the Affidavit upon which they were bound was only to this effect, That the Proſecutor goes in fear of his life when he goes into ſuch parcels of land, whereas in truth thoſe lands are ſetled upon Sir Thomas Revell by decree in Chancery, and the Proſecutor hath alſo brought 18 ſeveral Actions againſt the Tenants of the lands, and hath declared againſt none of them, and there are four Affidavits againſt the firſt Affidavit. Green on the other ſide ſaid, that the party is in Court, and ſays he is ſtill in fear of his life, and prays he may not be diſcharged. But becauſe upon reading the Affidavits and examining the matter, it appeared to the Court that they were bound to the peace upon malice, and for veration, they were diſcharged.

Peace.

Hill. 1652. Banc. ſup.

Who ought to repair Highways of Common right.

BY Roll chief Iuſtice, All High ways of common right are to be repaired by the Inhabitants of that Pariſh in which the way lies. But if any particular perſon will encloſe any part of a way or waſte adjoyning, he thereby takes upon him to repair that which was ſo encloſed.

Maſ.

Maſſey and Aubry.

Hill. 1652. Banc. ſup.

Arreſt of judgement in debt upon an Obligation to ſtand to an Award.

AN Action of Debt was brought upon an Obligation to ſtand to an Award: The Defendant pleaded that the Arbitrators made no Award; The Paintif replies that the Umpire made an award, and ſets it forth, and aſsigns the breach, and upon iſſue joyned, and a verdict for the Plaintif, It was moved in Arreſt of Judgement that the aſsignment of the breach was not good, for the incertainty of it, for the breach is aſsigned upon but a part of the Award; for the breach aſsigned is, that the Defendant ſhould pay the Arrears of rent due after the purchaſe of certain lands; and doth not ſhew what theſe Arrears are. But Roll chief Juſtice ſaid, That the words ſince the purchaſe thereof ſeem to make this certain, yet ſtay till the other moves. At another day the caſe was moved again, and the ſame exception inſiſted upon by Barry of the Inner Temple who formerly moved it. Hales held the Exception not good, and that the breach was well aſsigned, becauſe though it ſeem uncertain of it ſelf, yet it relates to a thing which makes it certain; As an Award for one to deliver to another all the goods in ſuch a Shop which belonged to him, hath been held to be good. But Barry anſwered, That it is utterly incertain, and that there is nothing in the Award which can make it certain, and here is a four-fold incertainty in the Award. 1. It cannot be known what theſe arrears are that are awarded to be paid. 2ly. It appears not by the Award for what lands theſe arrerages of rent awarded to be paid are due, for there are no lands mentioned, but only two leaſes of land. 3ly. It appears not by whom the arrerages are due. 4ly. It appears not to whom the arrerages are due. Roll chief Juſtice, All the matter is, whether it appears that theſe arrerages of rent awarded to be paid were in queſtion or no, and it ſeems they were, becauſe the leaſe and the rent thereupon reſerved are both in queſtion; but it is not certain what theſe arrears of rent are, and ſo the party that is awarded to pay them, cannot tell what ſum of mony he is to pay. Ierman Juſtice ſaid, he may know, becauſe he was Tenant of the land. Barry replyed he cannot know when the purchaſe was made, and the arbitrement is that the party ſhall pay all the arrears ſince the purchaſe. Curia adviſare vult. At another day the caſe was again moved by Barry, and exceptions taken that the breach was aſsigned upon a thing not ſubmitted unto, or awarded to be performed. And ſecondly. The award is incertain in many things. Firſt, It appears not what rent was due to be paid, but only by implication, which is not good. Secondly, It appears not for what the rent is due; nor 3ly. How much rent is due, and Salmons caſe, in the 5. rep. was cited. Alſo it was objected that the award was not finall, and concluding, and therefore not good: Alſo the Award is unreaſonable, and for that cauſe alſo it is not good, and he cited 21 E. 4. f. 40. and 17 E. 4. f. 51. and prayed for the Defendant that judgement might be ſtayed. Hales on the other ſide prayed for judgement, & ſaid, That the Arbitrators were not to aſcertain particularly the rent to be paid, but it is ſufficient for them to make the Award touching all the differences betwixt the parties, and an averment may aſcertain the particular things, being they are only matters of fact, although one may not be admitted by an averment to ſupply an Award in a matter, wherein it was in the ſubſtance of it defective before. Roll chief Juſtice, What certainty is there by the Award that the party

party ſhall enjoy all his right in the two leaſes in difference between the parties? for the payment of the rent, Both parties know what rent is due, reſerved by the leaſes, but how can the party know what the arrears are which are accrewed ſince the purchaſe? for how can he know when the purchaſe was made? for it is made by a ſtranger, and what if the ſtranger will not tell him when he made it? ſo that me thinks the Award is unreaſonable, and then it cannot be good. The rule was, Nil capiat per Billam, Niſi, &c.

Award.

Hill. 1652. Banc. ſup.

Queſtion in Arreſt of Judgement in an Action upon a Bill of exchange.

THe queſtion being upon a motion in Arreſt of judgement in an Action brought for money paid upon a Bill of Exchange brought by a wrong perſon, to whom the Bill belonged not, and a verdict for the Defendant, Twiſden ſaid, That if money be paid to a wrong perſon upon a Bill of Exchange, if the wrong perſon do ſhew the Bill, by the Cuſtom of Merchants this is a good payment, and the party that paid it ſhall not be charged again. Wild, It is doubtfull whether the Cuſtom be ſo or not. But Roll chief Juſtice ſaid, here is a verdict for the Cuſtom, and therefore it were well if the parties would agree to a new tryal, but if they will not, take your judgement, becauſe the verdict hath found it a good cuſtom.

Cuſtom.

Cuſtodes againſt the Inhabitants of Stoneham in Suffolk.

Hill. 1652. Banc. ſup.

Motion to ſet a fine upon a conviction for not repairing a High-way.

THe Inhabitants of the Pariſh of Stoneham in Suffolk were indicted for not repairing a High-way, and a verdict found againſt them. The Court was moved that a good fine may be ſet upon them, becauſe the way is not yet amended, and a Traveller that paſſed that way hath loſt his horſe ſince the Tryal, by reaſon the way was ſo bad, ſo that the Horſe brake his Leg. Twiſden on the other ſide moved the fine might be reſpited, becauſe there was a conteſt between this Pariſh and another which of them ought of right to repair the way, and in regard this Pariſh is very poor, and laſtly, becauſe the way cannot be amended until Summer, and then it ſhall be done. Roll chief Juſtice, The fine ſhall be ſet upon you for not repairing it already, becauſe the verdict found you ought to do it, and the Country ſuffers by your neglect, Therefore take a Diſtringas to levy a fine of twenty pounds of the Pariſhioners for not repairing it.

Fine. Diſtringas.

Hill. 1652. Banc. ſup.

Motion for the Plaintif to diſcontinue his Action.

WIld moved the Court that paying coſts the Plaintiff might have a rule to diſcontinue his Action, becauſe there is ſuch a travers now taken that the title of the land in queſtion can never come to be diſputed. Roll chief Juſtice, You may do this by the courſe of the Court without motion, therefore why move you for it? But I conceive your reaſon is, becauſe there is a peremptory rule of Court upon you to try the cauſe this next Term, and now you move to avoid the contempt you may fall into, for diſobeying that rule, if you ſhould not go to a tryal. Yet pay good coſts and diſcontinue your Action. Q. Nota.

Contempt.

Hill.

Hill. 1652. Banc. ſup.

THe Court was moved that a Feme that was ſued only as an Executrix might be diſcharged upon putting in Common Bail. Roll chief Iuſtice, It is the common courſe if there be no ſpecial cauſe of Action againſt an Executor, as a Devaſtavit, or the like, for Common Bail to be admitted. Motion that Common bail might be accepted.

Hill. 1652. Banc. ſup.

HOdſden One of the Attorneys of this Court, was together with another made a Leſſee in an Ejectment Leaſe, and would not grant an Imparlance to the Defendant, as the uſual courſe is, becauſe he is an Attorney of this Court, and ſo claims his privilege, that the Defendant may anſwer him this term, or elſe he will enter judgement againſt him for want of a plea. Q. what was done hereupon. For an Imparlance. Privilege.

Hill. 1652. Banc. ſup.

IN the caſe of one Hoff the Court was moved to confirm a rule made between the Plaintiffs Attorney and the Defendants, for a Tryal at the Bar. Roll chief Iuſtice, Let it be ſo, for if the Attorneys agree to reaſonable things, we will not oppoſe them, But the Attorneys ought not to make rules of themſelves. Motion to confirm a rule. Rule.

Hill. 1652. Banc. ſup.

BOynton moved for a Deer-ſtealer that was convicted at the Seſſions in London upon an Endictment preferred againſt him upon the late Act made againſt ſtealing of Deer, and removed hither by a Habeas Corpus, that the Return might be filed, and took this Exception, viz. That it appears not in what Pariſh the offence was committed, as it ought to doe. Roll chief Iuſtice, Here is a conviction and a judgement in the Caſe, and the party is in Execution, and therefore bring your writ of Error if the judgement be erroneous, for we will not overthrow it for a fault in the return of the Habeas Corpus: But becauſe it did appear to the Court that the party was convicted behind his back, they moved the Councel to adviſe of a way how he may come to a fair tryal for the ſatisfaction of the party, and of the people; For it is a hard caſe, and let the Marſhal take him in the mean time, And we will alſo adviſe. Exceptions to a return of a Habeas Corpus. Error.

Hill. 1652 Banc. ſup.

BY Roll chief Iuſtice. If a ſum of money be to be levied upon a Corporation, it may be levied upon the Maior or chief Magiſtrate, or upon any perſon being a Member of the Corporation. This was ſpoken in the Caſe of the Town of Colcheſter in Eſſex. Nota. How money is to be levied upon a Corporation.

Hill. 1652. Banc. ſup.

Motion for a Sheriff to return his writ. Pain. Affidavit. Sugeſtion.

THe Court was moved that a Sheriff might be ordered to return a Writ upon a pain. But Roll chief Iuſtice anſwered, let him return it, but not upon a pain, becauſe here is no Affidavit to proove that he refuſed to return it; but only the ſuggeſtion of the Councel at the Bar.

Hill. 1652. C. B.

Who may defend a title in Treſpaſſe and ejectment.

BY Pinſent protonotary of the common place. If one move that the title of land doth belong unto him, and that the Plaintiff hath made an ejector of his own, and thereupon prayes that giving ſecurity to the ejector to ſave him harmleſſe, he may defend the title, this Court will grant it; but will not compell the Plaintiff to confeſſe the leaſe, entry, and ouſter, except he will be ejector himſelf; But it is not ſo in the Court of the upper Bench, for there in both caſes they will compell him to confeſſe leaſe, entry, and ouſter. But Q. for I have not known it ſo ruled.

Hiil. 1652. Banc. ſup.

Order of Seſſions quaſhed.

AN order of Seſſions made at Arondell in Suſſex for paying ſo much money weekly to a Pariſh, towards the keeping of a Baſtard Child, was quaſhed, becauſe it did not appear by the order, that the Child was born in that Pariſh to which the mony was awarded to be paid.

Hill. 1652. Banc. ſup.

Motion to diſcharge the plea of engagement. Certificate.

THe Court was moved to diſcharge the plea of not taking the engagement pleaded to a Soldier in the States ſervice in Ireland, upon a certificate under the hand and ſeal of an officer in the Army there, under whoſe command he was, that he had taken it, and alſo upon a certificate under my Lord General Cromwells hand, and Coronel Whaleys hand, that they did believe the other certificate was true. Roll chief Iuſtice anſwered, we cannot help you, for our hands are tyed up by the Act, from which we muſt not vary. Nota.

Hill. 1652. Banc. ſup.

Whether one endicted of perjury be bailable.

ROll chief Iuſtice ſaid, that he doubted whether one endicted of perjury may be bailed, although the clarks of the criminal ſide ſaid he might. Q.

Brightwell and Robſon.

Paſch. 1653. Banc. ſup.

Arreſt of Judgement in an Action upon the caſe.

AN Action upon the caſe was brought for delivering in a falſe note of goods, for which exciſe was to be paid into the office of exciſe, whereby he was compelled to pay 50 l. to his damage, &c. upon not guilty pleaded and

and a verdict for the Plaintiff. Green moved in arreſt of Judgement, becauſe that the Declaration did not ſet forth the Act of Parliament, which gives authority to the commiſſioners of exciſe. And 2ly. The damage is not coupled with the fraud, nor is it expreſſed how he was compelled to pay the 50 l. and the Court is not bound to take notice of the Ordinance of Parliament touching the offices of the exciſe, becauſe it is not a general law. But Roll chief Iuſtice anſwered, that the fraud is the ground of the Action, and all the other matter ſet forth in the Declaration is but matter of inducement to the Action, and it is not requiſite to be ſo punctual in ſetting that forth as is ſurmiſed, and we are bound to take notice of the Ordinance, and the Action brought is to recover damages cauſed by the fraud, and it is no more neceſſary to ſet forth all the circumſtances occurring in acting of the fraud, than for one to ſet forth all proceſſes in an Action grounded upon a fraudulent Judgement obteyned againſt him, by which he is damnified. Iudicium niſi, &c. pro queren. e. Inducement. Notice.

Paſch. 1653. Banc. ſup.

By Roll chief Iuſtice, If one that is bound to the Peace do break his recogniſance, he may be endicted upon it, for this is a new offence. Endictment for breaking the Peace.

Paſc. 1653. Banc ſup.

The Court was moved upon an Affidavit to diſcharge a Priſoner brought to the Bar by a habeas corpus, becauſe he was arreſted on the Sabbath day. Roll chief Iuſtice, plead this matter to his Action, that arreſted you, for we cannot diſcharge you upon an affidavit. Motion to diſcharge a Priſoner.

Cuſtodes and Rickaby.

Paſch 1653. Banc. ſup.

Rickaby convicted of Felony for killing a man during the wars, and brought hither by a habeas corpus; moved by his councell to be diſcharged upon the Act of the late general pardon. Roll chief Iuſtice, It appears not to us, whether you are excepted out of it or no. But enter your ſurmiſe upon the Roll by the advice of your councell as you will ſtand to it. Poſtea. Motion to diſcharge a Priſoner upon the general pardon. Surmiſe.

Paſch. 1653. Banc. ſup.

By Roll chief Iuſtice, One cannot anſwer for an infant as Guardian, either in the Chancery or in any other Court, except he be aſigned Guardian by the Court, for if he might that were to make himſelf his Guardian, and that might prove to the damage of the infant, therefore if one will ſue an Infant, he muſt move the Court to aſsign a Guardian that may anſwer for him; But an Infant may ſue per prochein amy, though his prochein amy cannot anſwer for him. Who may anſwer for an Infant as Guardian. Motion. Prochein amy Infant.

Paſch. 1653. Banc. ſup.

Who may be a witneſſe.

BY Roll chief Iuſtice, Upon a Tryal, although one who is a Legatee by a Will may not be admitted for a witneſſe to prove that will, yet he may be examined as a witneſs to prove a deed or other thing, which hath not relation to the will, in reſpect of the intereſt which he claims by the Will. And he then alſo ſaid, that Deeds were inrolled at the Common Law, for the preſervation of them, although not to paſs any eſtate, as it is now by the Statute of Enrolments made, 4 H. 7.

Enrollment.

Paſch. 1653. Banc. ſup.

How a diſſeiſin is taken away. Entry.

BY Roll chief Iuſtice, If one diſſeiſe me, and a Stranger enter upon the diſſeiſor for me, this Entry takes away the diſſeiſin; and if a Copyholder of a Manor enter as a Commoner, it is in right of the Lord, although it be not by his command, nor he have any notice of it. Nota

Paſch. 1653. Banc. ſup.

Arreſt of Iudgement in an Action for not paying monies upon a bill of exchange.

AN Action was brought for not paying monies upon the receipt of a bill of exchange according to the cuſtom of Merchants, and upon a verdict found for the Plaintiff it was moved in arreſt of Iudgement, and the exception taken was, that it appears not whether the demand of the mony ſued for was according to the old ſtile, or according to the new, and ſo it is incertain whether the mony was due, when it was demanded or no, for if it were demanded according to the new ſtile it was not due; but if according to the old ſtile then it was due for the new ſtile is 10. dayes before the old Twiſden anſwered, it ſhall be accompted according to the old ſtile, for that is uſed here in England, and he ſaid, if there be two Merchants that have a joynt trade, and one of them accept a bill of Exchange, if he do not pay it, an Action lyes againſt the other. Roll chief Iuſtice, If the bill of Exchange be accepted there is no neceſsity to allege a demand, and the demand here is not laid as part of the cuſtom, upon which the Action is founded. Therefore let the Plaintiff have his Iudgement.

Demand.

Herbert and Lane.

Paſch. 1653. Banc. ſup.

Arreſt of Iudgement in an Action upon the caſe.

HErbert a Carryer brought an Action upon the caſe againſt Lane an Inn-keeper, for goods loſt out of the Inn, viz. certain packs full of linen cloath and other goods, and after a verdict for the Plaintiff it was moved in arreſt of Iudgement, that it doth not appear by the Declaration, what ſort of cloath was in the packs, nor of what value the cloath and goods were, and ſo the Declaration is incertain. But Roll chief Iuſtice anſwered, that the Declaration is good enough, eſpecially now there being a verdict in the caſe.

Paſch. 1653. Banc. ſup.

By Roll chief Iuſtice, A Certiorari to remove a Record ought not to be made but to a known Officer who is known to have the cuſtody of Records, and upon a ſurmiſe that he hath ſuch a Record in his hand; and therefore We will not upon an Affidavit grant a Certiorari, but upon a ſurmiſe made upon the Roll. Where a Certiorari may not be granted. Affidavit. Surmiſe.

Paſch. 1653. Banc ſup.

COunt Arundeland my Lord Chandois, to whom Count Arundel was ſecond in a duel being formerly endicted at Surrey Aſsizes before Iuſtice Aſk & Iuſtice Warburton for killing Mr. Hen. Compton, found guilty only of Manſlaughter, by the grand Inqueſt were brought to the Bar to be arraigned for it, and were not admitted to be bailed, but were delivered over to the Marſhal to be brought again at another day, Nota. Bail denied for Manſlaughter.

Paſch. 1653 Banc. ſup.

IOhn Weeks who had been endicted and convicted upon the Statute of King Iames made againſt ſtabbing, being formerly brought to this Bar did plead the general pardon which he had ſued forth, and prayed it might be allowed; But then the Court ſaid they knew not whether he were excepted out of the general pardon or not, and ordered him to enter his averment upon the Roll, that he is not excepted, and then to appear again at another day; at which time he was brought again, and then he declared he had entred his Averment, and produced his pardon, and prayed it might be allowed, which after a grave admonition made to him by Mr. Iuſtice Iſerman, exhorting him to repentance and amendment of life, was done. Pardon allowed. Surmiſe entred.

Harris and Tooker.

Paſch. 1653. Banc. ſup.

HArris brought an Action upon the Caſe againſt Tooker for turning of an old Water-courſe from his Mill to a Mill which the Defendant had lately erected, and obtains a Verdict. The Defendant moves in Arreſt of Iudgement, 1. Becauſe it appears not by the Declaration what eſtate the Plaintif hath in the Mill, for he only ſays that he hath been ſeiſed of it. 2ly. It is not ſhewed from whence the water runs, as it ſhould be. 3ly. The erecting of the new Mill is not actionable, but the diverting of the water to his damage, and therefore ought not to be jumbled together. Roll chief Iuſtice, It is a damage to turn the water out of its antient courſe, and it is not needfull to ſay that there is a new Mill erected. But what ſay you to the firſt Exception, viz. That you have not ſhewed what eſtate you have in the Mill. Wild anſwered, they had ſhewed it. Roll chief Iuſtice, Be it ſo or not the Action lies, for what eſtate ſoever he hath an Action of the Caſe will lie, therefore take your Iudgement. Arreſt of Iudgement in an Action upon the Caſe. Caſe.

Paſch. 1653. Banc. ſup.

Arraignment for Manſlaughter.

MEmorandum, This day by Rule of Court my Lord Chandois and Count Arundel were again brought to the Bar and arraigned for Manſlaughter. Chandois as Principal, and Arundel as acceſſary for killing Mr. Henry Compton in a duel. They confeſſed the fact, and craved their Clergy and Peerage by the Statute of 1 Ed. 6. But becauſe the Court doubted whether the Statute was repealed or not, and in regard the priſoners were not willing to lie longer in priſon, the Court refuſing to bail them, becauſe the fact was notorious, they waived their Peerage, and prayed their Clergy as Commoners of England; Whereupon the Ordinary was called, who appeared, and brought his Book, which was a fair Latine Pſalter. The Court called for the Book, and ſeeing it to be Latin, commanded him to bring an Engliſh Book, which he did. But becauſe the Officer was not provided who ſhould have burned the Priſoners in the hand, the Court would not then hear them read though the priſoners urged it; But they were ordered to be ſtill in Cuſtody till another day, and then to be brought again.

Clergy.

Trin. 1653. Banc. ſup.

Motion for a reference to the Secondary.

TWiſden moved for a reference to Hern the Secondary, and put the caſe to be this. A Scire facias iſſued forth againſt Executors, and the Sheriff returns nulla bona: After, upon a ſuppoſal by a teſtatum, that the Executors had waſted the goods, a new ſcire facias with a fieri facias in the ſame writ iſſued out, according to the new way uſed, and upon 2 nichils returned a judgement was given againſt them de bonis propriis, and the parties were never ſummoned or had any notice of the proceedings. Roll chief Juſtice, If you be condemned upon 2 nichils returned; whereas you were never ſummoned, you may help your ſelves by an Audita querela, But it is not to be helped upon a reference.

Audita querela.

Reference.

Trin. 1653. Banc. ſup.

Arreſt of Judgement in an Action upon the Caſe

A Man brought an Action of the caſe againſt one for cauſing him to be indicted for ſtealing of a Mare, and hath a verdict againſt the Defendant. It was moved in Arreſt of judgement, that upon preferring of the Bill to the grand Jury, they found an Ignoramus, and ſo there is a repugnancy in the Declaration, which ſets forth that the Plaintif cauſed him to be indicted, and yet ſays that an Ignoramus was found, ſo that upon the matter it was found no Indictment. Wild on the other ſide ſaid, the Declaration is well enough, and there is no repugnancy, for the words ſhall be taken according to the common conſtruction. Hales, There is another Exception. viz. That all the proceedings mentioned in the Declaration are expreſſed to be before the Judges as Commiſſioners for the Gaol delivery, and not as Commiſſioners of Oyer and Terminer. Roll chief Juſtice, We will intend that the Indictment was before them as Juſtices of Oyer and Terminer, and in truth it is not material before what authority he was indicted; and in this caſe the trouble the party is put unto by reaſon of this indictment, is the cauſe of his bringing this Action, and not his Tryal upon it, and therefore the authority is not material; nor is it material whether the indictment be good or no, and the words here are to be conſtrued according to common intendment, viz. That he was indicted though the

Indictment.

Cure.

the endictment was not found, but an Ignoramus, and ſo by conſequence in Law it is no Endictment upon which he could be tryed to come in danger of his life. Hales moved that they might amend the Declaration, and go to a new Tryal. Roll chief Iuſtice, It would be good to do ſo, for it is doubtfull how we ſhall take the matter as it ſtands before us upon the Record. Amendment.

Trin. 1653. Banc. ſup.

The Court was moved for an Attorney of the Common Pleas that was ſued in this Court to allow his writ of privilege. But Roll chief Iuſtice bid him plead his privilege, for we cannot allow it upon a motion, and his ſhewing of his writ of privilege. Motion to allow an Attorneys privilege of the common pleas.

Whitehead and Buckland

Trin. 1653. Banc. ſup.

Hill. 1652. rot. 121.

Whitehead brought his Action of Treſpaſs againſt Buckland for taking of his Cattel, The Defendant pleads the Stat. of limitations of Actions in Bar, the Plaintif replyed that he ſued forth an Original within the time limited in the Statute: To this replication the Defendant demurs, and ſhews for cauſe, 1. That he ſaith he hath ſued out his Original, but doth not ſay prout patet per Recordum, as he ought to do. 2ly. He doth not plead the continuances upon the Roll, Maynard anſwered that the pleading is good, and we cannot take a traverſe upon their plea, which is ſurpluſage, nor is it neceſſary for us to ſhew in our plea all the continuances, but to plead ſo much of the Record only as goes in Bar. Roll chief Iuſtice, The plea is plain, and it is not neceſſary to allege the continuances, for here is an apparance. Poſtea. Demurrer to a replication in Treſpaſs for taking Cattel. Plea.

Sale and Wray.

Trin. 1653. Banc. ſup.

Wild moved the Court that the Defendant in an Action of Covenant might be ruled to ſwear his plea, becauſe it is a forein and dilatory plea, pleaded to out this Court of its Iuriſdiction and to hinder a Tryal; for he pleads that he was at Lisbon in Portugal at the day of the payment of the money which he had covenanted to pay. Roll chief Iuſtice, you may reply that he was in England, and you need not traverſe abſque hoc that he was in Portugal. But the queſtion is, whether the plea be forein, and I am of opinion that it is forein, and ought to be ſworn. Howell anſwered, it is not forein, for it may be tryed in the County where the Action is brought. Roll chief Iuſtice, Let him ſwear his plea, except better matter be ſhewn. Motion that the Defendant might ſwear his plea. Replication. Traverſe. Plea.

Kitchinman.

Trin. 1653. Banc. ſup.

Arreſt of judgement in an Action upon the caſe.

Upon a Verdict given for the Plaintiff in an action of the Caſe brought for preferring a Bill of Endictment of felony againſt him. It was moved in Arreſt of Judgement, that it was not ſaid in the Declaration to be done falſly, but that the Attorney of the Plaintiff hath interlined the word falſly in the Poſtea. 2ly. It is not ſaid that the Endictment preferred was delivered to the grand Jury, but to the Court. Roll chief Iuſtice, It is ſaid to be preferred malitioſe, and it cannot be malitioſe except it be alſo falſly, and here is falſly expreſſed in the beginning of the Record, and it is not neceſſary to ſay ſo through the whole Record, for the words ſubſequent are coupled to the precedent: And a Bill of Endictment is to be delivered to the Court, and the grand Jury receives it from thence. Iohnſon, Launcelot took another Exception, viz. That there is a variance between the Venire and the Diſtringas, for in the Venire one of the Jury is called Cargenter, and in the Diſtringas Carpenter. Roll chief Iuſtice, Let it be ſtayed for this fault, And let Williams the Sollicitor be committed for enterlining the Poſtea; But upon a voluntary confeſſion of the fact, and ſubmiſſion, the Sollicitor was releaſed, and only ordered to pay the charge for the motions in the Cauſe, and the Poſtea was ordered to be amended by the Paper book.

Endictment.

Variance.

Commitment.

Amendment.

Cuſtodes and *Trios*.

Trin. 1653. Banc. ſup.

Motion to ſtay judgement in perjury.

The Court was moved to ſtay Judgement in an Endictment of perjury found againſt one for perjury in an evidence given by him in an Action of Trover and Converſion. The Exception taken was, that the Oath is not averred to be made concerning the matter in iſſue in the action, & ſo it cannot be ſuch perjury, for which an Endictment lies. Roll chief Iuſtice, Is the Endictment grounded upon the Statute, or is it an Endictment at the Common Law? The Counſel anſwered, It is an Endictment framed upon the Statute. Roll chief Iuſtice, Then it is a material exception, but if it had been an Endictment at the Common Law it would have been otherwiſe, for at the Common Law one may be endicted for a falſe Oath in an Affidavit. Therefore let Iudgement ſtay till the Plaintif n ove.

Endictment. Perjury. Falſe Oath.

Cuſtodes and Martin and Long

Trin. 1653. Banc. ſup.

Motion to quaſh two Endictment.

The Court was moved to quaſh two Endictments againſt Martin and Long, as Lords of the Manor of Clarkenwell for not repairing the Stocks and Whipping Poſt, and not making of a Pound. The Exception was, that the making the Pound was not a publique thing, and therefore an Endictment lies not for not doing it. Roll chief Iuſtice, That is true. And he took another Exception, That the Endictment doth not ſhew that Martin and Long are Lords of the Leet; And if they be but Lords of the Manor

Endictments. Stocks. Whipping Poſt.

Manor, and not Lords of the Leet, they are not bound of common right to repair the Stocks and Whipping Post, and therefore the Endictment muſt ſhew how they are bound to do it, viz. either as Lords of the Leet, or otherwiſe, or elſe the Pariſh is bound to do it.

Cuſtodes and Rickabye.

Mich. &c. 1652. Banc. ſup.

Upon an old rule of this Court, made in the beginning of King Charls, The Court was moved to deliver their opinion in the Caſe of Kickaby that had been endicted for murther, and had obtained his pardon, whether the pardon was good and to be allowed, or that he ſhould be tryed notwithſtanding his pardon. Roll chief Iuſtice anſwered, This Caſe was argued often at the Bar 8 Caroli, which was long agoe, and before our times, therefore let us have books, and argue it again, for we have yet heard no Arguments in the Caſe. At another day by rule of Court the Caſe was again moved, and argued by Wadham Windham for the Keepers, that the pardon was not good, nor ought to be allowed, becauſe by the pardon murther was not pardoned, and in his argument he made theſe queſtions, viz. 1. Whether the King could pardon murther by the Common Law. 2. Whether he might do it by the Law of God. 3. Whether he might do it by the Statute. 4. Whether the pardon be made good by the non obſtante included in it. For the firſt, the King ex Officio may pardon Man-ſlaughter by the Common Law, and in ſome caſes he might pardon murther, viz. Where there is but only malice implyed in the Murtherer, but wilfull murther he could not pardon, becauſe it is againſt the Law of God, and he cited 12 H. 8. f. 5. Brudenell. By the Law delivered to Noah, ſhedding of blood was made unpardonable, and that is a perpetual Law, Stat. 13 R. 2. C. 1. The King may delegate adminiſtration of Juſtice to his Miniſters, but not diſpenſation of mercy. By the Statute of 13 R. 2. c. 1. The King was admoniſhed not to pardon murther ſo generally as he uſed, but enacted, That if in his pardons he did not expreſſe the word Murther, the pardon ſhould not be good, and the word Murther is not expreſſed in this pardon, and therefore it is not good, nor to be allowed, 3 Inſtit. 236. 8 H. 6. 20. 9 H. 6. 8. Kel. 92. Nor doth the King in this pardon recite the Endictment it ſelf, for then it may be it might have altered the Caſe, but only recites the fact generally, and though the words in the pardon be general, and ſeem to include murther, yet they cannot make the pardon good, becauſe it wants the expreſs word it ſelf, viz. Murther, and although the Charter be not void, yet it cannot be allowed for want of that word, nor can the general non obſtante in the pardon diſpence with the Statute of 13 R. 2. for all non obſtantes are good only where the King takes notice of the Law wherewith he diſpenſeth. And as to the Statute of 13 R. 2. Firſt, By it the juſt power of the King is made certain, and ought to be ſtrictly purſued. 2ly. That Statute was made of grace, and as a boone, to the people, in which they have a ſpecial intereſt, and is not to be abridged. 3ly. It was made for the more free adminiſtration of Juſtice, with which the King may not diſpence, Hob. f. 214. Here 4 Lyſiars caſe 11 Rep. f. 88. And although the party here be proſecuted at the ſute of the King, yet the proſecution is for the benefit of the people, and therefore the King cannot pardon him, 3 Inſt. f. 337. and ſo he prayed the pardon might not be allowed. Hales appointed by the Judges to argue ad informandum conſcientiam, as Windham alſo was, argued for Rickaby, that the pardon was to be allowed, for the queſtion

Arguments and Judgement whether a pardon for murther was well pleaded.

9 Gen. ver. 6.

ſtion now is not whether the pardon be to be granted or no. And 2ly he held that here is a good non obſtante in the pardon to diſpence with the Statute, and he argued that murther at the Common Law was pardonable by other words, as well as by the word murther, viz. by the word Felony, and by the word Death of a man, for murther is but Felony in a high degree, and majus et minus non variant ſpeciem, 4. rep. Holfords caſe, and the Statute of 13 R. 2. makes this cleer, and that Statute is diſpenſed with by the non obſtante. For that Statute was not made to diſable the King from pardoning murther, but to direct and enform the King, and with that the King may diſpence by a non obſtante, 16 R. 3. Tit. graunts, 34. & 5 Iac. in this Court, Bakers caſe. And here is a diſpenſation by the Statute of R. 2. that thismay be ſaid a pardon at the Common Law, for it appears by the words of the pardon, that the King intended thereby to break through the Statute, and to pardon the party what ever his offence was, for although the non obſtante do not expreſs the word murther, yet it is good, for there are equivalent words to murther in the pardon, for the non obſtante to diſpence withall. As if the King grants a pardon notwithſtanding the Statute of Rich. 2. It is neceſſary to be referred to that clauſe in the Statute, which is to be diſpenſed withall, and ſo is it here, for there is no other end for the King to diſpence with the Statute of R. 2. C. 13. but for this clauſe, and beſides here is a ſpecial non obſtante, and not a general, and for authorities he cited Stamford 101. pleas of the Crown, 236. and for preſidents 31 Eliz. 4 Iac. 5 Iac. 6. Iac. and many others, and ſaid, that he found none againſt them. Roll chief Iuſtice, Were it not for the preſidents I hold there would be but little queſtion in the caſe; but ſome of theſe queſtions have been debated in ſome times, although we cannot queſtion the King for granting ſuch pardons, yet it is queſtionable whether he may grant them by the Law of God; but the King may do it in ſome caſes, but here is a Statute that ſayes he ſhall not do it, if he do not take notice of the fact in his pardon by the name of murther, and here is no ſuch expreſsion, but the words are general; if the King pardon malum in ſe with an non obſtante it is not good; But let us ſee Preſidents, and we will adviſe till the next Term. The next Term Roll chief Iuſtice in the behalf of himſelf, and the other Judges, delivered the opinion of the Court in this caſe to this effect. We are all of one opinion, and my brothers have deſired me to deliver the reaſons of theirs, and my opinion. Firſt I will open the Record, which in effect is this, Rickaby was endicted at Durham for murther, and the endictment was removed into this Court by a certiorari, and Rickaby brought hither by a habeas corpus, and being demanded what he could ſay for himſelf, why he ſhould not be adjudged to die, he pleaded the pardon of the late King, which pardons the death of Curtine in very general words; but the pardon doth not expreſſe the word murther, and in his plea he mentions not the Statute of 10 Ed. 3, by a non obſtante, and this is ſet forth for confirmation of his plea, and the Statute of 13 R. 2. is alleged with a non obſtante. The caſe in brief is, Rickaby and others endicted for killing George Curtine, and brought hither pleads his pardon, as is before expreſſed. The queſtion is, whether the pardon is to be allowed or not: This caſe hath been well argued, and the like caſe with this was never called into queſtion, or argued before this, and therefore if we ſhall not allow this pardon now, we have better reaſon to move us to it than others have had to do the contrary, and therefore we ſhall ſend him into the Country to receive Juſtice there for his offence, for we are all of one opinion, that the pardon is not to be allowed, and that for theſe reaſons, the queſtion here is not whether the King will pardon murther; but Cook ſaith, the King will not pardon it, if he know it to be murther; but the firſt queſtion

Pardon.

on is, whether the King can pardon murder without a non obſtante. 2ly. Whether he can do it with a ſpecial non obſtante. 3ly. Whether he can pardon it by this non obſtante in this Charter of pardon. 4ly. Whether Rickaby hath pleaded this non obſtante, ſo that he may take advantage of it. For the firſt point we do not abſolutely diſallow the pardon; but we are to enquire whether here be murther or not, if there be murther, that it may be diſallowed, otherwiſe that it may be allowed. The Statute laws were made for preſervation of the publique peace, and to reſtrain pardons for murther, ſo that after the making of the Statutes, murther could not be pardoned without a non obſtante in the pardon, though before it might have been pardoned in general words. And the Parliament hath made divers Statutes to reſtrain pardons, and that murther ſhould not be ſo generally pardoned as before. 2 E. 3. 4 E. 3. 14 E. 3. 27 E. 3. C. 2. by which Statutes it may appear, that the opinion was, that the King could not diſpence with the Statutes with a non obſtante, and the end of all theſe Statutes was to enform the King to examine whether the fact he intended to pardon was murther, and that he ſhould not grant a pardon for murther, without expreſsing the word murther in the pardon, and with a non obſtante alſo, 22 H. 7. 9. Kelway. 8 H. 6. f. 20. 9 E. 4. f. 16. Cook, Pleas of the Crown 226. and ſo the Law is without a non obſtante. 2ly. Whether the King can pardon murther with a non obſtante, where the word murther is not expreſſed. To that I ſay, that if it had been ſo, yet the pardon would not have been good, for the Statute cannot be diſpenſed with by a non obſtante, becauſe the Statute was made to reform publique abuſes, for the benefit of the Common-Wealth, 11. rep. 8. Cooks Pleas of the Crown, 237. the King cannot pardon a common nuſance. 2ly. The King hath bound himſelf by expreſſe words in the Statute, and he cannot diſpence with them with a non obſtante, for then ſuch Statutes made for the advancement of juſtice would be void, and the King cannot pardon a recogniſance for the peace before it is broken, and the King may bind himſelf in ſuch manner by expreſſe words, as my Lord Barkleyes caſe is, with the Statute of 1 Iac. concerning Biſhops the King cannot diſpence, but with the Statute of 1 & 13 Eliz. he may. Doctor Hutchinſons caſe, Mich. 10. Iac. C. B. Hob. 103. the King cannot diſpence with this Statute, becauſe it was made for the advancement of Juſtice. For the third point, though the King might diſpence with the Statute by a non obſtante, yet not with this non obſtante in this pardon, for the King doth not take notice of the offence in the non obſtante, and the King is deceived here, which the Law will not ſuffer, and here is a hiding of the offence from the King, which is againſt the meaning of the Statute. 2ly. This manner of pardoning is againſt all manner of practiſe for two hundred years, and was never uſed till 2 Iac. but only in Spencers caſe, which was carryed with a ſtrong hand, and allowed only pro hac vice, 21 Eliz. by Popham the Attorney by the ſpecial command of the Queen, and untill 2 Iac. for 200. years no non obſtante uſed of the Statute of 13 R. 2. but this is grown up of late years, and a Judge of our own times hath told me that he hath diſallowed it. 3. Inſt. 105. it hath been uſed of late times to make a leaſe of the parties life, viz. to reſpite execution untill the time of 2 Iac. and that allowance I formerly mentioned pro hac vice, may be queſtioned whether it were good or no. For the fourth point the pleading of the pardon is not good, for he hath not pleaded a non obſtante for the pardon of the murther, but only to diſpence with the binding to the good behaviour, and the pardon is only recited to prove the plea, and therefore it is not to be allowed. Therefore let the Priſoner ire ſine die, and let the matter be inquired in the County where the fact was done. Yet we will conſider whether he ſhall be

Murther.

Non obſtante. Diſpenſation.

tryed in the Country or here, in the mean time, Marſhall take care at your perill that you keep him in ſalva cuſtodia.

Newman and Maſſey.

Trin. 1653. Banc. ſup.

ſial verdict in debt upon an obligation againſt an exec-tor.

Plea.

NEwman brought an Action of debt upon an obligation againſt Maſſey as an Executor; The Defendant pleads generally plene adminiſtravit, and after iſſue joyned he gives in evidence a Judgement againſt the Teſtator to make good his plea, upon which a ſpecial verdict was found. The queſtion thereupon was, whether this Judgement may be given in evidence upon the late meal Act to maintain the iſſue, or whether it ſhould not have been pleaded ſpecially in bar of the Action. Roll chief Iuſtice, The queſtion is, whether the giving the Judgement in evidence can ſtand with his plea of plene adminiſtravit, and it ſeems it cannot, for now you ſhew an adminiſtration in an other way than you pleaded upon a new matter alleged. Adjourned. At another day Hales argued that a plene adminiſtravit is a plea in Bar, although it be not a perpetual Bar, and it is a general iſſue, becauſe it compriſeth many things which may be given in evidence, 27 H. 7. 2. 11 H. 6. 35. and it is ſtiled a general iſſue, Br. gen. iſſue 91. & Hob. 106. caſe 227. and it would be miſchievous if it ſhould be otherwiſe. Roll chief Iuſtice, If upon the general iſſue one ſhould give in evidence non eſt factum, would it be good? certainly the Act for the general iſſue in it ſelf is miſchievous, and we will not enlarge it, and this is not the general iſſue intended in the Statute, although it be a common iſſue, for the general iſſue intended, ought to be an iſſue proper to the Action that is brought, and which he might have pleaded at the beginning, and who can tell upon this plea what you will give in evidence, and ſo the Plaintiff can never be provided for you at the tryal, and therefore you muſt rely upon your ſpecial plea of plene adminiſtravit, and not vary from it by ſhewing new matter. Therefore let the Plaintiff have his Iudgement.

Iſſue.

Evidence.

Atwood and Monger.

Trin. 1653. Banc. ſup.

Arreſt of Iudgement in an Action upon the caſe.

ATwood brought an Action upon the caſe againſt Monger, for cauſing a falſe preſentment to be made againſt him before the conſervators of the River of Thames, for ſuffering 8. loads of earth to fall into the River of Thames, and obteins a verdict; the Defendant moved in arreſt of Judgement, that it doth not appear by the Record what authority the conſervators had to take the preſentment, and if they had no authority, then it was coram non judice, and the Plaintiff could not be prejudiced by it. Twiſden anſwered it is well enough, though their authority appears not by the Record, becauſe they have authority given them by the Statute of 13 R. 2. C. 9. which is a generall Law, and ought to be taken notice of; but if not, yet the Action is well brought, for it is brought for the vexation the Plaintiff was put unto by reaſon of the preſentment, and the other matter alleged, is but by way of inducement to the Action, 2 Car. in Dent and Oliffes caſe in this court ſo held, and though the conſervators had no authority, yet the Action lies for the malitious proſecution, and for unjuſtly vexing him, and ſo adjudged. Trin. 16 Car. in this Court in Damon and

Sheremans

Sheremans caſe. Hales on the other ſide ſaid, that this Court is not bound to take notice, that the Lord Maior of London hath this juriſdiction of conſervatorſhip, for the Statute which gave it him is a particular Law touching him only, and ſo not to be taken notice of without it be ſhewn, and then if he have no ſuch authority, all the proceedings againſt the Plaintiff are void. Roll chief Iuſtice, An Action upon the caſe lies for bringing an appeal againſt one in the Common Pleas, though it be coram non judice, by reaſon of the vexation of the party, and ſoit is all one whether here were any juriſdiction or no, for the Plaintiff is prejudiced by the vexation, and the conſervators took upon them to have authority to take the preſentment. And I hold that an Action upon the caſe will lye, for maliciouſly bringing an Action againſt him where he had no probable cauſe, and if ſuch Actions were uſed to be brought, it would deter men from ſuch malitious courſes as are to often put in practice. Caſe.

Sherecroft and Weekes.

Trin. 1953. Banc. ſup.

SHerecroft brought an Action upon the caſe againſt Weeks, for ſpeaking theſe words of him; He, meaning the Plaintiff, got Mary Nab with Child, and the Child is his, and I have tryed it with a ſieve and a pair of ſheeres; It was moved in arreſt of Iudgement, that the latter words are inſenſible, and ſo the Action not maintainable, to which it was anſwered, that the firſt words are Actionable, & it matters not though the latter words be nonſence, becauſe they have no reference to the former words, and therefore ſhall be rejected as ſenceleſſe. But Serjeant Barnard on the other ſide ſaid, the latter words do take off the force of the former words, as the caſe is 4. rep. f. 19. 2ly. It is not ſaid here, when he got her with Child. 3ly. Doth he aver that there was any ſuch perſon as Mary Nab. Roll chief Iuſtice, The Action doth well lye, for the former words are poſitive ſcandalous words, and the ſubſequent words are not material, and if they be, then they are in confirmation of the former, for it ſeems he put confidence in the ſieve and the ſheeres, and that made him ſpeak the words, and it matters not whether his confidence be true or falſe. Therefore Iudicium niſi pro Querente. Arreſt of Iudgement in an Action for words. Caſe.

VVeldon and Strudder.

Trin. 1653. Banc. ſup.

IT was moved to the Court that the Plaintiff after he had obteyned a verdict, and before Iudgement entred, dyed, and prayed that this might be entred upon the Roll; but the Court denyed it, and ſaid it could not be. Motion to enter the death of the Plaintiff on the Roll.

VVhitehead and Buckland.

Trin. 1653. Banc. ſup.

THe caſe of Whitehead and Buckland was again ſpoken unto, which was this; Whitehead brought an Action of Treſpaſſe by original writ, for taking his Cattel; the Defendant pleaded the Statute of limitations of Actions in War; the Plaintiff replies that he took forth an original writ againſt Demurrer to a replication in Treſpaſs by Original.

gainſt the Defendant for this Treſpaſs within the time limited by the Statute, and upon this replication the Defendant demurred, and for cauſe ſhews, that he doth not ſhew what writ he ſued forth, as he ought to do, otherwiſe it cannot be known whether he be rightly thereby intituled to his Action or no. 2ly. He hath not ſhewed the continuances upon his proceedings, and ſo it cannot be known whether his Action be diſcontinued or no, that if it be we may take advantage thereof. 3ly. He doth not ſay that he hath taken out an Original, prout apparet per Recordum, as he ought to do, for we do not agree the writ that he pleads he hath taken out. 4ly. He hath concluded his plea, ſo that it amounts to a new aſsignment, and hinders us from objecting againſt it by way of rejoynder, and he joyns an iſſue of his own head of a matter not alleged before, and 5ly. The Action is for a Treſpaſs done in 1645. and yet he concludes it to be contra pacem publicam, which being in the late Kings time could not be, but ought to have been contra coronam et dignitatem noſtram. Latch on the other ſide ſaid, that both parties agree to the Original, and the diſagreement is only in the time of the execution thereof, and it is not neceſſary to ſay prout patet per recordum; nor is it neceſſary to ſhew the continuances of the proceſs, for this would make the Record too long, and here is no hinderance but they may rejoyn if they have cauſe. Roll chief Juſtice, As to the firſt Exception it is not neceſſary to ſet forth the particulars of the writ, and if the writ be not good you may have a writ of Error; and for the ſecond exception, the plea is good without ſhewing the continuances, and there is no inconvenience by not ſetting them forth, and we will intend that all is rightly done, becauſe you have appeared, and you are not hindred from replying, but may do it if you will, and have cauſe, and the Record here ſhews that you have appeared to this writ; but it is not good to conclude the plea ſuper totam materiam as you have done, for by this he is hindred from replying, and then he hath good cauſe to demur, becauſe you have concluded him, and what ſay you to that? Latch, The party may ſtrike out the words Et querens ſimiliter. Roll chief Juſtice, He cannot ſtrike out that which belongs not to him, and you cannot go back, and the other is compelled to demur. Therefore, Nil capiat per Billam niſi, &c. or waive the Demurrer, Poſtea.

Plea. Error.

Replication. Demurrer.

Trin. 1652. Banc. ſup.

Who may make a leaſe to try a title.

IT was ſaid in the caſe of Homes and Bingley, that Tenant at will may make a leaſe for years to try a title of land, and ſo may a Copyholder. Q.

Trin. 1652. Banc. ſup.

What plea an Attorney may plead without a ſpecial warrant.

BY Roll chief Juſtice, An Attorney who hath warrant to appear for his Client, may plead for him without warrant. But the Clarks in Court ſaid, he may plead no other plea without a ſpecial warrant, but a non ſum informatus, ideo Q.

Peck

Peck and Ewre.

Trin. 1653. Banc. ſup.

Paſch. 1653. rot. 116, or 117.

A Writ of Error was brought to reverſe a judgement given in an Action of debt for rent arrear upon two leaſes for years, viz. upon a leaſe for 3 years of divers Copyhold Lands, and upon a leaſe for 31 years for other lands. Howell aſsigns for Error, 1. That the Declaration is not good, becauſe that it is for an entire rent reſerved for 2 ſeveral terms, whereas one of the terms is expired, & here cannot be made any apportionment of the rent, becauſe it appears not which of the lands are Copyhold, and which are Free lands. Roll chief Iuſtice, He ought to ſhew how much of the lands are Copyhold, and how much Freehold. Hales, Here is but one entire rent reſerved, and it ſhall be paid as well after the expiration of the Copyhold lands as before. Roll chief Iuſtice, Then for what term ſhall the rent be reſerved? for it doth not appear to us, Therefore you were beſt to diſcontinue your action, otherwiſe if we give judgement upon the Exception taken, you may loſe your rent.

Error to reverſe a judgement in debt for rent.

Diſcontinuance.

Hill and Dechair.

Trin. 1653. Banc. ſup.

An Action of debt was brought for 5 l. for ſelling of Wine without Licence, and a Verdict was found for the Plaintif. It was moved in Arreſt of Iudgement, That the Action is not well brought, becauſe it is not by Original, as it ought to be by the Statute of 18 Eliz. Wild on the other ſide anſwered, that it is not neceſſary to be by Original, for a Bill of debt as this is, is in the nature of an Original writ, if it ſhould be otherwiſe the Statute would be repugnant; for the debt due by Statute may be recovered in this Court by Information, and this is the uſual practice of this Court. Twiſden took a difference between a penal Action, and a popular Action; A penal Action he ſaid may be by Bill, but not a popular Action. 2ly. It is not ſhewed that the party was not licenſed to ſell Wine. 3ly. The Verdict finds him guilty for ſelling of 5 pints of Wine between ſuch a time and ſuch a time, part whereof was before the Information brought, and part after the Information brought. To the laſt exception, Roll chief Iuſtice anſwered, The matter ſhall relate to the filing of the Bail, for then the Action beginneth, & not before. But what ſay you to the other Exception? Wild, That is miſtaken, for the Action is upon another branch of the Statute. Roll chief Iuſtice, By an original Action it is meant in the Statute that the offence ſhall not be tryed upon a plaint in an Inferiour Court, & not to diſtinguiſh it from an information; for a Writ & Bill is all one in this Court, Stat. 2 R. 3. A Bill is not an Original writ, but an original Action, and it is the common practice to ſue in this Court, in this manner But we will adviſe. At another day the Court was moved for judgement, becauſe the Action is well brought, though it be not brought by original, and the Caſe urged of Winſton againſt it is not to the purpoſe, for that Caſe was not upon an information, as our Caſe is, but it was brought by the party grieved to recover his treble damages, and in that caſe the party did not purſue the manner of ſuing for them as the Statute direct-

Arreſt of Judgement in an Action upon the Statute for ſelling wine without licenſe.

Relation, Action.

Writ, Bill.

ed, but we have here done it, and it is the conſtant practice of this Court. Twiſden anſwered, that Winſtons caſe is not anſwered; for that was a popular Action, as our caſe is. Roll chief Juſtice, The queſtion here is, whether there be an original Action or not upon the Statute of 18 Eliz. C. 5. And I ſay it doth not appear whether that Statute meant to out this Court of its Juriſdiction or not, but it is left at large in the Statute, and me thinks it is an original Action, and Plats Caſe is, that an original Action may be by Bill, And I conceive the Statute intended only to exclude inferiour Courts, and the conſtant courſe is, that the party being in Cuſtodia Mareſcalli he may be proceeded againſt by Bill, and we will not ſuffer this Court to be excluded from its juriſdiction by obſcure words in the Statute, Therefore let judgement be for the Plaintif, niſi, &c.

Juriſdiction.

Ricott and St. Iohn.

Trin. 1653. Banc. ſup.

Motion that the Defendant may plead as a third perſon ſhall direct.

IN Action of Treſpaſs an Ejectment brought by Ricott againſt St. Iohn, the Court was moved for a third perſon, that he will ſave the Defendant harmleſs, and prays that giving him ſecurity ſo to do, the Defendant may be ordered by the rule of this Court to plead as he ſhould direct him, and that he be not ſuffered to confeſſe a judgement. Roll chief Juſtice, It is out of the way for you to give ſuch ſecurity, for there yet appears no colluſion, But you ſhall be made a party to defend the title, and then move again.

Trin. 1653. Banc. ſup.

Where a day is taken inclusive, where exclusive. Arbitrement.

IN the Caſe of one Clark it was ſaid by Roll chief Juſtice, That if the ſubmiſſion to an Award be, that the Award be made ſix days after the ſubmiſſion, the day of the Award is to be taken inclusive and not excluſive, ſo that if the Award be made the ſame day on which the ſubmiſſion was, it is a good Award.

Ayre and Hauxeſworth.

Trin. 1653. Banc. ſup.

Whether a Traverſe was well taken.

AYre brought an Action of Treſpaſs againſt Hauxeſworth for his Cattels damage feaſant in D. the Defendant juſtifies in another County, and traverſeth abſque hoc, that he is guilty in D. or in any other place. The queſtion was whether the traverſe be well taken or not. Roll chief Juſt. anſwered, he muſt take a traverſe as this caſe is, becauſe the juſtification is local: Therefore let the Plaintif take nothing by his Bill, for he may not diſcontinue his Action becauſe it is in Treſpaſs. Nota.

Traverſe. Diſcontinuance.

Fletcher and King.

Trin. 1653. Banc. ſup.

Error to reverſe a judgement in debt upon an Aſſumpſit.

A Writ of Error was brought to reverſe a judgement given in the Common Pleas in an Action of debt brought upon an Aſſumpſit to ſave one harmleſs, in diſpoſing of certain goods ſeiſed by an Order of the Commiſsioners of Haberdaſhers Hall; The Defendant pleaded that he had

had saved him harmless; The Plaintif replyed that he was damnified, the Defendant rejoyns by protestation, that there was no Order of Haberdashers Hall, for plea saith, non damnificatus, and upon this the Plaintif demurred in the Common Pleas, and a judgement was given there upon the Demurrer for the Plaintif. In the writ of Error here the Error assigned was, that the rejoynder is a departure from the plea, and here it doth not appear that Iohn Pitcher named in the replication is the same Iohn Pitcher that is named in the Declaration, for it is said quidam Iohannes Pitcher, and not the said I. Pitcher. Latch said, This is not material, whether he be the same or no; but upon the entire matter it doth appear that he is the same person, for there is an averment afterwards that makes it so appear, viz. That it is the same person and goods mentioned in the plea, and in the condition made upon delivery of the goods, and it cannot be otherwise understood, and their bar is naught both in matter and in form also, for he is to be saved harmless of goods. Hale on the other side makes a difference between saying one I. P. and saying I. P. and saying of divers goods, and saying of goods generally; and the goods mentioned here cannot relate to the goods mentioned in the condition, and though the plea be not good it matters not, for the replication assigns not a breach. Roll chief Iustice, If your plea be not good, then the Declaration is not answered. It may be intended the same person, yet it is not well expressed to say quidam I. P. for how can a traverse be taken upon an intendment? nor doth it appear they are the same goods but by intendment, so that the bar is ill, and the replication also. Affirmetur nisi, &c. Nota.

Traverse. Intendment. Bar. Replication.

and Hodges.

Trin. 1653. Banc. sup.

A Writ of Error was brought to reverse a judgement given in the Town of Newbery in an Action upon the Statute of 5 Eliz. brought by an Informer for using a Trade, not having served an Apprentiship therein, and two Errors were assigned, 1. That the Action ought not to be brought in an inferiour Court, but must be brought in one of the Courts at Westminster. 2ly. The Venire is not good, for it is only præceptum est, and doth not say per curiam as it ought to be. Roll chief Iustice, The Action ought not to be brought there, but it ought to be brought in some of the Courts here and the second is a good exception also, therefore reversetur, nisi, &c.

Error to reverse a judgement given in an Action upon the Statute of 5 Eliz. Action. Venire.

Tayler and VVebb.

Trin. 1653. Banc. sup.

IT was resolved by the Court, that the delivering of a breviat of the Case to the Jury before the verdict, and their reading it, did make the verdict given by them to be void, for the Jury ought not to have any other writings given them to peruse than such as are given in evidence, for it would be dangerous if it should be otherwise, and to confirm this, Mich. 31 et 32 Eliz. Metcalfs and Deans case, and one Viccary and Farthings case were cited by Roll chief Iustice.

What Act may make a Verdict void.

Ash-

Aſhby and Child.

Trin. 1653. Banc. ſup.

Mich. 1652. rot. 686.

Upon a Demurrer in an Action of debt the caſe was this, A man died inteſtate, and a Stranger poſſeſſeth himſelf of the Inteſtates goods after Letters of Adminiſtration were granted to a Creditor of the Inteſtate, who brings an Action of debt againſt the ſtranger for the debt due to him by the Inteſtate, as Executor of his own wrong. The queſtion was, whether the Creditor by taking the Letters of Adminiſtration had not ſuſpended his Action for the time he ſhould continue to be Adminiſtrator: Twiſden held that his Action is ſuſpended, and cited 8 Rep. St. Johns caſe, becauſe the goods of the Inteſtate ſhall be aſſets in his hands, Hob and Longs caſe; and the Plaintif is at no prejudice, for he may recover the goods by an Action of Trover or Treſpaſs, 12 H. 4. f. 21. Hales on the other ſide held that the Action is not ſuſpended; for though he may bring Treſpaſs or a Trover and Converſion for the goods, yet they are not aſſets till they are recovered, and a Creditor may bring an Action againſt an Executor de ſon tort, although Letters of Adminiſtration be granted to another, and the ſubſequent adminiſtration doth not ſuſpend the Action which accrued before, and here can be no retainer to ſatisfie himſelf, becauſe he hath not the goods, and it is not the bare Letters of adminiſtration that chargeth the Adminiſtrator, but the Aſſets alſo, Com. 7. Baſſets caſe, An Action of debt is maintainable by an Adminiſtrator who hath not aſſets. Roll chief Iuſtice, There is a book againſt that, that the heir is not chargeable. Hales prima facie, It is a good plea, otherwiſe it would be miſchievous, for all the goods may be waſted before he hath adminiſtration granted him; and though he may bring an action of Treſpaſs for the goods, yet he may bring his Action to which he was intitled before the adminiſtration granted unto him. Roll chief Iuſtice, It is clear the Adminiſtrator may bring a Trover and Converſion for the goods, and here is but a right to aſſets in the Adminiſtrator, and no aſſets to charge him withall, and it would be miſchievous if it ſhould be otherwiſe; and the granting unto him Letters of Adminiſtration hinders him not from bringing his Action, becauſe the goods were not taken away after the Adminiſtration granted but before, and if they had been taken away afterwards, he might have had a Trover and Converſion, or an Action of Treſpaſs, but in the caſe at the Bar he may have an Action of debt, and he cannot ſue himſelf, therefore his Action is not ſuſpended, and he cannot retain the goods to ſatisfie himſelf, becauſe he hath no goods, and he may ſue the heir here if he will, and he ſhall not take advantage againſt him by reaſon of the adminiſtration, becauſe he hath no aſſets to retain or ſue himſelf for, and ſo it is in his election what Action he will bring, otherwiſe it would be dangerous, and we muſt ſupport men in their juſt Actions. Ierman, Nicholas and Ask ad idem. And ſo judgement was given for the Plaintif, niſi.

Trover and Converſion.

Aſſets.

Treſpaſs. Debt.

Suſpenſion. Retainer.

Election.

Fiſher

Fiſher and Ieoffryes.

Trin. 1653. Banc. ſup.

FIſher brought an Action of debt againſt Ieoffryes as Executor to another; the Defendant imparls, and after imparlance he pleads that he is Adminiſtrator cum teſtamento annexo, and not Executor, and that he ought to be named ſo in the writ, to this Plea the Plaintif demurred. Roll chief Iuſtice, Upon the matter he pleads a miſnomer after imparlance, which he cannot do, and therefore let the Plaintif have his judgement, niſi, &c. What may not be pleaded after imparlance. Plea.

Giles and Southward.

Trin. 1653. Banc. ſup.

IN this caſe it was ſaid by Roll chief Iuſtice, That if the Defendant doe plead an inſufficient bar, and the Plaintif do joyn iſſue upon it, and obtain a Verdict, the Plaintif ſhall have judgement though the Bar was not good. Iudgement though the plea in bar not good.

Rawley and Vivers.

Trin. 1653. Banc. ſup.

A Writ of Error was brought upon a judgement given in an Action of Treſpaſs, quare clauſum fregit, &c. The Error aſsigned was, that the Plaintif did declare quare clauſum fregit, and for pulling down of his houſe, but doth not ſhew the value of his houſe. Roll chief Iuſtice, It is not neceſſary, the Action being a real action. Affirmetur, niſi. Error to reverſe a judgement in Treſpaſs quare clauſum fregit. Value.

Bariar and Windham.

Trin. 1653. Banc. ſup.

IT was held by the Court that the Engagement taken before 2 Iuſtices of Peace in Ireland is well taken, and that the Engagement ought not to be pleaded to an Alien born, and ſubject to any forein Prince in amity with England, becauſe he is under another obedience, and thereupon the Engagement pleaded to ſuch an one was diſcharged in the Caſe of one Bariar and Windham. What engagement is well taken.

Trin. 1653. Banc. ſup.

ONe who was a witneſſe in the cauſe for the Defendant being bail for him, upon motion to the Court was taken off from the file, and another bail taken in his room in Court upon examination of his ſufficiency. Nota. Who may not be bail.

Trin. 1653. Banc. ſup:

Motion to diſpauper the Plaintif.

THe Court was moved to diſpauper the Plaintif in an Action of Treſpaſs and Ejectment, for that it was proved by Affidavit that he was a very vexatious perſon, for he had been thrice nonſute in this Action, & would never pay coſts, or make a ſufficient Leſſee able to pay them, and had alſo ſealed a general releaſe to the Defendant. Roll chief Iuſtice, Let him be diſpaupered, and let him put in an able Leſſee to pay the coſts, or otherwiſe he ſhall not proceed in his Action.

Trin. 1653. Banc. ſup.

Laws of England and Ireland all one, Error.

BY Roll chief Iuſtice, The Laws of Ireland are all one with the Laws of England, and a writ of Error lies in England to reverſe a judgement given in Ireland.

*Trin. 1653. Banc. ſup.

What is not good notice to a priſoner of a declaration againſt him. Iudgement diſcharged.

A Declaration was filed in the Office againſt one in cuſtody of the Mareſchal, and a Copy of it was left with the Clark of the priſon, but the priſoner had no notice of it. Upon the priſoners ſhewing of this matter to the Court, and reading an Affidavit to prove it, a judgement by a nihil dicit obtained againſt him was diſcharged, and ordered that the Plaintif ſhould accept of a plea.

Trin. 1653. Banc. ſup.

To diſcharge a priſoner that had lorg lain in priſon.

THe Court was moved to diſcharge a priſoner out of the Upper Bench that had lain there ever ſince 24 Caroli, upon a judgement obtained againſt him in an Action of Debt, where only common bail was filed, and becauſe no execution was ever taken out upon that judgement, and the Plaintif in the Action was now dead. Roll chief Iuſtice, Let him be diſcharged niſi cauſa ſhewed to morrow. Nota.

Trin. 1653. Banc. ſup.

Matter of Record not alterable without motion to the Court.

BY Roll chief Iuſtice, A matter entred upon Record cannot be altered without a motion made, and the Conſent of the Court firſt obtained, though the Attorneys on both ſides conſent to it.

Trin. 1653. Banc. ſup.

To quaſh an Order of Seſſions.

THe Court was moved to quaſh an Order of Seſſions for one to pay 3 s. a week to keep a Baſtard Child. Roll chief Iuſtice, Let it be quaſhed, for they can make no ſuch Order, for the party may keep the Child himſelf, if he will, and then he need pay no money to keep it.

Trin. 1653. Banc. ſup.

BY Roll chief Iuſtice, The Venue cannot be changed after a Plea pleaded in abatement of the writ, much leſſe after a plea pleaded in Bar. Q. When the Venue may not be changed.

Fanſhaw and Bond.

Mich. 1953. Banc. ſup.

IN this Caſe it was ſaid, That if a Copyholder refuſe to pay a reaſonable fine, or to be admitted to the Copyhold, This is a forfeiture of his eſtate. How a Copyhold is forfeited.

Dekin and Turner.

Mich. 1653. Banc. ſup.

VPon a motion in Arreſt of Judgement in an Action upon the Caſe for theſe words, Thou art a whore, and I will prove it, It was ſaid by Roll chief Iuſtice, That the words are not actionable, although ſpoken ſince the Act made againſt Adultery, becauſe they are but words of heat and choler, but if a ſpecial damage be laid by the ſpeaking of them, as per quod maritagium amiſit, or the like, there they are actionable. Arreſt of judgement in an Action for words.

Price and Goodrick.

Mich. 1653. Banc. ſup.

IN this Caſe it was ſaid by Roll chief Iuſtice, If there be a Iudgement againſt three, and one of them is taken in Execution, and be afterwards ſet at large by the Plaintifs conſent, if any of the other two be afterwards taken in execution upon the ſame Iudgement, he may have an Audita querela, but he cannot be relieved upon a motion in Court, though grounded upon an Affidavit. Where an Audita querela lies. Motion.

Newton and Osborn.

Mich. 1653. Banc. ſup.

NEwton brought an Action of Covenant againſt Osborn an Executor to a Leſſee for years for non-payment of rent reſerved upon the leaſe upon the general words yielding and paying in the leaſe; there being no expreſs Covenant therein for the payment of the rent. The queſtion was, whether this Action did lie againſt the Executor. Latch argued that it did not lie, becauſe it is a meer Covenant in Law compriſed only in the words yielding and paying, and not an expreſs Covenant, and ſo only binds the Teſtator, but not the Executor. But Roll chief Iuſtice anſwered, That an Action of Covenant doth lie againſt an Executor upon a Covenant in Law, although he be not named, but it is otherwiſe of an heir, for he is not bound by ſuch a Covenant. And the reſervation of the rent here doth ſeem to be an expreſs Covenant, for it is the agreement of both parties, viz. of the Leſſor and Leſſee, Iudicium niſi. Whether an action of Covenant did lie or not againſt an Executor. Covenant. Executor.

Benskin and Herick.

Mich. 1653. Banc. ſup.

A Plaintiff loſt his mony by joyning falſe iſſue, a Verdict againſt him.

BEnskin brought an Action of Debt upon an Obligation againſt Herick. The Defendant pleads that he tendred the mony due upon the Obligation at the day and place of payment, and that the Plaintiff refuſed to receive it. Upon this the mony was brought into Court by rule upon the Defendants motion, the Plaintiff joyns iſſue that there was no tender and refuſal; and upon this a Tryal was had, and a verdict found for the Defendant, that he did make tender, and that the Plaintiff did refuſe to receive the mony, and thereupon the Defendant moved to have the monies out of Court. Roll chief Iuſtice, The Plaintiff hath loſt his mony by this verdict, therefore let him ſhew cauſe why the Defendant ſhould not have them, for it is peremptory to the Plaintiff.

Peremptory.

Franklin.

Mich. 1653. Banc. ſup.

Motion for Merchants to be joyned to Auditors aſſigned to receive an accompt.

IN an Action of Accompt the Defendant was adjudged to accompt, and Auditors were aſsigned. The Court was moved that they would order to joyn ſome Merchants to the Attorneys on either ſide to help them to mannage the Accompt, becauſe the Attorneys were not skilfull in ſuch buſineſſes. Roll chief Iuſtice, We can make no rule for this, but you may by conſent adviſe with Merchants to aſsiſt you in drawing up the Accompts,

Mich. 1653. Banc. ſup.

One burned in the hand may be a Witneſs.

BY Roll chief Iuſtice, one that hath been burned in the hand for Felony, may notwithſtanding be a witneſs in a Cauſe: for he is in a capacity to purchaſe Lands, and his fault is purged by his puniſhment.

Townſend and Barker.

Mich. 1653. Banc. ſup.

Trin. 1653. rot. 743.

Arreſt of Judgement in an action for words.

TOwnſend brought an Action upon the Caſe againſt Barker, that had bæn a Copartner with him in trade, for ſpeaking theſe words of him, You are a coſening Knave, and did coſen me of 1200 l. at one time, and that was in making an accompt in the year 1648. Upon a verdict for the Plaintiff, it was moved in arreſt of Judgement that the words are not actionable, becauſe though they be ſpoken of a Tradeſman, yet they are not ſpoken of him in reference to his Trade, but in reference to an Accompt: and although by way of reduction and conſequence they may reflect upon his honeſty, yet they are not actionable, and though his reputation be impaired by ſpeaking them, yet he cannot be endicted for coſening in his Trade by reaſon of them, becauſe they are ſpoken of a ſingular and particular abuſe, and not of a general coſening uſed in his Trade, and an Action upon the Caſe lies not for words which are only ſcandalous by way of reduction, and if the words ſhould hinder the party

party to get a Partner hereafter to trade with him, yet he may uſe his Trade, and ſo cannot be prejudiced: nor are the words that he cheated him, but that he coſened him, which are not of ſo violent a conſtruction. Wild on the other ſide ſaid, that here is a Partnerſhip which is neceſſary to the driving of a Trade, and without which it cannot be ſo well driven, and the Accompt is incident to all Partnerſhips, and prayed for Judgement. Roll chief Iuſtice, If the Copartnerſhip continued, the words were actionable without doubt, for then they muſt be ſpoken of him in the way of his Trade: but here the Partnerſhip being ended makes the matter more conſiderable: but yet as it is the words are ſcandalous, and may hinder him from getting a Partner for the time to come, and it may be he cannot mannage his Trade without a Partner; and although an Accompt be a private thing, yet the Plaintiff is diſgraced by the ſpeaking of the words, and none will deal with a man that will coſen his own Partner; and we muſt countenance Trade and Traffique, and mens credits; and the Accompt is not ſo collateral a thing to trade as Hales objects, as is the hiring of a ſhop to trade in, or the like. German Iuſtice ad idem, and ſaid, that Copartnerſhip is neceſſary to ſupport Trade, and the keeping of a true Accompt is the principal thing between Partners. Nicholas and Ask Iuſtices ad idem. Judicium niſi pro querente. Caſe.

Bird and Chriſtopher.

Mich. 1653. Banc. ſup.

IN this Caſe upon giving of an evidence in a Treſpaſs and Ejectment, it was ſaid by Roll chief Iuſtice, that if I do enfeoff I. S. with a Proviſo contained in the Deed, that it ſhall be lawfull for me to revoke this Feoffment, and afterwards I levy a fine to I. S. of the ſame Land, this is an extinguiſhment of the Proviſo of revocation. Extinguiſhment of a Proviſo in a Deed.

Olive and Tong.

Mich. 1653. Banc. ſup.

Trin. 1651. rot. 1426.

VPon a ſpecial Verdict in an Action of Treſpaſs and Ejectment, the Caſe in effect was this, One whoſe Sirname was Mills ſeiſed of Gavelkind-lands in Kent in fee, by his laſt Will and Teſtament deviſed theſe Lands to Elizabeth his Daughter in tayl, with a Proviſo in the Will, that if his Daughter Elizabeth did mary one of his own Sirname that then ſhe ſhould have the Lands in fee-ſimple. Elizabeth maried one whoſe Sirname was Mill, but commonly called and known by the name Mills alſo. The queſtion was, whether ſhe had maried one of ſuch a Sirname, whereby according to the Proviſo in the Will ſhe had a fee-ſimple in the Lands deviſed unto her, or whether his Sirname ſhould be accompted a diſtinct name from the Teſtators, ſo that Elizabeth by the Will could only have an Eſtate in tayl in the Lands deviſed unto her. It was argued firſt, that the name Mill and Mills ſhall not be ſaid to be one and the ſame name, no more than if ſhe had maried one of a clear differing Sirname in ſound, yet commonly called alſo Mills, could ſhe have been ſaid to have maried one of his own Sirname, and the Proviſo here is not a particular pointing out of the perſon whom his Daughter ſhould mary, but a general limitation Special Verdict in a Treſpaſs and Ejectment.

directing her to marry one of his own Sirname, and this ought to have been punctually followed, because the name was used to induce the affection of the Devisor to enlarge the estate given by him. If he had devised his Land to his Daughter E. if she shall marry a Protestant or an Earl, she must marry one that is really so, and not one called or only reputed so. And as to the objection, that this construction would make contrariety in the Will, which is not to be admitted; this will not be, if the Will be taken compositive as it is penned, or together, and not abstractive and taken to pieces, and if it should not be intended that she should marry one who in truth was of his name there would be a contradiction in the Will; and here is an Emphasis in the word Own, which must be meant his real name, and not of a reputative name. Roll chief Justice, If a Juror be returned by the name of Mills, and is sworn by the name of Mill, shall this be a mistryal, quasi non? and the words sound alike as Baxter and Backster. At an other day the Case was put again by Hales, and argued for the Plaintiff, and he made divers points in the Case, but I could not well hear him: but the only point insisted on was the point formerly spoken to, and the sum of his Argument was, that we are in this Case upon the construction of a Will, which must be favourably taken, and the variation here betwixt Mills and Mill is small and inconsiderable to defeat an Estate, for it is only in the termination of the word, and is as little as the difference between Baxter and Backster, or Hasting and Hastings, 9 E. 4. 42. 44 Eliz. Molyn and Molyns, or Pitt and Pitts, which differ but in one letter, and is not a material difference. 2ly. It appears by the Verdict that he was commonly called Mill and Mills, and common reputation we know doth give names to things. 3ly. It is found that he was known by one name as well as the other, and this will satisfie the Testators intent well enough to carry the Estate. 4ly. The party himself was known to the Testator at the time of the making of the Will by the name of Mills, as appears in eight several places of the Will. And if one devise Lands and Goods, and excepts one Lease, if there be other Leases they are devised. 5ly. It appears by the Will and the Verdict, that the mariage was intended by the Father with this very person that is called Mills, and a settlement of Lands made upon it, and it shall not be intended that the Testator thought that this mariage would be dissolved and another mariage be had. And the devise in the body of the Will doth not make the Proviso in the end of the Will repugnant, but if it did the last repugnancy shall stand: for here is no dependancy of the last Proviso upon the other part of the Will, but it is a substantive clause which revokes not the other, Doctor Buts Case, 10 Rep. and this shall be counted his last Will, and it is the more strong, because it appears by the very words, that it is a plain substantive clause made to declare the new intent of the Testator, and it shall not be intended that this Proviso shall be applyed to another person, although there be a particular title given to him by the Will, and the Estate altered by the Proviso, and the former devise is derogated by it, Hob. 28. Case, Hardings Case, and the strength of the Proviso to have one of the true name of Mills is not to be intended, for it appears that the intent of the Testator was, to have one of his name in reputation, and this appears by the former limitation in the Will, and the provision made in the last Proviso to preserve his name, is no more than that he had done before: and the former limitation is as well for the Testators advantage as the latter Proviso, and more, and his intent was not to sell the Lands, but to preserve them, and it is no more to say of my own Sirname, than to say of my Sirname, nor is the videlicet any thing to the purpose. Roll chief Justice, if the question were only upon the Proviso, there would be no difficulty but that Mill and Mills should be all one, and it would

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be good in a Conveyance alſo, as I ſuppoſe, and if it were apparent that he intended one and the ſame perſon, then the laſt Proviſo would be good to revoke the former part of the Will: but the doubt is, whether he intend the ſame perſon or not, becauſe he makes ſuch an alteration of the Eſtate by the Proviſo, and puts theſe words mine own name in it, by which it ſeems he intended to advance his own name, and he ſeems exact in it by the great alteration of the Eſtate made by the Proviſo in the ſettlement of the Eſtate. Proviſo.

At another day the Caſe was again moved and argued by Wadham Windham, that Mills & Mill are both one name, and differ but in ſound, as Abacock & Habacock, and the Verdict finds that both the names are his true Sirname, though it could not be ſo in Chriſtian names, 6 Rep. 66. Sirnames are altered by time and Cuſtom of places, and being ſo altred do become true names, as the name of Cromwell is now become a true name, though antiently the name was Williams; but I agree, that Chriſtian names cannot be altered by time, no more than things can be altered from one thing to another. 3ly. By the conſtruction of the Will, and by the finding of the Verdict, the names are made one name, although by the Teſtator he was known by no other name than the name of Mills, for he is ſo called, and this anſwers the Proviſo in the Will, that he ſhould be of his own Sirname with whom his Daughter was to mary. 4ly. Here is a particular deviſe made to her in the body of the Will of the Lands, if they ſhould not be deviſed here, 8 Rep. Clauſa generalia non extendunt ad ea quæ ſunt ſpecialiter recitata; and there is a difference between a Will and a Deed, for all the words in a Deed are ſpoken together: but it is not ſo in a Will which is ambulatory, and may have ſeveral conſtructions, and one clauſe may controll another, Inſtit. 112. and the Proviſo here in the laſt part of the Will controlls the former part of the Will, as a Codicil might have done, if there had been any, and the very words expreſs the parties meaning, 1 Rep. Porters Caſe, Dyer 255. If in a Will a clauſe may receive a doubtfull conſtruction, then a verbis non eſt recedendum, nor ſhall there be a particular ſupplyment of words added to expound it, except to prevent an abſurdity, which muſt not be admitted, though in a Will. Maynard on the other ſide made two queſtions. 1. Whether Mills and Mill ſhould be intended to be one and the ſame Sirname, and ſo to be the Teſtators Sirname. 2ly. Whether Elizabeth take the Lands by the firſt clauſe in the Will, or by the Proviſo or latter clauſe. For the firſt he held, that Mills and Mill is not one and the ſame Sirname, becauſe the Teſtator had a particular eye to his own true Sirname, and the Caſes put of names that differ, yet ſound alike, do not come to our Caſe, becauſe there was no ſuch ſpecial eye or regard as here is. 2ly. Suppoſe that his true name be Mills, and that he is provided for particularly by the Teſtator in his Will, then the Proviſo cannot extend to him, for this would be ſenſeleſſe, and it is as much as to make the Teſtator in one breath to ſpeak contradictories, and it would be hard to make ſuch conſtructions of ſuch words that would argue the party to be irrational that ſpake them, and the words in the Proviſo are in nature of an exception in conſtruction of Law, 12 Ed. 1. Fitzh. Grants 87. and Carter and Ringſteeds Caſe is not yet anſwered by the other ſide, Bolton and the Lady Staffords caſe, 8 Iac. C. B. 1. rep. Mildmayes Caſe. The words in a Proviſo in a Will or Deed may be ſupplyed with other words, rather than to interpret it ſo, that it ſhall contradict the former part of the Will or Deed where it is, and by the conſtruction that we make of the Proviſo all the Will may ſtand together, but by another conſtruction it cannot. Elizabeth ſhall have a ſpecial entayl with her Husband by the laſt clauſe, and yet the general Eſtate tayl given in the former part ſhall ſtand; and we are in the interpretation of Wills to conſider circumſtances and conjectures, and there are two publications found in this

Will,

will, although this doth not appear upon Record, and so comes not in judgement. Roll chief Iustice, We are all of one opinion, that judgement ought to be given for the Defendant. If the first clause in the Will continue uncontrolled by the Proviso, it is for the Defendant, but if it continue not uncontrolled it is for the Plaintif, and we hold that the first clause is not controlled, for we ought not to make any part of a Will void, if all the parts of it may stand together, and this cannot be here if the Proviso should controll the former part, and to make it repugnant, but if the Proviso could stand with the former part of the Will it might revoke the former part, and if this Proviso had been made after the Will, it might have altered the Case, but that appears not; And we must collect the Testators meaning by the Will, and by the Will it cannot be understood that the Proviso should be void, and the common reputation of Mill and Mills to be the same name, shall not make Mill to be the Testators true Sirname, and the Testator intended his Daughter should marry one of his own true Sirname, and not one of his reputative name, for this is a special case, and goes not according to the ordinary rules of names that sound alike, and it cannot be intended that the Testator did mean to destroy one part of his will by another part. A general clause in a grant shall not extend to a particular thing provided for in the grant, much less shall it do so in a Will. Therefore let judgement be for the Defendant, nisi.

Revocation.

Intention.

Mich. 1652 Banc. sup.

Arrest of Iudgement in an Action for words.

AN Action of the Case was brought by one that kept a Victualling house, for speaking these words of her, There was a man killed in her house, and she concealed the murther. Upon a rule to stay judgement till the Plaintif should move; Wild moved for judgement, because he held the words to be actionable, in that they amount to a scandal of the Plaintif, as well as they tend to cause her to be fined and imprisoned. Roll chief Iustice, She shall not be fined and imprisoned except she receive and comfort the party that killed him, but the words are scandalous, and the Case differs from the Cases put on the other side. Twisden for the Defendant urged, that it was not averred that the Plaintif did know of the murther. Roll chief Iustice, The words imply she knew of the murther, for how else could she be said to conceal it. Bowlstrode for the Defendant said, That it doth not appear by the Record that any man was killed in the house, nor any time when, nor is it said the Defendant spoke the words of the Plaintif, but only by an innuendo. Roll chief Iustice, The words are actionable to say that thou hast murthered a man, without averring that he is killed; but if it appear by the Declaration that the man was alive after the words spoken, it is otherwise; And here if no man be murthered the feigning of a false thing makes the words the more actionable, by saying she concealed a murther, where there was in truth no murther done; But the greatest doubt here is, whether because admitting a murther were done, the Plaintif is to be but fined and imprisoned for the concealing it, the words can be actionable; And I hold they are actionable notwithstanding, because they are scandalous; and he said that in an Endictment, a thing must be expressed to be done falso et malitiose, because that is the usual form, but in a Declaration those words are not necessary. Therefore let the Plaintif have his Iudgement, nisi.

Fine. Imprisonment.

Case.

Endictment. Declaration.

Mich.

Mich. 1653 Banc. ſup.

IT was held by the Court that a Conſtable cannot be ſued out of the County where he is Conſtable for a thing done by him in execution of his Office; but for other matters he may. A Conſtable not to be ſued out of his County.

Elſton and Drake.

Mich. 1653. Banc. ſup.

ELſton brought an Action of Debt for rent due upon a leaſe for years, as being Adminiſtrator to I. S. and declares for rent due ſince the death of the Inteſtate, and hath a verdict and a judgement in the Common Pleas. Drake brings his writ of Error here to reverſe this judgement. The Exception taken was, that it doth not appear by the Declaration whether this rent ſued for doth belong to the Adminiſtrator or not, for he makes himſelf no title to it, and for ought doth appear it may belong to the heir and not to him. Wadham Windham on the other ſide, This is no Exception now after a Verdict, but if it had been upon a Demurrer it would have been good, and we do not declare that the Inteſtate was ſeiſed in fee who made the leaſe, and ſo it may well be underſtood, that he had but a leaſe of this land, & did let an under leaſe to the Defendant, and the better conſtruction ſhall be made for us. Hales on the ſame ſide ſaid, non detinet is pleaded, and the Jury hath found detinet, which would be impoſsible if the Inteſtate had been ſeiſed in fee, and there is a double intendment that the rent is reſerved upon a leaſe, for it is reſerved to Executors, and not the heir. Maynard on the other ſide ſaid, the Verdict helps nothing, becauſe the Declaration is naught in ſubſtance in our caſe; for the Plaintif therein hath made himſelf no title to the rent, and all that is in the Declaration to intitle him is expreſſed but by way of inference or concluſion, and for the reſerving the rent to the Executors, this had been good if the rent had grown due during the time of the Inteſtate. The Court moved the parties, that by conſent the Declaration might be amended, paying coſts, and that a new tryal might be had by conſent, which was agreed unto, and ſo ruled. Error to reverſe a judgement in debt for rent. Amendment; Tryal. Coſts.

Bedwell and Fenwick.

Mich. 1653. Banc. ſup.

BEdwell brought an Action upon the caſe againſt Fenwick, and declares that the Defendant, in conſideration that the Plaintif would marry E. his Siſter, he would give his Siſter 300 l. for her mariage portion upon his mariage with her, and for breach of this promiſe brings his action, and obtains a verdict againſt the Defendant. The Defendant in Arreſt of Judgement urged, that the breach aſsigned in the Declaration was not well aſsigned, for it recited another promiſe than upon which the Plaintif had declared, for he declares of a promiſe made to give 300 l. in mariage to the Plaintif with his Siſter E. and he aſsigns the breach in not paying the 300 l. unto the Plaintif, ſo that the breach doth not answer the promiſe, for if the money be paid to the wife, which for ought appears may be, the promiſe is not broken though ſhe be maryed. But Hales on the other ſide ſaid, that it is all one as it is alleged, and that it is equivalent and reciprocal; reſt of Judgement in an Action upon a promiſe.

cal, and here is a refusal to pay the money, assigned for a breach, and this is a good breach. Roll chief Iustice, I suppose it is all one as if he had expressed the very words of the promise, for the Husband is to give the acquittance for the money, and the moneys are to be paid unto the Husband, and the Verdict finds that they are not paid: And if moneys be due to a Feme upon a Contract dum sola fuit, and after, and before the payment thereof she marry, the moneys are to be paid to the Husband, and not the wife, and the moneys here are intended to be paid for a marriage portion, which doth properly belong to the husband, and they were not to be paid unto her before the mariage, and it is all one in this Case as if the Plaintif had said, that the Defendant had not paid the moneys to the Husband with his Wife in mariage; Curia ad idem, The Rule thereupon was, that the Plaintif should take his judgement, nisi.

Acquittance.

Payment.

Hicks and Joyce.

Mich. 1653. Banc. sup.

Arrest of judgement in an Action for words.

AN Action of the Case was brought for these words, She, meaning the Defendant, is a whore, and I will prove it, and her plying place is in Cheapside, and she gets 40 s. a night by playing the whore. It was moved in Arrest of Judgement, that the words are not actionable, because they are but words of choler, and very general words, and may receive divers constructions, and at the first moving the judgement was staied; but the matter being moved again at another day, Roll chief Iustice said, that these words import more than the bare calling of a woman whore, by reason of other particular circumstances set forth to aggravate the matter, and therefore let the Plaintif take her Iudgement.

Townesend and Barker.

Mich. 1653. Banc. sup.

Trin. 1653. rot. 743.

Arrest of judgement in an action for words.

AN Action upon the Case was brought by a Churchwarden of a Parish, for these words spoken of him, Thou dost make Lowns (i.e. taxes or assessments) thy self, and makest 5 quarters in the year, and dost cheat and cozen the Parish. It was moved in Arrest of Judgement that the words are not actionable, because they are spoken of a Churchwarden, which the Common Law takes not notice of: And 2ly. In that it doth not appear they were spoken of him in relation to his being a Churchwarden; But it was answered, That a Churchwarden is an Officer of Trust, and taken notice of by the Common Law, and so was it adjudged in Stroade and [illegible]es his Case in this Court, and the words must be intended to be spoken of him in the relation to his Office, for that is implyed by his making of Lowns and his cozening the Parish. The rule was for the Plaintif to have his judgement.

Mich: 1653. Banc. sup.

Endictment quashed. Addition.

AN Endictment of one endicted for refusing to serve in the Office of a Headborough was quashed, because it did not shew that he was chosen to the Office, and because the party endicted wanted an addition.

Mich.

Mich. 1653. Banc. ſup.

The Court was moved to diſcharge one Cullins, that was arreſted as he was attending the Court to give teſtimony as a Witneſs in a Cauſe, and for an attachment againſt the parties that did arreſt him. German Iuſtice abſente Roll chief Iuſtice, Take a Superſedeas, and let the parties ſhew cauſe why an Attachment ſhall not be granted againſt them that arreſted him.

To diſcharge one arreſted attending the Court as a Witneſs.
Superſedeas.
Attachment.

Hanſlop and Johnſon.

Mich. 1953. Banc. ſup.

The Court was moved to change the venue in an Ejectione firmæ laid in London, becauſe the Lands in Queſtion did concern the Poor of London, and therefore it was ſuppoſed there could not be an indifferent Tryal in London, for by conſequence in that it concerns the Poor, it concerns the whole City. But Roll chief Iuſtice anſwered, the Action is local, and it cannot be removed, except you can draw it from thence by your Plea.

To change the Venue in an Ejectione firmæ.
Action local.
Venue.

Boyle and Scarborough.

Mich. 1653. Banc. ſup.

Hill. 1652. rot. 226.

An Action of Debt was brought by Boyle againſt Scarborough, wherein the Plaintiff did declare, that the Defendant in conſideration that the Plaintiff would forbear to ſue forth a ne exeat regnum againſt the Defendants Son, who did owe unto the Plaintiff five hundred pound, did aſſume and promiſe unto the Plaintiff a certain ſum of mony expreſſed in the Declaration, upon non aſſumpſit pleaded, and a verdict and a judgement given for the Plaintiff, the Defendant brought a Writ of Error, and it was aſsigned for Error; That there appears no conſideration to ground the promiſe upon, ſo no ground of Action, for he doth not ſhew that he had done any thing in proſecuting the Writ of ne exeat regnum, and Roſyer and Langdales Caſe 1650. in this Court was cited, and Hob. 216. Bedwell and Cottons caſe, and there is no ſuch Writ in the Regiſter, as a ne exeat regnum, and therefore there could be no forbearance to ſue out ſuch a Writ, but there is a Writ to give ſecurity not to go out of the Realm to the publique prejudice of the King and his people, and here is no ſuch matter expreſſed, but only that his Son owed him 500 l. ℔ Nat. Brev. 85. was agreed; and it was farther objected by Wild who argued againſt the Iudgement, that though the conſideration ſhould be good, yet the replication is not good and ſufficient to tye the ſecond Writ to the firſt: for it is not ſaid that the ſecond Writ is pro una & eadem cauſa, and ſo it is incertain, Br. Treſpaſs 85. 9 H. 6. and there may be ſeveral promiſes made in one day; and if the replication is good, yet the rejoynder is not good, 19 H. 8. 43. for he only admits, that he being a Knight is the ſame perſon which was ſued by the name of Eſquire, Hob. 171. Stukelyes Caſe. And here is a judgement by a Nihil dicit; and no warrant of Attorny, for it is in Latin, and ſo it is nul, it being ſince the late Act made for the proceedings in Law to be in

Error to reverſe a judgement in Debt upon a Promiſe.

Engliſh. Latch on the other ſide prayed that judgement might be affirmed, and ſaid, that here was a good conſideration to ground the promiſe, for there is a Writ of ne exeat regnum, and any one may move for it, and it is a benefit to the party, that the Plaintiff will forbear to ſue it forth, and he had cauſe enough here to move for this Writ in order to recover his debt, and although it be in the diſcretion of the King, whether he will grant it or not, yet it is for his honor to grant it, and the Regiſter 193. 134. and Brit. 102. make mention of this Writ, Infra. 130. There is a caution uſed to be taken of parties licenſed to go beyond Seas, that they ſhall pay their debts. 2ly. The replication is good, for it is not neceſſary to ſay, that the ſecond original ſued forth is for the ſame cauſe that the former was, becauſe it is in an Action upon the Caſe ſet forth at large, which ſhews verbatim that it is for the ſame cauſe, and ſo it is plain in it ſelf. 2ly. It is ſaid, that he ſued out the ſecond Original pro cauſa prædicta, which is a ſufficient averment, if there needed any, and the variance in the dammage is no argument that there is another cauſe of Action, for when the ſecond Original was ſued forth, the dammages were encreaſed by the encreaſe of the time, being a whole year afterwards. For the rejoynder, it is to be conſidered, 1. whether the party be eſtopped. 2ly. If not, whether the matter ſet forth be good. For the firſt he held, that he is eſtopped by his comming in formerly gratis as an Eſquire, and being not brought in in cuſtody, for Dyer, 192. there he ſhall not plead another name: but here this is not alleged as it ought to be, for he ought to have concluded abſque hoc, that he is an Eſquire, but he hath affirmed himſelf to be an Eſquire, by ſaying of prædictus, &c. and he ought to have alleged this ſpecially, viz. that Richard Boile Knight, which was ſued by the name of Richard Boile Eſquire; and the Book 2 E. 4. f. 3. is againſt the other Books, and the Law is otherwaies, and the old Book of Entries, and other Preſidents which are againſt me, they paſſed ſub ſilentio, and the Law generally is againſt theſe Preſidents, Raſtal Brief. 54. 19 H. 6. 1. 36. 44. ſay, that he is eſtopped if he ſo come in, and ſo is Br. Tit. Defence, 15 & 26. 32 H. 6. 3. 35 H. 6. and many other Books; and the Book of 19 H. 6. 43. urged on the other ſide is againſt them; and though he ſhould not be eſtopped, yet we can take advantage of the firſt Original, for it is but abateable by the Miſnomer, and is not abated, and there is a flaw in the rejoynder, for he ought to have traverſed that he was not an Eſquire. And 2ly. the 26th. of March is after the Original ſued forth, and it is incertain as to the time when he was a Knight, Plowd. 37. by Morgan 7. H. 7. 5. And the Warrants of Attorney are good, though they be in Latin, and if they were in Engliſh they would be erroneous, and the non-entry of them is not material, for the conſtant practice is not to enter the Warrant of Attorney before the Iſſue, Trin. 8 Iac. Morley and Morley in this Court: here is not the entry of the Warrant it ſelf, but only an entry that he is Attorny by Warrant, and ſo he prayed the affirmance of the judgment. Roll chief Juſtice, If one bring a Writ of 1000 l. and it be abated, and brings another Writ for the ſame debt, can you encreaſe the dammages accrued between the firſt and the ſecond Writ? It cannot be, for the ſecond is but the reviving of the firſt Writ, and not a new Writ; but here are divers points conſiderable, and fit to be ſpoken unto. A ne exeat regnum is a Writ uſually ſued forth although that originally it was only uſed in Caſes of State buſineſſes, therefore the forbearance to ſue it forth is a good conſideration. The Court adviſed to take a new Plea to try the matter. Poſtea, A40.

Dammages.

Writ.

Mich. 1653.

An Endictment was preferred againſt one for reading the Book of Common prayer, and it was moved to be quaſhed upon this exception, viz. that the Endictment did not ſay that he read it publiquely: but only ſaid, that he read it voluntarily. And upon this it was quaſhed. An Endictment quaſhed.

Mich. 1653. Banc. ſup.

One Captain Streeter committed by the Councel of State, and by the Parliament, for publiſhing ſeditious Pamphlets, to the Gate-houſe at Weſtminſter, was brought into Court by a Habeas Corpus, and the return read and prayed to be filed by the Priſoner, which was granted, whereupon he prayed he might have a Copy of it, which was granted; then he prayed he might be bayled, but was denied, and he was turned over to the Marſhal of this Court, and not remanded, becauſe upon filing of the Return the Court was ſeiſed of the Record, and the Priſoner, and he was ordered to be brought again Friday following, to be heard what he could ſay againſt the Return. Priſoner appeared upon a Habeas Corpus.

Farmer and Lawrence.

Mich. 1653. Banc. ſup.

Farmer let a Chamber and a Cloſet within it to Lawrence from ſuch a time, to hold as long as ſhe ſhould pleaſe, paying therefore yearly as much as it ſhould be reaſonably worth, and this was by paroll; afterwards Farmer brought an Action for the rent of this Chamber and Cloſet, and declares upon this Leaſe, and avers, that ſhe held the ſaid Chamber and Cloſet from ſuch a time to ſuch a time, and that for that time it was reaſonably worth ſo much, and for not paying that rent he brought his Action, and obtains a Verdict againſt the Defendant. It was moved in arreſt of judgement, that it is alleged in the Declaration that ſhe held the Chamber and Cloſet from ſuch a time to ſuch a time, but it doth not aver, that ſhe held it as long as ſhe pleaſed, as the agreement was. Roll chief Iuſtice, The old Books are, if I let Land to one for as long as he pleaſeth, it ſhall be intended as long as both parties pleaſe, and here ſhall be intended that the Term was determined, except you had ſhewed that you would have held the Chamber and Cloſet longer, and if the time be determined, you ought to pay preſently as much as it is reaſonably worth, if no time be expreſſed for the payment thereof; and the averment ought to be on the Defendants ſide, viz to allege that the Plaintiff did not ſuffer her to hold the Chamber and Cloſet ſo long as ſhe pleaſed. Iudgement was given for the Plaintiff, niſi. Arreſt of judgement in Action of Debt for rent. Leaſe at will. Averment.

Mich. 1653. Banc. ſup.

Memorandum Colonel Barkſtead Lieutenant of the Tower of London, came into the Court and produced an Order of the Counſel of State, that he ſhould not bring John Lilborn to the Bar upon a Habeas Corpus directed to him out of this Court. Norbury of Counſel with the Priſoner prayed for an Alias habeas Corpus to be directed to him. Roll chief Iuſtice, Why a Priſoner was not brought upon a Habeas Corpus.

ſtice, Take it, for no matter of Record appears before us to hinder it, and let it be returned Saturday next, which was three days after.

Norton and Jaſon.

Mich. 1653. Banc. ſup.

Trin. 1651. rot. 935.

Arreſt of judgement in an action on the Caſe.

IN an Action upon the Caſe for entring into the Plaintifs houſe, and making an aſſault upon his Daughter, and getting a Baſtard Child upon her, the Jury found a ſpecial verdict, upon which the Caſe was this, Norton ſojourned in the houſe of Jaſon, and during his ſojourning there he got his Daughter with Child; Four years after Iaſon brought an action upon the Caſe againſt Norton for aſſaulting his Daughter, and getting her with Child, per quod ſervitium amiſit. The queſtion here was, whether becauſe no Action was brought by the Daughter for the wrong done to her within four years, and thereby ſhe was barred by the Statute of limitations of Actions to bring her Action, Iaſon the Father might now bring his Action upon the Caſe for the damage done to him by the loſs of his Daughters ſervice, or ſhould be alſo barred by the Statute. Powis argued, that he was not barred though the Daughter was, becauſe in many caſes the Law gives two Actions for one thing, and cited 19 H. 6. 45, 46. a. and Hill. 1649. Norburies caſe adjudged in this Court, and ſaid, that though the Treſpas and the Aſſault was done to the Daughter, yet here is a per quod ſervitium amiſit declared of, which doth belong to Iaſon the Father. Roll chief Iuſtice, This Action is an Action brought for the damage done to the Maſter, and though the ſervant will releaſe the battery, yet the Maſter may have an ~~Action~~ action for the damage cauſed to him by the Battery, and although the Daughter cannot have an Action, her Father may, although not for entring into his houſe, becauſe it was with his leave, nor for aſſaulting his Daughter, and getting her with child, becauſe this is a wrong particularly done to her, yet for the loſs of her ſervice cauſed by this, he may have an Action, but it is a pretty caſe, and fit to be argued, therefore bring us books, and we will adviſe upon it. At another day the caſe was again ſpoken unto by Baldwin of the Inner Temple on the Defendants part, and he made the queſtion to be, whether this be an Action of Treſpaſs vi et armis, or an Action upon the Caſe which is here brought, and he argued that it is a Treſpaſſe vi et armis, and not an Action upon the Caſe which is here brought, and cited Nat. Brev. 86. & 17 Ed. 3. and 12 H. 4. and the 9 Rep. the Earl of Shrewsbury caſe, and ſaid, that the matter here alleged is not Cauſa cauſans, but Cauſa cauſata, and he agreed that one may be lyable to divers Actions for one Treſpaſs in divers reſpects, but here all the matter is jumbled together, and it cannot be an Action upon the Caſe, for the judgement ought to be quod defendens capiatur, which is the Judgement in a Treſpaſs vi et armis, and not in a Treſpaſs upon the Caſe, Hob. Rep. Wheatly and Stones Caſe, And although the Action conclude with a per quod ſervitium amiſit, yet it ſounds more in Treſpaſs than to be an Action upon the caſe and then he is barred by the Statute of limitations, for not bringing it within 4 years, and here are entire damages alſo given for all, which ought not to be, for the Defendant was a ſojourner in the Plaintifs houſe, and had licence to enter into it, & by conſequence is is not guilty of the vi et armis declared, of Hob. Andrews and

Caſe.

de

de la hope, 22 Eliz. Dyer 369. 20 Iac. Rhetorick and Chapels Caſe, and therefore no dammages ought to have been given for the domum fregit, becauſe he entred with Licenſe. Roll chief Iuſtice, It may be the entire dammages are given by the Jury, for the treſpaſſe, of which they make doubt and refer to the judgement of the Court, and not for the entring with Licenſe: but if the entire ſpecial matter had been found and left to the Court, it had been otherwiſe. But if they had not made a doubt, they might have found him culpable, and ſo I doubt that it is not good to find the dammages entire, becauſe as to the Treſpaſs for entring vi & armis he is not guilty. But for the other point the cauſe of action is per quod ſervitium amiſit, and for this he hath brought it within the time limited by the Statute, for it is an Action upon the Caſe, although the cauſa cauſans is the vi & armis which is but inducement to the Action, and the cauſa cauſata, viz. the loſs of the ſervice is the ground of the Action. Hales è contra ſaid, that the dammages ſhall be applyed to the other matter. Roll chief Iuſtice, this is the ſole Queſtion, whether the dammages refer to all the Treſpaſs or not, and upon reading the Record he ſaid, that it referred to all, and ſo is not good. The rule was to ſhew cauſe why a new Venire ſhould not iſſue forth to try the matter de novo. Dammages. Venire. Tryal.

Mich. 1653. Banc. ſup.

The Court was moved to quaſh an order of Seſſions made for the committing of one Wade and another, Surveyours of the High-way, untill they ſhould pay the arretages of mony collected by them upon the Statute of 2 & 3. Phil. & Mar. C. 8. for amending of High-waies, and it was prayed the Priſoners might be bayled. Theſe exceptions were taken by Twiſden againſt the Order, firſt to the Mittimus, in that the parties were not convicted before the Juſtices as they ought to have been. 2ly. The Mittimus is repugnant in it ſelf, for they are committed for not paying of illegal rates levied upon the Pariſhioners, and if they be illegal they are not to be paid. Next they are committed for not paying all the mony by them levied, whereas they are to deduct 8 d. in the pound out of it for their pains in collecting of it, and ſo they are committed for more than is due. Roll chief Iuſtice, The order is not good, yet let them on the other ſide take time to maintain it if they can, becauſe it is an order for repairing of the High-way, which is for the good of the Common wealth. To quaſh an order of Seſſions. Order of Seſſions.

Henſhoe.

Mich. 1653. Banc. ſup.

A Writ of Error was brought to reverſe a judgement in an Ejectione firmæ; it was moved for the Defendant in the Writ of Error, that the Record was not yet tranſcribed, and therefore prayed he might amend the judgement by making it recuperet inſtead of recuperare debet, becauſe it was only the fault of the Clark in miſ-entring. Roll chief Iuſtice, This is a matter of ſubſtance, and we cannot tell whether the judgement be final or not. If it be not final it ought to be recuperare debeat: but if it be final, it ought to be recuperet. Therefore we will make no rule in it. Error to reverſe a judgement in an Ejectione firmæ. Amendment. Iudgement.

Mich.

Mich. 1653. Banc. ſup.

Vpon what promiſe an Action lies. Averment.

By Roll chief Iuſtice, If one make a leaſe for years of land, rendring rent, and after the Leſſee promiſeth the Leſſor to pay the rent, an Action lies upon this promiſe, if the promiſe was made at the time of the Leaſe made, but in the Action brought this promiſe muſt be expreſly averred to be ſo.

Bocking and Symons.

Hill. 1654. Banc. ſup.

Error to reverſe a judgement in the Common Pleas.

A Writ of Error was brought to reverſe a judgement given in the Commmon Pleas, and the Error aſsigned was, that the Action was brought againſt 3 perſons, one of whom was within age, and that they all appeared by Attorney, whereas he within age ought to have appeared by his Guardian, and ſo the Judgement was erronious as to him, and conſequently to the reſt becauſe it was a joynt Judgement. Roll chief Iuſtice, This is a good exception, for it being a joynt judgement, if it be naught in part, as without doubt it is, it is naught in the whole, And ſo it was reverſed.

Iudgement.

Hill. 1652. Banc. ſup.

To quaſh an Endictment for not repairing a High way.

The Court was moved to quaſh an Endictment for not repairing a High-way. The Exception taken was, that the Endictment did conclude, that the party ought to repair it by reaſon of his tenements, which was ſaid to be uncertain, and it ought to have ſaid, that he, and all thoſe whoſe eſtate he hath in the Tenements uſed to repair it. And 2ly. It ſhould have ſaid, that by reaſon of the tenure of his Tenements he ought to repair, and not by reaſon of his tenements, And upon theſe Exceptions it was quaſhed.

Trevilian and Welman.

Hill. 1654. Banc. ſup.

Arreſt of Judgement for words.

Trevilian brought an Action upon the Caſe againſt Welman for ſpeaking of theſe words of him, viz. He did put in two Horſes to Colonel Windham, meaning Colonel Windham that was Governour of Bridgewater, and as ſoon as any warrants came for the preſſing of men for the ſervice, he acquainted the Cavalliers, by reaſon whereof none could be preſſed that were fit, and he doth hold conſtant correſpondency with the Cavalliers. Upon Iſſue joyned, and a Verdict found for the Plaintif, It was moved in Arreſt of Judgement that the words were not Actionable, becauſe utterly uncertain, either when Col. Windham was Colonel, and when the Horſes were put in, and the other words are as incertain as theſe. But it was anſwered, that if all the words be taken together, they are certain enough to ground an Action, for if they be true the Plaintif thereby will be expreſly made a Delinquent, and have his eſtate ſequeſtred for adhering and aſſiſting the King againſt the Parliament, and of this opinion was the Court, and thereupon the Plaintif had his judgement.

Hill.

Hill. 1654. Banc. ſup.

IN the Caſe of one Page and Crook, it was ſaid by the Court, That if an Action of Treſpaſs be brought againſt one with a ſimul cum with others, if nothing be proved againſt the others, they may be examined as witneſſes in the cauſe. Who may be Witneſſes.

Whitehead and Buckland.

Hill. 1654.

WHitehead brought an Action of Treſpaſs by Original againſt Buckland, for taking away 400 Sheep, and 26 Bullocks, the Defendant pleads the Statute of 21 Iac. of limitations of actions in Bar, the Plaintiff replyed that he ſued forth an Original writ within 6 years, and that the proceſs thereupon was duly continued, upon this the Defendant demurred, and for cauſe ſhews, that the replication is not good; for when the Plaintiff ſays that he ſued forth an original, he ought to have added prout patet per Recordum, which is omitted. 2ly. He hath not pleaded the continuances of his proceſs upon the Record. Maynard anſwered, that the replication is good, for we cannot take a traverſe upon their plea, which is ſurpluſage, and we need not plead all the continuances but it is ſufficient if we plead as much of the Record as goes in Bar. Roll chief Juſtice, The plea is plain, and it is not neceſſary to allege the continuances, for here is an appearance. At another day Maynard ſaid, the plea in Bar is not good, for he pleads an immaterial thing, for it matters not when the original was ſued forth, but he ought to plead not culpable within ſix years before the Original ſued forth. Roll chief Juſtice, This is the uſual way of pleading, and it is but to put you to a new aſsignment, and the plea is good, for you are not tyed up by it, for you are not forced to joyn iſſue, for you may make a new aſsignment; but waive the Demurrer on one part, and the pleading of the Statute on the other part, and take a new plea and go to a tryal, otherwiſe we muſt give judgement for the Plaintiff. But the Court would adviſe. Latch at another day ſaid, that the replication is naught for the uncertainty, for it doth not appear where the Original was ſued forth, nor the time when, for it is only ſaid he ſued forth an Original in Michaelmas Term, and part of Michaelmas Term may be within ſix years, and the other part may be after the ſix years, and ſo it cannot be known whether it was ſued forth in due time or no, and becauſe no place is ſhewed there can be no Venue. Adjourned to the next term, At another day the Caſe was moved again, & then the 2 exceptions taken, that it was not ſaid prout patet per Recordum, and had not ſhewn the continuances of the proceſs, were over-ruled by the Court; and then another Exception was taken to the replication, that it concluded & hoc petit quod inquiratur per patriam, which is not good, for it hinders the other party to rejoyn, and he is compelled either to joyn iſſue, or to demur. Latch anſwered, That the party may not be admitted to take advantage of this fault now upon a general demurrer, and he is not tyed up from rejoyning, although an iſſue be offered him, for though the plea be informal yet he may paſs over and rejoyn, Hob. f. 80. Newman and Stones caſe. Notwithſtanding an unneceſſary traverſe the party may plead over, and is not bound to joyn iſſue, and the impertinency of the plea ſhall remain but only Demurrer to a replication in Treſpaſs vi & armis. Plea.

as a blemish in form of the plea, and shall not be accompted a fault in the substance of it. And 2ly. their bar is not good, and therefore it matters not though the replication be not good, for it is impertinent to set forth an Original, but he ought to have pleaded generally that he was not guilty within 6 years before the Original brought, but here he hath impertinently set forth the time of bringing the Original, and this answers not the Statute, and the matter alleged destroys his own plea, and here can be no good Issue joyned without departure from his plea, to wit from his bar, and this is not to be suffered in pleading; and here is neither certainty nor congruity in the parts of the pleading, for the beginning of the term is uncertainly alleged. 2ly. He shews not what day of the Term he issued forth his Original, but only says generally in Michaelmas Term, which in Cole and Sibseys case in this Court was lately adjudged naught. Hales on the other side said, that the bar is good, and that the replication is insufficient, because the Defendant is tyed up by an issue, and is not suffered to rejoyn, and it is insufficient in substance, for he hath not made a proper conclusion, for he ought to have concluded, et hoc paratus est verificare, and as it is it is impertinent, and the Plaintif cannot pass over to rejoyn as Latch supposeth, and this case is not like the case of the traverse cited by him, where he may pass over, it being but in matter of form, but it is not so here, for the Travers avers the plea, and concludes not the party as here he is concluded, and can do no other thing but demur or joyn in the Issue tendred; And the bar also is good and sufficient, notwithstanding the time of the Originals issuing forth be alleged, although it was in his election to have shewed the time, or not to have shewed it. and his shewing it makes not the plea worse but more certain, and although it be not the truth of the Case as he hath alleged it, I doubt whether it should be a departure for the Plaintif to reply to a new Original assigned, and it may be there were two Originals, and the Defendant relyes upon the last Original, and if the other Original be pleaded he may reply to it afterwards. 2ly. Admitting he cannot depart, this will doe no hurt, for the plea is not worse for him although it be better for the other. 3ly. It is not incertain to say that it issued forth in Michaelmas Term, for all the Term is but one day in Law, and it is said when the Term began, namely the 23 of October, and if it be not so certainly expressed as it ought to be, yet by the replication this advantage is lost, and it is not like to Cole and Sibseys case cited on the other side, for there was a special Demurrer, but here the Demurrer is general, and there it was of the parties own setting forth. Latch, If the Assignment of the Original be at his peril, if he set it not forth right it is ill, and it is not well here assigned, for there is neither time nor place alleged when it issued forth. Roll chief Iustice, I conceive the replication is not good, for the party is bound up that he cannot rejoyn, but must either demur or joyn in Issue with you, and I have not heard of passing over in this Case, as may be done in the Case of a Traverse which concludes not the party, and here you aver not your plea as you ought, and the other ought to be left at liberty to rejoyn if he please, which he cannot do here; but it is doubtfull whether the Plea in Bar be good or not, because there is no time certain alleged of issuing out the Original, for it is said generally in Michaelmas Term, whereas an Original bears Teste at a day certain, and may issue forth out of the Term, and it is not like a judicial writ, and it is questionable whether this be matter of form only, or of substance, and me seems it is matter of substance to be averred. The Court would advise.

Replication.

Averment.

Original. Teste.

At another day the Case was again put and spoken to by Wadham Windham, who, upon putting the Case urged, that the Defendant here sets forth ano-

another original not set forth by the Plaintiff, and this is not brought within the time limited by the Statute; and upon this the Plaintiff rejoyns, and he cited Coles and Sibsyes Case, and insisted, that the Defendants plea in bar is not good in the matter of substance, for he shews no time nor place when he first sued forth his Original, and he ought to shew when he took it forth, that the Court may judge whether it was done in due time or no, as the Statute requires, and not to put the Court to make enquiry when it issued forth, and although it be but surplusage to shew it, yet now having taken upon him to shew the time, he ought to shew it precisely, Hill. 10 Iac. Westby; and Rookes Case in this Court, the mis-pleading of a Statute is not good, though the party was not bound to plead it, and so it is here, And the replication doth us no harm: for there is no matter in it that makes against us, for the Court ought to judge upon the whole Record, and consider who made the first fault, and that hath the Defendant done in his bar, and that in matter of substance, and he cited Cardinal Pools Case, and Hob. rep. Baspooles Case, and prayed judgement for the Plaintiff. Wild on the other side said, that the bar is only vitious in form, and so it hurts not, and if so, then the other party hath lost his advantage of it by the Statute, for he hath not demurred upon us, but we have demurred upon him, to wit, upon his replication. Roll chief Iustice, I am of opinion that the setting forth of the Original by the Defendant, and concluding that he is not guilty within six years from that time is not good: but now that is waived by the replication, and is made matter of form, as it is in the Case of a new assignment, and the Common bar is now out of doors. It had been good to have shewn the precise day of taking forth the Original, but it is not absolutely necessary to do it, and this is not like the mis-pleading of a Statute which must be precisely pleaded and is matter of substance: but this is matter of form only, and besides this matter is here waived, and nothing is shewed by the Plaintiff which can bar him of his Action, nor hath the Defendant pleaded any thing to bar him. And by the replication you have hindred the Defendant to plead to you, for you have concluded ad patriam, and stopped him from proceeding further in pleading: but the principal matter is, that you have waived the matter pleaded in bar, of which you might have taken advantage, and I conceive that he who demurs upon matter of form ought to shew the special matter wherefore he demurs: but if it be waived by the other by his replying, he shall not afterwards take advantage for the not shewing it, notwithstanding the Statute, and divers opinions upon it, for the Statute enjoyneth to set forth the matter of form pleaded insufficiently. Nil capiat per billam, nisi.

7 H. 7. f. 150.

Dyer, 365. Lakes Case.

Demurrer.

Advantage.

Hill. 1653. in the Upper Bench.

MAster Attorney General moved the Court after issue joyned in an Endictment preferred against Mrs. Levingston, and the Tryal being to be the next day, that the Tryal might be stayed by rule of Court, because the Endictment is erroneous in many things, and the Tryal thereupon will be fruitlesse, for no judgement can be had upon it, and we may prefer a new Endictment, and one fault in it is, that the Bill was found by a Grand Jury, whereof some of them were outlawed when they found it. Wild on the other side prayed the Tryal might go on, because the Issue is joyned, and the Jury returned, and many Witnesses, viz. a hundred at least are brought to Town, some a great way off, and are kept here at a great charge. Roll chief Iustice, The Attorney may waive the Issue if he please though it be joyned or he may demur if he will, therefore let him

To stay a Tryal upon an Endictment.

Waiver. Demurrer.

Entry. Rule. make what entry he thinks good upon the Roll, for we will make no rule in it.

Stephenſon and Steward.

Hill 1654. Upper Bench.

Exception to a Plea of Priviledge of Parliament.

STevenſon brought an Action of Debt againſt Steward for rent, the Defendant pleaded in abatement of the Writ that he was, in regard of monies which he had lent to the Parliament, protected by their ſpecial order from all arreſts. The Plaintiff replyed, that this order was afterward repealed by another general order of Parliament. Carew urged, that the Defendants plea was not now good, becauſe the Parliament being diſſolved, their orders are of no force; and prayed judgement for the Plaintiff. Roll chief Juſtice, If the plea was good when it was pleaded, your Action

Abatement. Peremptory. muſt abate, and you muſt begin again: for the plea is but in abatement, and not peremptory to the party; and therefore let the Writ abate.

Hill. 1654. Upper Bench.

Where may be a new Original.

BY Roll chief Juſtice, If an Action of Battery by Original be againſt two, and one comes in upon the Exigent, there may be a new Original brought againſt the other with a Simul cum, and thoſe who are waived may

Witneſs. be Witneſſes in the Cauſe, and this is uſual practice: but thoſe who are declared againſt with a Simul cum cannot be Witneſſes.

Greenling and Bawdit.

Hill. 1654. Upper Bench.

Arreſt of Judgement in an Action upon an Aſſumpſit.

GReenling brought an Action upon the Caſe againſt Bawdit, and declared, that the Defendant in conſideration that the Plaintiff would mary ſuch a Woman, did aſſume and promiſe that upon his mariage with her, he would pay the Plaintiff 50 l. and would alſo give unto him yearly one firkin of Eggs, and a flitch of Bacon during the life of the Plaintiff; and upon a Nihil dicit the Plaintiff obtains a Judgement, and upon a Writ of Enquiry of dammages executed, great dammages were found for the Plaintiff. It was moved in arreſt of Judgement, 1. That it doth not appear for what breach of promiſe the Action is brought, whether for the not paying the 50 l. or not paying the Egges and Bacon. 2ly. It is not averred in what year the Defendant was to begin to pay the Egges and Bacon. To this Roll chief Juſtice anſwered, that it ſhall be intended to be-

Intendment. gin within the year next after the mariage ſhall take effect. 3ly. It was excepted againſt, that it doth not appear for how many years the Egges and Bacon were unpaid, and the promiſe was made anno 1647. and the Writ of Enquiry was executed anno 1653. But Roll chief Juſtice over-ruled the Exceptions, and to the laſt anſwered, the Record is huc uſque, and ſo it is certain enough. Therefore let the Plaintiff have his Judgement, niſi, &c.

Hill. 1654. Upper Bench.

IN the Caſe of one Baniſter where the Action was an Action of Debt brought againſt an Executor, Roll chief Iuſtice, ſaid, That riens inter maines pleaded by an Executor is an affirmative plea in ſubſtance, though it ſound ſomething in the negative, for it is in effect the ſame with plene adminiſtravit, and ſuch plea muſt be averred, and he put this difference, viz. where an Iſſue is joyned up, upon a negative plea without any replication, it is not neceſſary to aver the plea, but if there be a replication it muſt be averred. What is an affirmative plea and not negative. Averment.

Hayward and Ducket.

Hill. 1654. Banc. ſup.

Paſch. 1653. rot. 196.

HAyward brought an Action upon the Caſe againſt Ducket that was Executor to another, and declares, that whereas the Teſtator did owe unto the Plaintif ſuch a ſum of money, which the Plaintif did intend to ſue the Defendant for, the Defendant did aſſume and promiſe to the Plaintif, that if he would forbear to ſue him for the money, and would ſuffer him to go into the Country, he would pay the money, and for breach of this promiſe he brought his Action, and obtains a verdict. It was moved in Arreſt of Iudgement, that there appears no conſideration in the Declaration to ground the promiſe upon, whereby to make the Defendant lyable to pay the money which he promiſed to pay, for it doth not appear that he is Executor, and Roſyer and Langdales caſe, Anno 1650. in this Court was cited. To this it was anſwered by the Councel on the other ſide, That a good conſideration doth appear well enough, for when he ſaith that he was to forbear to ſue him as Executor, it ſhall be intended that he was Executor at the time when he ſhould ſo forbear to ſue him, and the promiſe is ſo laid. Plow. 128. Roll chief Iuſtice, To ſay that I will forbear to ſue one as Executor, is not an affirmance that he is Executor, and there was ſuch a caſe as this ruled in the Exchequer, and it is no more, nay not ſo much as if he had ſaid, that he would not ſue him at all. Iudgement pro Defendente, niſi. Arreſt of Iudgement in an action upon a promiſe.

Hill. 1654. Banc. ſup.

BY Roll chief Iuſtice, In an Action upon the caſe vi et armis, It is not neceſſary to conclude contra pacem publicam, but in an Action of Treſpaſs quare vi et armis, the concluſion muſt be contra pacem publicam. Where one needs not conclude contra pacem publicam.

Hill. 1654. Upper Bench.

BY Roll chief Iuſtice, A ſpecial Bayly is bound to ſhew his warrant to the party whom he is to Arreſt, otherwiſe the party to be arreſted is not tyed to obey him, but he is not bound to ſhew his warrant to a Stranger, but a known Bayly is not bound to ſhew his Warrant to any. What Bayly muſt ſhew his Warrant.

Hill. 1654. Upper Bench.

What Writ of Error is good.

By Roll chief Iuſtice, If an Action be brought againſt three, and one of them is an Infant, and they all appear by Attorney, and an entire Iudgement is given againſt them all, and they all joyn in a writ of Error to reverſe this Iudgement, this writ is well brought, for the iudgement was erroneous, becauſe it is an entire judgement, for as to the Infant it cannot be good, & ſo it is naught to the reſt, and he cited one Byres caſe 9 Iac. in the point.

Iudgement.

Porter and Swetnam.

Hill. 1654. Upper Bench.

Trin. 1653. rot. 723.

Error to reverſe a judgement upon a non ſum informarus in debt for rent.

A Writ of Error was brought to reverſe a Iudgement given upon a non ſum informatus in the Common pleas in an Action of Covenant brought upon a Leaſe for years for not paying the rent reſerved, and not repairing, and this was againſt an Executrix of the Aſsignee of the Leſſee for years, and it was brought as to the non-payment of the rent upon the words yielding and paying, and not upon an expreſs Covenant, and for that the words yielding and paying are but a Covenant in Law, and only an implyed Covenant, and ariſeth but from a perſonal Covenant, and not upon a real contract, as Latch held, who argued for the Plaintif in the writ of Error, Therefore he ſaid the Action of Covenant could not here lie againſt the Executrix, as a warranty in Law binds only the party, and not privies, as Spencers caſe is, Dyer 257. 2ly. The Plaintif in the Action doth not declare that the Defendant was made Executrix, and if ſhe be but Executrix de ſon tort demeſne, ſhe is not liable to this Action. Wadham Windham on the other ſide held, that the words yielding and paying in the Leaſe are an expreſs Covenant, and the Action here is for rent become arrear in the time of the Executrix, and this Covenant being a Covenant which makes the rent payable ratione terræ, it doth concern her, and an Executrix de ſon tort is bound to pay the rent. Roll chief Iuſtice, take time to anſwer both Exceptions, but I conceive at preſent, that the words yielding and paying are an expreſs Covenant, for if they were not, what remedy elſe would there be to recover the rent? for if ſhe be a diſſeiſor, neither debt nor Covenant will lie againſt her. At another day Windham argued that the Action was well brought, becauſe this is an expreſs Covenant, and not a Covenant in Law. 2ly. It is not material to ſhew how ſhe is made Executrix; and for the firſt this muſt be an expreſs Covenant, becauſe it is by Indenture, although the word Covenant be not expreſſed, for that word is not a word of Art, and ſo not eſſential to the conſtituting of a Covenant, Dyer 57. 27 E. 4. f. 6. And for the ſecond it is well ſet forth, that ſhe is made Executrix, for it is ſaid ſhe entred as an Executrix. 2ly. She hath admitted herſelf to be Executrix by pleading. Latch on the other ſide held, That here is only a Covenant in Law, and ſo is the book in Dyer cited by Windham, and the Executrix is not bound here, becauſe it is againſt the Aſsignee of a Term, and the very words doe ſhew that here is no expreſs Covenant, for the words yielding and paying are not the words of the Leſſee, but only by conſtruction of Law, but are the words of the Leſſor enjoyning the Leſſee to pay the rent. Roll chief Iuſtice, How

Covenant.

prove

prove you that this Action lies not against an Assignee? Latch The case of Overton & Sidney proves it, for it proves that Debt lies not, and by consequence Covenant lies not. And for the second matter, the Defendant is not intitled to the lease in privity, because it is not shewed that she is made Executrix, and so she shall be taken but as an Executrix of her own wrong, and so is not chargeable, because she hath no privity of estate but by her entry, nor is it any where ever mentioned that any can be Executrix de son tort of a Term. 2ly. She cannot be a Termor, but she must be a Disseiseress, for she cannot apportion her own wrong. 3ly. She cannot make a title to the Term by her entry, as it may be by a que estate, and therefore it is against reason that she shall be a Termor, and there is no authority against this, Pasch. 25 Eliz. in this Court. King and Burges in Mores Reports Dyer 254. Upon a Demurrer, adjudged that it was not to be shewed how one was Executor. Roll chief Iustice, What say you to the Objection, that the Action is brought against you as an Executrix, and you appear and plead, and so admit your self to be an Executrix? And I hold that here is an express Covenant, for the words are the agreement of both parties to the Indenture, and then the Executor is chargeable by them, and it is not like to the Case of a Demise, and there is no difference here between a Covenant in Law, and an express Covenant, because it is touching a thing which ariseth from the land, and so the Assignee is bound by it, and this Case is not like the case cited out of Dyer, for there the estate was determined, but here it continues. And as to the last point, I conceive prima facie, that she shall be accompted a true Executrix, and you by pleading have admitted it; and if one enter as an Executor upon a Term, he may have the Term if the other will admit him to be a Termor, and he shall not be accompted a Disseisor to the Lessor, and to strangers he shall be accompted an Executor in Law, if they bring Actions against him, and the Term shall be assets in his hands; As if one receive my rents without my consent, I may charge him as my receiver, or make him a disseisor at my election. Curia ad idem, and so the Judgement was affirmed. But afterwards it was moved again, and the writ of Error was quashed for a variance betwixt it and the Record, for the Record is against the Assigns, and the writ of Error is to remove a Record against the Assignee. Postea. Assets.

Bromefield and Sir Iohn Williamson.

Hill. 1654. Banc. sup.

Mich. 1651. rot. 353.

BRomefield brought an Action of Debt upon an Obligation to perform the Covenants of a Lease for years against Sir Iohn Williamson, the Defendant pleaded that he had performed the Covenants, the Plaintif replyes, and sets forth a breach, and upon this the Defendant demurred, and upon the Demurrer the Case was this: A Lease was made for one year, the Lessee covenants for him and his Assigns to pay the rent, so long as he and they shall have the possession of the thing let; the Lessee assigns over his Term, the Term expires, the Assignee continues the possession after the Term expired, and for rent behind by the Assignee after the expiration of the Term, the Lessor brings the Action, and the question was whether here be such an Assignee that the Action will lie against, or not, Roll chief Iust. held, that though here be not an Assignee, strictly, according to the rules of Law, yet that he shall be accompted such an Assignee as is to per- Demurrer to a replication in debt upon an Obligation. Assignee. Covenant.

perform the Covenants made between the parties, and ruled the Defendant to ſhew cauſe why the Plaintif ſhould not have judgement. Nota.

Wood and Markham.

Hill. 1654. Banc. ſup.

For a reſtitution after an habere facias poſſeſſionem executed.

UPon an Ejectione firmæ brought, and a Tryal thereupon had, a Verdict was found for the Plaintif; but upon an agreement made between the Plaintif and the Defendant, the Defendant was to hold the land recovered the remainder of his Term to come, and according to this agreement he held it for 2 years, but afterwards, before his term expired, the Plaintif takes out an habere facias poſſeſſionem, and executes it. Serj. Bernard moved for the Defendant upon this matter ſhewed to the Court, That the Defendant might have a rule for reſtitution. But Roll chief Iuſtice anſwered, It cannot be, but you muſt have your Action upon the Caſe againſt the Plaintif for not performing his agreement, for the Act ſeems to be unconſcionable.

Reſtitution.

Caſe.

Maſters and VVallis.

Hill. 1654. Banc. ſup.

Paſch. 1652. rot. 581.

Errot to reverſe a judgement in Treſpaſs quare vi et armis.

A Writ of Error was brought in this Court to reverſe a Judgement given in the Common Pleas in an Action of Treſpaſs quare vi et armis, and the Error aſsigned was, that the Treſpaſs is concluded to be contra pacem, &c. but doth not ſay publicam. Twiſden anſwered, that it is well enough, becauſe the Action was commenc'd by Original, but if it had been by Bill it would have been otherwiſe. Roll chief Iuſtice, It is the uſe in the Common Pleas to make ſuch ſhort recitals, but in the beginning of the Record here it is recited at large, and if it were not recited at large it would not be good; but for the matter it ſelf it is matter of ſubſtance, and generally it ought to be concluded to be contra pacem publicam, yet it is good here as it is for the reaſons before alleged. Affirmetur judicium niſi, &c.

Recital.

Hill. 1654. Banc. ſup.

Againſt filing a return of a writ.

VVIld moved againſt a Sheriff, that he may not be admitted to file the return of a writ directed to him, becauſe an Action upon the Caſe is depending againſt him for not returning this writ, and if he ſhould now be admitted to file the return, he would thereby abate our Action. Roll chief Iuſtice, If the writ be not filed, it ſhall not be filed till the Court be moved; but he cannot file it as of this Term, though he ſhould file it for the return of the writ, (as it ſeems) is long ſince paſt, but if the return be already filed you move too late.

Swan

Swan and ~~Fenham.~~ Howwick

Hill. 1954. Banc. ſup.

Trin. 1650. rot. 1072.

IN an Action of Trepaſs and Ejectment a ſpecial Verdict was found, and in it this Cuſtom, viz. That the Owners of Houſes in the Town of New-Caſtle in fee ſimple may deviſe them by Parol, but not Tenants in tayl, and it was further found, that the Teſtator was ſeiſed of the Houſes in queſtion in fee tayl in poſſeſſion, and of the remainder of them in fee-ſimple, and ſo ſeiſed did deviſe them by Parol. The queſtion was, whether this deviſe was warranted by the Cuſtom. Shafto argued, that the Cuſtom did not warrant this deviſe, becauſe Cuſtoms are not to be enlarged by conſtruction, but are to be taken ſtrictly, and according to the letter, becauſe they run in abridgement of the Common-law, and ſo are not to be favoured, 9 E. 3. f. 38. 11 H. 4. f. 33. 5 H. 6. f. 51. Next here are immaterial words found in the Verdict, for if it be the Cuſtom for Tenant in fee-ſimple deviſe, yet this extends not to Tenant in tayl, 27 H. 6. f. 5. 21 E. 4. f. 34. and a deviſe of rent to be iſſuing out of theſe Houſes is not good within the Cuſtom, although that a rent doth follow the nature of the Land, 22 Aſſiſ. pl. 78. 26 H. 8. 54. It is true, Cook in his Littleton, f. 111. ſaith, that one may deviſe a rent remainder, but I deny this, for the authorities of the Books are againſt him. An eſtate in remainder is not Aſſets, nor can be deviſed, 3 H. 7. f. 23, 24. a condition goes to an Eſtate-tayl, not to a fee-ſimple in remainder, 6 Rep. f. 33. And here is but a power of an Eſtate, and not an Eſtate in poſſeſſion, Lit. ſect. 137. And the finding here that the Tenant in tayl did die without iſſue is not material, for this could not be known at the time of the deviſe, and the deviſe takes its effect in the time of the Deviſor, 27 H. 8. Dyer 45. 5 Eliz. Dyer, Biſhops Caſe, 1 Rep. Archers Caſe, f. 66. 2ly. Here is no Cuſtom found to intitle the party: for a Town cannot have a Cuſtom as it is here found, though a Borough may, 22 Aſs. 178 and this is not found to be an antient Will, 7 H. 6. Dyer, 22 H. 6. Fitzh. præſcript. 47. Next the Cuſtom is not found, that Burgers may deviſe as it ought to be. Turner Iohn on the other ſide held, that ſome Eſtate doth paſs by the Will, and it matters not what Eſtate paſſeth, and the Owners of Houſes in one Caſe ſhall be intended to be Tenants in fee-ſimple, and it is not neceſſary that they be Tenants in fee in poſſeſſion, Perkins deviſes, Plowd. 262. Dyer 22. 23 Eliz. 371. p. 5. and the Cuſtom here found is no more, but an ordinary Cuſtom common to other Boroughs, and it ſhall not be intended a ſpecial Cuſtom. And this caſe may be reſembled to Caſes upon the Statute of 32, & 33 H. 8. for deviſing of Lands, 10 Rep. f. 81. Trin. 34 Eliz. Benefiles Caſe there cited, and 35 Eliz. Howards Caſe, which prove, that reverſions may be deviſed, Nat. brev. 199. a. Perkins Deviſes, Pl. 240. is the very Caſe in queſtion, and the Caſes put on the other ſide come not to our Caſe. Roll chief Iuſtice, It is not neceſſary in a ſpecial Verdict to be ſo preciſe as in pleading, but ſomething may be ſupplyed, and the verdict hath found that he was Owner, and that the Owner may deviſe, and the Cuſtom is, that every Owner in fee-ſimple may deviſe, and the Cuſtom ſhall go to Land, and holds to reverſions as well as to lands in poſſeſſion. At another day it was argued, that the deviſe was not good, for the word Owners cannot extend to all ſorts of Owners, for it extends not to an Infant Owner of ſuch Houſes, for he cannot deviſe,

Special verdict in Treſpaſs and Ejectment.

Special verdict.

therefore the words must receive a limited construction, and therefore I conceive the word Owner extends only to an absolute Tenant in fee-simple, and not to a reversioner in fee: for a Custom must, as hath been said, be taken strictly, 12 E. 4. f. 3. 21 E. 4. f. 24. 2ly. In true construction this Owner in fee in remainder shall not be said Owner, but the Tenant in tayl is Owner, and so here is not Owner ex vi termini. 3ly. Here is but a possibility of fee-simple in him, which is not grantable or devisable, 2 Ed. 4. 1. and the Statute of Westm. 2d. helps not to the Custom: for that Statute is within memory of man, 26 H. 8. f. 4. 22 Ass. Pl. 28. And upon the very finding of the verdict it cannot be good, for by the Verdict no title is found for the Defendant. Latch on the other side held, that here is a good devise warranted by the Custom, for here is an Estate within the very letter of the Custom, for he is true Owner of the House in fee-simple, although it be not in present possession, for he hath fee-simple in it, and hath it to his own benefit in such an Estate as it is, and the word Owner is a general word, and comprehendeth all manner of Ownerships. 2ly. It is within the reason of the Custom, for it intends the same benefit to Owners in reversion as it doth to Owners in possession, and is indifferent unto all Estates. And although a Custom shall be taken strictly, yet it shall also be taken reasonably, as having respect to the benefit of the party, and there can be no reason alleged to be against this devise; 26 H. 8. 4. A remainder in fee shall go according to the Custom, whether by the Custom Lands in fee shall go, the Custom shall go to all things issuing out of the Land, and so to all Estates in the Land, Dyer 148. and here is more than a possibility devised, 4 & 5 Phil. & Mar. Benloes. It is ruled, that a fee-simple expectant shall go to the youngest Son by the Custom, where the Custom was, that the youngest Son should have the Lands of which his Ancestor dyed seised; and as to the Verdict here is a good title found for the Defendant. Roll chief Iustice, The verdict is imperfect, for the Ejectment is against Baron and Feme, and the Feme is found Ejector by the verdict, and nothing is found concerning the Baron, therefore you must have a Venire de novo, if you will not agree to amend the Verdict according to the notes, if the notes will warrant it. Afterwards a Venire de novo was awarded by consent.

Venire de novo.

Pendarvis and Saint Aubin.

Hill. 1654. Banc. sup.

Trin. 1653. rot. 723.

In an Action of Accompt the Defendant pleads ne unques receptor, upon this an Issue was joyned, and an imperfect verdict found, and thereupon a Venire de novo was awarded, and the Jury found for the Plaintiff, and the Defendant adjudged to accompt before Auditors. The Defendant pleads before the Auditors, that he had delivered over part of the monies. To this the Plaintiff demurs, and shews for cause that this Plea is contrary to the Verdict, for that is, that he should accompt for all, and here he would accompt but for part only. Windham for the Plaintiff argued, that this cannot be a good plea before Auditors in discharge of the accompt, but it goes in bar of the accompt, Dyer 196. 41 E. 3. f. 31. 22 H. 6. 25. and in Boynton and Cheeks Case lately in this Court such a Plea was adjudged not good. And it would be mischievous if it should be otherwise, in reserving such

Plea before Auditors.

ſuch matter to be tryed again. Twiſden on the other ſide ſaid it is a good plea before Auditors, to ſay, that he received the monies to deliver over, and there are four opinions in the Books how this matter ſhould be pleaded, 10 E. 3. Br. Acc. 80. held, that this Plea is pleadable before Auditors, and this plea is in diſcharge of the Accompt, and therefore pleadable before Auditors, 12 H. 4. 18. And in Bayton and Cheeks Caſe cited, the judgement was not given upon this point. Roll chief Iuſtice, The Books generally are, that this plea is in bar of the Accompt: but here your plea of delivery over, hath made it a plea in bar, and it would be miſchievous to plead it now, for this would cauſe one and the ſame iſſue to be twice tryed, and then there may be contrary Verdicts, which would be inconvenient. Therefore let judgement be for the Plaintiff. Plea. Bar.

Stavely and Ulithorp.

Hill. 1654. Banc. ſup.

AN Action of Debt was brought upon the Statute of 2 Ed. 6. for not ſetting forth of Tithes, and a Verdict was given for the Plaintiff. It was moved in arreſt of judgement that the Statute was miſ-recited, becauſe it was not ſaid the Parliament in which it was made was held by prorogation, as in truth it was. But Latch anſwered, that it is not miſ-recited, for it is true that the Parliament was held, upon the 9th. of November, as we have alleged, though we have not expreſſed it to be held by prorogation, and we conceive it is not neceſſary to expreſs it to be ſo held, for the Preſidents are contrary, as in Cooks Entry, tit. Prohibition. Roll chief Iuſtice, The Parliament is not ſaid to be begun and held, but only to be held, and therefore it is well enough. Iudgement was given for the Plaintiff, niſi. Poſtea. Arreſt of Iudgement in an action for not ſetting forth of Tithes. Recital.

Dorman and Snag.

Hill. 1654. Banc. ſup.

AN Action upon the Caſe was brought upon two promiſes, viz. to pay ſo much mony upon a certain day: and 2ly. to ſave the Plaintiff harmleſs, &c. Upon iſſue joyned and a verdict found for the Plaintiff, it was moved in arreſt of judgement, that the Plaintiff did not ſhew how the Defendant hath not ſaved the Plaintiff harmleſs, but only ſayes generally that he did not ſave him harmleſs, and ſo he may bring another Action for the ſame thing. The Court was then of opinion that it was not good to ſay generally, that the Defendant did not ſave him harmleſs, but he ought to ſhew in what particular; as if I aſſume and promiſe to one to give him all the mony in my Purſe, I muſt ſhew how much mony was in it, and aver that I gave it him. At another day Sergeant Clark moved for judgement, whom Latch ſeconded, and ſaid, here is a good breach aſsigned: for it is that he paid not the mony for which the Plaintiff was bound with him at ſuch a day, according to his promiſe. Twiſden on the other ſide ſaid, that the conſideration is to pay the uſury for the mony for which the Plaintiff was bound with the Defendant, which is not a good conſideration, for it is againſt the Common-law to let mony for uſury, and ſo it was adjudged 2 Car. and the Statutes do but tollerate the taking of uſury for monies. 2ly. Here is no time of the conſideration ſet forth. Latch, The uſury here is no more than the Statute allows, and ſo it is a good conſideration. Alleyn, The promiſe decla- Arreſt of judgement in an Action upon two promiſes.

red upon is double, 1. to pay mony. 2ly. To ſave harmleſs, and the breach is aſsigned generally, and not particularly as it ought to be. Roll chief Iuſtice, If two breaches be aſsigned, and the one well aſsigned, and the other not, yet the Action lies well enough: but here is but one breach aſſigned, viz. the non-payment of the mony at the day. And for the other matter I hold it a good conſideration to aſſume to ſave one harmleſs from paying of Uſury, and the uſury here expreſſed is lawfull by the Statute, and ſo it hath been reſolved ſince 2 Car. and therefore let judgement be for the Plaintiff, niſi.

Caſe.

Conſideration

Turner and Trapes.

Hill. 1654. Banc. ſup.

TUner brought an Action of Debt upon a recogniſance in the Pettibagg. The Defendant prayed oyer of the Condition there, and had it, afterwards he ſhews this matter to this Court, and prays, in regard he had miſtaken his plea, that he may replead. Roll chief Iuſtice, This cannot be granted upon motion here, for if the iſſue be joyned in the Pettibagg, you muſt try it, we can make no rule but by conſent.

Motion to alter a Plea in the Pettibagg-Office.

Hill. 1654. Banc. ſup.

WAdham Windham moved for his Client, that he might have liberty to plead ſpecially in an Action of Treſpaſs and Ejectment, and not generally not guilty. Roll chief Iuſtice, For what cauſe? VVindham, Becauſe there hath been matter given in evidence at a former Tryal, which ought not to have been. Roll chief Iuſtice, proceed according to the courſe of the Court, if the other will not conſent you ſhall not plead ſpecially, yet let him ſhew cauſe why you may not plead ſpecially.

To plead ſpecially.

Barker and Elmer.

Hill. 1654. Banc. ſup.

THe Caſe was this, one of the Iuſtices of Aſsize falling ſick, and dying at Chelmesford in Eſſex, the Aſsiſes were adjourned to Brentwood in the ſame County; afterwards, and before the ſitting at Brentwood the other Judge fell ſick, and dyed at London, and a new Commiſsion iſſued forth to authoriſe another Judge to ſit at Brentford according to the adjournment, and there a Tryal was had upon the old Iurata returned before the other Iudges. The queſtion was, whether this were not a miſtryal, in regard there was not a new Jury returned; The Caſe was divers times moved, and the Court took time to adviſe: but at length Roll chief Iuſtice delivered the opinion of the Court, that this was not a miſ-tryal, becauſe the death of the Iuſtices was not material to make it void, for the Iuſtices are not named in the Iurata: but the Cauſe is expreſſed generally to be tryed by the Iuſtices. And he ſaid, that he held it for a rule, that if a Clark miſ-enter a thing uſual in matter of form, it is to be amended: but the error of the Iudge may not be amended, and he cited theſe Preſidents, Mich. 13 Car. Sawyer and Hortons Caſe in this Court, and Hill. 15 Car. Belch and Fates caſe in this Court.

Whether a Miſ-tryal or no.

Miſ-tryal.

Miſ-entry. Amendment.

Hill.

Hill. 1654. Banc. ſup.

AN Action of Aſſault and Battery was brought againſt two, one of them pleads his priviledge of Parliament, and the other non cul. The Plaintif moved the Court that he might ſtrike him out of the Declaration who had pleaded the priviledge, and might proceed againſt the other only: But the Court would make no rule, but bid the Plaintif proceed as he pleaſed at his own peril, Motion to ſtrike one Defendant out of the Declaration.

Hill. 1654. Banc. ſup.

ONe Cock was committed by the Court for delivering a Bill of Middleſex to arreſt one as he was coming to the Court about his occaſions, but was preſently releaſed, paying the fees and diſcharging the party arreſted, and the Bailif was reproved, but not committed, becauſe he ſaid he knew not that the party had any buſineſs in Court, and that he arreſted him out of the Hall. Nota. Commitment for contempt to the Court.

Hacker and Newborn.

Hill. 1653. Banc. ſup.

IT was ſhewed to the Court that the Plaintif had heretofore had a tryal at the Bar for the ſame thing, for which he now brings his action, and that it went then againſt him, but he hath not yet payed the Defendant his coſts, and now brings a new Action; It was therefore prayed that he may pay the Coſts taxed in the former Action before he be ſuffered to proceed in this Action. Roll chief Juſtice, Let it be ſo ruled. To ſtay proceedings till coſts paid in a former Action.

Higgs and Harriſon.

Hill. 1654. Banc. ſup.

Mich. 1653. rot. 429.

HIggs brings an Action of Treſpaſs quare clauſum fregit againſt Harriſon an Attorney of the Common Pleas. The Defendant pleads his priviledge by an Attorney, and to this plea the Plaintif demurred; the queſtion was whether he may plead this plea by Attorney, or ought to plead it in proper perſon. Latch argued, That he ought not to plead it by Attorney, for this plea is not a plea to the juriſdiction of the Court, but it is only a prayer to the Court, and he might have done it ore tenus, and pleading it by Attorney his plea cannot be entred, for then the plea of priviledge would be deſtroyed in making him to attend. Every one by the Common Law ought to apppear in perſon, and there is no Statute, Law nor uſage that authoriſeth an Attorney to make an Attorney to demand his priviledge. 2ly. It is againſt the dignity of this Court that he ſhould be admitted to do it. 3ly. By making of an Attorney he deſtroys the very reaſon why he claims his priviledge, which is to be ſpared of his attendance, which he needs not if he make an Attorney, and his making of an Attorney here is a general warrant to defend other cauſes as well as this, and the Caſe of an Demurrer to a plea of priviledge by an Attorney.

Eſſoign objected makes for me, which is but to pray an excuſe, and after an Attorney made one cannot caſt an eſſoign, except it be where the Attorney cannot anſwer, 4 Ed. 3. 34. And there is no authority can be ſhewed that he may make an Attorney. But on the contrary part there are many preſidents where Attorneys have prayed their priviledge in perſon, and theſe me ſeems ſhould make the Law in this Caſe, Dyer 33 H. 8. is the expreſs caſe, 20 H. 6. 32. The Court adviſed. At another day Roll chief Iuſtice ſaid, That the opinion of the Court was, that an Attorney may plead his privilege by an Attorney, and there is no inconvenience follows by doing it; but it is true the Preſidents are both ways, and it is not contrary to any thing he hath done, and it may be he is ſick, or hath buſineſs in another Court, where he is neceſſarily to attend. Therefore let his plea be allowed, niſi.

Attorney.

Leake and Reynolds.

Hill. 1654. Banc. ſup.

Special verdict in debt upon a bond.

LEake brought an Action of Debt upon an Obligation againſt Reynolds, The Defendant pleads non eſt factum, the Jury upon iſſue joyned find a ſpecial verdict to this effect, That the Plaintifs Declaration is upon an Obligation dated the 24 day of the month, and they find that the Obligation was ſealed and delivered the 27 day of the month, but bears date the 24 day, and whether this ſhall be accompted the ſame Obligation upon which the Plaintif declares or not, is left to the Court to determine. Green for the Plaintif ſaid, that this caſe is the ſame with Goddards caſe, and there it was adjudged a good deed, 12 H. 6 f. 1. Dyer 247. and in the end of Goddards caſe the caſe in point is adjudged. Roll chief Iuſtice, This is a plea in Bar, and not in abatement, therefore take your judgement.

Plea.

Hill. 1654. Upper Bench.

What is not ſlandering a title.

BY Roll chief Iuſtice, If one hath colour of title to land, an Action of the Caſe will not lie againſt him for ſaying, I have better title to the land than you, though his title be not ſo good as the others title is. Nota.

VVingfield and Valence.

Hill. 1654. Banc. ſup.

Hill. 1650. rot. 1409.

For reſtitution of monies in the Sheriffs hands.

LAtch moved to have reſtitution of monies out of the hands of a Sheriff, which he had levied upon an execution taken out of this Court, becauſe it iſſued forth erroniouſly. for before the Execution taken forth the Defendant brought his writ of Error in the Chequer Chamber to reverſe the judgement, and the Record was removed thither, and although the late Statute ſay, that a writ of Error ſhall be no ſuperſedeas to ſtay execution, yet the Record being removed into the Exchequer Chamber, no execution can be granted out here, for here is no Record to warrant it. Roll chief Iuſt. The caſe being moved again at another day, till when the Court would adviſe, ſaid, The Record is removed by a writ of Error in the Exchequer Cham-

Chamber, and is not now before us, nor was at the time when the Execution iſſued forth, and this being after a verdict and a judgement the writ of Error is no ſuperſedeas, and ſo it is miſchievous both ways, but how can we help it? yet take a ſuperſedeas quia erronice to ſuperſede the execution, for it was ill awarded, and take the moneys out of the Sheriffs hands. Nota. Miſchief. Superſedeas

The Protector and Captain Streeter.

Hill. 1654. Banc. ſup.

Captain Streeter was brought in Court by habeas Corpus, and upon the return read and filed, it appears that he was committed by an Order of Parliament, for publiſhing ſcandalous and ſeditious books. Twiſden moved that the priſoner might be bailed, becauſe that the Parliament is now diſſolved, and by conſequence the Order by which he was committed, is of no force. Mr. Attorney General on the other ſide urged, that the Parliament was not diſſolved, but only the meeting of thoſe perſons in Parliament was diſſolved, for the Parliament by the antient Law is to be every year, ſo that this is but in effect an adjournment, and not a diſſolution, and beſides, this matter for which the priſoner ſtands committed cannot be here inquired of, and ſo the cauſe of his commitment ſhall be intended to be good, and the Parliament may commit without ſhewing the cauſe of the commitment, and this commitment may be in order to his Tryal, and the Priſoner is not without remedy, for he may apply himſelf to the ſupreme Authority, to whom the Parliament have reſigned their power. Twiſden for the priſoner confeſſed, that this Court cannot be Judge of the Parliament; but this Order by which he is committed differs from an Act of Parliament, for this is temporary, and determineth; and although the authority of Parliament ceaſeth not, yet a particular Parliament may be diſſolved, as this was. Wad. Windham, When a Parliament is diſſolved, the proceedings there are determined. Flowrdews caſe 1 H. 7. the Latine caſe, and the Parliement is now diſſolved; and not adjourned, and a Parliament diſſolved is not like the Courts of Juſtice here in the Vacation time. Wild; This caſe is not like to the caſe where this Court remaunded a priſoner committed by the Parliament ſitting the Parliament, for the priſoner here is coram Protectore who may deliver him. Captain Streeter, Mr. Attorney labours to aſperſe me, but ſhews no cauſe or crime for my commitment, and I am here before the Protector in his own Court. Attorney General, Only the perſons and their convention is diſſolved, but not the Court, no more than this Court is, by the demiſe of the King, or in the Vacation time, and I muſt refer it to the Court how far you will intermeddle in this caſe, and this Order by which he ſtands committed may be his judgement there, and then he cannot be delivered; and I know no difference between an Order and an Ordinance of Parliament, and the ſtamp and authority of Parliament is upon this order; and if the priſoners Counſel ſay true, then he may have an Action of falſe impriſonment againſt his Gaoler. Twiſden, Here is no Order of the Parliament returned, but it expreſſeth that he was committed by the Speaker by vertue of an Order of the Parliament. Roll chief Juſtice, We examine not the Orders of Parliament; but the queſtion is whether the Order doth now continue, and I conceive it is determined by the diſſolution of the Parliament, and ſo would it have done by prorogation of the parliament, becauſe there is another Seſſion, and we can judge no otherwiſe of Orders of Parliament, but by the words of them. Ask Juſtice, If one that is committed by Order For delivery of a Priſoner appearing upon a Habeas Corpus. Order of Parliament. Diſſolution.

Order

der of Parliament cannot be delivered until another Parliament, the peoples liberty will be loſt, for there may not be a Parliament in many years. Roll chief Iuſtice, A new Parliament hath not reference to the old, but it is a new Court created upon new Summons, and why may not the Priſoner be bailed without theſe diſputes? although he may apply himſelf elſewhere; But the Court would adviſe, becauſe they perceived the priſoner ſtubborn. At another day, Mr. Attorney, upon the priſoners appearance again upon his Habeas Corpus ſaid, that he had no more to ſay than what he had formerly offered, only he added that it was a tender and a leading caſe, and therefore to be well adviſed of. Roll chief Iuſtice, For the firſt part of the return, I conceive it too general, for it doth not appear in what the books are ſcandalous, for the publiſhing whereof he was committed.

Return.

Order.

2ly. I conceive that the Order of Parliament ceaſeth with the Parliament, which is diſſolved; as an Order of one Seſſion of Parliament ends with the Seſſion, and is not like an Act, which continues after the Parliament; and all Committees made by order of Parliament do ceaſe by diſſolving of the Parliament, but thoſe which are made by Act of Parliament doe continue afterwards; and this individual Parliament being diſſolved, they can now make no further order, and ſo the priſoner may lie perpetually in priſon, and he hath already lain long in priſon, and therefore it is reaſon he ſhould be bailed. The priſoner was admoniſhed to be quiet, and not henceforth to diſturb the State. The priſoner was ordered to bring ſureties to be bound in 500 l. for his appearance here the next Term, and ſic de die in diem until Mr. Attorney will proceed againſt him, if he will proceed at all.

Committee.

Bail.

Hudſon and Dickenſon.

Hill. 1654. Banc. ſup.

For entry of a Nil capiat per Billam for expedition.

The Court was moved on the behalf of the Plaintiff, that a Nil capiat per billam may be entred againſt him for expedition in an Action of Treſpaſs for taking away his Cattel, wherein he had obtained a Verdict, becauſe he had declared for taking away 6 Mares and Colts, and did not ſhew how many Mares, and how many Colts particularly. Roll chief Iuſtice, Let a Nil capiat per Billam be entred.

Pinchard and Fowke.

Hill. 1654. anc. ſup.

Arreſt of Iudgement in an Action upon an Aſſumpſit.

Pinchard brought an Action upon the Caſe againſt Fowke, upon an Aſſumpſit, and declares, that the Defendant, in conſideration that the Plaintiff would forbear to proteſt a Bill of Exchange drawn upon the Defendant, that he would pay the moneys when he ſhould next come to London: And upon an Iſſue joyned, and a Verdict found for the Plaintif, it was moved in Arreſt of Iudgement, that here is no conſideration ſet forth to ground the promiſe upon; for he doth not ſhew that he came to London, but ſhews that he dyed at Plymouth, and came not to London. Roll chief Iuſtice, The coming to London is alleged to no purpoſe, for the payment of the money was a duty, and the monies to be paid were received beyond Sea, and ſo is a duty, and made a good conſideration, therefore let the Plaintif take his Iudgement.

Conſideration.

Duty.

Paſch.

Paſc. 1654. Banc ſup.

IT was ſaid by the Court that when an Informer hath attached his Action in a Court, another Informer cannot inform for the ſame thing, and if he do, it is a good plea in Bar to the ſecond Informer, that an information is depending againſt him for the ſame thing. Nota. A good plea againſt an Informer.

Trin. 1654. Banc. ſup.

BY Roll chief Iuſtice, A Bailif of a liberty hath return of writs, and therefore a reſcous made from him muſt be expreſſed to be out of his hands, but a reſcous made from the Sheriffs Bailif muſt be expreſſed to be out of the hands of the Sheriffs Bailif, for the Bailif is but the Sheriffs ſervant. How a reſcous is to be expreſſed. Bailif.

Patnell and Brooke.

Trin. 1654. Banc. ſup.

THe Court was moved upon an Affidavit to ſtay Execution upon a judgement given for an Adminiſtrator, becauſe the Letters of adminiſtration were repealed before the judgement entred. Roll chief Iuſtice, The matter comes not legally in queſtion before us, you muſt bring your audita querela, yet let Hern the Secondary examine it. To ſtay execution upon a judgement. Audita querela.

Trin. 1654. Banc. ſup.

THe Court was moved for a writ of Diſtringas againſt the Inhabitants of a Town in Huntingtonſhire, for throwing in of banks of the Earl of Bedfords in his drained lands. Roll chief Iuſtice, Take it, but at the return of the writ the Inhabitants may plead to you, notwithſtanding May the late Kings Attorney would not have ſuffered it. Nota. For a Diſtringas againſt Inhabitants of a Town. Plea.

and the Sherifs of London.

Trin. 1654. Banc. ſup.

AN Action upon the Caſe was brought againſt the Sheriffs of London for not returning a fieri facias: The Defendants plead not guilty, and a Jury was returned to try the iſſue, and after the Defendants filed the return of the Scire facias. Wadham Windham moved, that the Defendants might waive their general plea of not guilty, and might plead ſpecially, viz. That they had executed the writ. Roll chief Iuſtice, You have pleaded already, and it is in our power whether we will ſuffer you to alter your plea or not, and we will not doe it without the Plaintif will conſent, therefore make the beſt of that plea you have pleaded upon your tryal. Moved that the Defendants might plead ſpecially. Amendment.

Oyles and Marſhall.

Trin. 1654. Banc. ſup.

Againſt granting a Prohibition to the Court of Policy of aſſurance.

Wild upon a rule to ſhew cauſe why a Prohibition ſhould not be granted to the Court of Policy of aſſurance in London, ſhews for cauſe, that the Defendant had pleaded there, and the Plaintiff had replyed, and that the cauſe was ready for Tryal, and that the principal matter was fit to be tryed there, and they had authority to try it. Roll chief Iuſtice, If they have Juriſdiction of the principal matter, they have alſo Juriſdiction of all matters incident thereunto, and they may try them according to the courſe of their Law, ſo that it be not contrary to the Common-law. Therefore diſcharge the former rule.

Juriſdiction. Tryal.

Trin. 1654. Banc. ſup.

Who of common right are to repair a Sea-wall.

By Roll chief Iuſtice, If no particular perſon by Cuſtom be bound to repair a Sea-wall wherein a breach is made, the whole Level are bound to do it.

Trin. 1654. Banc. ſup.

How a Will may be revoked.

Upon evidence given in a Tryal at the Bar between Sir Iohn Bridges, and my Lord Chandois, it was ſaid by Roll chief Iuſtice, that one may revoke a Will in writing by Paroll, and may revive it again by Paroll.

Trin. 1654. Banc. ſup.

For a Habeas Corpus.

The Court was moved for a Habeas Corpus for one out-lawed in felony, becauſe he cannot be tryed there where the felony was done, untill the Outlawry be reverſed. But it was prayed for the Protector that a Habeas Corpus may not be granted, becauſe the Priſoner ſtands committed for divers felonies and rapes. Roll chief Iuſtice, He ſhall be brought hither by a Habeas Corpus to reverſe the Outlawry, but we will remand him to be tryed where he is.

Trin. 1654. Banc. ſup.

That one might be bayled. Quo warranto.

The Court was moved for one brought out of Wales by a Habeas Corpus, that he may be bayled, becauſe they have no Gaol-delivery there. Roll chief Iuſtice, It were good a Quo warranto were brought againſt them for not uſing their privileges duly. Let the Priſoner be bound to anſwer his offence at the next Aſſiſes.

The Protector and Baxter.

Trin. 1654. Banc. ſup.

Error to reverſe an Outlawry in felony, and prayed to be allowed.

One Baxter endicted upon ſuſpition of Robbery was out-lawed upon the Endictment, and taken upon the Outlawry, and committed to

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Finsbury-Gaol; afterwards he brings a Writ of Error to reverse the Outlawry, and obtains a Habeas Corpus to be brought hither to prosecute his Writ of Error, and upon the return thereof was brought to the Bar, and prayes to have his Writ of Error allowed, and to have Counsel assigned him, and that he may have a Copy of the Record, and that he may be bayled; and he took two exceptions to the Outlawry, 1. That he was in Prison at the time he was out-lawed, and knew nothing of the Outlawry. 2ly. That the charge against him is too general, and there is no body prosecutes against him, and prayed he may go with his Keeper to his Counsell. Roll chief Justice, You cannot be bailed, nor have a Copy of the Record, but you shall have Counsell assigned you, but you must be remanded. Bail. Copy.

Iles and VVindsor.

Trin. 1654. Banc. sup.

Trin. 1653. rot. 360.

A Writ of Error was brought to reverse a Judgement given by default in the Common-Pleas in an Action of Trover and Conversion, and the error assigned was, that the Plaintiff had declared for two pieces of Cloath, and did not express whether they were linnen or woollen cloath: But the exception was over-ruled, and the judgement affirmed, nisi, &c. Error to reverse a judgement in Trover given by default.

Bunniworth and Gibbs.

Trin. 1654. Banc. sup.

Mich. 1653. rot. 50.

A Writ of Error was brought to reverse a Judgement given in the Court at Peterborough in an Action upon the Case upon a promise, wherein the Plaintiff declared, that in consideration that the Defendant had received 5 l. which was due by the Plaintiff unto the Defendant upon an accompt made up betwixt them at such a time, the Defendant did assume and promise to the Plaintiff to pay unto him a certain sum of mony when the Defendant shall set up an Apothecaries shop in Peterborough, if the Plaintiff be then living there. The error assigned was, that here is no consideration laid in the Declaration to ground the promise upon: for the consideration is the receipt of five pounds, which was his own mony, for it was due to him upon the acccompt, and this can be no good consideration. But Roll chief Justice answered to this, that a little consideration will serve to ground a promise upon, and it may be the Plaintiff would not have acknowledged so much as 5 l. to have been due upon the Accompt, if the Defendant would not have made this promise. A second exception was taken, that the Plaintiff doth not aver, that when the Defendant set up the Apothecaries shop in Peterborough that he was living there. Roll chief Justice, This is a good exception, for the intent of the Plaintiff appears to be, that he would not have another of his own Trade in the Town to lessen his trading. Therefore let the Judgement be reversed, nisi, &c. Error to reverse a judgement in an action upon an Assumpsit. Consideration. Averment.

Lord and Michell.

Trin. 1654. Banc. ſup.

Trin. 1653. rot. 358.

Error to reverſe a judgement by a Nihil dicit in an action upon an Aſſumpſit.

A Writ of Error was brought to reverſe a judgement given upon a Nihil dicit in the Common-pleas in an Action upon the Caſe upon an Aſſumpſit; the conſideration was laid, that if the Plaintiff would forbear to ſue the Defendant, that then the Defendant would pay ſuch a ſum of mony. Two errors were aſsigned to reverſe the judgement, 1. That whereas the conſideration is laid generally, that if the Plaintiff ſhould forbear to ſue the Defendant, he would pay the mony; the Plaintiff hath not averred this conſideration, but ſaith in facto that he did forbear to ſue till *June*, which cannot be the ſame conſideration. 2ly. The Writ of Enquiry is ſaid to be enquired of by twelve lawfull men in the County, whereas it ſhould be of the County, for the Jurors for ought appears may be of another County, and then it cannot be well. Roll chief Juſtice, This is but an inqueſt of Office, but you have not averred the conſideration as you ought to have done, and this is error. Therefore let the Judgement be reverſed, niſi, &c.

Averment.

Phillips and Phillips.

Trin. 1654. Banc. ſup.

Error to reverſe a judgement in an action for words.

A Writ of Error was brought to reverſe a judgement given in the Court at Newport in an Action upon the Caſe for theſe words, Thou art a whoreſon Bankrupt-Rogue, and they were laid to be ſpoken of a Farmer. The errors aſsigned were. 1. That it doth not appear by the Declaration that the Plaintiff gets his living by buying and ſelling. And 2ly. It appears not that the words were ſpoken of him in relation to his profeſsion. And upon theſe Exceptions the judgement was reverſed.

Bancks and Prat.

Trin. 1654. Banc. ſup.

Hill. 1653. rot. 603.

Error to reverſe a judgement in an action upon a Promiſe.

A Writ of Error was brought to reverſe a judgement given in the Common-pleas for an Attorny in an Action upon the Caſe, grounded upon a promiſe that the Defendant would pay him ſuch fees as ſhould grow due to him as an Attorny in proſecuting ſuch a Sute for him in the Common-pleas, and for proſecuting another ſute for him in Chancery as his Solliciter. The Errors aſsigned were, 1. That he doth not ſhew particularly how he hath laid out the mony, but only expreſſeth it generallly, that he had expended, and there was due unto him ſuch a ſum of mony. 2ly. The Promiſe is, that the Defendant would pay him the fees ſo long as he ſhould continue to be his Attorny and to proſecute for him, and it doth not appear that he continued to be his Attorny, and to proſecute for him during the ſute, and to make the firſt exception good Took and Sir Tho. Walſinghams Caſe lately

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ly adjudged was urged. But as to that exception Roll chief Iuſtice anſwered, it is not neceſſary to ſhew particularly how the mony became due, and was expended, for this would make the Declaration too long; and though the Plaintiff, as hath been objected, ſhould bring another Action for the ſame thing, yet you may plead this recovery in bar generally againſt him. And as to the ſecond exception it ſhall be intended he continued to be his Attorny, if it appears as it doth, that he proſecuted for him. Therefore ſhew cauſe Friday next why the judgement ſhould not be affirmed. Poſtea.

Plea in bar. Intendment.

Kemp and Gord.

Trin. 1654. Banc. ſup.

Hill. 1653. rot. 840.

AN Action upon the Caſe was brought by the Maior and Commonalty of the Town of Lyſcard in Cornwall againſt Gord for not grinding at their common Mill. The Defendant demurs to the Declaration. And Wadham Windham for the Defendant urged, that the Cuſtom is not well alleged upon which the Action was grounded. For firſt it is not ſhewed, that the Houſe where the Defendant inhabiteth, and by reaſon whereof it is ſuppoſed he ought to grind at the Mill is held of the Maior and Commonalty. 2ly. It is not ſhewed, that the Maior and Commonalty are bound to repair the Mill, and do conſtantly keep Grinders and Loaders. And for the firſt, this Cuſtome ought to be aſſured, by reaſon of the tenure of the Houſe, or in reſpect of the Corn growing upon the ground uſed with the Houſe, and it is not proper to ſay, a man is bound to grind by reaſon of his Houſe, 8 Rep. Farmers caſe, f. 125. Hob. Harding and Greens caſe, 19 Ed. 2. Fitzh. Aſſ. 559. For the ſecond, this grinding at the Mill is a perſonal ſervice, and if the Maior and Commonalty be not bound to repair the Mill, and to find Grinders and Loaders, then there is not quid pro quo, and the Cuſtom will be unreaſonable, and a meer oppreſsion, 22 Aſſ. Pl. 58. Latch on the other ſide ſaid, here is a good Cuſtom alleged, and it is not neceſſary to ſhew any tenure in this Action, being but an Action upon the Caſe, and not a Secta ad molendinum, and ſo is it agreed in Harding and Greens Caſe. And in 9 Iac. Hill. rot. 691. an Action was brought for this very Cauſe, and the Cuſtom was then allowed to be good. Roll chief Iuſtice, I believe this is a good Cuſtom, and the Corporation is bound to repair the Mill, and there can be no prejudice for the party to grind here, and the Cuſtom hath been already tryed and found good. Therefore let the Plaintiff have his Iudgement, niſi, &c.

Demurrer to a Declaration in an action upon the Caſe for not grinding at a Mill.

Cuſtom.

Iones and Graves.

Trin. 1654. Banc. ſup.

IN the Caſe of one Iones and Graves, It was ſaid by Roll chief Iuſtice, That if a Writ of Covenant be brought againſt three, and one of them die, the Writ is abated only to him; but is not abated to the reſt, but only abateable: but Latch fortment that it is abated to all. Q.

Where a Writ is abated, where it is abateable.

Tompkins and Clark.

Trin. 1654. Banc. ſup.

Error to reverſe a judgement in an action for words.

A Writ of Error was brought to reverſe a judgement given in the Court at Newcaſtle upon Tyne, in an Action upon the Caſe for theſe words, He, meaning the Plaintif, is a baſe beggarly Raſcal, and hath cozened the Parliament a hundred times, and deſerves to ride on the wooden horſe, ſtanding on the Sand hill. The Exceptions were, that the words are not actionable, for the Plaintif is at no loſs or damage by ſpeaking of them, nor is thereby endangered of his life, or to be puniſhed corporally. 2ly. The words are not ſaid to be ſpoken of the Plaintif, nor to the Plaintif. 3ly. The Venire is not well iſſued. Roll chief Juſtice, Reverſetur, niſi, &c.

Staveley and Ulithorp.

Trin. 1654. Banc. ſup.

For judgement in an action on the Statute of 2 Ed. 6. concerning tithes.

Recitals.

Latch moved again for judgement in this caſe formerly ſpoken to, notwithſtanding the exception inſiſted upon by Shaftoe after the Court had delivered ſome opinion, viz. that it was not expreſſed that the Parliament was held by prorogation, becauſe it is not neceſſary it ſhould be ſo expreſſed. 2ly. The Action is here brought upon the ſecond branch of the Statute, which is, that all perſons ſhall ſet forth their tithes, and the word ſubject is only mentioned in the firſt clauſe. Maynard on the ſame ſide ſaid, that this miſ-recital, if it be a miſ-recital, affirms the Statute, and it is not a falſe recital, and therefore it doth not hurt. Roll chief Juſtice, It is not good to make ſuch recitals of Statutes in a Declaration, nor would I have any recital made hereafter more than is neceſſary for the gift of the Action. Shaftoe inſiſted upon it, That the miſ-recital here is a material Exception, for the recital is not true; for it is not all one to ſay the Subject of the King, and to ſay the Subject of the then King, for the former words goe to the politick capacity of the King as King, and the latter words go to the natural capacity of his particular perſon. Roll chief Juſtice, But what ſay you to that which is ſaid on the other ſide, That the Action is brought upon the ſecond clauſe of the Statute, which is, that all perſons ſhall ſet forth their tithes, and not upon the firſt Clauſe, which ſpeaks of all Subjects of the King: And the recital here is not material to the Action. It is true, here is a miſ-recital, and if the Action were brought upon the firſt Clauſe of the Statute, it would not be good, but it is not ſo here. Therefore let the Plaintif have his Judgement, niſi. Antea.

Trin. 1654. Banc. ſup.

For an Attachment.

The Court was moved for an Attachment againſt the Sheriff of Staffordſhire, for making a frivolous return of a Habeas Corpus, viz. That the Committee for poor priſoners had ordered, he ſhould not bring the body till they had conſulted with the Lord chief Juſtice. Roll chief Juſtice, Take an Alias habeas Corpus, with a pain of 80 l.

Rovye

Roby and Twelves.

Trin. 1654. Banc. ſup.

Trin. 1652. rot. 502.

IN a ſpecial Verdict in an Ejectione firmæ, it was found, that there was a cuſtom within the Manor of Caſtle Dunnington, that any Copyholder of that Manor may make a writing in the nature of a Letter of Attorney to two Copyholders of the ſame Manor, to ſurrender his Copyhold after his death. The queſtion was, whether this was a good cuſtom or not. Alleyn argued for the cuſtom, that it was a good cuſtom; becauſe ſuch cuſtoms are not to be governed by the rules of the Common Law, but by the rules of natural reaſon, and are conſiderable in themſelves, and ſuch cuſtoms may reſtrain the Common Law, and the Common Law doth tollerate them. And this cuſtom that gives power to make this ſurrender after the Copyholders death, is not unreaſonable, for the power given is not countermanded by his death, no more than an Attorney is reſtrained by his maſters death to act in the cauſe. And in Butler and Bakers caſe, by the delivery of a deed after the death of the party, the eſtate may paſs by Attorney, and ſo although here be but a bare power given, yet it is well executed, notwithſtanding his death that gave it. 2dly. This Letter of Attorney was not countermandable by the Copyholder himſelf during his life, and therefore it ſhall not be countermanded by his death, and though it had been countermandable during his life, yet it being not countermanded by him in his life, his death ſhall not countermand it, and the cuſtom doth ſtrengthen this power. Next, this cuſtom is not contradictory, for here is no Attorney made, but a writing made in the nature of a Letter of Attorney, and a power to ſurrender given by it, and it is no more than for one Copyholder to ſurrender for another, which is uſual, and in Cooks 9 Rep. f. 76. A Copyholder is called an Attorney; alſo Copyhold eſtates are made by cuſtoms, and therefore ſuch cuſtoms which are to confirm eſtates are to be favoured in Law, although they do differ from conveyances of eſtates at the Common Law, and this cuſtom is not only reaſonable, but convenient alſo for the paſsing of Copyhold eſtates. And this cuſtom enlarges the power of alienations, and ſuch cuſtoms have generally been admitted good, though different from the Common Law; And when a cuſtom is become a Law it is very dangerous to alter it, and the doing of it would overthrow many eſtates. Ellis Sollicitor General on the other ſide argued, That the cuſtom is not good, becauſe it is againſt the rule of Law, That an authority given ſhould ſurvive the party that gave it, and a cuſtom cannot ſtrengthen it, for a cuſtom ought to be reaſonable, and agreeing to the nature of the thing which it concerns, otherwiſe it cannot be good, for Ratio eſt formalis cauſa conſuetudinis, Daliſons Rep. 32. 1 Inſtit. f. 59. And this cauſe cannot be reaſonable, becauſe it cannot give an authority to another to do ſuch a thing for him after his death, which he could not do during his life; And this cuſtom doth purely deſtroy the nature of the Common Law, and therefore cannot be good; And it is againſt the very nature of an authority to ſurvive, and ſo conſequently it is againſt the nature of the thing, Dyer 357. 10 E. 3. f. 5. 18 Rep. Vynyers caſe. The party in his life time might have revoked this authority, and therefore his death doth revoke it; and by the death of the Copyholder the Copyhold is deſcended, and cannot be ſurrendred by a dead man, and here was no in-

Special verd. & in an Ejectione firmæ.

incoation of the eſtate of the party that is dead, and I hold there is a diffe-
rence betwixt a will and an authority; And alſo here the Letter of Atto-
ney is not purſuant to the cuſtom, and therefore it is a void Letter of Atto-
ney, 16 Iac. rot. 530. Greenwood and Onſlaes caſe. Cuſtoms are to be taken
ſtrictly, and to be ſo purſued, and it is not ſo here, for here is an addition
Copyhold. to the cuſtom, and this makes all void. Roll chief Iuſtice, Copyholds are
much led by the cuſtoms of the Manor, and, me thinks, here is little diffe-
rence betwixtt ſurrendring into the hands of another Copyholder, to make
a ſurrender for him, and this caſe, and the variances are not ſo conſiderable
as to make it void here. The Court would adviſe. At another day the
Cuſtom caſe was again put, and the Court delivered their opinion, that the cuſtom
was good; and Roll chief Iuſtice ſaid, that the death of the party doth
Revocation. not revoke this writing made in the nature of a Letter of Attorney, for it
is ſtrengthned by the cuſtom, and it is not like an ordinary Letter of At-
Authority. torney which becoms void by the death of him that made it, for this cuſtom
Executor. is a Law, and the authority here ſurvives, as an Executor may ſell the
Teſtators lands, if he be impowered to do it by the will, and therefore the
Cuſtom is good, and let the Plaintif have judgement, niſi, &c.

Child

Trin. 1654. Banc. ſup.

That the Defendant might not plead to the Action. AN Action upon the Statute of 5 Eliz. was brought for uſing a Trade not having ſerved an Apprentiſhip in it. Serjeant Fletcher moved that the Defendant might not be compelled to plead, becauſe he ought not to be ſued out of the County where he uſeth the Trade. Roll chief Iuſtice, proceed according to Law, and plead this matter, or move it in arreſt of
Rule. Judgement, for we will make no rule.

Trin. 1654. Banc. ſup.

Where an Action on the Caſe lies, and where not. BY Roll chief Iuſtice, an Action upon the caſe doth not lie againſt one for cauſing another to be endicted for a Treſpaſs, but for cauſing one to be endicted for a thing which deſerves corporal puniſhment, or a thing which ſounds in ſcandal of the party endicted, an Action upon the caſe will lie. Nota.

Stevens againſt Ask.

Mich. 1654. Banc. ſup.

Action on the Caſe for words. Arreſt of judgment. Adjective words. STephens brought an Action upon the caſe againſt Ask for theſe words, Thou art a common Baſtard-bearing Whore, and hadſt two Baſtards by a Butcher, and I will prove it. Upon not guilty pleaded, and a verdict found for the Plaintif, Twiſden moved in Arreſt of Judgement that the firſt words, viz. Thou art a common Baſtard-bearing Whore are not actionable, becauſe they are adjective words, and are not poſitive; And for the other words they are not actionable, becauſe they were ſpoken of a Feme Covert, who cannot have a Baſtard. Upon this the judgement was arreſted till the next Term, and then Wild moved for judgement, for that he conceived that the words taken together are actionable, and cited Owen Clevons caſe adjudged in this Court to prove it. Roll chief Iuſtice, If the

were

were married at the time of the words ſpoken ſhe could not have a Baſtard; but yet why ſhould not the words be actionable, for the words purport that ſhe was not maried when ſhe had the Baſtards, and the Jury hath found for the Plaintif. Therefore let her take her judgement, niſi.

Barker and Weſton.

Mich. 1654. Banc. ſup.

The Court was moved that the bail to an Action might be diſcharged, becauſe they had now brought in the principal, and it was but one day after the return of the writ. But Roll chief Iuſtice anſwered, that it may not be, becauſe they come in upon the return of the ſecond Scire facias. To diſcharge Bail.

Harvey and Mountney.

Mich. 1654. Banc. ſup.

In this Caſe the Action being a Treſpaſs and Ejectment, and the title concerning Hugh Audley of the Inner Temple, the Defendant was by rule of Court, at the tryal, which was to be at the bar, to appear and confeſs the leaſe, entry, and ouſter, and to ſtand upon the title only, yet at the tryal he would not appear, upon which the Plaintif was non-ſute, and yet the judgement was for the Plaintif upon the rule, and he was ordered to pay the Jury. Nota. Plaintif non-ſute and yet judgement for him.

VValkenden and Haycock.

Mich. 1654. Banc. ſup.

Upon a Verdict given for the Plaintif in an Action upon the caſe for theſe words ſpoken of a Millener in London, viz. Thou art in a breaking and decayed condition, and I will prove it, and if you queſtion me, I will prove it to your diſgrace. Twiſden moved for judgement for the Plaintif, becauſe he held the words are actionable; for by the ſpeaking of them the Plaintif is diſgraced in his profeſsion; for in common underſtanding the words amount to as much as if he had ſaid that the party is a Bankrupt, and it is ſo averred in the Record, and found by the Jury, and he cited Mich. 1651 Tayler and Keiſers caſe, and Smith and Rookes caſe 24 Car. Wild on the other ſide ſaid, that the words are not actionable, for they are adjective words, and of an incertain ſignification, for the words may as well mean that he is broke or burſt in his body, as that he is a Bankrupt or broken in his eſtate; and there is no averment that the words were ſpoken in the hearing of tradeſmen, and though they were, yet they may not tend to his diſgrace, for a Tradeſman may be in a decaying condition, in reſpect of what he hath formerly been, and yet have ſtock enough left to trade withall. The Court then enclined that the words were actionable, but for that time gave no judgement; but the caſe being moved again the ſame Term, judgement was given for the Plaintif. Action upon the caſe for words. Adjective words. Iudgement.

Lawrence and Harriſon.

Mich. 1654. Banc. ſup.

Action upon the Caſe for breach of truſt.

AN Action upon the Caſe was brought by Lawrence againſt Hariſon his Attorny for delivering a Fieri facias againſt him, in the ſute wherein he was Attorney for him, to the Under-Sheriff, and procuring it to be executed againſt him, contrary to the truſt repoſed in him. Upon not-guilty pleaded, and a verdict found for the Plaintiff, It was moved in arreſt of judgement for the Defendant by Windham, That there appears not in the Record to be any combination between the Defendant and the Plaintiffs adverſary againſt his Client, and ſo no breach of truſt appears to ground the Action upon. 2ly. Here being a judgement in the Caſe, the ſute in which he was entertained to be Attorny is ended, and conſequently the truſt repoſed in him is determined, and ſo no breach of it, for he is now diſcharged from being Attorney, and the Plaintiffs averring the contrary doth not alter the Law, and beſides, this delivery of the Fieri facias is in purſuance of Juſtice, which ſince that the ſute is ended cannot be called a breach of truſt. Roll chief Juſtice, But you did not only deliver the Writ againſt your Client to the Under-Sheriff; but did alſo procure it to be executed againſt him, which ſhews there was a combination againſt him. The only

Whether a Warrant of Attorney determined.

queſtion is, whether the Warrant of Attorney be determined by the judgement given in the ſute wherein he was retained; and I conceive it is not, for the ſute is not determined, for the Attorney after the judgement is to be called to ſay why there ſhould not execution be made out againſt his Client, and he is truſted to defend his Client as far as he can from the execution.

Judgement.

Therefore let the Plaintiff have his judgement, niſi, &c.

Roungs and Woodyard.

Mich. 1654. Banc. ſup.

Action of the Caſe for words againſt a Farmer.

ROungs a Farmer in the Country brought an Action upon the Caſe againſt Woodyard for ſpeaking theſe words of him, You are a Beggar, and a Banckruptly Fellow, and if every one had his own, you are not worth a Groat. Sergeant Fletcher moved in arreſt of judgement that the words are not abſolute and poſitive words, but are ſpoken adjectively, and alſo they are not ſpoken of a Merchant, or of one that gets his living by buying and ſelling, and ſo are not ſcandalous: for a Farmer cannot be a Bankrupt, and here is no dammage to the party by the ſpeaking of them. Roll

Particular dammage.

chief Juſtice, Though it appear not that the Plaintiff is a Tradeſman, yet here appears to be a particular dammage to him by the ſpeaking of the words, viz. that by reaſon of the ſpeaking of them he was diſcredited with his Landlord, and his Landlord had given him warning to be gone out of his Farm, and it matters not though the words generally conſidered are not actionable. Therefore ſhew cauſe Saturday next why the Plaintiff ſhall not have his judgement.

Jones

Iones and Graves.

Mich. 1654. Banc. sup.

AN Action upon the Case was brought by Iones against Graves for entring upon the possession of a Term, after he had recovered it by a verdict given for him. Upon not-guilty pleaded, and a verdict for the Plaintiff, it was moved in arrest of judgement, that the Plaintiff hath not shewed that there was any Term continuing in him at the time of the Defendants entry into the Land, for though the Term might have a continuance at the time of the recovery, yet it may be ended at the time of the Plaintiffs entry into the Land. 2ly. It is not expressed when the entry was, and so it appears not whether it was before or after the recovery, so that it cannot be known, whether the Plaintiff hath cause of Action or not. Latch also doubted, whether this kind of Action ought to be in this Case or not, and whether he ought not to have brought an Action of Trespasse, and not an Action upon the Case. Roll chief Iustice, He may bring an Action upon the Case, or an Action of Trespasse at his own election. Wild on the other side held, that the Declaration was good enough, for by it there appears to be good cause of Action, for the time of the entry is expressed, viz. that it was after the recovery. 2ly. The entry is found to be vi & armis, which implies an unlawfull entry, and so the Jury have found it to be, viz. that he is put out of his possession recovered. Roll chief Iustice, Though the Plaintiff had no title, yet he had a possession, and it is actionable for the Defendant to disturb him. Therefore let the Plaintiff have his Iudgement, nisi, &c.

Action upon the Case for entring upon the possession of a Term.

Election of Action.

Implication.

The disturbing a possession actionable.

Mathew and the Hundred of Godalming in Surrey.

Mich. 1654. Banc. sup.

IF a Carriers man or Son conspire to rob him, and accordingly do it, the Carrier not being privy to it, The Carrier may bring an Action against the Hundred, upon the Statute of Winchester for this robbery, but this conspiracy may be urged in mittigation of dammages. Per Roll chief Iustice, In a Tryal at the Bar, between one Mathew, and the Hundred of Godalming in Surrey.

Action upon the Statute of Winchester against a Hundred.

Mitigation of dammages.

Hacker and Newborn, a Sussex Cause.

Mich. 1654. Banc. sup.

IF a Man make his Will in his Sickness, by the over-importuning of his Wife, to the end he may be quiet, this shall be said to be a Will made by constraint, and shall not be a good Will. By Roll chief Iustice, In a Tryal at the Bar in the Case of one Hacker and Newborn, Mich. 1654.

What shall be a Will by compulsion.

Bronge and More.

Mich. 1654. Banc. ſup.

Arreſt of judgement in a Replevin.

MAſter Sollicitor general moved in arreſt of judgement in a replevin, and took theſe exceptions to the avowry. 1. That the party did avow the taking of the Cattel dammage-feaſant in a Common, where he had Common, and doth not ſhew that he hath Common for his Cattel levant and couchant. 2ly. He doth not ſhew, that he was dampnified by the Cattel that were diſtreyned dammage-feaſant, and it may be there was common enough for him notwithſtanding the other Cattel diſtreyned were there, and ſo he was not dampnified by their being there. Roll chief Iuſtice anſwered, if one who hath no right to Common do put his Cattel upon the Common, he who is a Commoner may take the Cattel dammage-feaſant upon the Common, and it is not neceſſary for him to aver, that he hath dammage by them, for he hath an intereſt which doth authoriſe him to remove the nuſance, but he muſt make a Title to the Common, and if he have made it here but by implication, it is well enough: for it is now helped by the verdict, and you have paſſed over your advantage by not demurring to him.

What diſtreſs lawfull without avermem of dammages.

Intereſt.

Title by implication.

Mich. 1654. Banc. ſup.

A Deed good in part, and fraudulent in part.

BY Roll chief Iuſtice, A Deed may be fraudulent in part, and good in part, and ſo he ſaid it had been adjudged in the Caſe of one Lydal of the Middle-Temple.

Banks and Pratt.

Trin. 1654. Banc. ſup.

Hill. 1653. rot. 603.

Error in an action of the Caſe by an Attorney for fees and ſolliciting.

PRatt brought an Action upon the Caſe againſt Banks upon an Aumpſit, to pay him ſuch fees as ſhould be due unto him as his Attorney in proſecuting a ſute for him in the Common-pleas, and ſuch monies as he ſhould lay out in ſollicitting a ſute for him in the Chancery, and upon non-aſſumpſit pleaded, a Verdict was given for the Plaintiff, and a judgement thereupon. The Defendant brought a Writ of error in this Court, and aſsigns for error, that the Plaintiff did not ſhew particularly what ſums of mony he had laid out for him, nor to whom he had paid it, as he ought to do, and Tooke and Sir Thomas Walſinghams caſe in this Court was cited to prove it. 2ly. The Aſſumpſit was that he ſhould pay him his fees, ſo long as he ſhould continue to be his Attorny, & it appears not that he continued to be his Attorny in the ſute wherein he ſuppoſeth be proſecuted for him. But for the firſt exception Roll chief Iuſtice ſaid, that it is not neceſſary to ſet down particularly, the ſeveral ſums of mony he had laid out, for this might make the Declaration tedious, and if the Plaintiff ſhould (as it is objected he may) bring another Action for ſome part of the monies recovered in this ſute, you may plead this recovery generally in bar of ſuch Action. And as to the 2d. exception it ſhall be intended, that he did continue to be his Attorney if it appears, as it doth, that he proſecuted for him. The caſe was moved again the next

A general Declaration good.

Intention.

Term.

Term, and the former exceptions only insisted upon. But Roll chief Iustice over-ruled the exceptions, and affirmed the Iudgement. Antea. Iudgement affirmed.

Mich. 1654. Banc. sup.

THe Court was moved, that two that were bayl for one in an Action might be discharged and two others accepted of, because the party was to examine them as Witnesses in the Cause, which was granted upon consent of the parties. To change the Bayl.

VVise and Jeffryes.

Hill. 1654. Banc. sup.

Mich. 1654. rot. Q.

VVIse a Corn-Merchant and a Baker in London brought an Action upon the Case against Ieffryes for speaking these words of him, viz. Thou art a broken fellow, and hast cheated me of 200 l. Upon a verdict for the Plaintif it was moved in arrest of judgement, that the words are not actionable, because the words are adjectively spoken, and are not positive words, nor of a certain signification, for they may be meant that he was broken in his body, and not in his estate. But VVild answered, that 1. The words are spoken of a Tradesman, which may be a Bankrupt; and 2ly. Here is an averment that the words were meant to signifie that the Plaintif was a Bankrupt, and besides here is a verdict for the Plaintif. Green replyed, that it doth not appear that the words were spoken of him in relation to his Trade or Profession, and to say, that thou hast cheated me, were adjudged not actionable in Hills case, 2 Car. and in one Iohnsons case. Roll chief Iustice, I do not agree the Case of 2 Car. cited, but to the Case in question, take all the words together as they are laid they imply he is broken in his Trade, and the word cheated enforceth this sense, and the words are very scandalous, and the averment, and the verdict makes it more strong. Therefore judicium pro querente, nisi, &c. Action for words brought by a Corn-Merchant. Adjective words. Iudgement.

Fowkes and Copsye.

Hill. 1654.

IT was said in this Case, that if there be divers breaches of an Award, you may assign but one of them in an Action brought for breach of the Award. One breach of an Award assignable.

Michill and Hepworth.

Hill. 1654. Banc. sup.

Trin. 1654. rot. 717.

A Writ of Error was brought to reverse a judgement given in the Common-pleas in an Action of Trespass for an Assault, and taking away of the Plaintifs Goods, and amongst other for taking away of Wrt- Error in Iudgement in Trespass.

tings, and two Errors were aſsigned, 1. That the Declaration was with a quod cum, which was ſaid is not good in an Action of Treſpaſs. 2. That the Plaintif did not ſet forth what the writings were which were taken away; but the firſt exception was only relyed upon, and to that Roll chief Iuſtice, anſwered, That if the Action were an Action of Treſpaſs upon the caſe, though it were with a vi et armis, it might be good with a quod cum, but the Action here is a meer Action of Treſpaſs vi et armis, Therefore ſhew cauſe why the Iudgement ſhall not be reverſed.

A quod cum nor good in in Treſpaſs. Otherwiſe in Treſpaſs on the caſe.

Kirk and Lucas.

Hill. 1654. Banc. ſup.

Hill. 1653. rot. 579.

What ſhall be a good plea in an accompt before Auditors.

KIrk brought an Action of Accompt againſt Lucas, the Defendant Lucas pleads ne unques receptor, and upon this Iſſue there was a verdict for the Plaintif, that the Defendant ſhall accompt, whereupon Auditors being aſsigned, he pleads before them in diſcharge of the Accompt, that he received the money of the Plaintif to deliver over, and accordingly he had delivered it over; The queſtion was whether this plea pleaded before the Auditors was a good plea in diſcharge of the Accompt. Twiſden ſaid, It was not a good plea in diſcharge of the Accompt before the Auditors, but it had been a good plea in bar of the Action, and here it is not ſhewed that there was any direction given to pay the money over. Roll chief Iuſtice, If he plead that it was paid by his conſent it is a good plea before the Auditors, and this is a good plea in bar if the money be paid accordingly, Therefore take your judgement, niſi.

Iudgement.

The Protector againſt Richardſon.

Hill. 1654. Banc. ſup.

Error upon a Iudgement upon an Information for Extortion.

A Writ of Error was brought by Richardſon to reverſe a judgement given againſt him, being by profeſsion a Tayler, upon an information of extortion exhibited againſt him at Oxford, at the Aſsizes there, for taking more money of one that bound himſelf Apprentice with him, than by Law he ought; and the Error aſsigned was, that the Iuſtices of Aſsize have no power to determine offences of this nature, and Metcalfs caſe 11 Rep. was urged, and the Statute of 22 H. 8. C. 5. and 28 H. 8. C. 5. But Crook Seignior anſwered, That as they are Iuſtices of Oyer and Terminer they have power by their Commiſsion to determine offences of this nature, and it ſhall be intended they proceeded here by virtue of that Commiſsion, and in 7 Eliz. in Dyer it is a quære whether the Statute be meant of the Courts at Weſtminſter, or no, and it would be inconvenient if the Iuſtices ſhould not enquire of ſuch offences at the Aſsizes, and he cited Gregories caſe, and Cooks Juriſdictions of Courts, to prove they have authority Roll chief Iuſtice, But it appears not here by vertue of which of their Commiſsions you have tryed the offence; but you have jumbled the Commiſsions together in the Record, and they have not authority by all their Commiſsions; and beſides there is another fault in the judgement, for it is not ſaid it is conſidered by the Court, but only it is conſidered. By the Statute of 22 H. 8. the Iuſtices of Aſsize by vertue of their Commiſsi-

Certainty is required.

on

on of Oyer and Terminer, have power to try divers offences, if they be not restrained to certain Courts; but for the reasons aforesaid, Shew cause why the Iudgement should not be reversed.

Protector and Cartwright.

Hill. 1654. Banc. sup.

IT was moved on the behalf of Cartwright that he might have allowance of his Plea confessed by Mr. Attorney general pleaded to a quo Warranto brought for the Protector against him for certain liberties which he claimed within the Manor of Ossingham in Nottinghamshire; the Exception to the plea was, that he claimed the Assize of Wine, to which it was answered, that it is intended only of the measures for Wine, and that the Plea had been read and examined by Iustic. Ask. Roll chief Iustice, Let Iustice Ask examine it again. For allowance of a plea confessed by the Attorney general.

Toft and Daye.

Hill. 1654. Banc. sup.

Trin. 1653. rot. 547.

A Writ of Error was brought to reverse a judgement given in an Action upon the Case brought against a Sheriff for restoring of goods taken in Execution to the party from whom they were taken, and for endorsing of nulla bona upon the writ of Execution, and delivering over the writ so endorsed to the new Sheriff his Successor. The Errors assigned were these. 1. It is not said in the Record that he returned nulla bona, but only that he endorsed nulla bona upon the writ. 2ly. It is said that he delivered the writ thus endorsed to the new Sheriff, but doth not shew that the writ was delivered over by Indenture betwixt the new Sheriff and the old, to be returned by him. 3ly. It appears not whether there were any return at all made of the writ by the new Sheriff or the old. And 4ly. The Action is not laid in the County where it ought to be, for it is neither brought in the County where the writ was indorsed, nor where it was delivered over. Latch answered, that the Action was brought for re-delivering the goods taken in execution back again to the party, and not for the endorsing of the writ, and delivering it over to the new Sheriff. But the Iudgement was reversed, nisi, &c. Postea. Error to reverse a judgement in an action upon the Case. Iudgement reversed.

Porter and Swetnam.

Hill. 1654. Banc. sup.

Trin. 1654. rot. 393.

IN this Case upon a writ of Error brought upon a judgement given upon an Action of Covenant for not paying of rent reserved upon a Lease for years by Indenture, After the opinion of the Court was delivered that the words yielding and paying in the Indenture made an express Covenant, and were not a bare Covenant in Law, and that an Action of Covenant did well lie upon them, the writ of Error was quashed for a defect in form, Error in Covenant. Express Covenant. Writ of Error quashed, and judgement affirmed.

in it, and a new writ of Error brought, and thereupon the judgement was again prayed to be affirmed, which was done, nisi, &c. Nota. Antea.

Hill. 1654. Banc. sup.

Habeas Corpus.

THe Court was moved for a Habeas Corpus to remove a Prisoner in Northampton Gaol, that was convicted of felony, and had been burnt in the hand, upon an Affidavit that the Gaoler used him hardly. But Roll chief Iustice answered, that it could not be, but they might either endict the Gaoler, or bring an Action against him.

Endictment. Action upon the Case.

Hill. 1654. Banc. sup.

For a new Tryal.

THe Court was moved upon an Affidavit for a new tryal, because the Jury were not kept together till they had given their verdict, as they ought to be. But Roll chief Iustice answered, this is a misdemeanor, yet the verdict is a good verdict notwithstanding, yet we will hear the Councel on both sides before we conclude any thing: The same Term Iudgement was given, upon another motion made for a new Tryal.

The Iuries misdemeanor spoils not the Verdict.

The Protector and Lowr.

Hill. 1654. Banc. sup.

To quash an Endictment.

BArton moved to quash an Endictment preferred against Lowr at the Assizes at Cornwall, for speaking of scandalous words against the Parliament; The Exception taken was, that it did not appear in the Endictment that the Parliament was sitting at the time when the words were spoken. But Roll chief Iustice answered, It appears not to us but that the Parliament was [not] sitting at the time; and peradventure it will be made appear at the tryal. Therefore plead, and go to tryal, and then move in Arrest of judgement if you have any thing to move.

Denied.

Page and Parr.

Hill. 1654. Banc. sup.

Trin. 1654. rot. 1687.

Covenant upon an Indenture.

PAge brought an Action of Covenant upon a Covenant conteined in an Indenture of a demise for years, for the not paying the rent reserved by the Indenture, according to the Covenant. The Defendant pleads in bar that the Plaintif entred into part of the land demised before the rent due, for which the Action was brought, and so had suspended his rent: The Plaintif replyed, the Defendant did re-enter, and so was possessed as in his former estate, and to this replication the Defendant demurred, and for cause he shewed, that here was no confession and avoidance, or traverse of the plea in bar. Roll chief Iustice, Have you shewed that he continued in possession until the rent grew due; for you ought to shew that he entred and was possessed until after the rent-day, but here you have only said that he was possessed in his former right, Therefore nil capiat per Billam, nisi.

Suspension of ren.

Nil capiat per Billam.

Hill.

Hill. 1654. Banc. ſup.

VPon an Affidavit read in Court, that 20 l. coſts were taxed upon a non-ſuite in an Action of Treſpaſs and Ejectment brought to the Bar, and that the Plaintif had not payed them, nor was to be found, and yet had brought another Action for the ſame land, The Court was moved that the Defendant might not be ruled to plead to this ſecond Action, until the Plaintif had paid the coſts taxed upon the former non-ſuite, and that another Plaintif might be named, or that ſecurity might be given to pay the coſts if the Plaintif ſhould be non-ſuite again. The rule was to ſhew cauſe why it ſhould not be ſo.

Not to plead till coſts paid aſſeſſed in a former Action.

Shew cauſe.

Hill. 1654. Banc. ſup.

DArcy moved that an Endictment of Michaelmas Term laſt might be amended in the Caption. But Roll chief Iuſtice, anſwered, It cannot be if it be of the laſt Term, but had it been an endictment of this Term it might have been amended.

To amend an Endictment of a former Term denied.

Hill. 1654. Banc. ſup.

THe Court was moved to quaſh an Endictment for entring forcibly upon a Tenant for years, againſt the Statute of 21 Iacobi, and the Exception was, that the Endictment doth not ſay that he entred manu forti. Roll chief Iuſtice anſwered, The Statute is only, that if one enter by force; and the words manu forti are not expreſſed in the Act, Therefore move it again if you will.

To quaſh an Endictment.

Hill. 1654. Banc. ſup.

A Habeas Corpus cum cauſa was granted for Elizabeth Bayne, to the intent to charge her with an Action, and upon the return thereof ſhe was committed to the Mareſchal. Wild moved that ſhe might be diſcharged, becauſe the return of the Habeas Corpus is erroneous. But Roll chief Iuſtice anſwered, It could not be; whereupon he moved for another Habeas Corpus for her ad ſubjiciendum to be directed to the Mareſchal, which was granted,

To diſcharge a priſoner turned over to the Mareſchal.

For a habeas corpus ad ſubjiciendum.

Hill. 1654. Banc. ſup.

THe Court was moved to quaſh an Endictment preferred againſt one for practiſing Phiſick, not being skilfull in the profeſsion, and not having a Licenſe to practice from the College of Phiſicians. The Exceptions were, 1. That no Endictment at the Common Law lies for the offence ſuppoſed to be committed, for it is not an offence againſt the Common Law, and 2ly. an Endictment upon the Statute lies not, and ſo no Endictment lies, And upon theſe Exceptions it was quaſhed.

To quaſh an Endictment for practiſing Phiſick without licence.

The Protector and Hart.

Hill. 1654. Banc. ſup.

To remand a priſoner appearing upon a Habeas Corpus, and turned over. Denied.

One Hart committed to the Gatehouſe appeared in Court upon the return of a Habeas Corpus granted for him, and upon the prayer of his Councel the return was filed, upon which it was moved on his behalf that he might be remanded to the Keeper of the Gatehouſe, and not turned over to the Mareſchal, to the intent to ſave his fees, but the Court ſaid it could not be, becauſe upon filing of the return there ought to be entred upon it a Committitur to the Mareſchal, whereby he becomes his priſoner.

Torret and Frampton.

Hill. 1654. Banc. ſup.

Trin. 1653. rot. 178.

Special verdict upon a Deviſe.

Upon a ſpecial Verdict the Caſe was this, A man deviſeth his lands to his wife for her life, the remainder to A. B. and C. and their heirs reſpectively for ever. The queſtion was whether A. B. and C. were joynt tenants, or tenants in common. Serjeant Twiſden held, that they were joynt tenants, and that this caſe differs from Radcliffs caſe, and cited Wilds caſe in the 6 Rep. that a Will muſt be clear and conſpicuous, but ſo it is not here, and here is no enforcement by theſe words reſpectively, and they do relate to the perſons, and not to the lands bequeathed, and a Covenant made by three reſpectively is a joynt Covenant, and not a ſeveral Covenant, and the word reſpectively hath relation to the ſurvivorſhip which may happen betwixt the parties, and a deviſe to one and his heir is a fee-ſimple. Latch, For the Defendant held, that here is a tenancy in Common, and not a joynt tenancy, for the Eſtate ought to be whole out, either a tenancy in Common, or whole out, a joynt tenancy, and this of neceſsity; for there cannot be a joynt tenancy for life, and ſeveral inheritances in the remainder, and Littletons ground proves this to be ſo. And 2ly. It is againſt all conſtruction to be otherwiſe, as the word reſpectively is here placed, and Ratclifs caſe, which is not ſo ſtrong a caſe as this caſe proves it to be ſo, and although the word reſpectively may ſometimes make a diſtribution of heirſhip; as hath been objected, viz. of ſeveral heirſhips; yet here the placing of the word reſpectively ſhews it cannot be ſo, and this uſing of the word is not operative, but idle, if here ſhould be a joynt tenancy, for the law ſays as much, though the word reſpectively were left out, and the word would be the more idle in explicating a thing ſo obvious to common underſtanding, and no ways doubtfull, and therefore we cannot think but that theſe extraordinary words do enforce an extraordinary conſtruction, and not a common one, and an idle application; and this comes not within the rule objected for the certainty, for this word hath a proper meaning to make a ſeveral diſtribution, which makes it certain enough, & the word is uſed here abſolutely, & ſhall be ſo taken in 3 Car. Iaques and Thorowgoods caſe in the Common pleas, the word equally was taken operatively, and not in common conſtruction, and in Lewin and Dods caſe in the Common pleas, 36 and 37 Eliz. the word equally was held by two Judges to make a joynt-tenancy, and not a tenancy in common; and in this Court alſo the Judges were divided at the firſt; but afterwards

Whether joynt-tenancy or a tenancy in common.

Diſtribution of heirſhip.

Operative words.

Por-

Popham changed his opinion, and it was adjudged a tenancy in common, and afterwards a writ of Error was brought in the Exchequer Chamber, and there the judgement was affirmed, Pasch. 41 Eliz. B. r. rot. 270. Also the subject matter here is apt to receive a tenancy in common, here being intended a provision for children, and their several posterities, which a survivorship would destroy, 37 H. 8. Bro. Devise 29. and the very intent of the Devisor appears in the will to be as I have argued. Roll chief Justice, I hold here is a tenancy in common, and that it shall goe throughout, and is not to be divided, and the intent of the devisor appears in the will that every one shall have his part, and their heirs, for here is a provision made for Children, and the word respectively would be idle, if another construction should be made, and would signifie no more than what the law said without it. Ask and Newdigate ad idem, and Newdigate cited Dyer 3 6 Huntlyes case, so judgement was given for the Plaintif, nisi.

Words not to be construed to make them idle.

Judgement for the Plaintif.

Shepheard and Gray.

Hill. 1654. Banc sup.

Trin. 1654. r. 672.

A Writ of Error was brought to reverse a judgement given in an Action upon the Case in the Court at Doncaster, and the Error assigned was in the judgement, which was entred thus, and the said Shepheard, to wit the Defendant, shall be in mercy of W. Gray, to wit the Plaintif. Roll chief Iustice, This is erroneous, for he ought not to be in mercy of the Plaintif, but of the State, Therefore let the judgement be reversed.

Error in Action upon the Case.

Reversed.

Lamplew and Hewson.

Hill. 1654. Banc. sup.

After a verdict in an Action upon the Case brought for these words, viz. I was never a Traytor to the State as you have been: It was moved in Arrest of Judgement by Turner for the incertainty of the Declaration, for that it appears not thereby that the words were spoken of the Plaintif, or to the Plaintif, and because it is not said that the words were spoken falso et malitiose. Shafto of Councel on the other side answered, that it appears the words were spoken upon conference betwixt the parties, and thereby doth appear a sufficient averment, that the words were spoken of the Plaintif. Roll chief Iustice, The Declaration implies that the words were spoken falso et malitiose, & ther néeds not an express averment that they were so spoken, as there ought to be in an Endictment, and this Declaration is laid two years after the words were spoken, Therefore take your Judgement except better matter be shewn.

Arrest of judgement in an Action for words.

Implyed averment good.

Iudgement.

Hill. 1654. Banc. sup.

A Forein plea, which is to out the Court of the Jurisdiction in the cause depending ought to be sworn to be true, or else is not to be allowed by the Court. So ruled by the Court.

To swear a forein plea.

Dod and Herbert.

Hill. 1654. Banc. ſup.

Trin. 1655. rot. Q.

Debt upon an Obligation to ſtand to an Award.

DOd brought an Action of Debt againſt Gregory Herbert an Attorny of this Court upon an Obligation to ſtand to an Award. The Defendant pleads no Award made. The Plaintif replies and ſets forth the Award, which was, that the Defendant ſhould ~~not~~ pay unto the Plaintif 100 l. at two ſeveral dates of payment, and aſsigns the breach in not paying the 100 l. accordingly. To this replication the Defendant demurs, and the exception taken was, that it doth not appear in the Award, that the Award is reciprocal: but that is only made on one part. It is true by the allegation in the pleading it doth appear: but this helps it not, for it ought to appear in the Award it ſelf. Roll chief Iuſtice, the Award appears to be made de & ſuper præmiſſis, and that may help it. But the Plaintif hath not well aſsigned the breach, for the breach is not aſsigned upon a good part of the Award, for there is no cauſe ſet forth in the Award why the Defendant ſhould pay the 100 l. Therefore nil capiat per billam, niſi, &c.

Award de & ſuper præmiſſis.

Breach not well aſsigned

Henly and Baynton.

Trin. 1654. Banc. ſup.

Trin. 1654. rot. 1384.

Arreſt of judgement in an Action upon the Caſe for words.

HEnly brought an Action upon the Caſe againſt Sir Edward Baynton, for ſpeaking of theſe words of him, viz. You have couſened the State of 20000 l. and I will prove it, for you have received five and twenty thouſand pounds profits of the Office, and not compounded for it, and have foiſted in words into the order for your compoſition. After a verdict found for the Plaintif, it was moved in arreſt of Judgement, that the words as they are laid in the Declaration are not actionable: for the Plaintif doth not entitle himſelf to the Office, but only to eleven parts of the profits of the Office, and ſo he cannot be ſcandalized by the words as an Officer, & Hob. 267, 268. Sir Miles Fleetswoods caſe was cited, and Hob. 76. Bray and Humes caſe, and 4 Iac. Cars and Rans caſe, and Hill. 14 Iac. Snails caſe, and 20 Iac. Curle and Tucks caſe. 2ly. Here is no averment that Whitwick during whoſe life he claims the office was alive when the words were ſpoken, and if he were dead then he was no officer. And the ſubſequent words do qualifie the former part of the words, for the receiving of the mony is not an offence or coſening of the State, 14 Iac. Godard and Gilberts caſe in the Common-pleas, and for the word foiſting it is an inſenſible word, and therefore cannot be actionable, and the Plaintif doth not aver, that he did not foiſt in words into this order, but only ſayes, he did not foiſt in words into any order. And though the words were actionable, yet at the time when the Action was brought Henly was pardoned by the Act of Oblivion if he had done it, and ſo could not be damnified by the Defendants ſpeaking the words if they were true, and ſo no Action lies, for no dammages could be recovered, Hob. 82. 294. Chuddington and Wilkins caſe, 1 E. 3. 3. 12 Eliz. Bartons caſe, 20 Aſſ. Pl. 7. 6 Rep. 13. 16 Iac. Serles caſe. Shafto on the ſame ſide urged, that it appears not by the Declaration that Henly was an Officer, or that Sir Edward Baynton knew him to be ſo, and ſo here is an ill inducement

Inſenſible word.

No Action where no dammages.

ment, and Sir Miles Fleetwoods caſe is, that he ought to know that he was an Officer, and there the words were poſitive and certain, but ſo they are not ſo here, nor do relate to his Office and the words are to be conſtrued as they lye together, and ſo ſome of them are of a very ambiguous conſtruction and uncertain, and others of them are inſenſible, and an averment cannot make ſenſeleſs words to be ſenſe. And in the caſe of Curle and Tuck, 20 Iac. no judgement was ever given, and yet that was ſtronger than our caſe. It was alſo urged by Bowis on the ſame ſide, that it appears not that the mony ſpoken of did belong to the State, or was to be compounded for, for it may be he received the monies before he was a Delinquent, and then he was not to compound for them, Hob. 323. Bradſhaw and Walkers caſe cited. Sergeant Twiſden for the Plaintif held the words to be actionable, and cited 8 Car. Culme and Denhams caſe, where it was adjudged, that to ſay a man was a coſening Knave are actionable words, and 16 Iac. Sir William Brunkers caſe, and Hill. 1651 Strode and Homes caſe in this Court, and Trin. 1653. Townſend and Barkers caſe; and in this Caſe is an inſtancing wherein the Plaintif hath coſened which makes it more plain, and it is alſo aggravated by ſaying he had coſened, the State, for he hath thereby incenſed the State againſt the Plaintif; and the words in themſelves are ſcandalous and prejudicial alſo, for if he hath not compounded he is no Officer, but hath loſt his Office, being lyable to be ſequeſtred, and the words here, ſhall be taken in ſenſu compoſito, and not in ſenſu diviſo, for they are poſitive words, 8 Car. Redwood & Smiths caſe, and the laſt words are only ſpoken to inſtance the Cauſe of ſpeaking of the former, and it is not material whether they be actionable or not, but the meaning of the word foiſting is not ſo doubtfull, but is very well known, and ſhall be intended that he had falſely put in words into the order, and ſo they are ſcandalous as well as the former, 5 Car. Alleyns Caſe. And there is no neceſsity here to aver the life of Whitwick as is objected on the other ſide, for the Office was for the life of Henly and Whitwick, and the ſurviver of them, and if the averment were neceſſary in ſome Caſes, yet here it is not, becauſe Whitwick is an Officer upon Record in this Court, where the Action is brought, and ſeen to be alive here in Court; and beſides, the Statute of 21 Iac. would help this if need required, it being after a verdict, and not upon a demurrer; and beſides, here is an averment, that he hath not foiſted words into this order in effect, for he hath averred, that he hath not foiſted words into any order, and ſo conſequently not into this, 2 R. 3. f. 7. 12 H. 7. f. 23. And the Act of oblivion hath not pardoned this offence, as is alſo objected, and though it ſhould, yet it muſt be pleaded, that the party may appear not to be excepted out of it, as many are, and the Jury have here found for the Plaintif, and ſo it ſhall be intended that he is out of the Act, and he ought to have averred it before, or have given it in evidence, and ſo he prayed judgement for the Plaintif. Roll chief Juſtice, you miſtake the exception, for they ſay that Mr. Henly is pardoned by the Act, and ſo cannot be damnified by the words if they were true, and ſo they are not actionable. Twiſden, By their pleading it appears not, that Mr. Henly is within the pardon, for there are many perſons excepted out of it. Roll chief Juſtice, But if it be ſo yet if the words do not relate to him as an Officer they are not actionable. Wild, The words are ſpoken intentionally in relation to his Office. Roll chief Juſtice, He was not an Officer at the time of the words ſpoken, for he was ſequeſtred, and then what ſcandal can they be to him. Wild, The Jury hath found that he was damnified, though the words were true. The firſt queſtion here is, whether the words, as they are laid, relate to his Office, for he is not an Officer, nor can the Action be brought by him as he is ſo, but this is not much to the purpoſe: but the deceit alle-

Senſus compoſitus et ſenſus diviſus.

ged to be done to the State charged upon him is the cauſe of the Action, and it is ſaid that he deceived the State in his compoſition, for his fine, and for foiſting words into the order, and if he foiſted not any words into any order then he did it not into this. And there is no need to aver Whitwicks life, for he could not receive the profits of the Office if Whitwick were dead, and therefore he ſhall be intended to be alive; and there doth dammage ariſe to the Plaintif by the ſpeaking of the words, for he is in danger thereby of ſequeſtration by ſuch foiſting of the words; and in the common underſtanding of the words they ſhall be taken to be meant of falſifying of the Committees order, and one man ought not to ſlander another; and ſay that you had not notice of the Ordinance touching which he is ſlandered, it is not to the purpoſe, for you ought to take notice of the Ordinance. Newdigate Iuſtice, to the ſame effect, that the words are actionable, for as they are laid, Henly is brought therby within the compaſs of Sequeſtration, and the words in themſelves are actionable, becauſe they inſtance in what thing he coſened the State, and the ſubſequent words do not qualifie the former, but aggravate the matter, and I conceive it not neceſſary to aver Whitwicks life, but if it be, it is averred here; and ſo judgement was given for the Plaintif, niſi, &c.

Averment.

Judgement for the Plaintif.

North and James.

Hill. 1654. Banc. ſup.

Trin. 1651. rot. 1666.

A Writ of error was brought to reverſe a judgement given in an Action of Treſpaſs in the Common-pleas upon a demurrer, the error aſsigned was, that there were diſcontinuances in the Proceſs, and it was ſhewed by Howell of Councell with the Defendant in the Writ of error that this is helped by the late Statute, which ſayes, that no Writ of error ſhall ſtay execution, and Iudgements upon Demurrers, as this is, are within the Statute. Roll chief Iuſtice, By your reaſon a Writ of error will not now lye for any thing. The branch of the Statute is to be intended of matter in form only, but this is matter of ſubſtance notwithſtanding the branch of the Statute alleged. Therefore let the judgement be reverſed, niſi, &c.

Error to reverſe a judgement in Treſpaſs.

Diſcontinuances.

Reverſed.

Yokehurſt againſt Scott.

Hill. 1654. Banc. ſup.

Hill. 1653. rot. 35.

YOkehurſt brought an Action of Debt upon an Obligation againſt Scot, the Defendant pleaded non eſt factum. Upon this a ſpecial verdict was found, wherein the queſtion was, whether it was his Deed or no, becauſe the Obligation was, that he was bound in centrem libris inſtead of centum libris. Green for the Plaintif held it a good Bond notwithſtanding this miſtake, becauſe centem doth ſound like centum, and he cited many Caſes to prove, that miſ-writing of words in an Obligation ſhall not hurt it, as Hob. 34. Trigintat. for triginti, and ſeſſanti for ſexcenti and Oſborns caſe, ſewenteen for ſeventeen, 9 H. 6. f. 7. and Pinder and Tugges caſe

Debt upon an Obligation, and a ſpecial verdict.

Falſe Orthography.

case in this Court, and 2 Car. Davis his Case, and the Jury in our case have found that the Defendant did seal and deliver the bond as his Act and Deed. Roll chief Justice, The condition of the bond doth set it forth to be 100l. wherein the Defendant became bound; therefore shew cause the next Term why the Plaintif should not have judgement. Judgement.

Cooks and Chambers.

Hill. 1654. Banc. sup.

For a Prohibition to the Prerogative Court.

Cooks moved for a Prohibition to the Prerogative Court for proceeding against him there by way of attachment for not obeying the Decree of that Court. The Case was this, Cooks and Chambers being in Suite in the Prerogative Court for Letters of administration of the Goods and Chattels of one that dyed intestate, at last they agreed by consent, that Cooks upon putting in bond to perform the decree of the Prerogative Court, touching the distribution of the Intestates estate should have the administration granted unto him whereupon he did enter into bond, and had the Letters of administration granted unto him, and afterwards the Court made an order or decree that he should distribute the estate in such and such manner, and for not-performing of this decree Chambers proceeds against him in the Prerogative Court by way of Attachment. It was urged against the Prohibition that this Court is now absolute by the late Statute, and that there is no appeal from it; and that the decree made was made by consent of the parties, and therefore it was no reason to grant a Prohibition to hinder that Court from forcing the party to perform the decree, Sergeant Twisden answered, that the consent of the parties cannot give a Jurisdiction to that Court which they had not before. Roll chief Justice, That is true; but by consent peradventure it may be as it is here, but they cannot compell them to consent, and they have no authority given them by the late Statute, but they have only their old authority, and it would be dangerous to out the old, and here is a decree made by consent of both parties: but bring us Presidents where a Prohibition hath been granted after an administration granted by consent as this is. At another day Latch moved again for the Prohibition, and said, that the attachment was granted beyond the Condition of the Bond given in Court, and they have no power to award it, notwithstanding the distribution of the estate be not made according to the bond, for the Ordinance of Parliament gives them no such authority. 2ly. They cannot order such a distribution of the estate, notwithstanding our consent, for our consent was, that the clear estate only should be distributed, and not the whole estate, and we have six presidents here to prove that they ought to proceed upon the Bond, and not as they have done, & we could have brought a hundred to the same purpose if we had thought it needfull; And their giving of us the administration upon the bond given, doth abridge them from making any order to distribute the estate, or to proceed by attachment, and Slaynyes case, Hob. f. 85. and Tucker and Loans case, Hob. 191. were cited. Wild on the other side agreed the books cited, but said, here is the consent of the parties, that the administration should be as it is here, and that agreement was before the administration granted. Roll chief Justice, Will you consent to bring an Action upon the Bond, and waive the prohibition. Answer to this to morrow. At another day it was moved again, and then Roll chief Justice answered, Proceed upon the Bond, for they cannot grant an attachment for not performing the decree, although it was made by consent. Wild replyed, This being a Decree made by

Administration by consent.

No Attachment.

by conſent, they have ſubmitted to it, and the attachment is granted for diſobedience to the Court who made the decree, and the late Ordinance doth give them power to commit ſuch as ſhall diſobey the decrees and orders of the Court. Roll chief Iuſtice, appear, and plead to it, and try their power that way, I believe that if parties will conſent that adminiſtration ſhall be granted in truſt, it may be ſo granted, although it be not in the uſual way, and as the Statute doth direct, but the taking of the Obligation ties them up to that remedy, and they cannot proceed by way of attachment, Therefore take a prohibition as to the attachment, and appear to it, and try the matter.

Prohibition granted.

Boyle and Scarborough.

Hill. 1655. Banc. ſup.

Hill. 52. r. 296.

Action upon the Caſe upon a promiſe and judgement upon a Demurrer and writ of Error to reverſe it.

Scarborough brought an Action upon the caſe in the Common pleas againſt Boyle, upon a promiſe, that whereas his ſon William did owe unto Scarborough 500 l. and Scarborough did intend to ſue a ne exeat regnum againſt him, to hinder him from going out of England till he might recover his debt. Boyle the Defendant did promiſe that if he would forbear to ſue out an ne exeat regnum againſt his ſon William, he would pay the debt; Upon this Action the Plaintif obtains a judgement upon a demurrer. Whereupon Boyle brings a writ of Error to reverſe this judgement. The pleading in the Common pleas was thus, the Defendant in the Action in the Common pleas was ſued by the name of of Robert Boyle Eſq; who appears and pleads the Statute of limitations of Actions of 21 Iac. The Plaintif replies that he took out an Original againſt him within 6 years out of the Chancery by the name of Robert Boyle Eſq; and outlawed him upon that Original, and that afterwards the Defendant Boyle came in and reverſed the Outlawry, the Defendant rejoyns and ſays proteſtando, that he took not out ſuch an original within 6 years, for plea ſays, that he was a Knight at the time of the Original ſued forth, the Plaintif ſur-rejoyns that he came in and reverſed the Outlawry upon that Original, for want of proclamation, by the name of Robert Boyle Eſquire, The Defendant by way of Rebutter ſays, that he was a Knight at the time of the Outlawry reverſed; the Plaintif by way of ſur-rebuttter ſays, he reverſed the outlawry by the name of Robert Boyle Eſq; upon this the Defendant demurred, and upon the demurrer judgement was given for the Plaintif, and upon this the writ of Error was brought in this Court. The Errors aſsigned were, 1. That here was no good conſideration for this promiſe, for there is no ground of Action ſhewed againſt the ſon, nor that he had been at any charge in the proſecuting any action againſt him, and Roſyer and Langdales caſe 1650. in this Court, and Bedwell and Cottons caſe Hob. 216 was cited; and 2ly. there is no ſuch writ as an ne exeat regnum in the Regiſter; but only a writ to give ſecurity not to go out of the Realm to the publique prejudice of the King and his people; and here is no ſuch matter but only that he owed 500 l. and therefore he would ſue out the writ, and though the conſideration ſhould be good, yet is not the Plaintifs replication good to tye the ſecond writ to the firſt, for he doth not ſay that the ſecond is pro una et eadem cauſa, and ſo it is incertain, Brook Treſpaſs 85. 9 H. 6. and there may be ſeveral promiſes made here in one day, and if the replication be good, yet the rejoynder is good, 19 H. 8. 43. He only ad-

Conſideration to ground a promiſe.

Ne exeat regnum.

Rejoynder.

admits that he being a Knight is the same person which was sued by the name of an Esquire, Hob. 171 Stukelyes case. And here is a judgement by a nihil dicit, and no warrant of Attorney, for it is in latine, which being since the Act for Law proceedings to be in English, is not good, and so it was prayed the judgement might be reversed. Latch on the other side prayed to affirm the judgement, and he argued, 1. That here was a good consideration to ground the promise upon, for this writ of ne exeat regnum may be sued forth by any one, & here is a benefit to the party in the forbearing to sue it forth, and here is good cause to move for this writ, and it is in the discretion of the King to grant it or not, but it concerns him in his honour to grant it, Regist. 193, 194. Brit. 182. Cooks instit. 130. There is caution to be taken of persons licensed to go beyond Seas, that they pay their debts. Warrant of Attorney.

2ly. The replication is good, and it is not necessary to aver that the second Original was for the same cause; first, because it is in an action upon the case, and is set forth at large, which shews verbatim that it is for the same cause, and is plain in it self; and 2ly. it is said that he sued out the second Original pro causa prædicta, which is a sufficient averment, if an averment be necessary, and the variance in the damages argues not that there is another cause of Action, for when the second Original was sued forth, the damages were increased by increase of time, it being a year after the suing forth of the first; For the rejoynder it is to be considered, 1. Whether the party be estopped thus to plead. 2ly. If he be not, yet whether the matter set forth be good. For the 1. I hold he is estopped by coming in gratis as an Esquire, to say that he was a Knight, and he not being brought in custody, Dyer 192. There he shall plead no other name; but here he hath not alleged it as he ought, for he ought to conclude absque hoc that he was an Esquire, and he hath affirmed himself to be an Esquire by saying & prædictus, &c. but he ought to have alleged specially that Robert Boyle Knight, who was sued by the name of Robert Boyle Esquire: and 2 E 4. f. 3. is against the other books, and the law is otherwise. It is true that the old book of Entries, Title Trespas, and some other Presidents which passed sub silentio are against me, but the Law generally is against those Presidents, as Rastal entries brief 54. 19 H. 6. 2. 36, 44. which say, if he come in he is estopped, Br. Tit. Deff. 15 & 26. 32 H. 6. 3. 35 H. 6. and many other books, and the book of 19 H. 6. 43, which is objected on the other side is against them, and Dyer, f. 58. But though he were not estopped, yet we may take advantage of the first Original writ, for it is but abatable by the misnosmer, and so not abated; and here is a flaw in the rejoynder, for he ought to have traversed that he was not an Esquire, which he hath not done. 2ly. The 26 of March is after the original sued forth, and so it is uncertain in respect of time, when he was a Knight, Plow. 27. by Morgan, 7 H. 7. 5. And the warrant of Attorney is good, though it be in Latine, and if it were in English it would be erronious, for the entry is material, and the constant practice is not to enter the warrant before the issue, Trin. 8 Jac. Morley and Morley in this Court, and here is not the entry of the warrant it self, but the Entry is that he is Attorney by Warrant. Roll chief Justice, If one bring a writ of 1000 l. and it be abated, and then he bring another writ for the same debt, may he increase the damages accrued betwixt the first writ and the second? Certainly no, for the second writ is but the renewing of the first writ, and is not a new writ; But here are divers points considerable, therefore speak again to it, But a ne exeat regnum is usually sued forth in such cases as this, although that originally this writ was only used in businesses which concerned the State, and not in private cases; and the forbearance to sue it is a good consideration to ground an Action upon. At another day the Case was again put by Christ. Turner, Averment. Estoppel. Abated. Abatable. Traverse. Entry. Increase of damages. Prerogative Writ.

and he prayed the judgement might be reverſed, and in his Argument he made theſe queſtions. 1. Whether there be a good conſideration to raiſe a promiſe, and he held there is not, becauſe it doth not appear that the Plaintif had any cauſe of Action. Nat. Brev. 85. A. a ne exeat regnum is at the ſute of the King, and not at the ſute of a common perſon; and whereas it is objected that the King may ſtay any one from going beyond Seas, I anſwer any that he cannot ſtay one for every cauſe, but for a cauſe which concerns the State; and if there were in our caſe a good cauſe to ſue out this writ, the agreement betwixt the parties not to ſue it out is not a good agreement, Hob. 154. Dyer 296. Every one may go out of the Kingdom at his pleaſure. 2ly. Here is no averment that both the Originals were ſued forth for one and the ſame cauſe, although that they agree literally, Hob. Rep. Foſter and Jacksons caſe. 3ly Here is no good averment, becauſe it cannot be thereby known for what cauſe the laſt Original was ſued forth, Cook Inſt. f. 20. 4ly. Though there be an averment, yet it is void by the parties own ſhewing, 45 E. 3. 2. 21 H. 7. 24. And our caſe differs from the caſe of 10 lib. Aſſ objected, for there the averment was the Defendants averment, but here it is the Plaintifs. Alſo the damages in the firſt Original, and the damages in the ſecond Original do differ, which ought not to be; but they ſhould agree, otherwiſe the Originals ſhall not be preſumed to be both of them for one and the ſame cauſe, 6 Rep. Spencers caſe, 12 H. 7. 4. 3 H. 6. 9 And the party ſhall not be eſtopped here, to ſay that he was a Knight, and this miſnomer is well pleaded, for there are but two ways to plead miſnomer, and we have pleaded it one of thoſe ways, Cooks Entries 689, 690. Tit. Outlawries, Raſtal brief 608. Tit. Treſpaſs 670, and the preſidents of 1 E. 4. 3. and 21 H. 7. are with us, that he ſhall not be eſtopped, and he pleads not expreſly that he was an Eſquire, but only by way of implication. Serjeant Twiſden on the other ſide prays for judgement, and he argued, 1. That here is a good conſideration, for he is intitled to have this writ by Fitz. Nat. Brev. 85. where it is ſaid any perſon may make a ſurmiſe to have this writ, for it conduces to the benefit of the Plaintif, and of the Defendant alſo, and the King may hinder any one from going beyond Sea, 9 Car. Meads caſe, 18 Iac. C. B. Hall and Wollers caſe cited by Hobart to be adjudged, 43 & 44 Eliz. Rippon and North. 2ly. The Replication is good notwithſtanding the Objection againſt it that here is not an averment, that the ſecond Original is for the ſame cauſe as the firſt was, for it is not neceſſary to make ſuch an averment, becauſe that this is a ſpecial particular Action, and not a general Action, yet here is an averment if it be neceſſary. Thirdly. Here is no variance though the dammages doe differ, for the wrong done is properly the cauſe of the Action, and not the dammages ſuffered by the wrong, and the encreaſe of time hath made the damages to encreaſe, and ſo to differ, 26 H. 8. f. 6. in a ſecond deliverance, Hill. 8 Car. entred 5 Car. in this Court, this point was reſolved in Theophilus Finch and Laws caſe; and the miſnomer objected is not material, for he is eſtopped to plead it, becauſe he appears gratis by the name of Eſq; not upon the Sheriffs return, Dyer 192. he muſt be admitted to be the ſame perſon, and ſo is eſtopped to ſay the contrary, 19 H. 6. f. 65. the Book of 19 H. 6. f. 43. is not againſt me, for there the party came in upon the return of the Sheriff, and not voluntarily as he doth here. Alſo the warrant of Attorny entred in Engliſh doth no hurt notwithſtanding the objection that all pleadings ought to have been in Latin at the time of the giving of the warrant. for a warrant of Attorny may be entred at any time, becauſe there is no preciſe time directed for the entring of it, 11 E. 3. f. 1. 24 E. 3. f. 62. 15 H. 7. f. 14. 4 Ed. 4. f. 13. Stat. 32 H. 8. C. 3. a warrant of Attorny entred at any time pending the plea is good, & at the

Conſideration.

Agreement.

Averment.

Eſtoppel.

Miſnomer pleaded.

Implication. Conſideration.

Replication

Averment.

Cauſe of Action.

Miſnomer. Eſtoppel.

Apparance.

Entry.

the time of the entring of it by the late Statute it ought to be in English. Roll chief Iuſtice mutata opinione ſaid, he may encreaſe his dammages by his ſecond Action, otherwiſe it would be unreaſonable, for he hath been delayed twenty years by the Outlawry of the Defendant. And here is alſo a good conſideration to ground the Action, viz. the forbearance to ſue out this Writ of ne exeat regnum, for it is beneficial to the Defendant, and it is for the Kings honor to grant it, and the party by forbearing to ſue it, is freed of trouble, by not being ſtaied in England to be ſued here. And here is no need of an averment, for it appears that both the Originals were ſued forth for one and the ſame cauſe. But the queſtion is, touching the manner of the pleading, whether he be not eſtopped to ſay that he is a Knight, and not an Eſquire, and I ſee no reaſon why he ſhould be eſtopped to ſay ſo, notwithſtanding his voluntary coming in to reverſe the Outlawry, for he comes in to ſave himſelf from arreſting, and the lying under an Outlawry, and it would be miſchievous if he did it not, and take all the plea together, methinks it is good, and the entry in Engliſh is good, for it is to affirm a judgement, and being good both waies, we will take that which makes the judgement good. Yet let it be argued again. At another day the Caſe was put again, and argued by Sergeant Glyn that the judgement was not good, and firſt he admitted, that here is a good conſideration to ground the Action upon. 2ly. He made queſtion whether there be a good averment touching the going beyond Sea, and touching the ſum, and he ſaid, that the judgement given in the Common-pleas was for the reaſon that he came in to reverſe the Outlawry by the name of Eſquire, and this is by Eſtople: But I conceive it is no Eſtople, for Knight is part of his name, and ſo the Outlawry is not good, 26 H. 6. there is no Eſtople made by the word prædict. But if it be an Eſtople, yet the Plaintif relies not upon it in his plea, but upon other matter, and that for theſe reaſons, 1. Becauſe the courſe of pleading is generally ſo in reverſing of Outlawries, as it is here, and ſo is the old book of Entries, although ſome Preſidents run the other way, and in the Common-pleas it hath been adjudged good as it is here pleaded, and he may well aver, that he is not the ſame perſon. 2ly. Eſtoples are taken ſtrictly againſt him that pleads them, and are not favoured in Law, and ſhall not be therfore taken by implication. Cooks lit. f. 252. B. but if there ſhould be an Eſtople here, it muſt be by implication only, and there ought not to be an Eſtople againſt an Eſtople in the ſame Record, as it would alſo be here, for he may as well be eſtopped to ſay that he is a Knight, as to ſay that he is an Eſquire. Next the Plaintifs concluſion is not good, for he relies not upon the Eſtople, and a good plea with an ill concluſion is not good, 18 H. 6. f. 33. 11 Rep. Rawlins caſe. Roll chief Iuſtice, Makes he not the concluſion upon the Record? let it be read. upon the reading it he ſaid, that he relies not on the concluſion and ſo the Eſtople is relyed upon. Sergeant Twiſden, In our Sur-rebutter we rely upon the Eſtople, although we do it not in our reſoynder, and ſo it is good. Sergeant Glyn, But you do not conclude upon the Record, to wit, whether you ſhall be received againſt the Record, as you ought to do, 22 H. 6. f. 26. Roll chief Iuſtice, It is in effect ſaid ſo, though it be not in expreſſe words. Finch Henage on the other ſide argued in affirmance of the judgement, and ſaid, the queſtion is, whether his comming in by the name of Eſquire to reverſe the Outlawry ſhall not be an Eſtople to him to ſay afterwards that he was a Knight, and I conceive it is, becauſe he that comes in gratis to reverſe an Outlawry ſhall not plead Miſnoſmer, 6 E. 4. f. 9. he who comes in gratis is not prejudiced if he be not allowed this plea, but it is otherwiſe if he come in upon proceſs to reverſe it. 2ly. It is leſſe miſchievous to deny the plea of Miſnoſmer, than to allow it where it is not allowable, the pleading of the Miſnoſmer if it be not true may invegle

Increaſe of dammages.

Conſideration

Averment.

Eſtople.

Conſtruction.

Conſideration

Averment.

Eſtople.

Pleading.

Implication.

Concluſion.

Eſtople.

Miſnoſmer.

the Court, 10 E. 4. 12, 12 E. 4. f. 6, 19 H. 6. f. 8. There are 4 kinds of
4 Miſnoſmer. Miſnoſmer, to wit, miſnoſmer of the Chriſtian name. 2ly. Of the Sirname. 3ly. Of addition of Profeſsion. 4ly. Of addition of place, and in none of them ſhall miſnoſmer be pleaded where the party comes in gratis, Br. Miſnoſmer 48. & 3 E. 4, 5. 27 H. 8. f. 1, 15 H. 6. Statham pl. Error, Dyer 192. 21 E. 4. f. 8. Fitzh. tit. Miſnoſmer 8. 39 H. 6. 1 E. 4. and as the caſe
Eſtople. here is he is eſtopped to plead miſnoſmer by reverſing of the Outlawry which is a matter of Record, and by it he hath confirmed his name to be ſo, 19 H. 6. f. 1. 7 Ed. 4. f. 1. Although he might plead Miſnoſmer if he came in by a Cepi, yet there he may alſo plead another way ſpecially if he will, and it will be good alſo, 19 H. 6. f. 1. Nor hath he here relyed upon his Plea of Miſnoſmer, but upon the want of Proclamation, and he reverſed the Outlawry by the name of Eſquire, and yet now he will ſay that he was a Knight, which is unreaſonable, 34 H. 6. Fitzh. Proteſt. 7. and this is an allegation contra factum ſuum proprium.
Original. Here is a ſecond Original, and that is a good Original within the Statute; and it appears, that this ſecond Original is againſt the ſame party, and ſo he acknowledgeth by the Record, by which the Court may be aſcertained, that he was the ſame perſon, and his Addition miſ-named ſhall do no hurt. And the ſecond Original is good as the Court hath agreed upon opening of the Caſe. Roll chief Iuſtice, he reverſeth the Outlawry as an Eſquire, and afterwards ſayes he is a Knight. He may come in without
Outlawry. Proces to reverſe the Outlawry, where his perſon or eſtate is endangered by it, 39 E. 3. in Debt, 38 E. 3. but he cannot plead Miſnoſmer, yet he may proteſt, that he is a Knight, and ſave himſelf in another ſute which may be brought againſt him. If he have pleaded right you agree, that he is not eſtopped here, and it appears that he is the ſame perſon, and comes in gratis
Original. by this name, yet it is no eſtople. And the ſecond Original is good, for it appears that he is the ſame perſon, and that by the Statute notwithſtanding the variance, and he may come in gratis without proces, and take advantage of the error. But argue again to the point, whether he may bring a ſecond Original by the Statute. At another day it was argued again, but I could not hear, but 33 H. 6. f. 19. & 50. was cited, that there ought to
Mutual Eſtople. be a mutual Eſtople, viz. on the part of the Plaintif, and of the part of the Defendant. Roll chief Iuſtice, It appears to be one and the ſame party, and we muſt maintain Actions againſt the Statute of Limitations, becauſe
Iudgement affirmed. by that Statute the benefit of the Law is taken away in part. Therefore let the Iudgement be affirmed.

Hill. 1655. Banc. ſup.

To ſhew cauſe why execution not done. MEmorandum the two Sheriſs of London appeared in Court, in their proper perſons upon a rule of Court to ſhew cauſe why they did not grant out execution upon a judgement given in their Court, or elſe to make a ſufficient retorn of a Certiorari directed to them, becauſe they had made three
Retorn of the Sheriff. inſufficient retorns. Upon this, their retorn now made was read, the effect whereof was, that there is no ſuch judgement as the Writ mentioneth to
View of the Record. make out execution upon. Roll chief Iuſtice, This is a good retorn, as it now is, and if the retorn be falſe, you may take your remedy againſt them for making a falſe retorn. Upon this the Councel prayed that the party might have a Copy of the Iudgement out of the Sheriſs Office. Roll chief Iuſtice, You may have a ſight of the Record, and if they will not ſuffer you to have it, you may have your remedy againſt them. The rule was, that the party ſhould have a Copy of the Record.

Paſc-

Paſch. 1655. Banc. ſup.

VPon a motion for a new Tryal grounded upon an Affidavit, Roll chief Iuſtice ſaid, That if there be a Tryal and a verdict given upon it, The ſame iſſue cannot be tryed again by the ſame Jury, although the Chancery do order ſuch a Tryal, but if there be a miſtryal the party muſt move the Court where the Action was commenced for a Venire de novo to ſummon a new Jury. Nota.

For a new Tryal. Tryal of an Iſſue. Order of Chancery. Venire de novo.

The Protector and Bruſter.

Paſc. 1655. Banc. ſup.

CArew upon a rule to ſhew cauſe why an attachment ſhould not iſſue forth againſt Commiſſioners of Sewers in Suffolk for ſetting a Fine upon one for not obeying their orders, after a Certiorari was delivered unto them to remove the orders made againſt the party in contempt of this Court, ſhewed for cauſe, that the Fine ſet was for diſobeying a new Order of theirs made againſt the party after the Certiorari was returned, and not for diſobeying the Orders removed by the Certiorari, and ſo it was no contempt to this Court. Roll chief Iuſtice, The Certiorari doth not remove the Commiſſion of Sewers, and therefore they may proceed upon the Commiſſion notwithſtanding the Certiorari. Therefore let no Attachment iſſue againſt them.

Cauſe why no Attachment. Certiorari.

Paſch. 1655. Banc. ſup.

THe Court was moved to quaſh a return of reſcous, the reſcouſer being in Court, Upon this exception, viz. that the Endictment ſets forth that the party reſcoued was arreſted on or about the fourth day of February, and ſayes not certainly when, and upon this it was quaſhed.

Return of a Writ of reſtitution.

Paſc. 1655. Banc. ſup.

THe Court was moved upon an Affidavit for an Attachment againſt four that were ſerved with a Subpæna out of this Court to appear as Witneſſes for the Protector at a Tryal upon an Endictment of Perjury, and did not appear, whereby the Tryal could not go on. The rule was, that an Attachment ſhould iſſue forth except cauſe ſhewed to the contrary. Nota.

For an Attachment. Granted, niſi.

Paſc. 1655. Banc. ſup.

VPon evidence given in a Tryal at the Bar in a Treſpaſs and Ejectment betwixt Goodſon and Jones, It was ſaid, That one may not ſhew in evidence to a Jury an Inſpeximus of a Deed inrolled in Chancery, if it be not a deed of bargain & ſale enrolled there, for if it be a deed of feoffment, the party muſt ſhew the Deed it ſelf, for the inſpeximus is no matter of Record. But by Roll chief Iuſtice, Though the inſpeximus be the inſpeximus of the Enrolment, and not of the Deed it ſelf, yet if it be an antient Deed it may be given in evidence. It was then alſo ſaid, that if it do not appear by the fabrick of a Deed that lands are to paſs thereby by way of feoffment

Evidence to a Jury. Matter of Record. Feoffment.

Uſe. ment yet the land may paſs by way of uſe, if there be a ſufficient conſideration expreſſed in the Deed to raiſe a uſe. It was alſo then ſaid, that if a

Indenture. Deed Poll. Deed do run thus, This Indenture made, whereas in truth the Deed is not indented, yet may this Deed operate as a Deed Poll. It was likewiſe ſaid, that if one make a voluntary conveyance upon conſideration of

Badge of fraud. natural affection, and is not at that time indebted unto any, nor be in treaty with any for the ſale of the lands, ſuch conveyance hath no badge of fraud, but otherwiſe it is if he be indebted or in treaty for ſale of the lands.

Voluntary Affidavit. It was then alſo ſaid, that a voluntary affidavit made before a Maſter of the Chancery cannot be given in evidence at a Tryal.

Paſch. 1655, Banc. ſup.

Treſpaſs and Ejectment. IN a Tryal at the Bar in a Caſe between Bryers and Lake in an Action of Treſpaſs for cutting down and carrying away wood, and the Defendant juſtifying as a Commoner for Eſtovers, It was ſaid, That if an antient

New Cottage. Common by preſcription. Cottage which had Common be fallen down, and another Cottage is erected in the place where the old Cottage ſtood; this is no new Cottage, but it may claim common as an antient Cottage by preſcription. Nota.

Timbrell and Bullock.

Paſch. 1655.

Treſpaſs and Ejectment. IN a Tryal at Bar in a Treſpaſs and Ejectment between Timbrell and Bullock it was ſaid, that to make a ſuſpenſion of rent reſerved upon a

Suſpenſion of rent. leaſe for years, the Leſſor muſt out the Leſſee of part of the thing let at

Rent revived. leaſt, and hold him out till after the day on which the rent is made payable by the leaſe, and if the Leſſee re enters the rent is revived. It was alſo then ſaid by Roll chief Juſtice, That if one have a leaſe for years of land by Deed, and during the term the Leſſee accepts to hold the lands for a leſſer

Surrender of Leaſe. term by parol, this is a ſurrender of the Leaſe by Deed. It was then alſo ſaid, if there be a leaſe for years rendring rent at a day, with a clauſe of re-entry for not payment; If the Leſſor do enter into part of the lands let before the day of payment, and at the day he makes a demand of the rent;

Avoidance of a Leaſe. Notwithſtanding this demand, and a non payment of the rent follows thereupon, whereupon the Leſſor re-enters, yet ſhall not this re-entry make the Leaſe void, for the rent was ſuſpended at the time of the demand.

The Protector and the Town of Colcheſter.

Paſch. 1655. Banc. ſup.

Return of a Writ of reſtitution to a Recorders place. BErnardiſton being removed from his Recorders place of the Town of Colcheſter in Eſſex by the Bayliffs and Common Councel of the ſaid Town, prayed for his writ of reſtitution to the Bailiffs and Common Councel thereof to be reſtored, and hath it, and upon the return they ſet forth the cauſes why they removed him, and why he ought not to be reſtored, which were to this effect. Firſt, that he being Recorder of that Town, at a quarter Seſſions held there before him and others, one Goodall was endicted for having two wives, and convicted thereof, and prayed

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his Clergy, and was denied it by Bernardiston the Recorder, and was condemned to die, & was reprieved, & after at another Sessions held, there he was notwithstanding his former judgement admitted to his Clergy. 2. That he neglected to sit at the publique Sessions of the Peace, which ought to have been held for that Town, whereby the Sessions could not be held. 3. He made one his Deputy, who was not an utter Barister, as he ought to be, and contracted with him for 40 l. a year to execute his place. 4ly. He neglected for a long time to sit in Court, whereby causes ready for tryal could not be tryed in delay of Justice. Latch of Councel for Bernardiston to the first exception answered, That though he had proceeded erroniously to deny the Clergy to Goodall, yet this being not done as he was Recorder, but as he was one amongst others of the Commissioners of Oyer & Terminer, which Commission was but to endure for a year, & was a distinct power from the Recorders power, & was executed by him together with other Commissioners, it was no cause to remove him. To the 2 he answered, that there doth not appear by the return that any body received any prejudice by his not sitting in Court to hold the Sessions, nor that there was any cause to hold a Sessions, and the Sessions which they suppose was appointed to be held was an illegal appointment of them, for it appears not to be appointed by those that had authority to appoint, or to hold them, and so no fault appears in the Recorder for not holding them. 3ly. The Justices are mis named, for they are called the Justices of the Borough, whereas it should be the Justices of the King. 4ly. Here doth not appear to be any appointment at all of any quarter Sessions, and so there can be no fault for not holding them; and it is not necessary (as it is suggested) for him to make an utter Barister his Deputy, but saying he was not a fit person to be his Deputy is too general an accusation, for they ought to shew in what he was insufficient, neither doth his contracting with him for money to execute the place for him, any ways concern the corporation, nor is it malum in se, but is only punishable by the Statute of 5 Ed. 6. and as to the not trying of the issues joyned in that Court, at the days they were to be tried upon, this is no cause to deprive him of his place, which is a freehold, for few Stewards of Corporations do otherwise than he hath done, for they usually stay till they have a competent number of causes to try before they will sit to try them, and there appears to be but 5 causes untryed, which is no great number, neither doth it appear that he had any notice that these five were ready for tryal, and so here cannot be so great an offence as is supposed, and he cited Semaigns case 9 Rep. 53. nor doth it appear that any tryal was disappointed by his absence, for it appears not that any issue was joyned in any of the causes, or any warning given for tryal during the time that is surmised for him to neglect to sit in Court; And besides, though these were sufficient crimes for to deprive him of his place, yet they have not proceeded against him in a legal way, for he was never called to answer the crimes objected against him, but is deprived without hearing his defence, which is illegal, as Sir James Baggs case is. Roll chief Justice, he ought to be heard what he could say for himself, else how could it be known whether there were just cause to remove him or no, and it is very hard to deprive one of his freehold without hearing him. At another day Serjeant Twisden moved the Court for their opinion, whether Bernardiston ought to be restored or no, and answered the exceptions formerly taken much to the effect as Latch had done. Whereupon Roll chief Justice said, you ought to have conbented him before you put him out, to hear what excuse he could make for his absence, otherwise how could you know whether he had just cause or not for his absence, Therefore let him be restored except cause be shewed to the contrary Saturday next. Postea.

Distinct power. Prejudice. Authority. Mistomer. Deputy Recorder. General accusation. Malum in se. Freehold. Notice. Illegal proceeding. Defence. Restored, nisi, &c.

Edwards and Stiff.

Paſch. 1655. Banc ſup.

Tryal in Treſpaſs and Ejectment. Jury ſuffered to drink at the Bar.

MEmorandum, Vpon a tryal at the Bar in a Treſpaſs and Ejectment between Edwards Plaintif, and Stiff Defendant, the evidence being long and the Weather hot, the Jury deſired they might have drink, which the Court granted, but ſaid they ſhould have it at the Bar, whereupon drink was ſent for for them, and they drunk it there before they went out to conſider of the evidence. Roll chief Juſtice did then reprove the Attorneys and Sollicitors for the great charges they uſed to put their Clyents to, in feaſting the Jury, and ordered that thenceforth no more thon 3 s. 4 d. ſhould be allowed to any Iuryman to pay for his dinner. Nota.

Feaſting of Iuries.

Paſch. 1655. Banc. ſup.

For a new tryal. Death of a Witneſs.

VPon an Affidavit read in Court, that a materiall witneſſe in the cauſe that was ſerved with a ſubpœna to give his teſtimony at the tryal, and dyed before the tryal: The Court was moved on the Defendants part for a new tryal, but the Plaintif oppoſed it, much inſiſting upon this, that there was no miſcarriage on his part: Whereupon Roll chief Iuſtice anſwered, here is the Act of God in the Caſe, which cannot be reſiſted, and this tryal is final to the Defendant, Therefore if the Plaintif will not conſent to take his coſts, and goe to a new tryal, we will not be haſty to give judgement, but will adviſe upon it.

Act of God.

New tryal paying coſts.

The Protector and Gunter.

Paſch. 1655. Banc. ſup.

To quaſh two Endictments.

THe Court was moved to quaſh two Endictments for continuing of purpreſtures in the high way, and it was urged by the Councel that there were 4 Endictments preferred againſt his Clyent, two for erecting the purpreſtures, and the other two for the continuing of them, and upon a tryal we were found not guilty of the erecting them, and therefore we cannot be guilty of the continuing of them, and he took this exception to the caption of the Endictments, viz. That it is ſaid that the Endictments were preferred at the Seſſions held at East-Grinſteed in the County of Suſſex, where it ought to have been at the Seſſions of the Peace held at East-Grinſteed for the County of Suſſex. Roll chief Iuſtice anſwered, You may be guilty for continuing of that which another did erect, and not you, but if the erecting and continuance be mentioned in one and the ſame Endictment you cannot be guilty. But plead to them, for no ſuch thing appears in the Record, but only that you kept the Highway ſtopped, but ſays not who ſtopped it.

Denied.

Paſch. 1655. Banc. ſup.

To quaſh an Endictment.

THe Court was moved to quaſh an Endictment grounded upon the Statute of 5 Eliz. preferred againſt one for uſing the Trade of a Draper, not having ſerved as an Apprentiſe in that Trade, according to the Statute, upon theſe 2 Exceptions, 1. It is ſaid he uſed the Trade in the year 1653. and doth not ſay the year of our Lord. 2ly. It is not ſaid that the Jury was

was returned, nor whence they were, and both exceptions were held good by Roll chief Iuſtice, and the Endictment was thereupon quaſhed. Quaſhed.

Paſch. 1655. Banc. ſup.

THe Court was moved to quaſh an Endictment againſt one Peers, for ſpeaking provoking language to one, contrary to the late Ordinance of the Lord Protector and his Councel, upon theſe Exceptions. 1. It is ſaid the Endictment was at the Seſſions held at A. and doth not ſay in what County. 2ly. It is ſaid by an Ordinance of the Protector made ſuch a day, and doth not ſay in that caſe provided. And upon theſe Exceptions it was quaſhed. To quaſh an Endictment upon the Ordinance againſt Duels. Quaſhed.

Paſch. 1655. Banc. ſup.

THe Court was moved for a tales to a Northumberland Jury returnable this Term, becauſe but 8 of the panel returned did appear. But Roll chief Iuſtice anſwered, Take it returnable in Michaelmas Term next, but this Term you cannot have it. For a tales. Return of a tales.

VValdron and VVard.

Paſch. 1654. Banc ſup.

IN a tryal at the bar between Waldron Plaintif, and Ward Defendant, One Mr. Conye a Councellor at the Bar was examined upon his Oath to prove the death of Sir Thomas Conye. Whereupon Serjeant Maynard urged to have him examined on the other part, as a witneſs in ſome matters whereof he had been made privy as of Counſel in the cauſe. But Roll chief Iuſtice anſwered, He is not bound to make anſwer for things which may diſcloſe the ſecrets of his Clyents cauſe, and thereupon he was forborn to be examined. Tryal at Bar. A Councellor at the Bar examined as a witneſſe. Not to diſcloſe a Clyents cauſe.

Pilkinton and Bagſhaw.

Peſch. 1654. Banc. ſup.

VPon a tryal to be had at the Bar between Pilkington and Bagſhaw, the Plaintif would not put in his writ that the tryal might goe on; Whereupon Roll chief Iuſtice bid the Cryer to call the Attorney of the Plaintif to appear, and to bring in the writ upon pain of 20 l. and ſaid, that if he brought it not in he ſhould be put out of the Roll. Serjeant Maynard moved, that if he brought not in the writ that the Plaintif might be called non-ſute upon the Record, which Roll chief Iuſtice anſwered might well be, becauſe the parties have day in Court by the Record or Roll; afterwards the Sollicitor who had the writ brought it in; yet Roll chief Iuſtice ſaid, There ſhall, notwithſtanding the writ be brought in, be 20 l. fine ſet upon him for his trifling with the Court. Tryal at the Bar. Pain of 20 l. Attorney put out of the Roll. Non-ſute upon the Record.

The Protector and Sumner.

Paſch. 1654. Banc. ſup.

To bail a priſoner denied.

SErjeant Bernard moved that Sumner that appeared in Court upon his habeas corpus directed to the Keeper of Northampton Gaol might be bailed, for that having killed two men upon the Highway the Jury had found it Man-ſlaughter ſe defendendo. Roll chief Iuſtice anſwered, The Iuries concluſion is contrary to their premiſes. Therefore let the priſoner be ſent to Northampton Gaol whence he came, yet that may not be, for the fact was done in Peterborough, and therefore he cannot be tryed at Northampton, therefore let him be ſent to Peterborough Gaol with a writ ad recipiendum to the Gaoler there to take charge of him.

Tryal.

Writ ad recipiendum.

Pilkington verſus Bagſhaw.

Paſch. 1655. Banc. ſup.

Treſpaſs and Ejectment.

IN a Tryal at the Bar in a Treſpaſs and Ejectment betwixt Pilkington and Bagſhaw, the queſtion being whether Copyhold lands may be entailed by the cuſtom of the Manor, It was ſaid that if Tenant in tail, and the iſſue in tail of Copyhold lands in tail joyn in a ſurrender in a Court Baron of the Copyhold lands, that this is not an eſtopel, for it ought to be by fine or deed indented. And Roll chief Iuſtice ſaid, that Copyhold lands in tail are not within the Statute of Weſtm. 2. but it is a Cuſtomary entail like in its nature to another entail, and ſuch an eſtate muſt be docked by fine, or by ſome other cuſtomary way. It was alſo ſaid by him, that if Copies of Court Rolls be ſhewed to prove a Cuſtomary eſtate, the enjoyment of ſuch eſtates muſt alſo be proved, otherwiſe the proof is not good. It was alſo ſaid upon the evidence, That a ſeiſure by the Lord made of Copyhold entailed lands within the Manor of Wakefield in Yorkſhire is in the nature of a recovery to dock the entail, and that the manner of doing it is either for the Copyholder to let his Copyhold for more years than he ought, or to refuſe to do his ſervice, and then the Lord ſeiſes the lands for a forfeiture, and grants it to another by the conſent of the Copyholder that made the forfeiture. It was then alſo ſaid by Roll chief Iuſtice, that a Cuſtom cannot be urged for a thing that had its beginning ſince Rich. the 1. if a Record can be ſhewed to the contrary. It was alſo ſaid by him that a common recovery ſuppoſeth a recompence in value to all perſons who loſt the eſtate by the recovery. He ſaid alſo that he conceived that there could be no ſuch Cuſtom to cut off entails of Copyhold lands by the forfeiture and ſeiſure of the Lord, for his ſeiſure upon the forfeiture deſtroys the Copyhold eſtate by the Common Law, for it is in the Lords election after the ſeiſure whether he will grant the eſtate again or no, and you do not prove that the Cuſtom binds him to it. Nota.

Eſtopel.

Copyhold lands in tail.

Cuſtomary entail.

Fine.

State enjoyed.

Seiſure of Copyhold lands.

Cuſtom.

Common recovery.

Recompenſe in value.

Cuſtom.

Copyhold deſtroyed.

Harris

Harris and

Paſch. 1655. Banc. ſup.

The Court was moved in the Caſe of one Harris, that the entry of a judgement twelve years paſt might be amended upon the Roll. But Roll chief Iuſtice anſwered, It cannot be after ſo long time paſt. To amend an old judgement. Denied.

Paſch. 1655. Banc. ſup.

Vpon a writ of Error brought to reverſe a fine levied by an Infant being a Feme Covert. The Court was moved for a day to bring in the party that levied the fine to be inſpected by the Court, which was granted, and at the day ſhe was brought into the Court, and viewed, and two witneſſes depoſed that ſhe was within age at the time of the fine levied, which was entred upon the Roll, upon which the Iſſue was tryed. Day to inſpect an Infant. Entry upon the Roll.

Paſch. 1655 Banc. ſup.

IT was ſaid by Roll chief Iuſtice, That if there be two Kinſmen in equal degree of kindred to the Inteſtate, it is in the election of the Ordinary to which of them he will grant Letters of Adminiſtration. Election.

Paſch. 1655. Banc. ſup.

AN Outlawry was reverſed, becauſe the place where the County Court was held is not ſhewed in the ſecundo exactus. Outlawry reverſed.

Paſch. 1655. Banc. ſup.

IT was moved that there was a judgement given in the Common Pleas, and thereupon the Defendant brought his writ of Error to reverſe the judgement in this Court, and ſince pending the writ of Error the parties were agreed, and therefore they deſired the judgement might be affirmed, becauſe that otherwiſe ſatisfaction of the judgement cannot be acknowledged upon the Roll, becauſe the Court of Common Pleas were foreclosed to do any thing further upon the judgement given there by reaſon of the writ of Error. But Roll chief Iuſtice anſwered, It cannot be, for you ſhew no cauſe why we ſhould affirm the judgement, and therefore we will make no rule in it, but enter ſatisfaction upon the Roll if you will at your own peril. To affirm a judgement a writ of Error depending. Denied.

Paſch. 1655. Banc. ſup.

IT was ſaid by Roll chief Iuſtice that an Action upon the caſe will lie againſt one that brings vexatious actions againſt another, or for entring of Actions of a great value, to force his adverſary to put in great bail, where he hath but ſmall cauſe of Action. Nota. Action upon the Caſe for vexation.

Trevanian and Penhollow.

Trin. 1655.

Plea to an Action on the Caſe.

TRevanian brought an Action upon the caſe againſt Penhollow for ſpeaking of theſe words of him, Thou haſt taken a falſe Oath at the Aſsizes, and art falſe forſworn. The Defendant pleads that the Plaintif had agréed to accept of 3 Juggs of Beer from him in ſatisfaction.

Demurrer.

The Plaintif demurred to the plea, and for cauſe ſhews that it doth not appear that the three

Iudgement.

Juggs of Beer were paid or tendred by the Defendant; and upon this exception judgement was given for the Plaintif, &c.

MEmorandum, Trinity Term 1655. beginning the 15 of Iune being Friday Iuſtice Aſk ſate alone in the Court of the Vpper Bench, being then the ſole Iudge there, The late Lord chief Juſtice Roll having ſurrendred his Patent the Tueſday ſevenight before, being the 5 of Iune, as I was enformed.

MEmorandum, Afterwards the ſame day John Glyn his Highneſs the Lord Protectors Serjeant at Law took his place of Lord chief Iuſtice of England in this Court, and the Lord Liſle one of the Lords Commiſsioners of the great Seal of England made a Speech unto him, according to the Cuſtom, and Serjeant Twiſden moved for a tryal at the Bar the next Michaelmas Term, which was granted, niſi, &c.

The Protector and the Town of Colcheſter.

Paſch. and Trin. 1655. Banc. ſup.

Exceptions to a return of a Mandamus to the Town of Colcheſter.

VPon a Mandamus to the Bailifs of Colcheſter to reſtore Bernardiſton to the Recorders place of that Town, upon the return they certified the cauſes for removing him, and why he ought not to be reſtored. 1. That one Goodall being endicted upon the Statute for having two wives, and convicted thereof did pray his Clergy, and was refuſed it by Bernardiſton, and was condemned to die, and after at another Seſsions he admitted him to his Clergy, and ſo he was burnt in the hand. 2ly. That he neglected to ſit at the Seſsions, whereby the Seſsions for the Town could not be held duly as they ought to have been. 3ly. That he appointed a Deputy Recorder to execute his place for him, who was not an utter Barreſter, and contracted with him for 40 l. per annum. 4ly. That he neglected to hold Courts whereby cauſes could not be tried, to the prejudice of many. Latch of Councel with Bernardiſton to the firſt cauſe anſwered, That although it was an Error in Iudgement to deny the Clergy where it ſhould have been granted; yet this was not committed as he was Recorder of the Town, but as a Commiſsioner of Oyer and Terminer, which was to endure but for a year, and was a diſtinct power from his power as he was Recorder, and executed by him, with other Commiſsioners that were joyned with him in Commiſsion. To the ſecond he anſwered, that here doth not appear to be any prejudice to any by his not holding the Seſsions, nor that there was any cauſe to hold them, and beſides, it doth appear, that the Seſsions where he neglected to ſit were not legally appointed to be held, for they were appointed by them that had no authority to do it, viz.

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by the Maior and Baylifs, whereas they ought to be appointed by the Maior, Baylifs, and Recorder; and next the Juſtices are miſ-named, for they are called the Juſtices of the Borough, whereas they ought to be called the Juſtices of the King. 4ly. Here doth not appear any appointment at all of the Quarter Seſsions. To the 3d. he anſwered, that it is not neceſſary that he ſhould appoint a Barreſter to be Deputy-Recorder, and to ſay that he was not fit to be Deputy-Recorder is too general a charge, but it ought to be ſhewed in what he was unfit, and his contracting with him for mony concerns not the Corporation, neither is it malum in ſe, but is only puniſhable by the Statute of 5 Ed. 6. And as to the laſt, viz. his neglecting to try the iſſues joyned at the daies appointed it is not a crime material to deprive him of his free-hold, and few Stewards do otherwaies, for they do uſually ſtay till they have a competent number of Cauſes to try, before they will ſit; and here are but ſix cauſes alleged to be untryed, and one of them was not tryable in that place, nor is it averred, that he had notice given him of any iſſues to be tryed, and ſo the offence is the leſs, 5 Rep. Semaignes caſe, nor doth it appear, that any tryal was diſappointed by his abſence, for it appears not that there was any iſſues joyned, or any warning given for tryal in any of the Cauſes during the time alleged, wherein it is ſaid he did forbear to ſit to try them. Laſtly, here is no juſt way of proceeding to deprive him of his place though he might be deprived, for he was never ſummoned to appear to anſwer the matters objected againſt him, as he ought to have been, and ſo is Cook in Sir James Baggs caſe. Sergeant Glyn on the ſame ſide inſiſted only upon the laſt matter urged by Latch, which he ſaid went through the whole Caſe. Roll chief Juſtice, He ought to have been heard, how elſe can it be known whether they had juſt cauſe to remove him or not, and it is very hard to deprive one of his free-hold without hearing him make his defence. The Court was moved at another day for their opinion, and then Sergeant Twiſden endeavoured to anſwer ſome exceptions taken to the return by Windham, and to make good the exceptions taken againſt Bernardiſton, much to the ſame effect as formerly. Whereupon Roll chief Juſtice anſwered, you ought to have convented him before you had put him out, that you might have heard what excuſe he could make for his abſence, elſe how can it be known, whether he had a juſt cauſe of abſence or not. Therefore let him be reſtored, niſi, &c. At another day, being in Trinity Term 1655. Sergeant Maynard ſhewed for cauſe why he ought not to be reſtored, 1. That he held not the Courts duly, but did abſent himſelf for ſixteen months, without any cauſe, to the endangering of the forfeiture of the Charter of the Town, and ſaid, that if an Officer of Record do wilfully and without cauſe abſent himſelf from his Office, it is a forfeiture thereof, for by ſo doing the Charter is forfeited, and here is no ſuppoſition of any excuſe. 2ly. The return is good, though no notice was given him, for he ought to take notice of himſelf as he is an Officer of that Court, and endict him they cannot, and if his offence be true de facto they may put him out of his place, as a Maſter may put away his Servant, and this their Charter warrants them to do Twiſden on the ſame ſide ſaid, he hath contracted with another for his place, and ſo is diſabled by the Statute. Wild, He could not be here convented, for it is expreſly ſaid, that he went to unknown places. Glyn chief Juſtice, The main buſineſs inſiſted on was his abſence. but here was no notice given to him, and you ought not to proceed againſt him, and never hear him, though the crime objected againſt him be true, for it may be he was ſick or had ſome other juſt excuſe for his abſence, and he ought alſo to be heard to all the other crimes objected againſt him. Therefore let him be reſtored, niſi, &c. to morrow.

Judgement niſi.

Forfeiture of an Office.

Judgement niſi.

Howard and Howard.

Trin. 1655. Banc. ſup.

Peerage pleaded.

My Lord Howard being taken by a Latitat out of this Court appeared upon the day of the return of the Writ in Court, and pleaded his privilege of Peerage, and demands in judgement of the Writ, and thereupon to be diſcharged. Powis of Councel againſt him moved, that he might put in ſpecial bayl. Glyn chief Iuſtice, You ought to demur to his Plea, for he is now in Cuſtodia, and therefore he need not put in bayl. Nota.

Bayl.

Demurrer.

The Protector and Norrice.

Trin. 1655. Banc. ſup.

To diſcharge a Priſoner upon the Act of Oblivion.

Norrice being committed to priſon for ſpeaking words againſt the Parliament in the year 1650. was thereupon endicted, and was convicted and fined 100 l. and ordered to lye in priſon untill he could find Sureties for his good behaviour; afterwards he was brought into Court by vertue of a Habeas Corpus, and his Councel moved on his behalf that he might be diſcharged, becauſe he was pardoned by the Act of Oblivion. It was urged againſt this for the Protector, that he may be a perſon excepted out of the Act, and therefore ought not upon this ſurmiſe to be delivered. Glyn chief Iuſtice, It doth not appear to us that he is not excepted, and therefore we cannot deliver him. Thereupon it was moved for the Priſoner for a Certiorari to remove the Record hither, whereby he ſtands convicted, that he might enter the ſuggeſtion upon it, that he is pardoned by the Act. Glyn chief Iuſtice, Take it.

Surmiſe.

Certiorari.

Entry.

Webberly and Sir John Lenthall.

Trin. 1655. Banc. ſup.

Motion againſt Sir Iohn Lenthall for detaining a Priſoner diſcharged.

The Court was moved for Webberly againſt Sir Iohn Lenthall, that whereas he being a Priſoner in the Upper Bench priſon for Debt, and having agreed with his Creditors was diſcharged by them, yet Sir Iohn Lenthall did keep him Priſoner till he ſhould pay him Action mony. Glyn chief Iuſtice, You have two remedies againſt Sir Iohn Lenthall for this, for either you may bring your Action of falſe impriſonment againſt him, or you may endict him for extortion. Yet let Sir John ſhew cauſe why he ſhould not diſcharge him paying his fees.

Action mony.

Falſe impriſonment.

Endictment.

Strowd and Keckwith.

Trin. 1655. Banc. ſup.

Mich. 1653. rot. 119.

Audita querela.

Strowd brought an Audita querela againſt Keckwith. The Caſe was this, Strowd acknowledged a Iudgement 17 Car. for 2000 l. upon which Iudgement an Elegit was taken forth againſt Strowds lands in the County of B. and lands thereupon were found and extended, and delivered to the

Co-

Conuſee, and the Elegit filed, and the lands enjoyed accordingly for ſix years, then the Conuſee dies and makes his wife Executrix, who takes out a Scire facias upon the Judgment for 2000 l. directed the Sheriff of the County of C. being another County, and upon two Nichils returned hath judgment and execution againſt Strowd for the ſame Debt, who thereupon brings his Audita querela. Wadham Windham held, that the Audita querela did lye, and cited 15 H 7. 7. & L Q. f. 40. and ſaid this was an illegal proceeding againſt Strowd, becauſe that after an Elegit executed no other execution lies, but where there hath been no execution of lands in the ſame County or in another upon the firſt Elegit, but here is land found, and the Elegit filed, and the lands enjoyed, 18 E. 12. Fitzh. tit. Execution 240. Dyer 152. an Elegit may be prayed to divers Counties. Glyn chief Juſtice, The Caſe is adjudged in Hobards Reports, that one cannot have an Elegit after a former Elegit, if lands be thereby found, and the Elegit filed. Therefore ſhew cauſe why judgement ſhall not be given for the Plaintif.

Execution.

Elegit to divers Counties.

No Elegit after an Elegit.

Judgement.

Price and Carr.

Hill. 1654. Banc. ſup.

PRice brought an Action upon the Caſe againſt Carr for ſpeaking theſe words of her, A pox upon you for a Welſh whore, for thou wenteſt into the Country and emptiedſt thy Cask of a Baſtard. After a verdict for the Plaintif it was moved in arreſt of Judgement, that the former words videlicet, the ſaying ſhe was a VVelſh Whore are not actionable, becauſe no Action lyes at the Common-law for calling a woman Whore, and the laſt words are uncertain words, and leſs actionable. The judgement was then ſtayed till the Plaintif ſhould move. Whereupon at another day the Plaintif moved for judgement, and a Caſe in 17 Iac. in this Court was cited, and 41 Eliz. VVheeler and Abigals caſe, and it was urged, that the words ſhall be interpreted according to common intention and underſtanding of the hearers, and ſhall be adjudged very ſcandalous. Wild on the other ſide ſaid, they are frivolous words and not to be regarded, for they do not ſay poſitively ſhe is a Whore, nor that ſhe had a Baſtard, but the words are of a very uncertain meaning, for it appears not when the words were ſpoken, or when ſhe went into the Country, nor is there any averment what is meant by the words. Glyn chief Juſtice, Now ſince the Act, the calling of a woman Whore, and ſaying ſhe had a Baſtard will bear an Action, and here are words certain enough to fix a particular Scandal upon the party, by application of the words, and they are made more than general words or words of heat and paſſion, for there is a general application of them, and a ſufficient averment, and for the time of ſpeaking them we will not preſume they were ſpoken four years ſince, which was before the late Statute made againſt Adultery. Therefore let the Plaintif have her Iudgement.

Arreſt of judgement in an Action on the Caſe for words.

Words actionable.

Iudgement.

Davis and Matthews.

Paſch. 1655. Banc. ſup.

THe Caſe was this, There being a controverſie in the Prerogative Court between the Widow of one that died inteſtate, and one of the inteſtates next kindred, who ſhould have Letters of Adminiſtration of the Goods

Bond put in ſute in the Prerogative Court.

goods and Chattels of the Intestate, It was at length agreed betwixt the parties, that the widow should have Letters of administration, and that thereupon she should enter into Bond in the prerogative Office, to make an equal distribution of the goods and chattels of the intestate amongst his kindred, whereupon Letters of Administration were committed unto her; and she afterwards entred into bond accordingly, and for not performing the condition of the bond in making an equal distribution of the estate, the bond was put in suit in the prerogative Court, upon which a prohibition was prayed, and a rule thereupon made for the Defendant to shew cause why it should not be granted, and at the day it was offered for cause that there ought to be no prohibition, because where an administration is granted to one unto whom the Ordinary is not bound by the Statute to grant it, as it is in this case, there the Ordinary may take a bond of the party, with condition to make an equal distribution of the goods; but otherwise it is where Letters of administration are granted to one to whom by the Statute they ought to be granted, and one Sharp and Sympsons case 14 Iac. was cited, and Hob. 191. On the other side it was urged that the Ordinary hath no authority to take such a bond for the equal distribution of the goods, and the difference put on the other side was denied, and it was said, that when the Ordinary hath once committed the Letters of Administration to the party, his power is then determined, and he cannot grant Letters of Administration upon Condition. Glyn chief Iustice, The taking of the Bond is against the Statute, for the wife ought to be preferred before the next of the Kin, notwithstanding the Statute, and so is the common practice, except there be a special cause for the contrary, as where the wife hath had a former provision made for her by her husband, &c. Therefore let there be a prohibition, nisi.

Prohibition.

Ordinary.

Power determined.

Administration upon condition.

Prohibition granted.

Trin. 1655. Banc. sup.

To discharge a Guardian.

Inspection.

THe Court was moved on the behalf of an Infant to discharge a Guardian assigned by the Court, with an intent to make Richard Somers Attorney of this Court Guardian in his room, and that the former inspection may be discharged, and that the infant may be now inspected again, because when the former inspection was, and the Guardian assigned, there was no action depending in Court against the Infant. Glyn chief Iustice, Let it be so for the cause you have alleged, and give notice of it to the former Guardian

Sherlock.

Trin. 1655. Banc. sup.

rot. 1320, or 1315.

Error by an Infant to reverse a fine.

Inspection.

ONe Sherelock a Widow of the Parish of Earth in Sussex, an Infant, brought writ of Error to reverse a fine levied by her of her lands whilst she was a Covert Baron, and the Court was moved that she might have a Guardian assigned her to prosecute for her, and that she might be inspected by the Court, and that the inspection might be recorded; and there was an Affidavit made by one in Court, that he knew the Infant who was there present, and the time of her birth and baptizing, and swore the times precisely; the Church-book was also produced in Court, and proved by

Oath,

Oath, wherein the time of her baptizing was entred, and that she was the same person upon which she had by her own election Attwood an Attorney of this Court assigned for her Guardian, and the Affidavits were ordered by the Court to be recorded, and the inspection to be entred, and a scire facias awarded against the heir. Guardian assigned. Entry.

The Protector and Crasord.

Trin. 1655. Banc. sup.

UPon a return of a Mandamus directed to the Master and Fellows of Gonvile and Cayus College in Cambridge, to restore one to an Ushers place of a Free-school in Cambridge, of which they are visiters. It was excepted against it, that they had not shewed that they had any authority to deprive the party of his place; And 2ly. It doth not appear that they gave him any notice of their proceedings against him, whereby he might prepare to defend himself. Serjeant Twisden made question whether a Mandamus did lie in this case, because a Schoolmasters place is a temporal Office, and an Action at the Law lies for the party to recover it, and therefore it seems a Mandamus, which is an extraordinary course ought not to be granted, and he cited 8 Ass. and Sir Iames Bags case, and Dyer 209. and said it is not like an Office without fee. Latch on the other side answered The Mandamus is allowed already, and the legality of it is not now to be disputed, and Sir Iames Bags case is not repugnant to this case, for this is a publique office, and not a private, and tends much to the publique good, and is like to the case of an Alderman, or Freeman of a Corporation, or a Fellow of a College. Glyn chief Iustice, A Mandamus to restore one to a Churchwardens place hath been adjudged good. It is true that for a private office a writ of restitution doth not lie, but if the publique be concerned in the office it doth lie; and though it be an office with a fee belonging to it, that makes no difference; for a Recorders place is an office with a fee, and yet a writ of restitution lies for it; But it appears here that the Schoolmaster hath much abused himself, and therefore we will advise. At another day this case was moved again, and then Glyn chief Iustice said, I doubt whether a Mandamus doth lie in this case, for it lies not for every taking away of a mans freehold, as in the cases of a Keeper of a Park, or a Stewardship of a Court Baron. Wild questioned to whom the Mandamus could be here directed, for he said that the Master and Fellows are no Corporation; and he cited Boremans case of the Middle Temple, who prayed a Mandamus to be restored to that society, where it was held that the Innes of Court are not Corporations, but only voluntary societies. Latch on the other side said that it was very proper to have a Mandamus in this case, for it is a publique office, and not a private, as a Keepers place of a Park, or a Stewards place of a Manor are; and a Steward of a Court Leet is a publique Officer: And this Court hath jurisdiction to reform all grievances of this nature, and to keep other jurisdictions in good order, that they do not intrench one upon another, here is no Visiter to whom the party may appeal, and it were very unreasonable to leave him without remedy, and Mandamusses have been granted for places of less consequence than this as in Pasch. 2 Car. a Mandamus was granted to restore one to the place of a Town Clark, which is a private office, and 19 Iac. a Mandamus was granted to restore one to a common Clarks place of a Mill, and 5 Car. and 18 Car. to restore the parties to Parish Clarks places. And if the place be publique this Court will not leave the party to seek his

A Mandamus to restore one to an Ushers place in a Free-school, and the return and exceptions to it. Authority. Notice. Action at Law. Extraordinary course.

Office publique, private.

Writ of restitution. Office with and without a Fee. Mandamus. Freehold.

Corporation. Innes of Court voluntary societies.

Iurisdiction.

remedy at Law, and Alderman Eſwicks caſe is well known, who was reſtored to the place of a Common Councel man of London, and here the party hath an imployment for his life, though he have not a freehold in it, and there is a ſetled profit accruing to him, and ſo prayed he might be reſtored. Wild on the other ſide held, that a Mandamus lies not in this caſe, and ſaid, this caſe differs from the caſes put on the other ſide; for the Schoolmaſter, though he have a freehold, yet it is but durante beneplacito, and he is in truth no more than a ſervant, and in all the caſes put on the other ſide the publique is more concerned than in this caſe 12 H. 4. f. 47. A Schoolmaſter hath no freehold as Skreen there held, and it is not like the caſe of a Churchwarden, which is an Office that the common Law takes notice of, 12 H 7. and a Town Clark is a publique officer of the Town, and Boremans caſe is very like to this: and the office of a high Steward is a publique office, and ſo is a Steward of a Leet, and one may put away a ſervant retained for his life, and ſo may the Schoolmaſter here be diſcharged, and this School is a private School, and is not a Corporation as Weſtminſter School is. Glyn chief Iuſtice, by the ſame rule that the Schoolmaſter ſhould be reſtored may ever Schollar claim to be reſtored, and I conceive the Viſitors may remove the Maſter of the School, if he obſerve not the rules for government of the School, and it ſeems as reaſonable for them to turn out the Maſters, as to receive them into the place. But let the whole matter be referred to the Juſtices of the Aſſize, one of whom, viz. my Lord chief Iuſtice St. Iohn, is the Chancellor of the Vniverſity of Cambridge, where the School is.

Imployment for life.

Durante beneplacito.

Churchwarden.

Referrence

Fowke and Preſcott.

Trin. 1655. Banc. ſup:

Arreſt of judgement in an Action upon the caſe upon a promiſe.

FOwke brought an Action upon the caſe upon a promiſe againſt Preſcott. The Caſe was this, Preſcott being a Coachman did by careleſs driving of his Coach break a pipe of wine of Fowkes which lay in the ſtreet, whereby much of the wine ran out, and was loſt: Fowke apprehends the Coachman, who thereupon promiſeth that if he would forbear to ſue him for the wine, that he would pay him as much as he had damnified him, and for breach of this promiſe he brings his Action, and obtains a verdict againſt the Defendant. It was moved in Arreſt of judgement, 1. That the Plaintiff had not averred how much the wine was worth that was ſpilt, and ſo he could not tell what ſatisfaction to make the Plaintiff for it, for he knows not the value. 2ly. Here doth not appear to be any requeſt made for the ſatisfaction by the Plaintif. Serjeant Twiſden anſwered, Here doth appear to be an apparent damage, and he hath not ſatisfied the damage we have laid in our Declaration, nor hath the Defendant pleaded any tender of damages at all, and the Jury have found the damages. 2ly. We ſay that we have forborn to ſue him, and this implies no ſatisfaction made at the time of the Action brought. Alleyne on the other ſide, The Plaintifs Declaration doth not intitle him to the Action, and the finding of the Jury cannot make this good. Glyn chief Iuſtice, Both parties did ſee the wine, and the Defendant is bound to take notice of the damage, and the Plaintif is not bound to give him notice, and the Jury hath made it certain, Therefore let the Plaintif have his judgement.

Averment.

Requeſt.

Tender of damages.

Implication.

Notice.

Iudgement.

Dod

Dod and Herbert.

Trin. 1655. Banc. ſup.

DOd brought an Action of Debt upon an Obligation to ſtand to an Award, againſt Herbert, the Defendant pleaded nil debet, and upon a Demurrer theſe exceptions were taken to the Award, why it ſhould not be good: 1. That here is 100 l. awarded to be paid to the party, and it doth not appear that it is to be paid unto him in ſatisfaction of the wrong done unto him. 2ly. Here is 8 l. ordered to be paid for charges and expences, which thing is not ſubmitted unto by the parties, and ſo no Award ought to be made for them. 3ly. The Action here is meerly grounded upon the Award, and therefore the award ought to have been brought into Court, which is not done for ought appears here. Wild on the other ſide anſwered, that upon the penning of the whole Award, it appears that the 100 l. is to be payd for the wrong done to the party by the ſpeaking of the ſcandalous words, and the Award is ſet forth to be made de et ſuper præmiſſis, which makes it good, as my Lord chief Iuſtice Rolls opinion was upon the firſt opening of the Record, and ſo was Burbidges caſe 16 Car. And as to the ſecond Exception he held, that the 8 l. awarded to be payed for charges was within the ſubmiſſion, for the Arbitators have power to allow charges: And as to the laſt Exception, he ſaid it is not neceſſary to produce the Award in Court. Glyn chief Iuſtice, It is to be intended that the 100 l. is to be paid for the wrong done, and the 8 l for coſts is as well within the ſubmiſſion as the other, and the Award is recited, and it is ſaid to be made de et ſuper præmiſſis. The only queſtion is, whether the Award ought to be produced in Court, and I conceive it is not neceſſary to do it, although he muſt plead the Award in writing, for the Action is not brought upon the Award, but upon the ſubmiſſion, for the Award is but the inducement, and the Court hath nothing to do with the Award, but to ſee whether it be in writing or no; For a Deed, that muſt I confeſs, be produced in Court, that the Court may judge whether it bind the party or not, and you your ſelves have here ſet forth the Award in your pleading, But ſpeak to it at another day, at which time the caſe being only put, Glyn chief Iuſtice ſaid, if an Action of debt be brought upon an Obligation, the Obligation ought to be produced, and in all other caſes where things cannot be demanded but by Deed; otherwiſe is it, if they may be demanded either by Deed, or without Deed; but here is no Deed in the caſe, for an Arbitrement under ſeal is no Deed, & the arbitrement may be made without a Deed, & therefore it is not neceſſary to be produced in Court, for it is but a writing under hand and ſeal. Iudicium niſi pro quereute.

Demurrer in debt upon an Obligation to ſtand to an Award.
Satisfaction.
Charges.
Submiſſion.
In Curia prolata.
De & ſuper præmiſſis.
Intendment.
Submiſſion.
Inducement.
Where a thing muſt be produced.
Deed.
Arbitrement.
Writing.
Iudgement niſi.

Maynell and Mackallye.

Trin. 1655. Banc. ſup.

MAynell brought an Action upon the Caſe againſt Mackallye, and declared, That whereas he had an intent to enter an Action againſt the Defendant, and to arreſt him at ſuch a time, the Defendant in conſideration that the Plaintif would forbear to arreſt him at that time did promiſe that he would put in bail to him at any time after when he ſhall enter his action againſt him, and for breach of this promiſe he brings his Action. Upon non aſſumpſit pleaded, and a verdict for the Plaintif, it was moved in Ar-

Arreſt of Iudgment in an Action upon the caſe upon a promiſe.

reſt of judgement, That it is not ſaid how long the Plaintif ſhould forbear to arreſt the Defendant, and it may be for ſo little time that it will not be a good conſideration to ground the promiſe. But it was anſwered, that it is well enough, for the declaration purſues the words of the agreement between the parties, and cannot be better expreſſed. Glyn chief Iuſtice, It is a good conſideration, and we muſt make reaſonable conſtruction of words, Therefore let the Plaintif have his judgement.

Conſideration. Declaration. Reaſonable conſtruction. Judgement.

Abbott and Vaughan.

Trin. 1655. Banc. ſup.

Paſch. 1655. rot. 557.

ABbott brought an Action upon the caſe againſt Vaughan and his wife, for words ſpoken of the Plaintif by the Defendants wife, and upon not guilty pleaded, and a verdict found for the Plaintif, and a judgement thereupon given, upon a writ of Error brought this Exception was taken, that the verdict found the wife only guilty, and yet the judgement was given againſt Baron and Feme, which was urged to be Error, but 9 E. 4. was cited on the other ſide, that the judgement is well given. Glyn chief Iuſtice, The Jury have found the wife guilty, and ſo the Declaration is true, and therefore juſt cauſe of Action, and the judgement well given.

Error upon a Judgement in an Action upon the caſe for words.

Williams and Probe.

Trin. 1655. Banc. ſup.

VVIlliams brought an Action upon the caſe for ſpeaking theſe words of her, viz. Thou art a Whore, and I will prove thee a Whore, and thou haſt made my houſe a Bawdy-houſe. After a verdict it was moved in Arreſt of judgement that the words are not actionable, becauſe they do not imply that ſhe had played the whore her ſelf, though ſhe had made the Plaintifs houſe a Bawdy houſe. But Glyn chief Iuſtice anſwered, If we take all the words together as they are laid they are actionable, for they are particular applicable words, relating to the parties playing the whore; Therefore let her have her judgement.

Arreſt of judgement in an Action for words. Particular applicable words. Iudgement.

Bacon and Ramſey.

Trin. 1655. Banc. ſup.

THe Court was moved for Bacon a Barreſter of Grays Inne that he might have his privilege to lay an Action tranſitory in Middleſex, whereas it was laid in Northumberland, and Franklin and Sir William Butlers caſe, and Bere and Iones his caſe of the Middle Temple were cited to prove that a Barreſter ought to have this privilege, that where any tranſitory Action is brought againſt him, he may have it laid in Middleſex, whereſoever the cauſe of Action was. The Court adviſed, and deſired to ſee the preſidents cited, At another day it was moved again, and upon the preſidents produced, It was ordered to lay the venue in Middleſex accordingly.

For a Barreſter for his privilege to lay his Action in Middleſex. Granted.

The

The Protector and Blackwell.

Trin. 1655. Banc. ſup.

THe Court was moved for a melius inquirendum to be directed to the Coroner of Middleſex to enquire of what goods one Tooms that hanged himſelf did die poſſeſſed of, becauſe the Inquiſition returned did only find the goods he was poſſeſſed of in London. Glyn chief Iuſtice, You may have a melius inquirendum, it being for the Protector, if the practice of the Court will allow it, but it muſt be directed to the Sherif, becauſe the Coroner hath done his office already, and hath nothing now to do with it.

For a melius inquirendum.

Sherif. Coroner.

Eſton and Manley.

Trin. 1655. Banc. ſup.

IT was moved in Arreſt of iudgement in an Action of Debt upon an Obligation, that the Obligation upon which the Action was brought was for the payment of 100 l. and the Plaintif declares for 80 l and ſo the Declaration varies from the bond. 2ly. It is ſaid that the Action was entred in the ſame Counter, whereas there was no mention of any Counter before, neither doth it appear that the Counter is a Court. Glyn chief Iuſtice anſwered, the firſt exception is to no purpoſe, and for the ſecond it is but an exception to a ſurpluſage, which might have been left out of the Declaration, and it is alſo after a Verdict, Therefore let the Plaintif have his iudgement.

Arreſt of iudgement in debt upon an Obligation.

Surpluſage. Iudgement.

Thomas and

Mich. 1655. Banc. ſup.

THe caſe was this, one promiſed to the Father, that in conſideration that he would ſurrender a Copyhold to the Defendant, that the Defendant would give unto his two daughters 20 l. a piece, and after a Verdict in an Action upon the caſe brought by one of his daughters for breach of this promiſe, It was moved in Arreſt of iudgement, that the Plaintif had declared upon a joynt promiſe made which concerned another with the Plaintif, and yet the Action is brought but by one of them, whereas they ought to have joyned in the Action. But Glyn chief Iuſtice anſwered, that the parties have diſtinct intereſts, and ſo any one of them may bring an Action. Turner replyed, The Declaration mentions the promiſe to be a joynt promiſe. Glyn chief Iuſtice, But the Law doth diſtinguiſh the intereſt, though the Declaration be general. Serjeant Bernard, Here ought to be a ſeveral Action, and ſo hath it been lately adjudged in the Common pleas: But it was anſwered, that the Action is brought but for one twenty pound due to one of the Daughters, and ſo iudgement for the Plaintif, niſi, &c.

Arreſt of iudgement in an Action upon a promiſe.

Joynt promiſe.

Diſtinct intereſts.

Diſtinction of Law. Iudgement.

VVood and Gunſton.

Mich. 1655. Banc. ſup.

No Action for ſcandalous words.

IN a Tryal at Bar in an Action upon the caſe for words between Wood Plaintif, and Gunſton Defendant, It was ſaid by Glyn chief Iuſtice, That if a Counceller ſpeak ſcandalous words againſt one in defending his Clyents cauſe, an Action doth not lie againſt him for ſo doing, for it is his duty to ſpeak for his Clyent, and it ſhall be intended to be ſpoken according to his Clyents inſtructions.

Hether and Bowman.

Mich. 1655. Banc. ſup.

Inſtrument in Law. Copyholder. Admiſſion.

IN a tryal at Bar between Hether and Bowman in Treſpaſs and Ejectment it was ſaid by the Court, That the Lord of a Copyhold is but an Inſtrument to admit the Copyholder, and ought to admit him according to the ſurrender, or otherwiſe the admittance is not good.

Thurle and Madiſon.

Mich. 1655. Banc. ſup.

Enrolment of a Deed. Evidence. Conſideration.

IN a Tryal at the Bar betwéen Thurle and Madiſon, It was ſaid by Glyn chief Iuſtice, that if divers perſons do ſeal a Deed, and but one of them acknowledge the Déed, and the Déed is thereupon enrolled, this is a good enrollment within the Statute, and may be given in evidence as a Deed enrolled, at a Tryal. It was then alſo ſaid, that if a deed expreſs a conſideration of money upon the purchaſe made by the Deed, yet this is no proof upon a tryal, that the monies expreſſed were paid, but it muſt be proved by witneſſes.

Copy proved.

MEmorandum, That upon the ſame Tryal an Act of Parliament produced in evidence for the ſelling of Delinquents eſtates, was ſworn to have been examined by the Parliament Roll, and that it was a true Copy before it was admitted to be read in evidence. Nota.

VVood and Gunſton.

Mich. 1655.

New tryal for miſcarriage of the Iury.

VPon a motion for a new tryal betwéen Wood and Gunſton, upon a ſuppoſition of exceſsive damages given by the Jury in an Action upon the caſe tryed at the Bar for words, viz. Calling the Plaintif Traytor, &c. 1500 l. being the damages given, It was ſaid by Glyn chief Iuſtice, that if the Court do believe that the Jury gave their verdict againſt their direction given unto them, the Court may grant a new Tryal. And a new Tryal was granted in this Caſe after a full debate had by Councell on both ſides.

Cul-

Culliar and Iermin.

Mich. 1655. Banc. ſup.

CUlliar brought an Action upon the Caſe upon a promiſe, and declared, that the Teſtator of the Defendant in conſideration, that the Plaintif would marry ſuch a Woman did promiſe that he would leave him half his Eſtate at his death, and thereupon he did marry the party, and yet he did not leave him half his eſtate at his death. Upon a verdict found for the Plaintif, it was moved in arreſt of judgement, that the Declaration was not good, for whereas the promiſe was, that the Defendant ſhould leave him half of all his eſtate, which might be intended both of his real and alſo of his perſonal Eſtate, and of any eſtate in reverſion, as well as of an eſtate in poſſeſſion, the Plaintif only ſays, that the Teſtator died worth 3000 l. in poſſeſſion, and that he did not leave him half of that eſtate, and it may be he left him part of his real eſtate, or eſtate in reverſion to the full value of half his whole eſtate. But Glyn chief Iuſtice diſallowed the exception, and gave judgement for the Plaintif.

Arreſt of judgement upon a promiſe.

Iudgement.

Lance and Blackmore.

Mich. 1655. Banc. ſup.

Hill. 1654. rot. 191.

LAnce an Executor brought an Action upon the Caſe againſt Blackmore, and declared, that in conſideration that the Teſtator would ſuffer the Defendant to enjoy ſuch a Cloſe of land, the Defendant did aſſume and promiſe to pay 53 s. a year for the rent thereof for ſo long time as he ſhould enjoy it, and for ſo much rent due for it for ſo long time in the Teſtators life time, and for ſo much rent due ſince his death he brings the Action. Upon non aſſumpſit pleaded, a verdict was found for the Plaintif; and entire dammages given. It was moved in arreſt of Iudgement, 1. That an Action of the Caſe doth not lie, it being for the non-payment of rent, which follows the nature of the land, and doth ſound in the realty, for which a perſonal Action lies not. 2ly. Here doth not appear by the Declaration, to be any conſideration to ground the promiſe upon, for the Declaration is that if the Teſtator in her life time would permit the Defendant to enjoy the Cloſe, then, &c. and it is not averred, that the Teſtator did in her life time ſuffer the Defendant to enjoy the Cloſe. Glyn chief Iuſtice, If a promiſe be made to the Teſtator, the Executor may have an Action, and it is a good conſideration as to him, for the executor is repreſentative of the Teſtator. And 2ly. An Action upon the Caſe will not lie for rent upon a promiſe in law, but upon a ſpecial promiſe of the party to pay it, as our Caſe is it will lie.

Arreſt of judgement in an Action upon the Caſe upon a promiſe.

Perſonal Acts on.

Conſideration

Averment.

Executor.

Promiſe in Law, Special.

Ingram and Fawſet.

Mich. 1655. Banc. ſup.

IN this Caſe it was ſaid by Glyn chief Iuſtice, That if an Adminiſtrator bring an Action againſt an Adminiſtrator, it is not neceſſary for the Plaintif

Adminiſtrator muſt ſhew how Adminiſtrator.

tif to ſhew by whom the letters of Adminiſtration were granted unto the Defendant, but he muſt ſhew by whom the letters of Adminiſtration were granted to himſelf to entitle himſelf to the Action, for if it appear not to the Court that he is Adminiſtrator, he cannot ſue by that name.

Mich. 1655. Banc. ſup.

How far ſpecial bayl is lyable for the principal.

IT was ſaid by Wild, and agreed by Whitwick one of the Maſters of the Upper Bench-office, that if an Attorny do appear for one in the Upper Bench, & ſpecial bayl is entred for his Client, to that Action, that that Bayl is not bound to ſtand Bayl to all other Actions that ſhall be declared in againſt the party upon the by, but the Attorny for him is bound to appear for him in all ſuch Actions, and to put in Common bayl.

Wagſtaff and Tempeſt.

Mich. 1655. Banc. ſup.

Diſpenſation with a forfeiture of an Eſtate tayl.

IT was ſaid by Glyn chief Iuſtice upon evidence given in a Tryal at the Bar, between VVagſtaff and Tempeſt, that if tenant for life do levy a Fine of the Lands he is ſo ſeiſed of, whereby he ſhould forfeit his eſtate, yet if he in the remainder will joyn with the Tenant for life in declaring the uſes, this is a diſpenſation with the forfeiture.

and Le Gay

Mich. 1655. Banc. ſup.

For a time to accompt before Auditors.

THe Court was enformed, that in an Action of Accompt brought there was a verdict, that the Defendant ſhould accompt before Auditors, and that Auditors were aſsigned, and the parties were now before the Auditors, and thereupon it was moved on the Defendants part, that this Court would grant him time to accompt, for the reaſons alleged. But Wild anſwered, that it was not proper to move here, for the Auditors are now Judges of the matter, and may give time if they ſee cauſe. To which Glyn chief Iuſtice agreed, and ſaid, the Auditors are Judges by the Statute, and therefore move before them, and trouble not us with it.

Auditors Iudges by the Statute.

Sergeant Bradſhaw and Procter.

Mich. 1655. Banc. ſup.

Challenge to an array no part of the Record.

IN the Caſe of Sergeant Bradſhaw and Mr. Procter of Grays-Inne. It was ſaid, that a challenge to the array is no part of the Record, but ought to be determined whether it be good or not by the Judge, before whom the tryal of the Cauſe ſhould have been, if the challenge had not been taken; and ſo hath it been ruled upon ſerious adviſe in the Common-pleas: and it was then likewiſe ſaid, if there be a demurrer to a challenge at the Aſsiſes, the Judge of Aſsiſe may determine it there, or over-rule it, or adjourn it to be heard at another time.

By whom to be determined

Demurrer to a challenge.

Somes

Somes and Sir John Lenthall.

Mich. 1655. Banc. ſup.

THe Court was enformed that an Action of Debt was formerly brought againſt Sir Iohn Lenthall, and that there was Iudgement, and an execution thereupon taken out againſt him, but that he abſconded himſelf, that he could not be taken, and therefore it was prayed in regard he was an Officer of this Court that the Court would order him to appear here, that he may be committed in execution to the Sheriff of Middleſex. But Glyn chief Iuſtice anſwered, if Sir Iohn Lenthall do appear here, and you pray him in execution, we can commit him to no other priſon but the Marſhalſea, for that is the priſon of this Court, and to commit him to that priſon of which he is the Keeper, without ſecuring the Priſoners there, before we doit, will be an eſcape in Law of all the Priſoners. Therefore let Sir John ſhew cauſe why he ſhould not pay the Debt, for it is neither for his own credit, nor the honor of this Court, that he ſhould not ſatisfie his Debts.

For Sir Iohn Lenthall the Mareſchall to appear, that he might be in execution.

Hardres and Prowd.

Mich. 1655. Banc. ſup.

HArdres brought an Action upon the Caſe againſt Prowd, and declared, that whereas he at the inſtance and requeſt of the Defendant had taken pains to reconcile differences betwixt the Defendant and I.S. and others, the Defendant did aſſume and promiſe unto the Plaintif to pay unto him 100 l. at a certain day, and for not paying the mony accordingly he brings his Action. And upon non-aſſumpſit pleaded, and a verdict found for the Plaintif. The Defendant moved in arreſt of Iudgement, 1. That here is no conſideration ſet forth in the Declaration to ground the promiſe upon, for it is only ſaid, that in conſideration that the Plaintif had taken pains, &c. he did promiſe, &c. and this is a conſideration executed, and not ſufficient to ground a promiſe upon, and one Hunt and Diers caſe was cited for proof. 2ly. He doth not ſhew what pains he hath taken, and ſo it cannot be known whether his pains were ſufficient to ground the promiſe upon. 3ly. He ſayes, that he took pains to reconcile differences betwixt the Defendant, and I. S. and others, and doth not ſhew who theſe others were. The two laſt exceptions were over-ruled without ſpeaking to; and to the firſt Vvild anſwered, that here was a continuing conſideration, though the pains taken were paſt, for it is ſaid he tok the pains at the inſtance and requeſt of the Plaintif Glyn chief Iuſtice, It is as you ſay, for here is more than a voluntary Curteſie, upon which no conſideration for a promiſe can be grounded, for the pains here were undertaken at the inſtance of the Plaintif. Iudicium, niſi, &c.

Arreſt of judgement in an action upon the Caſe upon a promiſe.

Conſideration executed.

Continuing conſideration.

Voluntary curteſie.

Mich. 1655. Banc. ſup.

BY Glyn chief Iuſtice, If one come in upon the Exigent he may appear by his Attorny, but if he come in upon the Outlawry he muſt appear in his proper perſon, and not by his Attorny, and ſo is the conſtant practice of the Common-pleas, and of this Court alſo. Nota.

Where one may appear by Attorny, and where

London and VVilcocks.

Mich. 1655. Banc ſup.

Arreſt of judgement in Treſpaſs.

LOndon brought an Action of Treſpaſs againſt VVilcocks inter alia, for taking and carrying away 40 loads of Corn in the Straw. Upon a verdict found for the Plaintif, it was moved in arreſt of Judgement that the Declaration was uncertain, for the Plaintif had declared for 40 loads of Corn in the Straw, and it doth not appear, whether they be Horſe-loads or Cart-loads, or what other loads of Corn they are. But Glyn chief Iuſtice anſwered, that it is well enough expreſſed, for it being of Corn in the Straw, it ſhall be intended Cart-loads, and therefore let the Plaintif have his Iudgement.

Judgement.

Q. If the Action had been laid in the County of Cornwall where it is uſual to carry Corn in the Straw upon Horſes whether the Declaration would have been good.

VVood and Gunſton.

Mich. 1655. Banc. ſup.

For a new tryal in an action of Treſpaſs for words.

VVOod brought an Action upon the Caſe againſt Gunſton for ſpeaking of ſcandalous words againſt; and amongſt other words for calling him Traytor, and obteyns a verdict againſt him at the Bar, wherein the Jury gave 1500 l. dammages. Upon the ſuppoſition that the dammages were exceſsive, and that the Jury did favour the Plaintif, the Defendant moved for a new tryal. But Sergeant Maynard oppoſed it, and ſaid that after a verdict the partiality of the Jury ought not to be queſtioned, nor is there any Preſidents for it in our Books of the Law, and it would be of dangerous conſequence if it ſhould be ſuffered, and the greatneſs of the dammages given can be no cauſe for a new tryal, but if it were, the dammages are not here exceſsive, if the words ſpoken be well conſidered, for they tend to take away the Plaintifs eſtate, and his life. VVindham on the other ſide preſſed for a new tryal, and ſaid it was a packed buſineſs, elſe there could not have been ſo great dammages, and the Court hath power in extraordinary caſes, ſuch as this is, to grant a new tryal. Glyn chief Juſtice, It is in the diſcretion of the Court in ſome caſes to grant a new tryal, but this muſt be a judicial, and not an arbitrary diſcretion, and it is frequent in our Books for the Court to take notice of miſcarſages of Juries, and to grant new tryals upon them, and it is for the peoples benefit that it ſhould be ſo for a Jury may ſometimes by indirect dealings be moved to ſide with one party, and not to be indifferent betwixt them, but it cannot be ſo intended of the Court; wherefore let there be a new tryal the next Term, and the Defendant ſhall pay full Coſts, and judgement to be upon this Verdict to ſtand for ſecurity to pay what ſhall be recovered upon the next verdict.

Diſcretion of the Court.

Diſcretion Judicial, Arbitrary.

The Court not to be intended partial.

Granted.

The

The Protector and Buckner.

Mich. 1655. Banc. ſup.

BUckner was endicted upon the Statute of 1 Iac. made againſt Stabbing at the Juſtice-Hall in the Old baily for killing of Horwood, and upon the evidence given for the Protector, the Jury found a ſpecial verdict, which was to this effect, viz. that Horwood and another man with him came into the lodging of Buckner being in Drury-lane, and when they were come into the lodging, that other man took down a ſword in the Scabbard which hung there, and ſtood at the Door of the Chamber with this Sword undrawn in his hand, and kept the Door to keep Buckner from going out till they might bring a Bailif to arreſt Buckner for a debt which he owed Horwood, whereupon upon ſome diſcourſe between Buckner and Horwood, Buckner takes a Dagger out of his pocket, and ſtabs Horwood and kills him, and whether this was within the Statute of Stabbing was doubted by the Jury. Upon which Buckner was committed to Newgate, and after the Body and the Cauſe was removed into this Court by a Habeas Corpus and a Certiorari, and argued divers times at the Bar and at laſt on the Bench; and firſt Arthur Harris of Lincolns-Inn opened the Record, and only put the queſtion, and then on the behalf of the Priſoner it was moved, that he might have a Copy of the Record, and Councel aſsigned him ſuch as he deſired, which the Court granted, then it was prayed he might be bayled, but that the Court would not grant, but turned him over to the Mareſcall, and gave day for the Protectors councel to be heard; At which day Twiſden for the Protector made this queſtion, whether Buckner was to have his Clergy in this caſe, or were debarred by the Statute or not, and he ſaid, this queſtion ſhould not have been made by the Jury as they have done upon the ſpecial Verdict, but the Court ought to have made it, for the Jury are only to proceed upon matter of fact, and not upon matter in Law, and he argued, that he ought not to have his Clergy, for the Statute of 1 Iac. doth not create the offence, but leaves it to the Common-law, and only takes away the Clergy from the party that commits it; and to prove this, 1. It is not within the words of the Statute, and 2ly. it is not within the meaning of the Statute, neither in its preamble, nor in the body, or in the proviſo thereof, for Buckner was not firſt ſtrook, nor had he a weapon drawn againſt him, although he was kept a priſoner in his Chamber, which was not a conſiderable but a ſlight provocation of him to move him to ſo fowl a fact. And within the body of the Act, there are no Acts expreſſed, but having a weapon drawn againſt him, or being firſt ſtruck, and this enumeration of the Acts excludes all other, as it is in the Statute of Fines, and in the Statute which takes away Clergy. Alſo the reaſon of Law requires to allow the Clergy to one that is firſt ſtricken; but here is no ſuch reaſon, and the party might have had his remedy againſt Horwood for comming into his Chamber and impriſoning of him by an Action of Treſpaſs; And the having a weapon drawn was a reaſon for the other to defend himſelf. Finch Henage for the Priſoner argued, that the Priſoner was only guilty of felony at the Common-law and is not within the Statute by which his Clergy ſhould to be taken away. For firſt the Statute is to be liberally interpreted, because it is made in reſtraint of the Common-law, and it was made only to prevent fewds betwixt the Engliſh and the Scotiſh-Nation, which were then apt to break forth, and the quarrel here was not a drunken and ſudden quarrel, but acted upon deliberation, and here is an Aſſault ſo great uſed

Special verdict upon an endictment upon the Statute of 1 Iac. againſt ſtabbing.

Interpretation.

againſt the priſoner, that it amounts to a ſtriking of him, 43 E. 3. f. 41. 42 E. 3. f. 7. and the impriſonment of him is more than an aſſault, and here is found a forcible entry into his Chamber, and the ſending for a Bailif, and the ſtaneing at his Chamber door with a ſword in the parties hand, though not drawn, which is as much in effect as if it had been drawn, and 23 Car. the Clergy was allowed to two perſons that aided and aſsiſted a third perſon in ſtabbing of a fourth man, and that becauſe the Clergy ſhall not be taken away by intendments. Intendment.

Glyn chief Iuſtice, The Statute hath not been ſo favourably conſtrued as hath been argued, for here is no ſtroak, nor weapon drawn for his preſent defence, as the Statute intends; and ſtabbing with a Tobacco pipe, and with a Halberd hath been adjudged to be ſtabbing within the Statute, and the Statute doth not ſay being firſt aſſaulted, as this caſe is, but firſt ſtricken, and I conceive not that there are any words in the Statute that will keep you out of it. Day was given over to the next Term. At which day the ſpecial verdict was again repeated by Serjeant Maynard, and by him it was argued for the priſoner, that he was not within the Statute of 1 Iac. of ſtabbing, becauſe firſt here was an unlawfull impriſoning of Buckner in his own Chamber, and this could not be without an aſſault, next this Statute is not to be literally interpreted, for if there be Acts of terror uſed againſt one, although a weapon be not drawn, yet he is not within the Statute although he kill another, for the taking up of a Candleſtick to ſtrike another hath been adjudged a weapon drawn, and he cited Patye and Horwoods caſe, and all the perſons that came into his Chamber were Treſpaſſors, and one of them taking the ſword in his hand how could it be known what miſchief might have been done with it, Cooks caſe 14 Caroli, One may do a lawfull act by unlawfull means, and although Buckner did ill yet is he not within the Statute. Arthur Harris on the other ſide argued that the act was ſtabbing within the Statute, and ouſted the priſoner of his Clergy, and that he is within the meaning and words of the Statute. The Statute intended to prevent the killing of men ſuddenly, which is the worſt of all other killing, for it is as it were to deſtroy not only the body, but even to kill body and ſoul alſo, and therefore though the Statute be penal, yet it is not to be favourably interpreted, it being made for the peace and quiet of the Nation. The killing is the matter aimed at in the Statute, and it matters not whether the party be killed with a Faucheon or a Piſtol, as Williams caſe was, that killed another by throwing a Taylors Goſe at him, and he is not within the ſaving of the Statute though he was aſſaulted, and the other ſtood with the ſword in the ſcabbard in his hand, 36, 37 Eliz. Hanger and Molins caſe in the Exchequer Chamber, The words of the Statute are, not being firſt ſtrook, but an aſſault is not a ſtriking, and ſo he is out of the Letter of the Statute, and here was no weapon drawn, for the ſword was in the ſcabbard, which is no more than a ſtaff in a mans hand, Stat. 5 E. 6. C. 4. and it is like to a Piſtol uncockt, and if the ſword had been drawn it would not have altered the caſe, becauſe it was not in Horwoods hand, who was ſlain, but in anothers, and you cannot extend the Statute further. Glyn chief Iuſtice, Will you have it argued any more? Finch, No. Glyn chief Iuſtice, I have conſidered of the Verdict, and conſulted with the Statute, and adviſed with all the Judges, and they are of mine opinion. This is a good Law, and to be interpreted ſtrictly, yet I hold the priſoner is not within it; for the ſcope of the Statute appears by the preamble, the body, and ſaving of it, which do all confirm my opinion: My firſt reaſon is, becauſe I find that the intent of the Statute is againſt ſudden killing, but here was not a ſudden killing, and the Statute takes not away the Clergy from all manner of Manſlaughter, and here was a Treſpaſs and an impriſonment acted

againſt

againſt the priſoner before he killed Horwood, and ſo the act was not ſuddenly done. 2ly. The body of the act ſeems to mean, that there ought to be malice in the caſe, and it doth not intend we ſhould ſtick to the very words of it; and here the party ſlain might have foreſeen the danger, and defended himſelf. 3ly The proviſo excepts divers particulars out of the Law, and the word killing is only in the proviſo, ſo that there is proviſion made how the Statute ſhall be interpreted, viz. That it muſt be ſudden killing, which is not ſo here, for there is provocations, and time intervenient betwixt them and the ſtabbing, and the Verdict finds no præconceived malice, and the Statute extends to no other killing by the proviſo. And if one be aſſaulted by Theeves which have no ſword drawn, and the party aſſaulted ſtabs one of the Theeves, he is not within the intent of the Statute, although he be within the words of it, or if one be aſſaulted in his houſe, and the Aſſaultor hath no weapon drawn, and one of the Aſſaultors be ſhot, yet the party aſſaulted is not within the Statute, 15 Car. in Davy and Williams caſe it was adjudged by all the Judges that he that killed another by throwing a Hammer at him was not within the Statute, becauſe there was a preceding provocation of him. And if two aſſault a third perſon, and one of them ſtrike the third perſon, and the third perſon kills the other that did not ſtrike him, I do not conceive he is within the Statute, for it is the aſſault of both, and ſhall alſo be adjudged the ſtriking of both. Ask Juſtice held he was within the Statute, becauſe it was not unlawfull to come to arreſt him, and here was no weapon drawn, and ſo it was adjourned to another day. At which day Buckner was again brought to the Bar, Ask Juſtice repeats the ſpecial verdict, & made the queſtion whether this fact of Buckner be within the Statute of 1 Jac. enacted againſt ſtabbing, and he argued that it was, and that Buckner could not have his Clergy, becauſe the Statute ſhall be taken beneficially for the Commonwealth, and not for the priſoner, who is a particular perſon, and the intent of the Statute is to take away the Clergy for ſome felony; Neither by the common Law, nor by the Law of God is there Clergy given for killing a man, and it was the Popiſh power that introduced the Clergy to be given for Manſlaughter, and alſo for murther, in diminution of the Common Law, and of regal power, yea, and of the Law of God alſo. and if a woman kill one ſhe ſhall not have her Clergy, but be hanged, which ſhews that by the Common Law the Clergy was not given for Manſlaughter. And by the Law of God I find no difference betwéen Murther and Manſlaughter, for it makes no difference betwéen hot blood and cold blood, as we do now diſtinguiſh; and every word in the Statute me thinks doth take away the Clergy by way of argument, even from the title of the Act to the very end of it, and here is a great ſin to be puniſhed, and great inconveniences would follow to admit of the Clergy in ſuch caſes as this is, and here was a ſudden killing as the act expreſſeth, for it was done with a dagger which was not ſéen, but ſuddenly drawn out of a pocket, and no weapon was drawn againſt him, for the provocations alleged, they cannot amount to the drawing of a weapon, or ſuch a provocation as the Statute intends, for all the acts done by Horwood amounted but to a Treſpaſs, and cannot be ſuch a provocation as ſhould cauſe Buckner to fear his death, for no violence was uſed to his perſon by ſtriking, or drawing of a weapon, or other ways, and the ſending for Bailifs to arreſt him cannot be ſuch a provocation as the Statute intends, which is to put the party in fear of his life, and the party knew that Horwood came with an intent only to arreſt him, and not to kill him, nor did the party ſlain do any thing againſt Buckner to provoke him; and there is by preſumption of Law a prepenſed malice in Buckner to kill Horwood, which is ſéen by his ſudden manner of ſtabbing him, and Davye

and Williams caſe urged on the other ſide is not like to this caſe. I grant if one kill a Thief ſuddenly it is not within the Statute, for ſuch killing was never intended to be prevented by it. The worſt words one man can give another are not a ſufficient provocation within the Statute, for ſpeaking of words doth much differ from drawing of a weapon: Nor is this a killing ſe defendendo, or by misfortune, but a killing at the Common Law, and ſo the Clergy is taken away by the Statute, and thoſe of Serjeants Inne in Fleetſtreet, amongſt whom are Barkly and Foſter, and Roll, who have been Judges, are of my opinion. Glyn chief Iuſtice held it not within the Statute, he argued long much to the effect as formerly, but having taken cold I could not diſtinctly hear him, Adjourned. This Caſe was again argued Trin. 1656. to enform Iuſtice Warburton who was called to that Bench, after the former arguments and opinion of the Court delivered much to the ſame manner as formerly, By Finch for the priſoner, and Baldwin for the Protector, and thereupon my Lord chief Iuſtice Glyn, and Iuſtice Warburton were of opinion againſt Iuſtice Ask, and ſo judgement was given for the priſoner, that the ſtabbing was not within the Statute, but was only felony at the Common Law, and the priſoner was admitted to his Clergy, and burnt in the hand accordingly.

VVilliamſon and Coleman.

Mich. 1655. Banc. ſup.

Iuſtification in Treſpaſs.

VPon evidence given in an Action of Treſpaſs between Williamſon and Coleman at the Bar, It was ſaid by Glyn chief Juſtice, that if one make a ditch, or raiſe up a bank to hinder my way to my Common, I may juſtifie the throwing of it down, and the filling of it up.

Mich. 1655.

Damages in Dower.

BY Glyn chief Iuſtice, If a Feme bring a writ of dower, and recover, and the Defendant die, the feme ſhall have her damages againſt the Terr-Tenants.

Mich. 1655.

Error quod coram vobis reſidet, what it is.

A Writ of Error quod coram vobis reſidet is when a writ of Error is brought to reverſe a judgement given in the Common pleas, or other Court where the Record was formerly removed into the Court of the Upper Bench, and by reaſon of the death of the party, or for ſome other cauſes reſts undetermined, by reaſon of the abatement of the former writ of Error.

Le-pool and Tryan.

Mich. 1655. Banc. ſup.

For a prohibition to the admiralty.

VVIld moved for a prohibition to the Court of Admiralty to ſtay a tryal there in a Trover and Converſion, in which they proceeded upon a pretence that the goods in queſtion were taken upon the High Sea, and that by the late Act they have excluſive power in all ſuch caſes, which is not ſo. Glyn chief Juſtice, It was reſolved in Cremers and Cokelyes caſe ſo adjudged, that they have no ſuch power, Therefore take a prohibition, niſi, &c.

Mor-

Morden and Hart.

Mich. 1655. Banc. ſup.

MOrden brought an Action of debt upon an Obligation to ſtand to an Award againſt Hart. Upon nil debet pleaded, and a verdict for the Plaintif, it was moved in Arreſt of judgement, and the exception taken was, that the Award was made but of one part, and ſo not binding to all the parties ſubmitting. The caſe was this, One Stephens and Body on one part, and Hart on the other part ſubmitted to ſtand to the Award. The Arbitrators awarded that Body ſhould pay a certain ſum of money unto Hart in ſatisfaction for the differences betwixt Body and Stephens on the one part, and Hart on the other part, which was objected could not be good, for the money paid by one could not be in ſatisfaction for another, and ſo the Award is not made to conclude all the parties ſubmitting, for Stephens was not concerned in it, and the Award is with an Ita quod, which ought to be a general Award, and include all parties, and therefore if it be void in part it is void in all. But Green on the other ſide anſwered, though the Award ſhould be naught in part, yet it may be good as to Body that paid the money, and the moneys ought to be received as they are paid, and that is for Body and Stephens, and may be well in ſatisfaction for both of them. It was alſo urged by Howell on the ſame ſide, that it appears that Body and Stephens are partners, and this will make an end of the matter, for then the money paid by one of them may ſatisfie for the other. Glyn chief Iuſtice, Here is a good Award betwéen two of the parties that ſubmitted, but there appears nothing to be awarded as to Stephens, the third parry, for it doth not appear that he can take any benefit by the Award of the money to be paid by Body, or that it can be any ſatisfaction for him, but only for Body. Iudgement for the Defendant, niſi. &c.

Arreſt of judgement in debt upon an Obligation to ſtand to an Award.

Award in part.

Iudgement for the Defendant.

Buſfield and Norden.

Mich. 1655. Banc. ſup.

A Writ of Error was brought by Buſfield againſt Nordon to reverſe a judgement given in the Court Military of Rippon in an action upon an indebitatus aſſumpſit for wares ſold, wherein there being a judgement given againſt the principal, a ſcire facias iſſued out againſt the Bail, and a judgement was thereupon had againſt him, the bail thereupon brings a writ of Error to reverſe both theſe judgements, and aſsigns for Error, that there was no iſſue joyned in the firſt judgement, and that being erroneous, and being the ground upon which the ſcire facias did iſſue forth, whereupon the ſecond judgement was given, the ſecond judgement cannot be good. Glyn chief Iuſtice, But the principal judgement ought to be reverſed by the principal, and not by the bail, and therefore the writ of Error is not well brought by the bail, therefore let it abate.

Error to reverſe a judgement upon an indebitatus aſſumpſit by the Bail.

Bail cannot reverſe the principal judgement.

The writ abated.

Mi

Vidian and Fletcher.

Mich. 1655. Banc. ſup.

Scire facias for an Infant to reverſe a fine levied during Coverture.

VPon view of an Infant brought into Court to be inſpected, who had during coverture joyned with her husband in levying a fine of her lands ſhe was by the Court adjudged within age, whereupon a ſcire facias iſſued out to the Terr-tenants who came in and pleaded that ſhe was of full age at the time of the fine levied, upon which plea iſſue was joyned, and a tryal was had at the Aſsizes, and a Verdict for the Plaintif, who now came in Court and prayed for judgement upon the Verdict. Glyn chief Juſtice; The Court is to judge of the Infancy, and not the Jury, and therefore you have not proceeded duly, but the proceedings do no hurt, for we judge ſhe was within age, Therefore let the fine be reverſed, niſi, &c. Nota.

Jury not to try Infancy.

Fine reverſed.

and the hundred of Crondon.

Mich. 1655. Banc. ſup.

Arreſt of judgement in an Action upon the Statute of Hue and Cryes. Caſe. Statute.

AN Action of Treſpaſs upon the caſe was brought againſt the Hundred of Crondon in Hampſhire upon the Stat. of Wincheſter, by one that was robbed within the hundred, & upon the tryal a verdict paſſed for the Plaintif, It was moved on the behalf of the Hundred in Arreſt of judgement, 1. That the Plaintif had miſtaken his Action, for whereas he hath brought a general Action of Treſpaſs upon the caſe, he ought to have brought an Action upon the Statute. 2ly. He declares that he took his Oath before I. S. a Juſtice of Peace in the County, whereas it ſhould be for the County. 3ly. He hath not expreſſed that he took his Oath before a Juſtice aſsigned to keep the Peace. 4ly. There is no iſſue joyned. 5ly. He ſaith that he took his Oath 20 days, but doth not ſay next before, as the Statute directs. Windham on the other ſide anſwered to the firſt Exception, that it is uſual of latter times to declare in an Action upon the Caſe generally. To the ſecond he ſaid it is no exception, for a Juſtice of Peace is not an Officer aſſigned to a place. Serjeant Twiſden, But it doth not appear that you took your Oath 20 days before your Original ſued out. Glyn chief Juſtice, That appears well enough upon the Record. But the writ here is in an Action upon the caſe generally, & yet he declares in an Action upon the caſe upon the Statute, which is not all one, and ſo the Declaration varies from the writ, for an Action upon the Caſe upon the Statute is an extraordinary Action upon the caſe, but I believe it is well enough, notwithſtanding, it being after a Verdict, and not being a materiall variance, but a bare recital, Therefore let the Plantif take his judgement.

Variation.

Recital judgement.

Conye and Lawes.

Mich. 1655. Banc. ſup.

Hill. 1655. rot. 251.

Error to reverſe a judgement in an Action upon a promiſe

LAwes brought an Action upon the caſe againſt Conye upon an indebitatus aſſumpſit upon an accompt, the Defendant pleaded non aſſumpſit, and

and upon iſſue joyned, a ſpecial verdict was found for the Plaintif, and a judgement given for him, upon the ſpecial verdict the caſe appeared to be this, the Plaintif Laws maried a Feme unto whom monies were owing dum ſola fuit, and the Baron, and the Debtor come to an accompt for the mony, the Debtor being found in arrere promiſeth the Baron to pay him the mony due upon the accompt at a certain day, & for not performing this promiſe the Plaintif brought his Action. Upon the writ of error brought it was urged, that the Plaintif did not ſhew how the monies became due to the wife, and that the accompt did not alter the Caſe, and Hernden and Palmers caſe, Hob. 88. was cited to be like this caſe, and Done and Thorns caſe, 24 Car. in this Court was alſo cited, and 20 H. 6. f. 20. b. Wild on the other ſide ſaid, that the Declaration is true, and the verdict contradicts it not, for by the mariage the debt is due to the Husband, and therefore he ought to bring the Action, and the caſe differs from Hobarts caſe. Glyn chief Juſtice, Hobarts caſe is not like this, it is true the accompt alters not the nature of the Action, but here the verdict finds that there was a ſpecial promiſe made to pay the monies to the Husband, and there may be an actual promiſe in an inſimul computaverunt, although the law doth create a promiſe where a ſpecial promiſe is not ſhewed, and here is a diſtinct day for payment of the mony alleged, and the conſideration is good, for it is a debt due to the Husband, and he may releaſe it, and the doubt made by the Jury is, whether the Action be well brought by the Husband alone or not. At another day Green urged, that here doth not appear a conſideration for the ſpecial promiſe, and then it can be taken but for a promiſe in Law, and upon ſuch a promiſe the Action cannot lye, for the debt is due to the wife notwithſtanding the mariage. Wild anſwered, the accompt is good to the Baron to ground the promiſe upon, and he cited Partridges Caſe, and the promiſe here to pay the mony at a day is a ſpecial promiſe and not created by the Law, and this makes the conſideration good, and the Declaration is true, for it is the Husbands debt, and the verdict confirms it, and if the wife by the adminiſtration belongs to the Husband, which proves it is his debt, and the writ of error is not good, and ſo the Record is not removed, the writ of error is directed to the Maior and Sheriffs of Lincoln, and the Court is ſaid to be held before the Sheriffs only. Glyn chief Juſtice, The nature of the debt is not changed by the accompt, no more than the accompting with an Executor, but a ſpecial promiſe may alter the debt: Here is a promiſe made to the Husband, and he hath brought the Action as if the Defendant were indebted to him, yet he is not indebted to him generally, but ſub modo, viz. jure uxoris. There is another point in the Caſe, I conceive here is cauſe of Action, but whether it be applicable to make it a ſpecial debt is the queſtion. But the writ of error is naught, therefore let it be quaſhed.

Special promiſe.

Conſideration Releaſe.

Promiſe in law.

Debt changed.

Writ of Error quaſhed.

Arnold and Floyd.

Mich. 1655. Banc. ſup.

ARnold a Brver brought an Action of Debt upon a Bond to perform Articles againſt Floyd his Clark. The effect of one of the Articles was, that the Defendant ſhould deliver weekly ſuch Ale and Beer as ſhould be delivered unto him to ſuch Cuſtomers as he had in his charge, & to receive the monies of ſuch Cuſtomers as were due for the ſame, and the exciſe, and ſhould accompt every Saturday weekly unto the Plaintif for ſuch monies as he ſhould receive for the ſame, for breach of Covenant the Plaintif

Arreſt of judgment in debt upon an Obligation to perform articles.

aſsigns that the Defendant did not accompt with him for ſuch monies as he had received upon Saturday the 26th. of July 1654. and for this he brings his Action. Upon iſſue joyned, and a verdict found for the Plaintif, it was moved in arreſt of judgement, that the breach was uncertainly alleged, becauſe the Plaintif doth not ſhew that the Defendant had any Cuſtomers in his charge, or who they were, or that he had delivered Ale or Beer to them, or received any mony of them. Glyn chief Juſtice, The charge is too generally ſet forth, for you ought to have ſhewed what monies he hath received, and that it was of thoſe Cuſtomers in his charge, for the Plaintif may have ſeveral Clarks, and ſome Cuſtomers may be in the charge of one Clark, and ſome in the charge of an other, ſo that the charge is not certain. Therefore let Nil capiat per billam be entred for the Defendant.

Incertain charges.

Judgement Nil capiat per billam.

Toft and Day.

Mich. 1655. Upper Bench.

Error to reverſe a judgement in an Action upon the Caſe for making a falſe return of a Writ.

AN Action of Debt was brought in the Common pleas, and a judgement given for the Plaintif, who thereupon takes out execution, viz. a Fieri facias, and delivers it to the Sheriffs of Norwitch, who executed it by levying the debt upon the goods and chattels of the Defendant, after which the Sheriffs were diſcharged their Office, and new Sheriffs elected in their places. Whereupon the old Sheriffs redelivered to the party the deeds goods taken in execution, by vertue of the Fieri facias, and endorſed nulla bona upon the writ of Fieri facias, and delivered it ſo endorſed unto the new Sheriffs, and for making of this return an Action upon the Caſe was brought in the Common-pleas againſt the two old Sheriffs, and a judgement obtained againſt them; whereupon a writ of error was here brought to reverſe this judgement, and theſe exceptions were taken, 1. That the Plaintif in his Declaration in his Action upon the Caſe doth not ſay, that the old Sheriffs did return nulla bona, but only that they did endorſe nulla bona upon the writ, which is not a return, and ſo the Action cannot lye for a falſe return. 2ly. He ſayes that the old Sheriffs delivered the writ thus endorſed to the new, but doth not ſay that they did deliver it to be returned, viz. by Indenture, as the uſe is. 3ly. It doth not appear whether there were any return of the writ made either by the old Sheriffs or the new. 4ly. The Action is brought in a wrong County, for it is not brought in the County where the endorſement and delivery over of the writ was. Latch of councel on the other ſide anſwered, that the Action was brought for delivering the goods back again to the Defendant after they had taken them by vertue of a Fieri facias, and not for the endorſement made upon the writ. The rule was to reverſe the judgement, except cauſe ſhewed to the contrary. At another day the Court was moved to affirm the judgement, and the councel on the other ſide inſiſted upon the former exceptions to reverſe the judgement. Glyn chief Juſtice cauſed the Record to be read, and upon Oyer thereof ſaid, I conceive it is well, and according to the courſe in that kind, for the old Sheriffs to make the return, and to deliver the writ over by Indenture to the new Sheriffs, and here is alſo a verdict in the Caſe, and a return is not properly a return untill it be filed here, yet it is the return of the Sheriff in the County where he is Sheriff. Shew cauſe upon notice why the judgement ought not to be reverſed. Antea, Q.

Return.

Indenture.

Venue.

Den-

Denton.

Mich. 1655. Banc. ſup.

AN order of the publique Seſsions made againſt one Denton for the keeping of a Baſtard-child was removed into this Court by a Certiorari, and the party alſo who was committed to Ailsbury gaol for diſobeying the order, was brought into Court upon a Habeas Corpus granted unto him, and upon the reading of the return of the Habeas Corpus, this exception was taken to the return, that it appears by the return that the order made for Denton to keep the Baſtard-child was made by the Juſtices at the Quarter Seſſions, and that for not obeying this order he was committed to the Gaol by two Juſtices at a private Seſsions of the peace, whereas the Juſtices of the Quarter Seſsions had no authority by the Statute to make ſuch an order, for it ought to have been made by the next two Juſtices of peace to the place where the Baſtard was born. And to this Glyn chief Juſtice agreed, but would not releaſe the Priſoner till he was bound over with good bayl to the next Quarter Seſsions for the County of Buckingham, to appear there and to anſwer the fact. To quaſh a return of an order of Seſſions.

Att Lee and the Lady Baltinglas.

Mich. 1655. Banc. ſup.

THe Court was moved on the Defendants behalf, that there was an Action upon the Caſe brought againſt Baron and Feme, and the Feme had appeared, but the Baron would not, and that the Plaintiffs Attorney ſtood to have ſpecial bayl for her, which ſhe could not procure, and therefore it was prayed, that ſhe might be delivered upon common bayl. But Glyn chief Juſtice anſwered, if there be cauſe to have ſpecial bayl the wife muſt lye in Priſon, untill the Husband appear and put in bayl for her, for ſhe cannot put in bayl for herſelf being Covert Baron. To diſcharge a feme covert upon common bayl. Denied.

Elmes and Martyn.

Mich. 1655. Banc. ſup.

THe Court was moved, for the Plaintiff that in reſpect that the Defendant had put in a ſpecial plea, and pleaded a very long Award, which made the plea very long, that therefore he might have time granted unto him by the Court to demur to this plea. But Glyn chief Juſtice anſwered, you need not have time to demur to the Plea, for you may do that preſently: but if you deſire time to rejoyn in reſpect of the length of the Plea, you ſhall have it. For time to demur to a plea. Denied. Rejoynder.

Plummer and Sir Iohn Lenthall.

Mich. 1655. Banc. ſup.

THe Plaintiff ſhewed to the Court by his Counſel that he had brought an Action of eſcape againſt Sir Iohn Lenthall the Mareſchall of the Marſhalſea of this Court, and had thereupon a judgement and an execu- To put Sir John Lenthall out of his Office.

on against him, but that Sir Iohn though as being Marshall he ought as an Officer of this Court daily to attend the Court, did yet nevertheless absent himself, so that the Plaintif could not take him upon the execution, and that if he were present he doubted, whether he might take him, for fear it would be an escape of the Prisoners committed to him, and therefore prayed that Sir John Lenthall might be put out of his place of Marescall, that so he might take him in execution. Glyn chief Iustice, This is very mischievous, let Sir John shew cause Friday next why he should not pay the monies.

Cause.

Le Gros and Hall.

Mich. 1655. Banc. sup.

To reverse a judgement for expedition.

IN a writ of Error brought in this Court to reverse a judgement given in an Action of debt. The Defendants Councel in the writ of Error moved, that the Court would reverse the judgement because they conceived it was erroneous, for their own expedition, that they might bring a new Action. Glyn chief Iustice, You have not yet confessed the error upon the Record, neither have you pleaded in nullo est erratum, as you ought to do, and therefore you move too soon to have the Iudgement reversed.

Denied for moving so soon.

Hamond and Thornhill.

Mich. 1655. Banc. sup.

Whether Gavelkind-lands held by chivalry be deviseable.

IN the Case of one Hamond and Thornhill in a trespas and ejectment tryed at the Bar, upon the evidence given it was affirmed by Sergeant Twisden, that Gavelkind-lands though they be held by Knight-service tenure, might be all devised by Will by the custom of Kent. Q. for other Councel doubted of it.

Arnold and Floyd.

Mich. 1655. Banc. sup.

THis Case formerly spoken unto, and after a Nil capiat per billam, nisi, &c. ordered to be entred against the Plaintif was again spoken unto, and the Case put, and the exception formerly taken that the Plaintif had declared of a general receiving of mony of such and such Customers, and had not accompted for them, whereas the Articles for breach of which the Action is brought do express that he should accompt for such monies as he should receive of the Customers, which were in his charge only. But Green answered, that though it was not so expressed, yet it should be intended that he had not accompted for all such monies as he had received of the Customers in his charge, and as to another exception which was also formerly taken, viz. that the Plaintif had not shewed what monies he had received, for which the Defendant had not accompted, and so he knew not what answer to give, Green answered, that the Plaintif is not bound to shew it precisely, for he cannot tell what the Defendant had received, and what not, but the Defendant doth know it well enough. Glyn chief Iustice, I doubt of that, for the Plaintif must know that the Defendant hath received some monies

nies which he hath not accompted for, otherwise there is no cause of Action, and though it be not necessary for you to shew all the particular sums the Defendant hath received and not accompted for, yet you must express some sum with which to charge him withall, and therefore as to this exception, I think it material, and the Declaration is too general to charge the Defendant by, for what issue can be joyned upon this? for here doth not appear to be any breach of the Articles, but only by implication that he hath received some monies unaccounted for, and an issue cannot be tryed upon a presumption. Green prayed leave to discontinue the Action But Wild on the other side said it ought not to be, because the Action is brought against a Surety only that was bound for the Defendant that he should perform Articles. Glyn chief Iustice, If he do discontinue the Action, he hath no further remedy against the Defendant. But shew cause why he should not appear upon the Articles, and to pay so much as it shall be found that he is dampnified by breach of them, and then he shall discontinue. Issue. Presumption. Discontinuance.

Devereux and ~~Jackson~~ Johnson

Mich. 1655. Banc. sup.

Hill. 1654. rot. 835.

A Writ of Error was brought to reverse a judgement given in an Action of Debt, and the exception taken was, that the Plaintif had brought his Action for 14 l. and he declares of a Debt due to him for wares sold by him unto the Defendant, which by his own shewing come but to twelve pound. Glyn chief Iustice, I conceive it is not good for the variance, and therefore let the Iudgement be reversed, nisi, &c. Error to reverse a judgement in debt. Variance. Reversed.

Pooly and Markham.

Mich 1655. Banc. sup.

THe Court was moved that the Secondary might return a Jury upon Affidavit that the Plaintif in a former tryal between the parties had feasted four of the Jury, and had also feasted some of the Jury that are returned upon this tryal. Glyn chief Iustice, Let the Freeholders book be brought to the Secondary, and let him return a Iury. For the Secondary to return a Iury. Granted.

The Protector and the Town of Kingston upon Thames.

Yates his Case and others.

Mich. 1655. Banc. sup.

YAtes and four or five other persons, Freemen of the Town of Kingston upon Thames, being disfranchised by the Baylifs, &c. of that Corporation, moved for a writ of restitution to be restored to their freedoms and places in that Town, and had it granted, which writ was accordingly directed to the Bailifs, &c. of that Corporation, who thereupon do make return of the writ, Upon the return of a writ of Restitution to Freemens places in Kingston upon Thames.

writ, and therein ſet forth at large there Charter and priviledges of the Town, and the cauſe of the diſfranchiſement of Yates and the others, and reaſons why they were not to be reſtored. And by the return the matter of fact for which they were diſfranchiſed appeared to be in ſubſtance this, viz. that there was a difference amongſt thoſe of the Corporation about making an Attorny of their Court, at a Court held for the Town, that there was like to be a tumult and uproar about this matter; whereupon the Bayliffs that held the Court did adjourn the Court, and commanded all perſons there to depart, and then they with the reſt that were of their party went away. But the other parties on the contrary ſide, whereof Yates and the reſt that were diſfranchiſed were a part ſtayed ſtill in the Town-Hall, and ſaid, the Court was not diſſolved, and did affirm they were a Court, and did therupon make divers orders or acts of Court, and cauſed them to be entred in the Court book where all the orders uſed to be entred. To this return many exceptions were taken, and firſt by Sergeant Twiſden, 1. That here was no ſufficient matter of fact returned to be done by Yates and the others, to cauſe them to be diſfranchiſed. 2ly. That the return did not ſhew, that the Cuſtoms of their Corporation did warrant them to diſfranchiſe any for ſuch offences, or did ſhew that any perſon had at any time been diſfranchiſed for ſuch offences, 3ly. The return mentions that the perſons diſfranchiſed had broken their oaths as Freemen of the Town, but doth not ſet forth this oath at large as it ought to be. 4ly. They do not ſhew in the return that they had any authority to hold that Court which they diſſolved, nor before whom it was held. 5ly. It is not ſhewed in the return that Yates and the others were at all convented to anſwer their offences, and ſo they are condemned without hearing of them, which is illegal. To theſe exceptions Green of Councel to maintain the return made this anſwer, for the firſt he ſaid, there doth appear a ſufficient fact to be done by Yates and the reſt to cauſe them to be diſfranchiſed, viz. their tumultuous going into the Court, and ſtaying there after it was diſſolved, and making of orders, and entring them into the Book, and cited Sir Iames Bags caſe, that this their fact was a corrupting the orders of the Town. For the ſecond the return doth ſufficiently expreſs, that by their Cuſtoms they may remove perſons from their places in the Corporation for ſuch offences, Removeable. for the return ſaith, that perſons have been from time to time removeable, which is all one as if it had ſaid, they have been removed. 3ly. It is not neceſſary to ſet forth the whole oath of a Freeman, and here is as much of the oath mentioned as is needfull to ſhew that the oath was broken by them. 4ly. It is ſhewed in the return, that the Court was held according to their Cuſtomes, and ſo it ſhall be intended to be a good Court, and rightly held, and it needs not to be expreſſed before whom it was held. 5ly. It is expreſſed that they were convented, and that they had alſo notice of the diſſolution of the Court. Mr. Attorney General on the ſame ſide ſaid, Here is cauſe to diſfranchiſe the parties; for here appears by their fact to be Oppoſition of government. a ſetting up of government againſt government, and this is corrupting of government, and done by knowing perſons that well underſtand the Cuſtome of the Town, which makes their crimes the greater, and it is better returned, that ſuch perſons are removeable, than to ſay they have been removed, and here is more than an opinion of one of the parties againſt the opinon of the others, for they have reduced their opinion into an Act to diſturb the government. Mr. Recorder of London on the ſame ſide ſaid, that here is a fact done to eradicate the whole government of the Town, for doing whereof the parties juſtly deſerve to be diſfranchiſed, and their entring of orders into the Regiſter-book is a corrupting of the Cuſtoms of the Town, and tends to the ſubverſion of the Corporation, and he cited 28 H. 8. Maleverers

verers caſe in Dyer. Alleyn on the ſame ſide. Here is ſufficient cauſe ſhewed in the retorn to turn the parties out of their offices, unto which they pray to be reſtored if there ſhould not appear ſufficient matter to diſfranchiſe them. Roll who when this caſe was firſt moved was chief Juſtice ſaid, here is one Groves that prays to be reſtored, concerning whom the retorn ſhews no cauſe at all why he was removed, but only that he was endicted of Felony, which is not a ſufficient cauſe, for he may be endicted falſely, and it doth not appear that any thing hath been as yet done upon the Endictment, and yet they allege this for cauſe why they will not reſtore him, and if you have no cauſe to remove him, then he is unjuſtly removed, and ought to be reſtored, and this cauſe you have ſhewed, ſuch as it is, was after that he was removed, and ſo could be no cauſe of his removal. But for the reſt there is no queſtion but that here is a high contempt, and juſt cauſe to diſfranchiſe the parties, for here is more than an opinion, as hath been urged for them, for there is an Act of a high nature tending to evert all government in hindring the proceedings of Juſtice, and the profit and welfare of the Town, and a greater offence of this nature cannot be imagined, and therefore for the matter there is cauſe to diſfranchiſe them. But the queſtion is, whether the retorn be good, and as to that I conceive it not neceſſary to ſet forth the whole Oath, or to aver the ſwearing of the Attorney. But the retorn ought to have been, that by their Cuſtome they have uſed to remove perſons for ſuch offences, and not to ſay they are removeable, and of this I doubt and will adviſe. At another day Latch of Councel for Yates urged that the retorn was not good, for they have not ſhewn any Act done to remove any perſon for miſdemeanors, according to the cuſtom, as they have alleged it; for the return ſays only that ſuch parties have been removable, and this is only a poſsibility of an act, and it appears not how they are removable, either by their Cuſtom, or by their Charter, and conſequently here is no ground for their removal returned, Paſch. 33 Eliz. C. B. a potential Cuſtom returned is not good, poſſit & potuiſſet adjudged not good in Sir William Hattons caſe, and 21 Iac. uſus fuit held naught. And as to the Objection that it is not neceſſary to return their power to remove, becauſe it is a thing incident unto their Corporation, I anſwer they have returned a power, but have not made it good by the return. Mag Chart. 25. and to the Objection that a return needeth not to be ſo formal as a pleading, and that therefore if their power do appear upon the whole return it is good enough, I anſwer, that they have failed in the very matter of their preſcription, and not in the form only, and they muſt certifie a good cauſe of their removal, that the Court may judge of it; and as to that which is objected, that their Charter is a very antient Charter, and therefore cannot be pleaded, I anſwer, that they may give it in evidence, and alſo a Charter made time out of mind may be pleaded as an old deed may, although you cannot plead that it was made time out of mind. Serjeant Twiſden on the ſame ſide, All cuſtoms ought to be alleged in facto, 9 Car. Fletcher and Bagnals caſe, Licitum fuit for a Londoner to uſe any trade by the cuſtom of London adjudged to be ill pleaded, and though it may be good in an evidence, yet it is not good in a return. Alleyn on the other ſide ſaid, that the return is good in the returning of the cuſtom, though it would have been ill in the pleading, which is ſtricter than a return need to be, and here is matter enough returned to remove the parties, and the whole cuſtoms need not to be returned, and the informality of the return ſhall not make it ill, for this Court is to judge of the matter of fact returned, and ſo is Giles Bags and Wagoners caſe, and they have returned a cuſtom to remove, and by conſequence ſome have been removed, or elſe the return is falſe, which is not to be preſumed. Windham,

No cauſe of diſfranchiſement.

Have uſed to remove.

Poſsibility of an Act.

Potential cuſtome not good.

Charter pleaded and not given in evidence.

Pleading. Retorn.

ham, Every cuſtom is preſumed by the Law to have a lawfull beginning, and ſhall be intended many times to be by antient Charter, namely, for ſuch things as are not to be claimed without a Charter, but if they may be claimed without a Charter it ſhall be intended otherwiſe. An antient Charter doth not loſe its force by not being confirmed in Eyre, as Latch hath ſaid, 24 H. 6. and there may be a preſcription for things which have never been acted, if it began by Charter, 22 E. 4. f. 9. Green on the ſame ſide The very words of the return do enforce that perſons have been removed. Glyn chief Iuſtice, I have no books delivered me in this caſe; And this Exception was moved the laſt Term, and it is very doubtfull to me, and my Lord Roll would not deliver his opinion, I could wiſh the buſineſs might be compoſed for the peace of the Corporation. To ſay that the lands have been demiſed and demiſable, the words ſhall be taken diſtributive. But me ſeems here is no matter of fact returned for removing of any. At another day the caſe was ſpoken to again, and againſt the return it was excepted as formerly, that the Town had not by the return intitled themſelves to any power to remove the parties, for here is a preſcription only in fieri and not in facto returned, viz. That ſuch perſons have been accuſtomed to be removable, and it doth not ſay they have been removed, and theſe caſes, viz, 20 E. 4. and Mich. 7 Car. Flowers caſe, and Mich. 9 Car. Fletcher and Bagſhaws caſe, and Skipwiths caſe, 25 Eliz. C. B. were cited by Wild on Councel for Yates. Windham on the other ſide as formerly diſtinguiſhed betwixt a pleading, and a return, which needs not be ſo formal as a pleading, but ſhall be taken good to a common intent, and ſaid that Wagoners caſe, which was as this is, was adjudged to be well upon good advice, and the ſubſtance of the preſcription is well ſet forth in the return, and the formality is not to be much ſtood upon, or regarded. Ilevn on the ſame ſide ſaid, that the rule in Wagoners caſe comes home to this. Glyn chief Iuſtice, There is an Action upon the caſe brought by Yates for this matter, and if it be found for him we will reſtore him, be the return as it will. Cuſtom is the main hinge upon which all diſfranchiſements do move, and if that be not well alleged, it will be hard for the diſfranchiſement. Try your cauſe this Term, otherwiſe we will deliver our opinions upon the return. At another day the Court was moved for their opinion upon the return, by Yates his Councel, whether it was good or not. Wherupon Glyn chief Iuſt. anſwered, It were good you would agree as the Court hath adviſed; But ſince you will not we will give our judgement, for the cauſe hath depended long. And firſt I conceive that here is good cauſe to diſfranchiſe the parties for entring of orders made by a pretended Court, which in truth was no Court, for their entry of ſuch orders is very prejudicial to the corporation, and is to the ill example of others, to diſturb the government. But Cuſtom is the main cauſe of diſfranchiſing any perſon, for by the diſfranchiſement the party loſes his freehold, which is no ſmall loſs, and therefore not to be put in practice but upon very good warrant; & yet in ſome caſes for the advancement of government one may be put out of his freehold without a legal proceeding againſt the party, as Sir Iames Bags caſe is. But there muſt be a Cuſtom or a Statute to warrant it. But here appears no ſuch Cuſtom upon the return, for the return is that for ſuch offences the parties have uſed to be removable and diſchargeable, which is meerly imaginary, and a thing in fieri, and not in facto, or in uſage, and ſo it is as a dead thing in the womb which never had birth, for you have not ſhewed that it was at any time put in practice, or have made any direct affirmance of the Cuſtom, as all Cuſtoms uſe to be pleaded. All Cuſtoms imply two things, to wit, a thing poſsible to be done, and that the thing hath ſometimes been done, and ſo are all our pleadings, and the return ought to have

Antient Charter.

Preſcription in fieri.

Subſtance.

Cauſe of diſfranchiſement.

Thing in fieri not in facto.

Poſſibility and uſe.

have in it certainty enough to inform the Court of the matter returned, although it is not required they should be so precise as pleadings ought to be, for both the Court and the party must abide by the return, and it is to be acknowledged as true. In Wagoners case cited, It was touched whether the Custom there was well alleged, and concerning the Customs of London also, which do differ from other customs, they being confirmed by Statute, and there they allege a special act of Common Councel by Custom, and a Statute also to enable them to do as they did. I have considered well of the return, and I hold the return to be naught, and therefore let him be restored. Ask Iustice concurred in opinion. The Court was moved to restore the rest, who were 4 in number, because all their cases were alike. Glyn chief Iustice, Let them be restored also, nisi, &c.

Return should be certain.

Ill return.

Restored.

London and Craven.

Trin. 1655.

rot. 44.

LOndon and Craven entred into Articles by Indenture betwixt them, wherein London did article to pay 110 l. at a certain day to come unto Craven, & Craven did article that upon the receipt of the 110 l. unto him from London, that he would give unto London an acquittance for the 110 l. and would also enter into an Obligation of 400 l. unto London to save him harmless from all claims which should be made unto certain lands in the possession of the said London, in pursuance of these Articles London doth tender the 110 l. unto Craven at the day limited in the Articles, but Craven refuseth to receive the 110 l. of London, and to give him an acquittance, and also to enter into the bond of 400 l. Whereupon London brings an Action of Covenant against Craven for breach of the Articles, and assigns the breach to be, that he did not give him an acquittance for the 110 l. nor enter into the bond of 400 l. according to the Articles, and upon issue joyned a verdict was found for the Plaintif. It was moved by the Defendant in Arrest of Judgement, That here is no breach of Covenant shewed by the Plaintif, for the Declaration is that the Defendant upon the payment of the 110 l. was to give the acquittance, and enter into the bond of 400 l. and here is no payment, but only a tender and a refusal of the 110 l. mentioned, and it was in the Defendants election, either to refuse the 110 l. and to give no acquittance, nor enter into the bond of 400 l. or else to receive it, and give the acquittance, and enter into the bond, and so his refusal is no breach of Covenant. On the other side it was urged that it was not in the Defendants Election to receive the 110 l. or to refuse it, but he was bound by the Articles to receive the 110 l. and to give the acquittance, and enter into the bond of 400 l. Glyn chief Iustice, Here is a Covenant grounded upon Articles indented, and it is the mutual Covenant of both the parties, so that he is bound by the Articles to receive the 110 l. at the day limited, & it is not in his power either to receive it, or to refuse it, as hath been objected, & the Defendant had remedy by the Articles to recover the 110 l. if it had not been payed at the day, and therefore he is bound to receive it, and to give an acquittance for it, and to enter into the bond of 400 l. and we must make a reasonable construction of the words of the parties, But we will advise. At another day the case was again put, and the opinion of the Court desired, And Glyn chief Iustice thereupon said, here is no breach of Covenant alleged to ground the Action upon, for the Articles express, that upon the re-

Arrest of judgement in an Action of Covenant for breach of Articles

Mutual Covenant.

ceipt of the 110 l. the Defendant would give the acquittance, and enter into bond, and the breach alleged is, that the Plaintif tendred the 110 l. at the day, and the Defendant refused to receive it, and hath not sealed the acquittance, nor given the bond of 400 l. and it may be it was the intent of the parties, that it should be in the election of the Defendant either to receive the 110 l. or not to receive it, and the Plaintif is not prejudiced by the Defendants not receiving of it; for if he should sue for the 110 l. the Plaintif may plead this tender and refusal against him, and that will be judged a payment, and when he sues you for the 110 l. you may sue him for the acquittance and the bond. Ask, I have not a book, but I think the case is as it hath been put, and here is no Covenant that the Defendant should receive the 110 l. at the day, Glyn chief Iustice, Nil capiat per Billam, nisi, &c.

Nil capiat per Billam.

Clark and Fitzwilliams.

Arrest of Iudgement in a Trover and Coversion.

AN Action of Trover and Conversion was brought by Clark against Fitzwilliams for divers goods and houshold-stuff, and amongst the rest the Plaintif declared of a Trover and Coversion of 6 Tuns. After a Verdict for the Plaintif it was moved in Arrest of Iudgement, that the Declaration was uncertain, for it cannot be known what is meant by 6 Tuns, and upon this the Iudgement was stayed till the Plaintif should move. Whereupon Serjeant Twisden at another day moved for Iudgement, and said the Declaration was good enough, for it is known that the 6 Tuns are Brewers Vessels, or else they signifie nothing, and then no damages are given for them, according to Osborns case, and the case where the Action was pro viginti ulnis instead of ulmis. Windham on the other side said, that a Tun is a measure, and well known so to be, and you ought to shew certainly of what you doe demand the quantity of six Tuns, and it cannot be said that the six Tuns shall signifie nothing, as Serjeant Twisden supposeth, for here the words are substantive, and signifie by themselves, and not adjective, and Osborns case cited was adjudged upon another reason, for fulcrum lecti signifies a Bedstead, and the Anglice which was added, viz. Curtains and Valence were a meer addition, and no part of the Declaration, and besides they were in English which ought not to have been. Glyn chief Iustice, The Court hath delivered their opinion already, That it is incertain what the Plaintif doth mean by the words 6 Tuns, for this case is not like the cases put, where a thing is mentioned, which doth signifie nothing, for there damages cannot be given for such a thing, for the word Tun doth signifie divers things, but it is incertain what it doth signifie here, and therefore Nil capiat per billam, Ask Iustice ad idem.

Nil capiat nisi.

Fox and Swann.

Mich. 1655. Banc. sup.

Exception against a witnesse.

IN a Tryal at the Bar in a Trespass and Ejectment betwixt Fox Plaintif and Swann Defendant exception was taken against a witness that was produced to prove the lease of ejectment, because he had the inheritance in the lands let, but it was urged by the Councel on the Plaintifs side, that the Defendant did claim under the same person that the Plaintif did, and thereupon

thereupon the witneſs was admitted to be ſworn, and in this caſe it was alſo ſaid that if Leſſée for years do covenant with the Leſſor not to aſsign over his Term without the Leſſors conſent in writing, and do afterwards without ſuch conſent deviſe the Term to J. S. this is not a breach of the Covenant, for a deviſe is not a leaſe. It was alſo ſaid, that if a leaſe for years be forfeited, and the rent for the land let be afterwards received by the Leſſor or by his aſſent, the leaſe is made good again by this Act of the Leſſee for, and the forfeiture is diſpenſed withall. Nota. A Deviſe is not an aſſignment. Leaſe forfeited revived.

Mich. 1655. Banc. ſup.

UPon Articles exhibited in this Court againſt one Alwin an Attorney of this Court for falſe practice and Barratry, and proved againſt him by divers Aſſidavits read in Court, Judgement was pronounced againſt him by the Court, that he ſhould be put out of the Roll of the Attorneys, and be fined 50 l. and turned over the Bar, and ſtand committed. He was turned over the Bar accordingly at the Weſt end of the Bar by the Tip-ſtaffs of the Court. Attorney convicted upon Articles, turned over the Bar.

Martyn and *Miller*.

Mich. 1655. Banc. ſup.

THere were two ſeveral cauſes tryed betwixt Martyn Plaintif, and Miller Defendant, and thereupon there were two venires, and two Diſtringaſſes taken out, and by the miſtake of the Sheriff a wrong Diſtringas was filed to the Venire, viz. that which ſhould have been filed to the Venire in the firſt cauſe, was filed to the Venire in the ſecond cauſe, and this was moved in Arreſt of Judgement. Glyn chief Iuſtice, This is as if there was no Diſtringas, and is therefore helped by the Statutes of Jeofails, but if it were an erroneous Diſtringas it could not be helped, and here was a good iſſue joyned, and a good tryal of that iſſue, and it was but the miſtake of the Sheriff, and may be amended by taking off the wrong Diſtringas from the Venire, and fixing the right Diſtringas in the room of it, and therefore this is no cauſe to arreſt judgement. Arreſt of judgement upon an Error of a Clark. No Rule.

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BE pleaſed to take notice that notwithſtanding my more than ordinary care in Correcting the Preſſe, theſe enſuing Errataes have happened in the Printing, but many of them are but literal, and alter not the ſenſe, and for the others I hope you will pardon them, and correct them by the Errata as you meet with them.

ERRATA.

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