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T H E
L I F E
O F

The RIGHT HONOURABLE

Sir JOHN HOLT, Knight,

Lord Chief Justice of the

Court of KING'S-BENCH;

C O N T A I N I N G

Several Arguments touching the Rights and Liberties of the People, delivered by his Lordship, with great Reason and remarkable Courage, upon most important Occasions, during the Reigns of their Majesties, King *William* the *third*, and Queen *Anne*; taken from the Report of the Lord Chief Justice *Raymond*, &c.

A N D

An ABSTRACT of Lord Chief Justice *Holt's* Will, Codicils, &c.

A L S O

Points of Law, resolved by his Lordship, on Evidence, at *Nisi Prius*.

W I T H

A Table of References to all his Lordship's Arguments and Resolutions in the several Volumes of Reports.

Never before published.

LIBERTATIS, AC LEGUM ANGLICARUM
ASSERTOR, VINDEXT, CUSTOS,
VIGILIS, ACER, ET INTREPIDUS.

By a GENTLEMAN of the *Inner-Temple*.

L O N D O N:

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T H E

INTRODUCTION.

LORD ^a *Bacon* says, of all History, *Biography* is the most profitable and useful: And we may add, that of all Lives, those of Lawyers, are not least interesting: And of all Lawyers, that of the Lord Chief Justice *Holt*, is, perhaps, most worthy to be transmitted to Posterity.

Sir *John Fortescue*, Chancellor to King *Henry the sixth*, told that Prince, “That ^b he thought it a peculiar Blessing, that from amongst the Judges and their Offspring, more Peers and great Men of the Realm had arisen, than from any other Profession or Estate of Men whatsoever, who had rendered themselves wealthy, illustrious, and noble, by their own Application, Parts, and Industry.” And Lord ^c *Coke* has given us an alphabetical List of near two hundred Families, who have advanced themselves by the Law.

There never was an abler, more unbiassed, and upright Judge, since *England* was a Nation, than the Lord Chief Justice *Holt*. His Life is interesting to every Individual, who sets the least Value on the Security of his Liberty or Pro-

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perty;

^a Lord *Bacon's* Works, fol. Edit. 1753, 1 Vol. P. 38.

^b *Fortescue, de Laudibus Legum Angliæ.* fol. Edit. 1741, P. 123.

^c Lord *Coke's* Preface to his second Report.

perty; his Lordship was always remarkably strenuous in nobly asserting and as vigorously supporting the Rights and Liberties of the Subject, to which he paid the greatest Regard upon all Occasions, and never suffered the least Reflection tending to depreciate either to pass uncensured, or indeed, without the severest Reprimand; in Confirmation of which, we have inserted the following most extraordinary Instance.

“ Mrs. *Stout*, ^d Mother of Mrs. *Sarah Stout*, sued a Writ of Appeal out of *Chancery* against *Spencer Cowper*, Esq; youngest ^d Son of Sir *William Cowper*, Baronet, Barrister ^e at Law, Justice of Peace, Captain of the Militia, [and afterwards King’s ^f Council, and one of the ^g Justices of the Court of *Common Pleas*] for the supposed ^h Murder of her Daughter, in the Name of an Infant, who was a Relation to the said *Sarah Stout*, and her Heir; and before the Writ was returnable, procured himself to be admitted Guardian to the Infant in the said Appeal by the Lord Chief Justice ^d *Holt*, at his Chambers. After this, the Friends and Mother of the Infant, being ^d influenced

^d Lord *Raym.* Rep. P. 555.

^e Mod. Rep. 12 Vol. P. 372.

^f Id. P. 478.

^g Lord *Raym.* Rep. 2 Vol. P. 1510. Append. to *Chron. Juridical.* P. 17.

^h See his Trial in *Salmon’s* critical Review of the State Trials, P. 717. where you will find his Observations upon that Trial. He says, it was one of the most memorable ones in the Age, and the World, to this Day, divided in their Opinions, concerning the Innocency of the Prisoner. Id. Ibid. It is the first Trial in the Collection, published in 1734, in four Volumes folio.

I N T R O D U C T I O N. v

ced by the ⁱ *Cowpers*, went to the Under-sheriff with the Infant, and demanded of him the Writ of Appeal, who delivered it accordingly, whereupon the Writ was burnt, and so lost.”

“ In this ^k Case, the Year being expired, they could not have a new Writ of Course, and therefore, afterwards, in the Vacation before ^l *Trinity* Term, 1701, 13 *Will.* 3. a Petition was preferred to Sir *Nathan Wright*, ^l lately made Lord Keeper of the Great Seal of *England*, to have a new Writ of Appeal granted. But upon the Hearing of Council on both Sides, more than six Hours before him, assisted by Lord Chief Justice *Treby*, the Lord Chief Baron *Ward*, and Mr. Justice *Powel*, (whom my Lord Chief Justice *Holt* sent in his Place) and Sir *John Trevor*, the Master of the Rolls; by the unanimous Opinion of them all, the Petition was rejected. Some, ^k especially *Treby*, alledging for Reason, that an Appeal was a revengeful odious Prosecution, and therefore deserved no Incouragement, upon which Occasion *Holt*, with great Vehemence and Zeal, said, “ he wondered that any *Englishman* should brand an Appeal with the Name of an ^m odious Prosecution, for his Part, he looked upon it to be a noble ⁿ Remedy, and a true Badge of the *English* Rights and Liberties, and referred to the Statute of *Gloucester*, Chap. 9. [6 *Edw.* 1. 1278.]^o and

ⁱ Mod. Rep. 12 Vol. P. 373.

^k Mod. Rep. 12 Vol. P. 375.

^l Lord *Raym.* Rep. P. 557.

^m Lord *Raym.* and Mod. as last above.

ⁿ Lord *Raym.* as last above.

^o 2 *Inst.* 279.

and the Comment thereupon, in 2 *Inst.* 314. which ^p Statute has provided, That an Appeal shall not be abated so lightly as before it has been; but if the Appellant declares the Fact, the Year, the Day, the Hour, the Time of the King, and with what Weapon, the Appeal shall be maintained. And 3 *Hen.* 7. Chap. 1. which gives Power to proceed at the Suit of the King within the Year, does yet save the Appeal to the Party after Acquittal. And therefore, since this Remedy has been favoured by Acts of Parliament, and tends to the Support of Families, and is of evident Necessity in some Cases (to say nothing of this present Case, but only that a very odd Method has been taken, and that too publicly avowed, for withdrawing this Appeal) the Judges ought to encourage Appeals.”

No Chief Justice, perhaps, ever continued in that Post so long as Lord Chief Justice *Holt* did; his Lordship having maintained it twenty or two Years successively, with great Reputation for his Courage, Integrity, and compleat Knowledge in his Profession; he applied himself with great Assiduity to the Functions of his important Office; he was a perfect Master of the Common Law, and as his Judgment was most solid, his Capacity vast, and Understanding most clear, so had he a Firmness of Mind, and such a Degree of Resolution, as could never be brought to swerve in

^p Lord *Raym.* as last above.

^q *Le Neve's Monument. Anglican.* 1 Vol. P. 168.

^r *Burnet's Hist. of his own Times,* 2 Vol. P. 543.

in the least from what he thought to be Law and Justice ; he had ^s upon great Occasions shewed an intrepid Zeal in asserting the Authority of the Law ; for he ventured to incur the Indignation of both Houses of Parliament by Turns, when he thought the Law was with him : Those who had the Happiness of living in his Time, were more immediately sensible of his Justice, Wisdom, and Integrity. His Advancement to the honourable Station which he so long and so well filled, is an unerring Proof that real Merit will make it's own Way without any Assistance, without any little mean Arts and Assiduities, and that the only certain Method to obtain true Honor, is to deserve it. To his Justice and unshaken Integrity, and the universal Suffrages of Praise of a whole ^t Nation for such a Behaviour, we may possibly, in a great Measure, be indebted for such a Series of great Men since his Time, in the Profession of the Law, not be equalled in any former Period of History, and not likely to be exceeded in any future.

Great and good Men, who dare do Right, without Regard to the Strength of Opposition, or the Clamours of a Multitude, are not only a Blessing to the Age in which they live, but even to succeeding Generations also, by the Influence which their glorious Conduct has in exciting Posterity to imitate their Virtues.

A 4

Hear

^s *Burnet's Hist. of his own Times, 2 Vol. P. 543.*

^t Nothing gave a more general Satisfaction than the naming Sir *John Holt* Lord Chief Justice. This Nomination was generally well received over the Nation. *Burnet, Boyer, Tindal.*

Hear the Sentiments of the celebrated *Addison* on this Subject.

“ There is no Virtue (says ^a he) so truly great and God-like as Justice; most of the other Virtues are the Virtues of created Beings, or accommodated to our Nature as we are Men. Justice is that which is practised by God himself, and to be practised in its Perfection by none but him. Omniscience and Omnipotence are requisite for the full Exertion of it. The one, to discover every Degree of Uprightness or Iniquity in Thoughts, Words, and Actions. The other, to measure out and impart suitable Rewards and Punishments.

As to be perfectly Just is an Attribute in the divine Nature, to be so to the utmost of our Abilities, is the Glory of a Man. Such an one who has the public Administration in his Hands, acts like the Representative of his Maker, in recompencing the virtuous, and punishing the Offenders. By the extirpating of a Criminal, he averts the Judgments of Heaven, when ready to fall upon an impious People; or, as my Friend *Cato* expresses it, much better in a Sentiment conformable to his Character.

*When by just Vengeance impious Mortals perish,
The Gods behold their Punishment with Pleasure,
And lay th' uplifted Thunder-bolt aside.*

When

^a *Guardian*, No. 99.

When a Nation once loses its Regard to Justice ; when they do not look upon it as something venerable, holy, and inviolable ; when any of them dare presume to lessen, affront, or terrify those who have the Distribution of it in their Hands ; when a Judge is capable of being influenced by any Thing but Law, or a Cause may be recommended by any Thing that is foreign to its own Merits, we may venture to pronounce that such a Nation is hastening to its Ruin.

For this Reason, the best ^w Law that ever passed in our Days (says *Addison*) is that which continues the Judges in their Posts during their good Behaviour, without leaving them to the Mercy of such, who, in ill Times might, by an undue Influence over them, trouble and pervert the Course of Justice.

Able and upright Judges are to be reckoned among the greatest national Blessings, and should have that Honor paid them whilst they are yet living, which will not fail to crown their Memory when dead.

I always rejoice (says he) when I see a Tribunal filled with a Man of an upright and inflexible Temper, who in the Execution of his Country's Laws can overcome all private Fear, Resentment, Solicitation, and even Pity itself. Whatever Passion enters into a Sentence or Decision, so far will there be in it a Tincture of Injustice. In short, Justice discards Party, Friendship, Kindred, and is therefore always represented as blind, that we
may

^w Stat. 12 & 13 Will. 3. Chap. 2.

may suppose her Thoughts are wholly intent on the Equity of a Cause, without being diverted or prejudiced by Objects foreign to it."

If the Act which continued the Judges in their Posts during their good Behaviour, was deemed by that discerning and judicious Writer *Addison*, the best Law that ever passed in his Days, how ought we to esteem that ^x which secures our Judges in the Enjoyment of their Offices, during their good Behaviour, *notwithstanding the Demise of the Crown*, and which establishes their Salaries during the Continuance of their Commissions, but more especially, his Majesty's most gracious ^y Speech to his Parliament on that great Occasion, wherein he was pleased to declare, that he looked upon the Independency and Uprightness of Judges as essential to the impartial Administration of Justice, as one of the best Securities to the Rights and Liberties of his loving Subjects, and as most conducive to the Honor of his Crown: Can we, as a grateful and loyal People, sufficiently admire or revere his Majesty for these his convincing Proofs of a noble and determined Resolution to preserve the Constitution, and the Rights and Liberties of the People inviolate? Can we, as Subjects, be insensible of the Blessings we enjoy when we reflect on his Majesty's Goodness, in having vouchsafed to appoint Persons of the greatest Integrity and Abilities, to administer Justice in the several Courts of Judicature of this Kingdom,

^x Stat. 1 Geo. 3. Chap. 23.

^y On Tuesday, 3d March, 1761.

dom, Persons sedulously careful of the Rights and Liberties of the People, and who would not, on any Consideration, either by Hope or Fear, Rewards or Threats, be induced to act contrary to what is Right? How sincere then must be the Satisfaction of every Individual, if he does but consider for a Moment, that by this happy Means his Life, his Liberty, his Property, his Reputation, and every Thing in the least dear and valuable, is fully and effectually secured from all Injury.

During the Time Lord Chief Justice *Holt* presided in Court, several Cases of the utmost Importance, and highly affecting the ^z Lives, ^a Rights, ^b Liberties, and ^c Properties of the People came in Judgment before him. There was a remarkable Clearness and Perspicuity of Ideas in his Lordship's Definitions; a distinct Arrangement of them in the Analysis of his Arguments; and the real and natural Difference of Things was made most perceptible and obvious, when he distinguished between Matters which bore an untrue Resemblance to each other. Having thus rightly formed his Premises, he scarce ever erred in his Conclusions; his Arguments were instructive and convincing, and his Integrity would not suffer him to deviate from Judgment and Truth in Compliance to his Prince, or as observed before, to either House of Parliament: And they all paid that

^z *Plummer's Case*, P. 47, 48. *Marwridges's Case*, P. 95.

^a *Ashly and White*, P. 74.

^b *The Queen against Paty*, P. 90.

^c *Coggs and Barnard*, P. 60.

that Regard to Justice in the Person of Lord *Holt*, as not to be offended at his Decisions; several of which seemed to cross their own Interests or Determinations. There is an Instance of each Sort in the following Pages, *viz.* Lord *Banbury's* Case, and the Queen against *Paty*.

That his Lordship's Arguments therefore are well worth the Perusal of every *Englishman*, need not, we presume, be much insisted on at this Time of Day, especially as most of them are now so faithfully and judiciously reported by that eminent Lawyer, the Lord Chief Justice *Raymond*.

The Reader will find the following most remarkable ones (for all would fill Volumes of themselves) inserted at large in the ensuing Sheets, *viz.*

1. Lord *Banbury's* Case, P. 8.
2. The Banker's Case, P. 20.
3. *Lane* against *Cotton*, P. 37.
4. The King against *Plummer*, P. 47, 48.
5. His Lordship's Speech to *Boucher*, P. 58.
6. *Coggs* against *Barnard*, P. 60.
7. *Ashby* against *White*, P. 74.
8. The Queen against *Paty*, P. 90.
9. The Queen against *Mawgridge*, P. 95.

After what has been said of the Character of Lord Chief Justice *Holt*, and of the Authority of his Lordship's Arguments, it will, we presume,

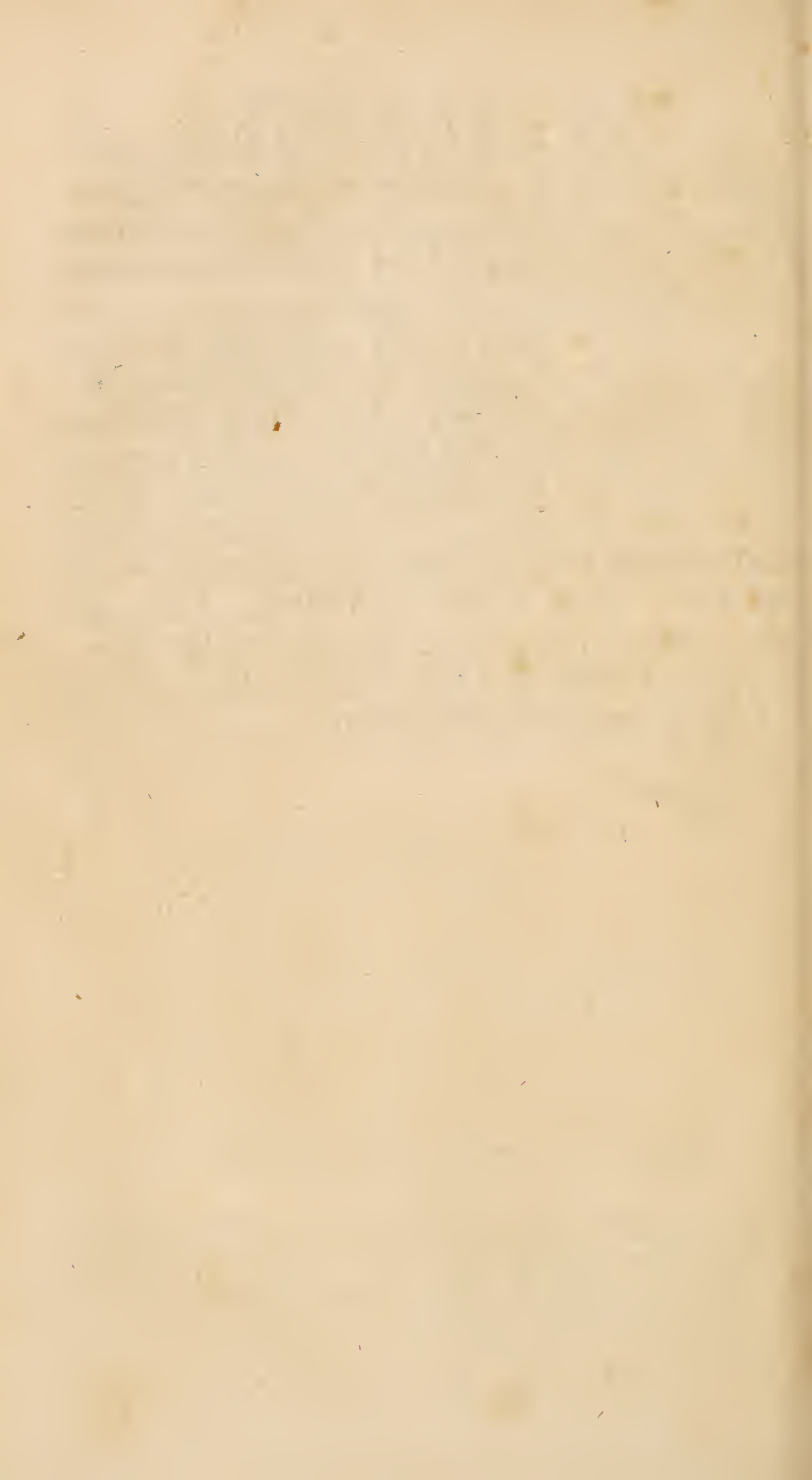
sume,

fume, be needless to apologize for inserting the Points of Law resolved by him, upon Evidence in Trials, at *Nisi Prius*, or the Table of References to his Arguments and Resolutions.

As his Lordship's Family is but little known to the World in general, for the Satisfaction of the Public, an Abstract of his Will, Codicils, &c. extracted from the Registry of the Prerogative Court of *Canterbury*, is subjoined. It is observable, that not a Syllable concerning this consummate Judge, or any of his Family, is to be found, either in the ten Volumes, folio, of the General Dictionary; the five of the *Biographia Britannica*; or, the eleven large octavo of the *Biographical Dictionary*.

Trinity Vacation,
1763.

J. R.



T H E

L I F E and C H A R A C T E R

O F

Sir *JOHN HOLT*, Knight,

L A T E

Lord Chief Justice of the *King's-Bench*.

THE Right Honourable Sir *John Holt*, Knt. Lord Chief Justice of the Court of *King's-Bench*, in the Reign of their late Majesties King *William* and Queen *Mary*, most eminent for his Abilities, Integrity, and Courage, in the Execution of his high and important Office, at a Time when his Prince and Country stood much in Need of an able and upright Judge, was the eldest Son of Sir *Thomas Holt*, Knight,^a Serjeant at Law in King *Charles* the Second's Reign; by *Susan* his Wife,

B Daugh-

^a Sir *Tho. Raym. Rep. P. 238. Dugdale's Chronica Series. P. 121. Chronica Juridicialia. P. 205.* He received his Writ on the 16th Day of *October, 1677, 29 Char. 2.* It may not seem totally foreign to our Subject to insert in this Place the Serjeant's Writ and Oath, the Writ is as follows,

“ *Charles* the second, by the Grace of God, of *England, Scotland, France, and Ireland*, King, Defender of the Faith, &c.” [which means, (says the learned Doctor *Burn*) “ *and of the Church of England, and also of Ireland in Earth, the supreme Head,*” *Burn's Ecclesiastical Law, 2 Vol. P. 172, 354. Stat. 35 Hen. 8. Chap. 3.*] To our beloved and faithful *Thomas Holt*, Esq; Greeting, Inasmuch as We have, with the Advice of our Council, ordained, That you shall take upon you the State and Degree of a Serjeant at Law, from the Day of *St. Michael*, in three Weeks,

We

Daughter of *John Peacock*, of *Chawley*, near *Commore*, in the County of *Berks*; he was ^b born in the Year 1642, 17 *Char.* 1. in a Market-town called *Thame* in *Oxfordshire*, and educated in *Abingdon* School, while his Father was Recorder of that Town. He became a Gentleman Commoner of ^c *Oriel* College, *Oxford*, under the Tuition of Mr. *Francis Barry*. In the Year 1658, 10 *Char.* 2. he entered himself of ^d *Gray's-Inn* before he took a Degree, sometime after which he was called to the Bar, where applying himself with great Industry to the Study of the Common Law, he arrived at so great Knowledge therein, that he soon became a very eminent Barrister, infomuch, that when the Earl of *Danby* (great Grandfather to his present Grace the Duke of *Leeds*) was, in the Year 1678, 30 *Char.* 2. im-

We Command, and firmly injoin you to settle and prepare yourself for taking upon you the aforesaid State and Degree, in Form aforesaid, and this you are in no wise to omit, under the Penalty of 1000*l.* Witness Myself at *Westminster*, the *third* Day of *July*, in the *twenty-ninth* Year of our Reign.

The Label was indorsed, “ To our beloved and faithful *Thomas Holt*, Esq; to take the State and Degree of a Serjeant at Law, “ returnable in three Weeks of *St. Michael*.” *Barker.*

Sir Tho. Raym. Rep. P. 238.

The Serjeant's Oath is,

“ That you shall swear, that well and truly you shall serve the King's People as one of the Serjeants at Law, and you shall truly counsel them that you shall be retained with, after your Cunning, and you shall not differ, tract, or delay their Causes willing for Love of Money, or covetous of any Thing that may turn to your Profit; and you shall give Attendance accordingly, as God you help, by the Contents of this Book.” *Show.* Rep. 2 Vol. P. 102, 103.

Note; the Motto to his Serjeant's Ring was *Gratiâ Regis, non Operibus Legis*; intimating, That his Preferment was owing to the King's Favor, not to *his* Merit. *Freem.* Rep. P. 233. *Sir Tho. Raym.* Rep. P. 238.

^b *Wood's Athens Oxonienses*, Vol. 2. Column 964.

^c *Wood* as above.

^d *Lord Raym.* Rep. P. 604. *Mod.* Rep. 3 Vol. P. 100.

impeached in Parliament by the Commons, the Lords appointed Serjeant *Raymond*, (Father of that eminent Lawyer, the late Lord Chief Justice *Raymond*), Mr. *Saunders*, afterwards Chief Justice of the ^e *King's Bench*, and Mr. *Holt*, to be of his Council; but the ^f Commons, by a Vote, which was posted round *Westminster-Hall*, and the Parliament-House, prohibited the same upon the severest Penalties.

On the 13th Day of *February*, 1685, 2 *James II.* he was made ^g Recorder of *London*, by Letters Patent, by ^h Commission, in the Place of Sir *Thomas Jenner*, made one of the Barons of the ⁱ *Exchequer*, in the Room of Sir *Edward Neville*, and a ^k Knight by the Favor of King *James the second*.

Having discharged the Office of Recorder with much Candor and Applause for about a Year and an half, he was removed thence, because he would not give his Hand towards the taking away the Test,^l but ^m another gives us this Account of it, “ and though King *James the second* had no other Wars, but against the Laws and Constitutions of the Nation, yet he would have the Act ⁿ which makes it Felony without Benefit of Clergy, for any Soldier taking Pay in the
B 2
King's

^e *Show. Rep. Vol. 2. P. 252. pl. 260. Sir Tho. Raym. Rep. P. 478. Fortesc. Rep. P. 383.*

^f *Boyer's Annual List of the Deaths of eminent Persons, at the End of his History of Queen Anne, P. 52.*

^g *Wood's Athen. Oxon. Vol. 2. Col. 964. Show. Rep. Vol. 2. P. 466.*

^h *Maitland's History of London, Vol. 2. P. 1206.*

ⁱ *Show. Rep. Vol. 2. P. 466.*

^k *Wood's Athen. Oxon. Vol. 2. Col. 964.*

^l *Wood, Ibid.*

^m *Coke's Detection of the Court, and State of England, Vol. 2. Lib. 5. P. 455.*

ⁿ 2 & 3 *Edw. 6. Chap. 2. Sect. 6.* which is repealed as to the Felony, by Stat. 1 *Mar. Sess. 1. Chap. 1.* and revived by Stat. 4 & 5 *Phil. & Mar. Chap. 3. Sect. 9.*

King's Service, in his Wars beyond Sea, and upon Sea, or in *Scotland*, to desert his Officer, to extend to this Army, thus raised by King *James* the *second*, in Time of Peace, to inflave the Nation, in the Year 1687, 4 *Jam.* 2. (or about the latter End of the Year 1686,) and because the Recorder of *London*, Sir *John Holt*, would not expound this Law to the King's Design, he was put out of his Place, and so was Sir *Edward* ° *Herbert* from being Chief Justice of the *King's Bench*, to make Room for Sir *Robert* ^P *Wright* to hang a poor Soldier upon this Statute, and afterwards this Statute did the Work without any further Dispute. On the *twenty-second Day of April*, in the Year 1686, 3 *Jam.* 2. or thereabouts, he was called to the Degree of a Serjeant ^q at Law with many others."

† Being chosen a Member in the Convention Parliament, called by the Prince of *Orange*, to settle the Nation, upon King *James* his withdrawing into *France*, in the Year 1688, 5 *Jam.* 2. he was appointed to be one of the Managers for the Commons, at the Conferences held with those of the Lords, about the ABDICATION, and the VACANCY of the Throne; he had an Opportunity to shew his great Abilities and Inclinations upon that solemn Occasion; and it is not at all un-

° *Mod. Rep.* 3 Vol. P. 125. *Show. Rep.* Vol. 2. P. 511. pl. 475. *Wood's Athen. Oxon.* 2 Vol. Col. 992. When King *James* asked him to vote for the Repeal of the Test, he answered, he could not do it in Honor or Conscience; the King said, he knew he was a Man of Honor, but the Rest of his Life did not look like a Man, that had great Regard for Conscience; (for he was indeed abandoned to Luxury and Vice); he boldly replied, he had his Faults, but they were such that other People, who talked more of Conscience, were guilty of the like. *Tindal's Continuation of Rapin's History of England*, 3 Vol. P. 41. in Notes.

^P *Show. Rep.* 2 Vol. P. 511. pl. 475. *Mod. Rep.* 3 Vol. P. 125.

^q *Mod. Rep.* 3 Vol. P. 100. The Motto of his Ring was, *Deus, Rex, Lex.*

† *Lejor's Remarkables of the Year*, 1710, P 407.

unlikely, but that it forwarded his Advancement: For the Government being settled, and King *William* and Queen *Mary* fixed upon the Throne, Sir *John Holt* was on the *fourth* Day of *May*, in the Year 1689, 1 *Will. & Mar.* made Lord Chief Justice of the Court of *s King's Bench*; Sir *William* ^t *Dolben*, Sir *William* ^u *Gregory*, and *Gyles* ^v *Eyres*, Esq; being the other three Judges so constituted at the same Time, as well as those of the ^w *Common Pleas*, and ^x Barons of the *Exchequer*. On *Tuesday* the *seventh* Day of the same Month of *May*, he was at a Meeting of the Governors of the *Charter-House*, at *Whitehall*, chosen ^y one in the Place of Lord Chancellor *Jeffreys*, and some Time afterwards, *viz.* on the *twenty fifth* Day of ^z *August*, in the same Year

B 3

1689,

^s Lord *Raym.* Rep. 2 Vol. P. 1309. Appendix to *Chronica Juridicalia*. P. 3. *Wood's Athen. Oxon.* 2 Vol. Col. 964. Bishop *Burnet* says, "That though he was a young Man for so high a Post, yet he maintained it all his Time, with an high Reputation for Capacity, Integrity, Courage, and great Dispatch; so that since the Lord Chief Justice *Hale*, his Time, that Bench had not been so well filled, as it was by him." *Burnet's History* of his own Times, 2 Vol. P. 5.

^t Appointed, 20th of *April*, 1689. Appendix to *Chronica Juridicalia*. P. 3.

^u Appointed, 8th of *May*, 1689. Appendix to *Chronica Juridicalia*. P. 3.

^w *Viz.* Sir *Henry Pollexfen*, appointed Chief Justice the 6th of *May*, Sir *John Powell*, Sir *Thomas Rokesby*, 8th of *May*, *Peyton Ventris*, Esq; 9th of *May*, 1689. Appendix to *Chronica Juridicalia*. P. 3.

^x Sir *Robert Atkins*, appointed Lord Chief Baron, 17th of *April*, Sir *Edward Neville*, *Nicholas Lechmere*, 8th of *May*, and Sir *John Turton*, 9th of *May*, 1689. Appendix to *Chron. Juridical*. P. 3. *Tind. Contin. Rap. History of England*, 1 Vol. P. 41. in Notes.

^y *Clarendon's State Letters*, 2 Vol. P. 186, published by *Richard Powney*, Esq; in the Year 1763.

^z *Boyer's Remarkables of the Year 1710*, P. 408. Mr. *Wood* says, it was on the 26th Day of *September*, in the Year 1682. *Wood's Athen. Oxon.* 2 Vol. Col. 964.

1689, he was admitted into his Majesty's most honourable^a Privy Council, and sworn at^b *Hampton-Court*.

^c The Reversion of the Place of Chief Clerk^d for inrolling Pleas in the Court of *King's Bench*, having been granted by King *Charles the second*, to his Majesty's natural Son the Duke of *Grafton*; and the same becoming vacant after the Duke's Decease, in Sir *John Holt's* Time, there was a Contest^e at Law between him and the young Duke of *Grafton* about the Disposal of it: But the Matter was at Length accommodated by the Interposition of the King himself; who, though my Lord Chief Justice might have, and had the Right, engaged his Lordship to make an handsome Allowance out of the Profits to an Orphan who had lost his Father in the public Service of his Country. My Lord gave the Place to his Brother Mr. *Rowland Holt*, who enjoyed it to the Time of his Death.

On the *twentieth* Day of *June*, in *Trinity* Term, 1694, 6 *Will. & Mar.* Lord Chief Justice *Holt* delivered his most excellent^f Argument, in Lord *Banbury's* Case. The Case was, that an^g Indictment had been found at *Hicks's-Hall* against the Defendant
Lord

^a *Wood* as above. *Boyer's History of Queen Anne*, P. 355. His Remarkables of the Year 1710, P. 408. *Tindal's Continuation of Rapin's History of England*, 4 Vol. P. 105.

^b *Wood* as above.

^c *Boyer's Remarkables of the Year 1710*, P. 409.

^d *Show. Parl. Cal.* P. 111.

^e *Lord Raym. Rep.* 1 Vol. P. 11. Mr. Serjeant *Skinner* says, that the Argument of *Holt*, Chief Justice, was more explicit than that of the other Judges, and delivered with greater Reason, Courage, and Authority. *Skin. Rep.* P. 517, 518.

^g *Lord Raym. Rep.* 1 Vol. P. 10. *Salk. Rep.* 2 Vol. P. 510. *Carth. Rep.* P. 297. *Salk. Rep.* 3 Vol. P. 242. pl. 1. *Cases Tempore, Holt, Ch. Just.* P. 530. *Comb. Rep.* P. 273. *Skin. Rep.* P. 517. *Mod. Rep.* 12 Vol. P. 59. *Lord Raym. Rep.* 2 Vol. P. 1115.

Lord *Banbury*, by the Name of *Charles Knollys*, Esq; for the Murder of Captain *Lawson*, (who had married the Sister of the Defendant) and this Indictment was removed by *Certiorari* into the *King's-Bench*, where the Defendant pleaded a *Misnomer* in Abatement, *viz.* that *William Knollys*, Viscount *Wallingford*, by Letters Patent under the Great Seal of *England*, (which he produceth in Court) bearing Date the *eighteenth* Day of *August*, 2 *Car. I.* was created Earl of *Banbury*, to have and to hold the Dignity to him and the Heirs Male of his Body lawfully begotten, &c. that *William* had Issue *Nicholas*, who succeeded *William* in the Dignity, from whom the Dignity descended upon the Defendant as Son and Heir to *Nicholas*, *et hoc paratus est verificare*, &c. The Attorney General replies to this Plea, that the Defendant upon the *Thirteenth* of *December*, 4th *William* and *Mary*, preferred a Petition to the House of Peers then in Parliament assembled, that he might be tried by his Peers, and that after long Considerations and Debates, the House of Peers dismissed his Petition, *secundum Legem Parliamenti*, and disallowed his Peerage, and made an Order, that the Defendant should be tried by the Course of the Common Law, &c. To this Replication the Defendant demurred, and the Attorney General joined in Demurrer.

The Case was argued several Times at the Bar by Sir^h *Edward Ward*, Attorney General, Sirⁱ *Thomas Trevor*, Solicitor General, Sir^k *William Williams*, King's
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^h Afterwards Lord Chief Baron in the Room of Sir *Edward Atkins*. Lord *Raym.* Rep. 1 Vol. P. 57. Append. to *Chron. Juridical*. P. 5.

ⁱ Afterwards Chief Justice of the *Common Pleas*, Mod. Rep. 12 Vol. P. 477. Lord *Raym.* 2 Vol. P. 748. Append. to *Chron. Juridicalia*. P. 7.

^k Afterwards Solicitor General to *James* the *second*, Mod. Rep. 3 Vol. P. 143.

Council, for the King and Queen; and by Serjeant¹ *Pemberton*, Serjeant^m *Levinz*, and Sir *Bartholomew Shower*, for the Defendant.

On the said *twentieth* Day of *June*, the Court of *King's-Bench* unanimously gave their Opinions for the Defendant, but because the Reasons of Sir *Samuel Eyre*, Sir *Giles Eyre*, and Sir *William Gregory*, Justices, were comprehended in the Argument of my Lord Chief Justice *Holt*, they are omitted here, to avoid Repetition.

He said at the Beginning, that since this Case was of so great Importance, that in some Manner all the Nobility of *England* had some Concern in it, and since this Case had given Occasion to many Debates in the House of Lords, and since there were many Persons of great Quality, who had made Reflections upon the Judges of the *King's-Bench*, for not having, before this Time, brought the Defendant to his Trial; he hoped that the Audience would give him their Pardon, if he examined the Questions hereafter arising a little at large.

In this Case (he said) two Questions would arise:

1. If the Plea be good?
2. Supposing it to be so, if the Replication confesses and avoids the Plea?

To

¹ Afterwards Chief Justice of the *King's-Bench* to *Charles the second*, in the Room of Sir *William Scroggs*, who was displaced. *Show. Rep.* 2 Vol. P. 155. *Ventr. Rep.* P. 354. Sir *Tho. Jones's Rep.* P. 141. Note, he was afterwards at his own Desire, made Ch. Just. of the *Common Pleas*. Sir *Tho. Raym. Rep.* P. 478, in the Place of Lord *North*, who was appointed Lord Keeper in the Room of Lord *Nottingham*, Lord High Chancellor, deceased. Sir *Tho. Jones's Rep.* P. 231. *Show. Rep.* 2 Vol. P. 252. pl. 260. Sir *Tho. Raym. Rep.* P. 478.

^m Afterwards one of the Justices of the *Common Pleas*, to *James the second*, *Chron. Juridicialia.* P. 209. Note, he was afterwards removed, *Lev. Rep.* 3 Vol. P. 257, and came to the Bar again; *Show. Rep.* 2 Vol. P. 471. pl. 437.

To the Plea (he said) the Council for the King had taken three Exceptions.

1. That it does not appear that *Banbury* is in *England*.

2. That Mr. *Knollys* ought to have averred, that he is *unus Parium Regni Angliæ*, for it may be that he is an Earl of *Ireland*, or of *Scotland*, and then he has not any Title to be tried by the Lords in this Realm.

3. That he ought to have concluded his Plea with *prout potet per Recordum*, or ought to have produced a Writ to certify that he was Earl of *Banbury*. Baron or not Baron being triable by Record.

To give Answers to these Objections more effectually, he thought it much to the Purpose to consider, what an Earldom was originally; and he said, that an Earldom consisted in three Things heretofore.

1. In Dignity.

2. In Office.

3. In diverse Possessions.

As to the first, before the Time of *Edward* the third, there were but two Titles of Nobility, *viz.* Earls and Barons, Barons were originally created by Tenure, afterwards by Writ; and lastly, *Richard* the second, in the eleventh Year of his Reign, by Letters Patent under his Great Seal, created *John Beaucham* of *Holt*, Baron of *Kidderminster*, and left a Precedent, which all his Successors have followed down to this Time, but Earls were always created by Letters Patent. The Empress *Maud*, created *Milo* of *Gloucester*, Earl of *Hereford*, by her Letters Patent.

As to the second, an Earldom consisted in Office, for the Defence of the King and Realm. Earls (*Comites*) had not their Denomination from the County, but a *comitando Regem*. And because it is an Office, it may be intailed within *Westm.* 2 Cap. 1. and although the Statute 26 *Hen.* 8. Cap. 13. had never been enacted,

an Earldom had been subject to Forfeiture by the committing of High Treason.

As to the third, an Earldom consisted in Rents, Possessions, &c. but in Process of Time they decreased to 20*l.* per Annum, and nevertheless the Heir should pay 100*l.* Relief within *Magna Charta*; but at this Day it consists only in Dignity and Office, which extend over all the Land.

2. He considered, that the great Seal of *England* is appropriated to this Realm, and that which is done under it ought to bear Relation to *England*, and to no other Place. If the King of *England*, before the Conquest of *Ireland*, had, by Letters Patent, conferred a Title of Honour, the Patentee should have been an *English* Peer. It is true that the King may create an *Irish* Earl under the *English* Great Seal. But then there ought to be express Words; for where, by the Prerogative, a special Act is done, there ought to be express Words, and it shall not be taken by Implication. And farther, an Act of Parliament shall not extend to *Ireland*, unless it be particularly named; and therefore, to intend the Defendant in this Case, to be an *Irish* Peer, is foreign, and ought to be rejected.

3. He was of Opinion, that the Place from whence the Patentee takes his Title, is not necessarily to be in *England*; nor in Reality is there any Necessity, that there be any Place. *Albemarle* is not within *England*, and nevertheless, at the Time of the making *Magna Charta*, there was an Earl of that Title, and there have been Dukes who have borne that Title very lately. A Man was an Earl, and he had no County. He said, that he had often made Inquiry, if there were any such Place as *Rivers*, but he had never been able to find such Place, only that it was the Name of the Earls of *Devonshire* in the Time of King *Stephen*. Here is then a sufficient Answer to the first Objection to the Plea; for

for if in the Creation of an Earl, the Place is not necessary (as by what he had been saying, it is apparent that it is not) it was not necessary nor material, to make an Averment, that *Banbury* is within *England*; but the Defendant being Heir to *William* who was created Earl of *Banbury*, under the Great Seal of *England*, shall be an *English* Peer.

As to the second Objection to the Plea, that the Defendant ought to have averred, that he is *unus parium regni Angliæ*, he answered, that what is apparent has no need to be averred, that he is an Earl, appears by the Letters Patent which he hath produced, and then, that he must be of *England*, is sufficiently demonstrated by what goes before. Besides that, he does not plead this Plea here, to make a Right or Title to the Earldom of *Banbury*, but only by Way of *Misnomer* in Abatement of the Indictment; and that *Misnomer* is a good Plea. See 2 *Inst.* 595. if a Knight be indicted by the Name of Esquire, the Indictment shall abate.

The third Objection to the Plea was, that the Defendant ought to have concluded his Plea with *prout patet per Recordum*, Baron or not Baron being triable by Record. Or *secondly*, he ought to have produced a Writ out of *Chancery*, to certify the Descents, and that he is Earl of *Banbury*.

As to the first Part of this Objection, he confessed, that if the Peerage of the Defendant had been created by Writ, it had then been triable only by Record, and it had been a fatal Exception; but Letters Patent may be pleaded and shewn to the Court (as in this Case is done) and they cannot be questioned, but by pleading *non concessit*; and therefore in this Case there cannot be any such Issue as Baron or not Baron; moreover there being Descents here, which are mere Matters of Fact, and triable only by the Country, such

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Conclusion had been ill; because it cannot appear by the Record, if *Nicolas* was the Son of *William*, or *Charles* the Son of *Nicolas*, and the Books of 22 *Affis.* 24. *Bro. Affis.* 240. ought to be understood of Peerage created by Writ, for there was no Baron created by Letters Patent until the *eleventh* Year of King *Richard* 2. there is also Nobility gained by Marriage, and this is triable by Jury.

And as to the second Part of this Objection, that the Defendant ought to have produced a Writ out of *Chancery*, &c. he answered, that these are only cautionary Writs, and Writs of Privilege, and were not of Necessity but for Expedition. And supposing that the Defendant might have had one, yet it is no Consequence, that the Omission of it shall be a Determination of his Peerage. And further, in all the Precedents cited on the other Side, there were no Letters Patent pleaded (as in our Case) so that it could not appear to the Court, without such Writ, that the Party was a Peer. So that he was of Opinion (and all his Brothers agreed with him in all these Points) that the Plea was very good.

The Question then will be, If the Replication confesses and avoids the Plea? Which is in Effect, if the Defendant be concluded from his Peerage by this Order of the House of Lords: And he was of Opinion, that he was not, for four Reasons.

1. Because this Order was not a Judgment by Parliament.

2. Admit that it was a Judgment, yet of an original Cause, the House of Lords has no Jurisdiction.

3. There was no Plea depending in the House of Lords, concerning the Right of the Earldom of *Banbury*.

4. There is not here any Judgment to bar him of his Title.

As to the first he said, that the Parliament consisted of the King, the Lords Spiritual and Temporal, and the Commons. The judicial Power is only in the Lords, but legally and virtually it is the Judgment of the King as well as of the Lords, and perhaps of the Commons too. Writs of Error to remove Records out of the *King's-Bench* into the House of Lords run, *coram nobis in præsens Parliamentum*; but in this supposed Judgment the King is excluded. If one may give Credit to an old Advocate, *Fleta*, Cap. 17. he says, that all Matters of Authority and Jurisdiction are derived from the King.

The House of Lords has a double Authority, as the Parliament, and the Course of the House; between which we must distinguish by their Stile. And their Proceedings are of different Effects in Law; for Journals are not Records of Parliament, and therefore we cannot take Notice of them.

Judgments ought also to be given in their proper Stile; and therefore if the *King's-Bench*, which is held *coram Rege*, enter Judgment by the Justices of the *King's-Bench*, it is void. But in the principal Case there is no mention made of the King; therefore this Judgment is not given in the proper Stile, as appears by what has been said before.

As to the second he said, that the House of Lords has no Jurisdiction in an original Cause, because that supreme Court is the last Resort. Besides, that for the most Part original Causes are mixed with Matter of Fact, and it is unworthy of so supreme a Court, to try Matters of Fact, for which Reason, Error of Fact in the *King's-Bench*, must of Necessity be brought before the same Judges of the *King's-Bench*.

If the Parliament took Cognizance of original Causes, the Party would lose his Appeal, which the Common Law indulgeth in all Cases, for which Reason the Parliament

liament is kept for the last Resort; and Causes come not there, until they have tried all Judicatories. Within these four Years Judgment was given against the Earl of *Macclesfield* in the *Exchequer*, he brought Error in the House of Lords, and the Question was, If by 31 *Edw. 3. Stat. 1. Chap. 12.* the *Exchequer* Chamber ought not to interpose, and adjudged that it ought; and the Writ abated. 4 *Inst. 21.* The Case of the Bishop of *Norwich*, to the same Purpose.

3. He was of Opinion, that this Dignity differed not from an original Estate at Common Law, for it was granted under the Great Seal of *England*, and therefore descendible according to the Course of the Common Law; and it was at Common Law, an Estate in Fee simple, but since *Westm. 2 Cap. 2.* it is an Estate tail. And if the Patentee be disturbed of his Dignity, the regular Course is to petition the King, and the King indorses it, and sends it into the *Chancery*, or the House of Peers. For the Lords have no Power to judge of Peerage, unless it be given to them by the King. For as no Peer can be created without the King's Consent, who is the Fountain of Honour, no more can any be degraded without his Consent. And an Ordinance of the House of Peers cannot confer Peerage.

The House of Peers (he agreed) has Jurisdiction over its own Members, and is a supreme Court; but it is the Law which hath invested them with such ample Authority, and therefore it is no Diminution to their Power, to say, that they ought to observe those Limits which this Law hath prescribed for them, which in other Respects hath made them so great.

The Precedents which Mr. Attorney General hath cited, are not to this Purpose. That of the Lords *Mountjoy*, *Bellafys*, and *Lovelace*, 1628, was Matter of Privilege. The Lord *Mountjoy* claimed Precedency

cy in the House of Peers of the Lords *Lovelace* and *Bellafys*, being created 5 June, 3 Car. 1. Baron of this Realm by Letters Patent, in which there was a Clause to precede the two other Lords, for which he petitioned the House of Lords, but they would not allow it to him. For although the King might give Precedency by the Common Law, nevertheless, in this Case, he was bound by the 31 Hen. 8. Cap. 10.

The Cases of the Lords *Pembroke*, *Stamford*, and *Mobun*, were only Petitions by them for a Trial by their Peers. If a Peer commits Treason, &c. he ought to be tried by his Peers, and therefore it is decent to submit his Trial to them, but he does not by that submit his Title to his Peerage; besides that, if the Peers make an Order that the Petitioner shall be tried by his Peers, and they make an Address to the King to make an High Steward, the King may chuse whether he will or no, notwithstanding their Order and Address.

The Case of the Lord *Preston* is less to the Purpose, for his Patent was void, being made by King *James* the *Second*, after the Revolution.

The Case of *James Percy* was also a Case of Privilege.

So that there is no Precedent to warrant the Proceedings in this Case. Therefore he concluded this Point, that the Case coming before the Lords originally, all Proceedings were *coram non Judice*, for they have not Jurisdiction of an original Cause; but, as is before shewn, it might have been brought before the Lords regularly, and then their Determination had been final.

3. Concerning the Right of the Earldom of *Banbury*, there was no Plea depending before the House of Lords; for the Defendant did not petition to enjoy the Earldom, but supposed himself in Possession.

4. There is not here any Judgment to bar the Defendant of his Title to the Earldom; for no Court can
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give Judgment in a Cause not depending, or which comes not in a judicial Method before that Court; but here it is proved by what he had been saying, that the Title of the Earldom was not in Question before the Peers. If Trespass be brought for a Trespass done in the Land belonging to an House, and it appear at the Trial that the Plaintiff hath no Title to the House, yet the Court cannot give Judgment, to put the Party out of Possession of the House.

2. A Judgment ought to be complete and formal; therefore, if *quo Warranto* be brought for usurping royal Franchises, the Court give their Opinion, that the Defendant hath no Title to them; unless they proceed and say, *ut abinde excludatur*, it avails nothing. In the same Manner, in the Case between *Level* and *Hall*, *Cro. Jac.* 284. where in Debt upon Bond, the Defendant pleaded acquittal by Verdict in another Action upon the same Bond, the Entry upon the Verdict was, that the Defendant should recover Damages against the Plaintiff, *et quod eat inde sine die*, and because there was no Judgment *quod Querens nil capiat per Breve*, it was adjudged ill.

3. Dismission is no Judgment in Court of Law.

And as to the Objection, that the Judgment was said to be given ⁿ *secundum Legem Parliamenti*, which the Defendant, by his Demurrer, hath confessed.

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ⁿ Mr. *Skinner*, and Mr. *Comberbach*, both add, that his Lordship, as to this, said, that he did not know any Reason for this Objection, which the King's Counsel had inserted, if it was not to frighten the Judges: But he said, that he did not regard it, for though he had all Respect and Deference for that honourable Body, yet he sat there to administer Justice according to the Law of the Land, and according to his Oath, and that he ought not to regard any Thing but the Discharge of his Duty. *Skin. Rep.* P. 526. *Comb. Rep.* P. 278.

He answered, 1. That a Demurrer confesses only Matter of Fact, and that only when it is well pleaded; but it never confesses Matter in Law.

2. *Lex Parliamenti* is to be regarded as the Law of the Realm; but supposing it to be a particular Law, yet if a Question arise determinable in the *King's-Bench*, the *King's-Bench* ought to determine it. The filing an Original against a Member of Parliament, was adjudged no Breach of Privilege. If a Man be committed by Parliament, and the Parliament is prorogued, the *King's-Bench* will grant an *Habeas Corpus*. The Common Law then does not take Notice of any such Law of Parliament to determine Inheritance originally. If there is any such, it ought either to be by Act of Parliament, and there is no such Act; or it ought to be by Custom, and no more is there any such Custom. But if Inheritance shall be originally determinable in Parliament, where the Parliament, *viz.* the House of Peers hath no Jurisdiction, the Peers would have an uncontrollable Power, *et ubi jus est vagum, res est misera*. For which Reasons he was of Opinion, that Judgment ought to be given for the Defendant. And accordingly, with the Concurrence of all the other Judges, for the same Reasons the Indictment was abated.

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° His Lordship said, as to the Law of Parliament, he did not know of any such Law, and every Law which binds the Subjects of this Realm, ought to be either the Common Law and Usage of the Realm, or an Act of Parliament; *nec super eum ibimus, nec super eum mittemus, nisi per legale Judicium Parium suorum, aut per Legem Terræ*; but if there were any such Law and Custom of Parliament [the which Mr. Attorney said was *inter Arcana Imperii*, which is a strange Notion of a Law, though it may be good in Politics; and for which the Lords would not thank him, when they considered that the Law which governs the Inheritance of their Dignities is *inter Arcana*.] *Skin. Rep. P. 526. Comb. Rep. P. 278.*

In ^p *Hilary* Term, 1697, 9 *Will.* 3. the Lord Chief Justice *Holt* was summoned to give his Reasons of this Judgment to the House of Peers, and a Committee was appointed to hear and report them to the House, of which the Earl of *Rochester* was Chairman. But the Chief Justice *Holt* refused to give them in so extrajudicial a Manner. But he said, that if the Record was removed before the Peers by Error, so that it came judicially before them, he would give his Reasons very willingly; but if he gave them in this Case, it would be of very ill Consequence to all Judges hereafter in all Cases. At which Answer some Lords were so offended, that they would have committed the Chief Justice to the *Tower*. But notwithstanding, all their Endeavours vanished in Smoak.

Note; Mr. Serjeant ^a *Salkeld* tells us, that the Defendant, Lord *Banbury*, was not tried for this Murder at all.

This Proceeding of the House of Peers did not in the least intimidate the Chief Justice, as will appear from a very remarkable Instance which happened but a few Years afterwards: The Bishop of *St. David's* moved in the *King's-Bench* for a Prohibition, which the Chief Justice denied, whereupon the Bishop petitioned the Lord Chancellor *Somers*, to have a Writ of Error upon this Denial of the Prohibition; who having some Doubt, whether it would lie or not, referred it to the Attorney General; who certified his Opinion to be, that a Writ of Error would lie in this Case. Upon which the Suggestion was entered upon Record, and the Denial of the Prohibition; and the Writ of Error was granted, and the whole Record brought by the Chief Justice into Parliament, and afterwards

^p Lord *Raym.* 1 Vol. P. 18.

^a *Salk. Rep.* 2 Vol. P. 512.

terwards upon hearing of his Opinion, the Lords of Parliament were of Opinion, that a Writ of Error would not lie in this Case. However, *Holt, Chief Justice*, told Lord Chief Justice^s Raymond, that if the Lords had been of Opinion, that the Prohibition ought to have been granted, he never would have granted it.

It † is well known in what Manner King *Charles* the second mortgaged the whole Revenue of the Crown to the Bankers for an immense Debt, and paid them Interest at the Rate of 8 per Cent. while those, who intrusted the Bankers, received only 6 per Cent. In the Year 1672, the *Exchequer* Payments were stopped, and Multitudes ruined. About five Years after, his Majesty granted his Letters Patent to all Persons concerned for the annual Pension of 6 per Cent. out of the Hereditary Excise, given by Parliament instead of the Wards and Liveries, 12 *Char.* 2. *Chap.* 24. and upon the principal Sums due to them, on delivering up their Securities, and accepting proportionable Assignments in Satisfaction of their Debts. The Payments were made regularly by Virtue of those Letters Patent, down to *Lady-Day*, 1683, and then no more issued for the † Remainder of King *Charles's* Reign, the whole Reign of King *James* the second, and for three Quarters of a Year from after the Revolution; whereupon in *Hilary* Term;

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Term;

^s Lord *Raym.* 1 Vol. P. 545.

† *Tind. Contin. Rap. Hist. Engl.* 3 Vol. P. 403, in Notes.

‡ Lord *Somers*, his Argument on his giving Judgment in this Case, which he delivered in the *Exchequer* Chamber, *June* 23, 1696. P. 6. This Argument is much admired for the inimitable Elegance of the Stile and Method, and for its Comprehension and Learning. It may be added, that it is not only esteemed one of the finest Performances in the Law, but has satisfied very able Lawyers of the Legality of his Judgment; so that the Publication of it did as much Justice to his Integrity, as Honor to his Parts. It is said, that in the making of it, the Search of Records and Precedents cost him seven hundred Pounds. *Tind. Contin. Rap. Hist. Engl.* 3 Vol. P. 405, in the Notes.

Term, 1 *W. & M.* 1689, a Petition was exhibited by *Joseph Hornby*,^w to the Treasurers and Barons of the *Exchequer*, for the Allowance of the said Letters Patent. The Attorney General demurred generally: The Court gave Judgment for the Petitioner *Hornby*, whereupon the Attorney General brought a Writ of Error in the *Exchequer-Chamber*, where Lord Chief Justice *Holt* delivered the following Argument in Affirmance of the Judgment, in *Trinity Term*, 1695, 1 *W.* 3.

In this Case,^x here have been two Points made :

1. Whether this Grant be good ?
2. Whether here be a proper Course taken by the Patentees ?

There has indeed been a third Point started by my Lord Chief Justice *Treby*, and that does respect the entering of the Judgment.

As to the first Question, I hold the Grant to be good, and all that have argued here, have concurred in the same Opinion. I do confess this is the great Point of the Case; but so much has been said to it, that little more can be added: But I must say something to it, though I cannot but repeat.

I hold that King *Charles* the *second* might charge this Branch of his Revenue, and my Reason for my Opinion is but short.

It is, because the King was seized of an Estate in Fee of this Revenue; for to such an Estate a Power of Alienation is incident. And I take it to be the Intent and the express Words of the Act, That the King should have a Right and Liberty of alienating and charging this Estate.

It is no Objection, that this Revenue was given to the King under a Trust; for notwithstanding that, he might

^w Mod. Rep. 5 Vol. P. 29, 30.

^x Mod. Rep. 5 Vol. P. 53.

might alien it: So several Kings of *England* have founded Corporations of charitable Uses, and yet these Persons incorporated might, notwithstanding such Trust, alien their Estates; so may Dean and Chapter theirs; so may a Bishop with the Consent of Dean and Chapter; so a Parson with the Consent of the Patron and Ordinary, might have aliened the Land of which he was seized in the Right of his Church: But the King has Nobody required to consent to his Alienations. To say, that he may alien by Consent of the Estates of the Realm, is as much as to say, he cannot alien without an Act of Parliament, which he may clearly do.

And, indeed, this Revenue comes to the King by Purchase; for he gave a Recompence for it, *viz.* Part of his standing Revenues, it being the Profits that did arise from his Wards and Liveries.

But it is objected, that this Power in the King of alienating his Revenues, may be a Prejudice to the People, to whom he must recur continually for Supplies. I answer, that the Law has not such dishonourable Thoughts of the King, as to imagine he will do any Thing amiss to his People in those Things in which he hath Power so to do.

But that which I insist on is, that it is absurd in its Nature to restrain the King from a Power of aliening his Revenues of which he is seized in Fee: It is against the Nature of the being of a King, that he should have less Power than his People; for before he was King he had Power to alien. Now when the Crown descended upon him, he is seized *in jure Coronæ*, and shall he then have less Power over those very Lands than he had before the Descent of the Crown? Shall he now be disabled to alien by being a King? This would be against a common Principle of Law, that the Descent of the Crown takes away all Disability.

Then it is repugnant to the Constitution of the Government, suppose a King should be under a present Danger of being invaded, if the King could not raise Money by alienating his Revenue, the Nation might perish; for he cannot otherwise raise Money than by an Act of Parliament, for which there might not be Time: And therefore heretofore the Kings of *England* have borrowed several Sums of Money by mortgaging their Lands.

And there ought to be a Power in all Governments to reward Persons that deserve well, for Rewards and Punishments are the Supports of all Governments; and it has been the constant Usage of the Kings of *England* to reward Persons deserving of the Government out of the Crown Revenues, by Pensions, and giving Estates to support the Titles of Earl and other Dignities. And this has been allowed of by Act of Parliament, as appeareth by 34 *Hen. 8. c. 20.*

But some perhaps will say, I have been talking little to the Purpose; for that they do not deny that the King might alien his own Demesne, or any Lands that come to him by Descent or Purchase: But, say they, this Revenue was settled by Act of Parliament on the Crown, and therefore it cannot be aliened. But I do not find any such Distinction in our Law-Books, nor any Authority from Common or Statute-Law, that restrains the Kings of *England* from aliening any Sort of their Revenues.

As for the Lands in *antient Demesne*, they seemed most appropriated for the King's Use of any of his Revenues: For they had several Privileges all relating to the King, as not to be impleaded out of the Manor, to be free of Toll for all Things concerning their Sustainance and Husbandry, not to be impanelled on any Inquest; and yet, notwithstanding all this, those Lands were always alienable; and if these Lands are
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alienable, what Estates in the Crown are not alienable? And our Books do take Notice that these Estates are alienable.

Then what Reason can be given why some Estates should be aliened, and others not? Why may not the King as well alien these Estates as he may the Flowers of his Crown, as appears in the Abbot of *Strata Marcella's* Case? For he may grant a County Palatine, which has *jura Regalia*; so he has granted a Power to pardon Treason or Felony, &c. and indeed these Prerogatives are reassumed to the Crown by the Statute *H. 8.* but the Grants were not void.

Then if an Estate be settled on a Subject by Act of Parliament, it will not be denied but that he may alien such Estate; and why shall not the King have the same Privilege? It appears, in Fact, that he has always done it; so all the Lands that belonged to the Abbies and Monasteries were aliened by the King, and yet they were given to him by Act of Parliament, and by general Words, as it is here: So the Customs have been always granted and charged by the King, and yet they were granted to him by Act of Parliament. The Authorities in our Books are full to this Purpose.

But it is objected, that this Revenue was given in lieu of Inheritances that were unalienable, *viz.* the Wards, Liveries, Purveyances, &c.

Though how the Nature of these Inheritances can effect Inheritances of another Nature I cannot see; but even these Inheritances were always in Effect alienable, for they might have been released. The King's Grant to be free of Prisage, and so were Services *in Capite*, and Purveyances, &c.

Some Opinions have been urged, which say, that the Crown Revenues could not be aliened, as *Fleta* and *Bracton*; but these Books are only Ornaments to the

Law; they are not looked on as authentic, especially where the Practice has been always to the Contrary: But *Brit.* 87. is otherwise, and so is *Selden* 549 and 552. And *Bracton* himself, in his second Book, C. 57. seems to be of another Opinion, where he saith, that even *Res Sacræ* are alienable by the Common Law, though, perhaps, by the Canon Law they are not to be aliened. So the Statute of *Bigamis*, Cap. 7. also admits, that the King may grant away his Revenues; *Fortescue*, in his Book *de Laudibus Legum Angliæ*, that the Government is not only regal, but legal and political, and then discourses of the Particulars wherein the regal Power is restrained: And if our Constitution had been so that the King could not alien his Lands or Revenues, it cannot be imagined but that he would have mentioned a Thing so remarkable, especially in a Time when there were so many Grants made by the Crown, though, indeed, at that Time, there were many Acts of Resumption made, as there were before and after, as in 6 *Hen.* 4. 14. and in the Time of King *Henry* the eighth, &c. which are a great Demonstration that those Grants could not be revoked or avoided, but by Act of Parliament.

It is objected, that the Fee-Farm Rents, in the Time of King *Charles* the second, were granted by Act of Parliament; but they might have been granted without that Act; it was only made to encourage Purchasers, to make good the Letters Patents beyond all Scruple, and to give Power to sue for the Arrears of Rent, and to distrain, &c.

When it is objected, that if this Grant of the Revenue should be alienable to the Subjects, that then the King's Officers of Excise would be the Subject's Officers.

But that does not follow, they are only a Means to convey to their Fellow-Subjects their Right, and that
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which is granted to them by the King's Letters Patents. So the Justices in *Eyre*, and of *Oyer and Terminer*, &c. are the King's Justices; and yet they convey Justice to the People.

As for these Letters Patents themselves, it is plain, by the whole Tenor of the Patents, that the King was not deceived in his Grant; and the Consideration being executed, though it be false, yet that will not avoid the Grant.

So that I conclude this Point, that these Letters Patent which charge this Branch of the Revenue, are good and firm in Law.

I come now to the second Point, and that is, concerning the Remedy taken by the Patentees.

And I hold they have taken a very proper and legal Remedy. We are all agreed that they have a Right; and if so, then they must have some Remedy to come at it too.

The Remedies, at Common Law, to recover against the King, were by Petition, or *Monstrans de Droit*.

Indeed, there is a new Remedy now given by Stat. 2 *Edw.* 6. Cap. 8. and that is by Way of Traverse to the King's Title.

But first, a Petition of Right is not necessary in this Case: Not but that a Man may proceed in this Way, and admit himself out of Possession if he pleaseth. But it is not necessary for two Reasons:

1. Because a Petition of Right is grounded always upon a naked Matter of Fact suggested, and not of Record; and upon such a Suggestion, there is a Commission issues out of *Chancery*.

But here the Title is derived by Letters Patents, which are of Record; so that here is no Matter of Fact to be enquired of.

2. The Patentees do not endeavour to destroy the King's Title: But Petitions of Right do so, and are generally inconsistent with the King's Title.

Then this Annuity is not turned to a Right, as if there had been an Attainder, &c. therefore why should there be a Petition of Right?

I take this Remedy to be by a *Monstrans de Droit*; and this Remedy is to be sued at Common Law, when the Party's Title appeareth of Record. *Monstrans de Droit*, or *ouster le maine* (which is all one in Effect) always lies where the Title or Right of the King appears, as well by Matter of Record as the King's Title; and this appears fully. *Sadler's Case*, 4 Rep. and *Hob.* 334.

Also, it is plain, that a *Monstrans de Droit* lies in the *Exchequer*: I think there is no doubt of that.

It is objected, that the Petition should be first sued to the King: But by the Records in *Ryly's Placita*, Parl. 351, 257. *Staundf.* 72. it appears, that these Petitions of Right have been sued to the Court of *King's-Bench*. But, indeed, this Petition differs from those; for this being only the Way of Complaint, there needs no Indorsement as in the other Cases.

The next Objection is, that in this Precedent there was a *Liberate*.

1. This Writ is, in its Nature, a Writ of Allowance. But this Writ does not give any Manner of Jurisdiction; for the Court may hold Plea and proceed without it.

2. But the next Answer that I give to this, and which may be satisfactory to any Body, is the Statute of 5 R. 2. Cap. 9. which directs the Barons of the *Exchequer* to answer every Demand, without any Writ or Letter from the King; so is 4 *Inst.* 110. So that

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^y See Lord Keeper *Sommers*, his Answer to this in his Argument, P. 72, &c.

I take it to be plain, that the Barons might proceed here without any Writ at all.

But it is objected, that the Writ should have been directed to the Treasurer, &c.

But this needs not be; for the Treasurer hath nothing to do with Civil Pleas.

Indeed, *Fitz. N. B.* 129. doth mention the Treasurer: But this is a common Error, and the Writs need not be so directed.

It is true, as my Lord *Coke* observes, that the Legitimation of any Case may be suspected that has no Case of Kin to it; and I agree to that Rule: But I think I have found out some Kindred to this present Case, and that is the Case in *Coke's* Entries. 93. Tit. "Claim of Liberties;" for there the Barons did allow certain Liberties, and also the Payment of a Rent-charge granted by the King to my Lord *Hunsdon*. So the Case of *Margery Parker*, in 9 *H. 6.* 13. is a considerable Authority to this Point; she had an Annuity out of the *Magna Custuma* of *London*, granted by the Queen, out of a Sum assigned for her Dower, to receive of the Customers, but must sue to the Barons of the *Exchequer*; and *Margery Parker* may sue for it in the *Exchequer*, in the same Manner as the Queen might for her Portion. Then there is my Lady ^a *Broughton's* Case, which happened in 25 *Car. 2.* my Lady *Broughton* forfeited the Keeper's Place of the New Prison to the King, who thereupon made a Seizure; upon this the Dean and Chapter of *Westminster* came into the Court of *Exchequer* and claimed the Inheritance, and the King's Hands were removed. Indeed, this Matter was first stirred in the *King's-Bench*, for they gave Judgment to seize the Prison. Now if the Court of *King's-Bench* could hold Plea there, of a *monstrans de droit*,

^a See Lord Keeper *Sommers*, his Argument, P. 67.

^b Lord *Sommers*, his Argument, P. 70.

droit, because the Seizure was there ; why may they not as well proceed in the *Exchequer* by *monstrans de droit*, because the Money is there ?

It is true, Money comes into and issues out of the *Exchequer*, without the Barons : But with Submission, the Rights of bringing it in, and issuing out of the Money, belongs to the Barons, and if you make the Barons only Judges of the Right of coming in of the King's Money, you make them Judges but of half their Business which belongs to that Court ; for the Barons have judicial Power over the whole Court of *Exchequer*. And to say that the Treasurer and his Officers have no Correspondence with the Barons, is not true ; for all the Books take Notice of them, as Persons that all belong to the *Exchequer*.

Some have objected, that this Court ought regularly to hold Pleas only where the King is Party ; and that this Court used to be prohibited to proceed in any Pleas that do not concern the King. 2 *Inst.* 551. there you may see what Pleas they may hold.

But here the Plea does not concern the King ; for here is the King's Grant, and the Suit is to the King : And this Determination of the Barons in this Case, is not thus any Judgment of their own ; but the King himself, by Reason of such his Letters Patents, hath obliged himself to make such Payments. As in the Case of an Obligation where Debt is brought upon it, and a Recovery is had ; it is not so much the Judgment of the Court as binds the Property, as the Obligor himself, who by his Bond has subjected his Property to be determined by the Judgment.

Now as to the Authorities which seem directly to govern this Point, and the Objections against them.

1. There is Sir *Thomas Wroth's* Case in *c Plowden*, which I rely upon as a clear and full Authority in this Case, notwithstanding all the Objections that have been made against it.

King *Henry 8.* had appointed Sir *Thomas Wroth*, to be Gentleman Usher of the Privy Chamber to Prince *Edward*, and that he granted to the said Sir *Thomas*, for the Exercise of the same Office, an Annuity of 20*l.* to be had, and yearly taken to the said Sir *Thomas*, from *Lady-Day* then last past, during his natural Life, by the Hands of the Treasurer of his Court of Augmentations of the Revenues of the Crown for the Time being, of such his Treasure of the same Revenues, as should remain in the Hands of the Treasurer at two Times in the Year, &c.

The chief Objection against this Case is, that there the Grant was under the Seal of the Court of Augmentations, which was incorporated with the Court of *Exchequer*; but that I deny, for that Court was never legally united to the Court of *Exchequer*, as was adjudged in *Dyer*, 216. So that the Objection, that Sir *Thomas Wroth's* Grant was under the Seal of the Augmentation Court, and under the Survey of it, is gone.

Then it does not appear to me, that ever the Court of Augmentations had any Power expressly given to relieve the Grantees of such Rents. I have looked over the Act of Parliament, by which that Court is constituted, but I cannot find any such Power; but I think, the Court of Augmentations did proceed in such Manner, that it might be also reputed a Court of *Exchequer*; and the Court of Augmentations is, by express Words, made a Court for the new Revenues that should come to the Crown, which are exempted from

^b Lord *Sommers*, his Argument, P. 90.

^c *Plowd. Com.* P. 452.

from the Jurisdiction of the other Court: But that which I infer from hence is, that if this new Court of *Exchequer* did in some Cases relieve Grantees of Rents, &c. certainly the old Court of *Exchequer* shall have the same Privilege.

There are other Courts which have also proceeded in the same Manner; as the Court of Wards did usually hold Plea of these Matters. Queen *Elizabeth* granted to *Allen*, under her great Seal, an Annuity of 40*l.* per *Ann.* to be paid by her Receiver of the Court of Wards. This being payable by the Receiver, is in the Nature of a Rent-charge. So the Court of Surveyors, erected by 33 *H.* 8. Chap. 39. did proceed in the same Manner, and relieve Grantees of Rent-charges, &c.

As to ^d *Nevil's Case*, also in ^e *Plowden*, I take it likewise to be a full Authority in Point. An yearly Rent-charge of 3*l.* 10*s.* was granted to Sir *H. Nevil*, and another for the Exercise of the Keeper of a Park, out of a Manor for their Lives; one is attained, the Manor comes to the Possession of the King; the King shall neither have the Office nor the Rent: And the Arrears of the said Annuity were paid to Sir *H. Nevil*, at the Receipt of the *Exchequer*, by the Hands of the Treasurer and the Chamberlain.

First, I grant that those Lands were also under the Survey of the Court of ^f *Augmentations*; but that I conceive makes nothing against me for the Reasons before mentioned.

^g There are several other Records which have been already quoted, but I shall not trouble you with the Repetition of them. I shall only mention some few, which I think have been omitted. As *Trin. primo Mar.*

^d See Lord *Sommers*, his Argument, P. 88.

^e *Plow. Com.* P. 377.

^f Lord *Sommers*, his Argument, P. 95.

^g See Lord *Sommer's* Argument, P. 106.

Mar. Rot. 126. 2 *El. Rot.* 145. *Mich.* 13. *Q. Rot.* 347. *Hill.* 13 *El. Rot.* 143. *P. 1 Q. Rot.* 108. In all these Records it also appears, that Money issued out of the *Exchequer*, by Order of the Court of *Exchequer*; and it is highly reasonable that they should have such a Power.

Suppose the King purchaseth Land that is charged with a Rent, the King must take the Land together with its Burden; but in such Case it would be too hard to drive the Grantee of the Rent to his Petition of Right to the King: No, certainly he may come to the Court of *Exchequer*, by Way of Petition to the Barons, who may give him Relief.

It has been objected, that Money which once comes into the *Exchequer*, can never be taken out. But if this is true in a general Sense, that none of the King's Revenues that are brought into the *Exchequer* can be paid out, this would destroy all Annuities, Rent-charges, and other Payments which the Crown is obliged to make.

^h It is true, if a Man be outlawed in the *King's-Bench*, and the Party's Goods are seized in the King's Hands, and then the Outlawry is reversed, there can be no Restitution. The Reason of this is, for that the Court of *King's-Bench* cannot send a Writ to the Treasurer; and the Court of *Exchequer* have no Record before them to issue out a Warrant of a Restitution. So if an Attainder be reversed, the mean Profits taken into the *Exchequer* cannot be restored for the same Reason; and also for that the King cannot be made a Disseisor, and the Statute gives a Remedy only as to Parliament.

There remains, after all, a great Objection, had it any Weight, and that is, *Cui bono?* If the Patentees should

^h See Lord *Sommers*, his Argument, P. 63.

should have Judgment for them, what will it signify if they cannot come at any Money?

As to this, I do think, that as soon as the Writs are delivered to the Officers of the *Exchequer*, I mean the Treasurer and Chamberlain, the Property is altered, and the Officers become Debtors to the Parties, as appears by 2 *H.* 7. So as soon as a *Fieri facias* is delivered to the Sheriff, and upon it Goods are levied, the Property of the Goods is altered, and the Sheriff becomes a Debtor to the Plaintiff: So an Action of Debt will lie upon a *Liberate*, and so it has been adjudged.

I shall only observe one Thing more, and so conclude, and that is in Answer to my Lord Chief Justice *Treby*, for he stuck very hard at the Judgment given by the Barons, he thought that it was very erroneous, and therefore void; but with Submission, I take this Judgment to be as well as it can be; and whereas it is said in the Judgment, that the Money shall be paid by the Commissioners and Chamberlain of the Treasury, it must be understood of the Receipt of the Treasury, and not of the Lord High Treasurer, which Office is long since expired.

As for the Levying of the Tallies mentioned in the Judgment, it does not hurt, it is at most but Surplusage; but that which I insist on is, that though this Judgment, in respect of Form, or any material Point of it, should be erroneous, yet if your Lordship should be of Opinion in the two first Points with Me, you will then give a new Judgment, such as the Court of *Exchequer* ought to have given, for that is the Law of this Place, as appears by 31 *Ed.* 3. and this last Point was so ruled upon a Debate in the House of Lords, and was the Case of the *King* and *Saintbill*, 30 *Car.* 2.

So that upon the Whole, I am of Opinion, that the Judgment given by the Barons, ought to be affirmed.

But afterwards, the Lord ⁱ Keeper was of Opinion to reverse the Judgment, and accordingly it was reversed. The Ground upon which he gave his Opinion was, that the Patentees had not taken a proper Remedy by Petition to the Barons, who have no Power or Control over the King's Treasury, &c. and that their only Remedy was by Petition to the King himself. He insisted much upon the same Reasons and Grounds which my Lord Chief Justice *Treby* mentioned.

The above Case had given Occasion to Clamour, because of the extensive Consequences following the Determination in Regard to the Property of large Numbers.

No *Liberate*, or Warrant ^k for Payment issued upon this Reversal; but in the same Session, an ⁱ Act passed to apply the Revenue of Excise as a Security for eight hundred and twenty thousand Pounds, and a weekly Payment of three thousand seven hundred Pounds, to the Civil List, on Account of the Necessity of Affairs, subject, at the same Time, to the Charge of an annual Payment of three *per Cent.* on the whole Principal due to the Bankers, from and after the *twenty-sixth* Day of *December*, 1705, which Principal was made redeemable on Payment of a *Moiety*. This Case in Respect of the unhappy Persons, who had intrusted the Bankers with their Money, deserved all that Compassion, with which it was popular to treat it in those Times; but the Bankers had made an unjust and extorsive Pro-

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ⁱ *Sommers*; see his Lordship's Argument, P. 128.

^k *Tind. Contin. Rap. Hist. Eng.* 3 Vol. P. 405, in the Notes.

^l Stat. 12 & 13 *W.* 3. Cap. 12.

fit from the Crown, and the iniquitous Extravagance of King *Charles* his Court had been the Source of the Calamity.

When the Lord Chancellor *Sommers* parted with the Great Seal on *Saturday* the *twenty-seventh* Day of *April*,^m in the Year 1700, and the same continued undisposed of for some Time, King *William* pressed the Lord Chief Justice ⁿ *Holt* to accept of it; but he replied, “^o *That he never had but one Chancery Cause in his Life, which he lost, and consequently could not think himself fitly qualified for so great a Trust;*” whereupon, (it being Term Time, so that a Vacancy in that Post put Things in some Confusion) a temporary ^p Commission was granted on *Sunday*, the *fifth* Day of *May*, in the said Year 1700, to ^q Sir *John Holt*, Sir *Thomas Trevor*, Master of the Rolls, Sir *George Treby*, Chief Justice of the *Common Pleas*, and Sir *Edward Ward*, Lord Chief Baron of the *Exchequer*, to judge in the Court of *Chancery*; and after a few Days the Seals were given to Sir *Nathan* ^r *Wright*.

In *Easter Term*, 1688, 10 *W.* 3. ^s *Richard Lane* brought an *Action* ^t upon his Case against Sir *Robert Cottor*

^m Lord *Raym.* Rep. P. 566.

ⁿ Mr. *Prior*, in a Letter to the Earl of *Manchester*, dated at *Hampton-Court*, *May* 2, 1700, and printed among Mr. *Cole's* *Memoirs*, P. 128, says thus: “My Lord Chief Justice *Holt*, having been here to Day, and with the King in private, has given People Occasion to say, that he has refused the Seals; if it be so or not, I cannot say, but as yet the Seals are not disposed of.” *Tind. Contin. Rap. Hist. Eng.* 3 Vol. P. 406. in Notes.

^o *Boyer's* Annual List of the Deaths of eminent Persons, at the End of his History of *Queen Anne*, P. 52.

^p *Burnet's* History of his own Times, 2 Vol. P. 242.

^q Lord *Raymond* and *Burnet* as above.

^r Lord *Raym.* P. 567, and *Burnet* as above.

^s *Modus Inrandi.* 2 Vol. P. 108.

^t Lord *Raym.* Rep. P. 646.

Cotton and *Sir Thomas Frankland*, as Postmaster General, for that a Letter of the Plaintiff's being delivered into the said Office, to be sent by the Post from *London* to *Worcester*, by the Negligence of the Defendants in the Execution of their Office, was opened in the Office, and divers *Exchequer* Bills therein inclosed were taken away, *ad damnum*, &c. upon not guilty pleaded, this Cause was tried before *Holt*, Chief Justice at *Guildhall* in *London*, and a special Verdict found there.

The Jury found the Act of 12 *Car.* 2. Cap. 30. of the Execution of the General Post-office, and that a General-Post was established pursuant to it, between *London* and *Worcester*: They find the Act of 1 *Jac.* 2. Cap. 12. which consolidates the Estates in Fee and in Tail in the said Office in the King, that the Defendants were constituted Postmaster General by Letters Patent of the King that now is, bearing Date the first Year of his Reign, under the Great Seal of *England*, pursuant to the said Act of 12 *Car.* 2. And that by the said Patent they had Power, to make Deputies, and to appoint Servants, at their Pleasure, and to take Security of them, but in the Name; and to the Use, of the King, and that the Defendants should obey such Orders as they should receive from Time to Time from the King, under the Sign Manual, and as to the Management of the Revenue, that they should obey the Orders of the Treasury, and farther, that the King granted to them, that they should not be chargeable, to account for the Mismanagement or Default of their inferior Officers, but only for their own voluntary Defaults; and farther, the King granted to them, a Salary of 1500*l.* per Annum, out of the Profits arising out of the Office, &c. that the Office was kept in *London*; that the Plaintiff being possessed of eight *Exchequer* Bills, inclosed them in a Letter directed to *John*

Jones at Worcester, and delivered it to *Underbill Breeze*, the Receiver of the Letters at the Post-office; that *Breeze* was appointed by the Defendants, to receive the Letters at the Office, and was removable by the Defendants, but received his Salary out of the Revenue of the said Office, by the Hands of the Receiver General; that the Letter was opened in the Office, by a Person unknown, and the Bills were taken away; *et si, &c.*

This Case was argued several Times at the Bar, by Sir *Bartholomew Shower*, Mr. *Northby*^u, and Mr. *Pratt*^w, for the Plaintiff, and by Serjeant *Wright*^x, the Solicitor General *Hawles*^y, the Attorney General ^z *Trevor*, and ^a *Cowper*^b, for the Defendants. And in *Easter Term*,

1701,

^u Afterwards Attorney General to their late Majesties, King *William the third*, [Lord *Raym. Rep.* 2 Vol. P. 748, 768,] and Queen *Anne*, Lord *Raym. Rep.* 2 Vol. P. 768, 1261, 1317, and to *George the first*. Lord *Raym. Rep.* 2 Vol. P. 1318.

^w Afterwards constituted Chief Justice of the *King's-Bench*, to *George the first*, *viz.* in *Easter Term*, 1718. *Stra. Rep.* P. 86. *Append. to Chron. Juridicial.* P. 13. Note; He was Father to the present Chief Justice of the *Common Pleas*.

^x Afterwards, *viz.* 30 Dec. 1696, made Serjeant to King *William the third*. *Append. to Chron. Juridicial.* P. 5. *Mod. Rep.* 5 Vol. P. 323, and by him knighted. Lord *Raym. Rep.* P. 135. His said Majesty, on *Thursday*, the 21st *May*, 1700, 12 *Will.* 3. in Council, delivered the Great Seal to Sir *Nathan Wright*, with the Title of Keeper of the Great Seal, &c. Lord *Raym. Rep.* P. 566, 567. *Mod. Rep.* 12 Vol. P. 478. *Mod. Rep.* 5 Vol. P. 323. *Append. to Chron. Juridicial.* P. 7.

^y *Mod. Rep.* 5 Vol. P. 24. Lord *Raym. Rep.* P. 57. 2 Vol. P. 748.

^z Afterwards, *viz.* 5 *July*, 1700, constituted Chief Justice of the *Common Pleas*. *Appendix to Chronica Juridicial.* P. 7. *Mod. Rep.* 12 Vol. P. 477. Lord *Raym. Rep.* 2 Vol. P. 748.

^a *Mod. Rep.* 12 Vol. P. 478.

^b Afterwards, in *Mich. Term*, 1727, 1 *Geo.* 2. he was by Patent, dated 27 *October*, 1727, created one of the Judges of the *Common Pleas*, in the Room of Sir *Francis Page*, who succeeded Mr. Justice *Fortescue*, in the *King's-Bench*, whose Patent was superceded. Lord *Raym. Rep.* 2 Vol. P. 1510. *Appendix to Chronica Juridicial.* P. 17.

1701, 13 *W.* 3. the Judges pronounced their Opinions in solemn Arguments, *viz.* *Turton*, *Powys*, and *Gould*, Justices, that Judgment ought to be given for the Defendants; and *Holt*, that Judgment ought to be for the Plaintiff.

^c *Holt*, Chief Justice, argued, That Judgment ought to be given for the Plaintiff. And he said, That he would not make it any Part of the Question, if a Letter was broke open upon the Road, whether the Postmaster General should be chargeable for it; but he would confine himself to the present Question, where a Letter was delivered at the Office to the proper Officer appointed to receive it and there lost, whether in such Case the Postmaster General should be liable. And he held, that he should, for these Reasons.

1. Because the Postmaster is by this Act intrusted with the Interest and Property of the Subject, to the End that no Damage may accrue to him; which is implied by the making him an Officer. The Act appoints one general Letter-office to be erected in *London*, and the Care thereof is committed to the Postmaster General; who, his Deputies and Servants, ought to have the Management solely of the Post-office. So that all the Persons concerned are as his Deputies. And by the Nature of the Trust, he ought safely to keep all Letters there, at his Peril, in his Custody. This Case does not differ from the Case of the Marshal of the *King's-Bench*, or Warden of the *Fleet*, who are obliged safely to keep the Prisoners at their Peril; and it is no Plea for them, that Traitors broke the Prison against their Will. And the Law was so, at Common Law, in Case of Damages recovered in Trespass, *quare vi et armis*, and when the

^c Lord *Raym.* Rep. P. 650. *Com.* Rep. P. 103. *Caf. Temp.* *Holt*, P. 583. *Mod.* Rep. 12 Vol. P. 477.

Statute 25 *Edw.* 3. Cap. 17. made the Body liable to Execution for Debt, the Gaoler ought to keep such, as safely as Defendants condemned for Damages in Trespass, *Vi et Armis*. The same Law, if Goods levied upon a *Levari facias* (which was the only Execution before the Statute gave a *Fieri facias*) in Execution were rescued from the Sheriff; he was liable to an Action. The same Law of a Man, in Execution upon the Statute of 13 *Edw.* 1. *de Mercatoribus*. The same Law, if upon an *extendi facias*, upon a Statute, merchant the Goods of the Conusor, taken by the Sheriff, were rescued from him. And there is no Difference between this Case of the Postmaster General, and the Gaoler, Sheriff, &c. for he ought safely to keep the Letters delivered to him, as the others ought safely to keep their Prisoners, or Goods taken in Execution.

2. The Subject ought to pay a *Premium* for the Carriage, to him who makes it his Employment. And when a Man takes an Employment upon him, to receive the Goods of the Subjects, and receives a *Premium* for it, that is sufficient, to charge him, to answer the Loss at all Adventures, for such Losses as happen within the Realm.

Objection, by *Gould*, Justice. That this Office is founded in Government.

Answer. If he means, that it is founded by the Law, he could not agree his Inference, because it is only founded by a different Sort of Law, *viz.* the one by Common Law, the other by Statute Law, which cannot make a Difference. And he did not see in what Sort of Government it was otherwise founded, but only that a Trust is given for the Benefit of the Subject.

Objection, by *Gould*, Justice. That such Charge ought to be by some Sort of Contract.

Answer. He denied that any Contract was necessary, to charge the Defendants; but it is like the Cases, where Officers, by Course of Law, receive Goods for the Benefit of others, they are obliged to keep them safely by them, so that they may have the Benefit of them.

Objection. The Defendants receive no *Premium* from the Plaintiff.

Answer. The Plaintiff gives a *Premium*, which intitles him to a Remedy; and against whom shall he have it, if not against the public Officer, against the Postmaster General, by whose Negligence he suffers.

2. The Defendants receive a *Premium*, viz. a Salary of 1500*l. per Annum* (which is a sufficient Reward) paid out of the Profits of the Office. And, therefore, this Case is not distinguishable from the Case of *Mors & Slue, Ventr.* 190, 238. *T. Raym.* 220. in which Case the Objection was, that the Master of the Ship did not receive the Freight to his own Use; but adjudged, that he was liable for the Goods of which the Ship was robbed in the River: And the Reasons given were, 1. Because he was an Officer known. 2. Because he received his Salary out of that which was paid for Freight; both which Reasons hold in this Case.

Objection. The Master of the Ship might take Caution, &c. the Postmaster General cannot.

Answer. He did not know how the Master of the Ship could Caution, &c. It was said, in the Case of *Mors and Slue*, that if a Man came to lade Goods at an unseasonable Time, he was not obliged to take them in, as before he was ready to sail. But if he takes them in before, and they are lost, he will be liable to an Action. So a common Carrier may refuse to admit Goods into his Warehouse, before he is ready to take his Journey; but yet neither the one nor the

other can refuse to do the Duty incumbent upon them, by Virtue of their public Employment.

3. This Case is within the same Reason and Equity upon which the Cases are founded, in which Men are chargeable for negligent keeping; and this is the Reason, that if they should not be charged without assigning a particular Neglect, they might defraud any Man, and he would not be able to prove it; and that is the Reason of the Cases of Carriers, &c. And this Reason is given in *Justinian*, Lib. 4. Tit. 5. *Minsinger. comment.* Fol. 5617. Such Matter is transacted among a Multitude of People, and therefore no Particular of them can be charged; and therefore the Officer ought to be charged, who chuses such inferior Officers. The Case of *Mors* and *Slue* was harder, because there the Servants were overcome by a superior Force.

Objection. The common Carrier may sue the Hundred, the Postmaster General cannot sue any Body.

Answer. That is no Reason, because a Carrier was chargeable before the Statute of *Winton*, at which Time he could not sue the Hundred. Besides, that he is liable, where he has no Remedy against the Hundred; as for Goods lost out of his Warehouse, or out of his Waggon in the Yard.

Objection. The Inn-keeper is only chargeable for Goods in his Custody within his Inn, and not for a Horse put to Grass, and therefore it differs from this Case.

Answer. Here the Letter was within the Walls of the Post-house. But the Case of the Inn-keeper was stronger, because he is obliged, while he has Room, to let in all Travellers. But *contra* of the Postmaster General, who may chuse his Deputies and Servants.

Objection. The Inn-keeper has People up all the Night in the Inn.

Answer. And the Postmaster General also in the Post-office.

Objection. The Case of Sir *Henry Herbert* and Mr. *Paget*. *Sid.* 77. *T. Raym.* 53.

Answer. There *prima facie* they held the Defendant chargeable; but afterwards they were of Opinion for the Defendant, that he was not chargeable, because the Clerks of Mr. *Henley* had Liberty to enter into the Treasury without his Consent, and so the Access to the Records was not confined to his Servant only. But here Nobody could enter into the Post-office but the Servants of the Defendants only. This Case differs from the Loss of a Letter upon the Road, (but to that he gave no Opinion;) for a Carrier receives Goods, safely to keep, and safely to carry; but the Postmaster General receives the Letters, safely to keep and send; so that there may be a Question, whether the Postmaster shall be chargeable, when he has safely sent the Letters out of the Office. But admit that he should not be liable, when the Post-Boy is robbed upon the Road; yet it will not follow, that he is not chargeable for Letters taken out of the Office. In the Case of *Mors* and *Slue*, if the Ship had been at Sea, the Master would not have been liable; yet it does not follow, that he shall not be chargeable for a Loss at Land. If a Man comes to an Inn, and orders the Inn-keeper to put his Horse into the Stable, being hot, and to let him cool, and then to put him to grass; because the Inn-keeper should not be chargeable, if he were stole after he is put to grass, it does not follow from thence that he shall not be chargeable, if he be stole before he be turned to grass, whilst he is in the Stable.

4. It is the Duty of the Postmaster to receive *Exchequer* Bills, and to send them by the Mail. For he ought to receive such Packets as are proper to be sent by the Post; and such are *Exchequer* Bills.

1. If a Man takes upon him a public Employment, he is bound to serve the Public as far as the Employment extends ; and for Refusal, an Action lies, as against a Farrier refusing to shoe a Horse. Against an Inn-keeper refusing a Guest, when he has Room. Against a Carrier refusing to carry Goods, when he has Convenience, his Waggon not being full. He had known such Action brought, and a Recovery upon it, and never disputed. So an Action will lie against a Sheriff, for refusing to execute Procefs. The same Reason will hold, that an Action should lie against the Postmaster, for refusing to receive a Letter, &c.

2. *Exchequer* Bills are proper to be sent by the Post. The Act does not confine it to any specific Thing, but generally of Packets. It appears, that the Act intended that other Things should be sent by the Post, as well as Letters. By the Words of the Act, Deeds, and other Things. Also *Exchequer* Bills are light, and a Pearl Necklace, of 1000*l.* Value, may be sent by the Post.

Objection. *Exchequer* Bills are new Things created by Act of Parliament.

Answer. A new Interest, created by a subsequent Statute, will be under the same Remedy, as a Thing in *esse* before of the same Nature. And one may as well say, that *Trover*, or *Trespafs* will not lie for them, because they are new Things. Bills of Exchange might have been sent by the Post, and *Exchequer* Bills are like to them. A Bill of Exchange, payable to a Man, or Bearer, is a lawful Bill of Exchange, and may be sent by the Post, as well as one payable to a Man or Order.

Objection. That the Postmaster will not be chargeable for Bills of Exchange lost, because they are excepted out of the Act, that nothing shall be paid for them.

Answer. That the Letter ought to be intended to be written for the Sake of the Bill, and therefore Payment is Payment for the Bill. As where a Man comes to an Inn, he shall pay nothing for the keeping of his Goods; yet the Advantage which the Inn-keeper hath by the Prefence of the Guests, makes him liable.

3. *Exchequer* Bills are not excepted, and therefore shall pay Postage.

4. The Defendants, being public Officers, are chargeable, though they had no Benefit; as the Sheriff, tho' he has no Fees for suing of Executions. For where the Law gives a Man custody of a Thing, *Virtute Officii*, it obliges him to keep it safely. And therefore upon the Reason of *Southcote's Case*, 4 Co. 83. b. If Goods are delivered to a Man to be safely kept, and he accepts them, he shall be chargeable if they are lost; and one cannot put a Case of a public Officer to the Contrary. The Opinion in 4 Co. 83. of a general Bailment, is not Law; for upon a general Bailment, the Bailee ought to keep them only as his own.

5. Before the 12 Car. 2. any one might have erected a Post-office, and such Erector had been liable for Miscarriage; and therefore this Postmaster is liable also; for now the Act having prohibited the Subjects to employ any other but this Postmaster General, it would be hard to deprive them of the Remedy which they had before.

Objection. The Plaintiff has a Remedy against *Breesse*.

Answer. If it could be proved that *Breesse* took out the *Exchequer* Bills, he agreed that it was so; likewise any Stranger that took them out may be charged as a *tort-feasor*; but *Breesse* cannot be charged as an Officer for Neglect: For Mifeasance of a Deputy, an Action will

will lie against him, but that is not *qua* Officer, but *qua tortfeasor*. And according to this, is the Difference between a negligent and a voluntary Escape. A Gaoler is liable to an Action for the latter, but not for the former. This Office is manageable only by them, their Deputies and Servants, and what is done by a Deputy, is done by the Principal; and reasonable, because the Principal may remove the Deputy at Pleasure, tho' he puts him in for Life, for it is contrary to the Nature of a Deputy, not to be removable.

A Deputy may forfeit the Office of the Principal; as if he does such Act as would be a Forfeiture in the Principal.

Objection. *Dier* 238.

Answer. It is (by him) directly contrary to the Purpose, for which his Brother *Gould* cited it.

Objection. This will be to make the Defendants responsible here for the Servants of the Deputies.

Answer. If a Deputy has Power to make Servants, the Principal will be chargeable for their Mifeasance, because the Act of the Servant is the Act of the Deputy, and the Act of the Deputy is the Act of the Principal. But here *Breesfe* is the Servant of the Defendants themselves.

Objection. The Defendants are but Fellow-Servants with *Breesfe*, because all receive their Salaries from the King.

Answer. He is appointed by the Defendants, and is their Servant, and removable by them, though they do not pay him his Wages. But then suppose that *Breesfe* is not a Servant of the Defendants, then it will be stronger against the Defendants, for then *Breesfe* will be as a Stranger, and then they will be the rather liable, the Act appointing them to manage the Office by their Servants.

Objection. *Powys*, Justice, compared the Defendants to a Captain of a Company ; and he shall not be chargeable for the Cowardliness of his Soldiers ; no more shall the Defendants for the Negligence of *Breefe*, admitting him to be their Servant.

Answer. If *A* received a particular Damage by the Cowardliness of the Soldiers of a Captain, he shall be chargeable ; but in such Case the Prejudice is national. But the Master of a Ship is liable for the Neglect of his Mariners.

Objection. The Act did not intend that the Defendants should be chargeable.

Answer. He was of a contrary Opinion, because all the Power is placed in the Postmaster General. And when a Statute erects a new Office, and places it under such Circumstances, as in Consequence of Law, make the Officer liable ; it must be presumed to have been their Intent, that he shall be chargeable.

2. It appears by the Words of the Act, that they intended that the Dispatches should be safe.

3. It appears by the Act, that it was the Judgment of the Parliament, that they were liable for the Fault of the Deputy. *Par.* 3. It is provided, that the Postmasters General, and their Deputies, &c. Then *Par.* 10. a Penalty of 5*l.* is imposed upon the Postmaster, if there be a Failure of furnishing with Post-horses ; from whence it appears, that the Parliament looked upon the Fault of the Deputy to be the Fault of the Postmaster.

Objection. This will ruin the Office.

Answer. It will make them more careful.

Objection. This will encourage Frauds.

Answer. The Method to prevent them, is to make the Postmaster liable.

Objection. The Plaintiff might have sent his *Exchequer* Bills by some other Means.

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Answer. That will not excuse the Defendants, no more than it will be an Excuse to an Inn-keeper, that his Guest, who has lost Goods, might have gone to another Inn.

Objection. The *Premium* limited by the Act is too small.

Answer. The Defendants have accepted the Office upon those Terms.

Objection. The Patent is, that they shall observe the Orders of the King, under the Sign Manual, and the Orders of the Treasury concerning the Revenue.

Answer. Their Observance of the Orders of the Treasury will not interrupt their Care of the Letters; and if a Prejudice happen by Observance of the King's Orders, that will not excuse; because they are obliged to observe the most convenient Methods for the Execution of the Office according to the Direction of the Act, and the Patent cannot excuse them in any Neglect of that.

Objection. There is a Clause in the Patent, that the Postmaster shall not be answerable for a Fault in their Deputy, but only for their own Act.

Answer. That is only intended of Imbezzlement of the Revenue by their Deputies, and as to that, the said Clause will excuse them; but it will not excuse them from any Remedy that the Subject hath against them for his Benefit by the Law. And no *non obstante* in such Case will avail, nor any Charter of Exemption. And for these Reasons he concluded, that Judgment ought to be given for the Plaintiff. But the other three Judges being of a contrary Opinion, Judgment was given for the Defendants. But however, the Plaintiff^d intending to bring a Writ of Error upon the said
Judg-

^d A Writ of Error was brought and allowed on these Reasons of Holt, Chief Justice. Mod. Rep. 11 Vol. P. 18.

Judgment, the Defendants seeing that, paid the Money to the Plaintiff, as Lord Chief Justice *Raymond* was informed.

In *Easter Term*, 1701, 13 *Wil.* 3. the Chief Justice *Holt* gave his Reasons of the Judgment of the Court of *King's-Bench*, in the Case of one *Plummer*, which Mr. Justice ^f *Foster* says, his Lordship published; and also, ^g that the learned Judge (Lord Chief Justice *Holt*) entereth with great Learning and sound Reason, into the Point upon which the Case turned; and as it seemed of very great Consequence, it had been for two Vacations under the ^h Consideration of all the Judges of *England*, before whom it had been several Times argued at *Serjeant's-Inn*, in *Chancery-Lane*.

Plummer,ⁱ the Prisoner, was indicted at the Assizes held for the County of *Kent*, *twenty-ninth* of *July*, 12 *Will.* 3. The Indictment sets forth, that *John Glover*, and *Benjamin Plummer*, the Prisoner, and others, *thirteenth* of *March*, 12 *Will.* 3. did, of Malice fore-thought, make an Assault upon *John Harding*, and that *John Glover*, having a certain Fuzee in his Hand, charged with Gunpowder and Bullet, did feloniously, voluntarily, and of his Malice fore-thought, discharge the same against the said *John Harding*, and thereby gave him a mortal Wound, of which he instantly died. And that *Benjamin Plummer*, the Prisoner, and others, did, of their Malice fore-thought, aid, abet, and assist the said *John Glover*, in committing the Murder aforesaid. *Benjamin Plummer*, pleaded not Guilty, and the Jury did find this special Verdict, *viz.*

That *Joseph Beverton*, was duly appointed to seize and apprehend all such Wool of the Growth of this
King-

^e Lord *Raym.* Rep. P. 658. Mod. Rep. 5 Vol. P. 456.

^f *Fost.* Cr. Law, P. 204.

^g Id. P. 296. Note*.

^h Mod. Rep. 12 Vol. P. 627.

ⁱ *Kelyng's* Rep. P. 109. Mod. Rep. 12 Vol. P. 627. See *Fost.* Cr. Law, P. 352.

Kingdom, that should be carried to be transported into Parts beyond the Seas, and also all such Persons as should carry the Wool in order to be transported. And that *Benjamin Plummer, John Harding*, and others, whose Names are unknown, to the Number of eight Persons, the said *thirteenth* of *March*, about *twelve* o'Clock at Night, about seven Miles from the Sea, did Load three Horses with eight hundred Pound of Wool, of the Growth of *England*, in order to transport it into *France*. And *Joseph Beverton* having Notice thereof, came with divers other Persons to his Assistance, to a certain Lane, about seven Miles distant from the Sea, in order to stop and seize the Wool so intended to be transported, and placed themselves in divers Places about the Lane; and *Joseph Beverton*, with his Company, hearing the three Horses laden with Wool, pronounced a Watch-word agreed on between him and his Assistants; and thereupon all of them used their utmost Endeavours to seize the Wool, whereupon, one of the eight Persons, in Company with *Benjamin Plummer*, whose Name is unknown, did shoot off the Fuzee, and thereby did kill the said *John Harding*, being one of the eight Persons, and a Partner with them in that Design of transporting the Wool, of which Wound he died.

The Question is, upon this special Verdict, whether *Benjamin Plummer* be guilty of the Murder as charged in the Indictment, or so much as of the Death of *John Harding*?

To put the Case in as few Words as may be, so as to bring it to a Point, it is no more than this, eight Persons had loaded a Quantity of Wool, to carry it to be transported; of which the King's Officers having Intelligence, did, in the Night-time, as they were carrying the Wool, meet to oppose, and to apprehend them, and they met in a Lane, and upon a Watch-word given by

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the King's Officers, one of the eight Persons shot off a Fuzee, and killed another of the eight Persons, whether the others of the Eight (besides him that shot off the Gun) be guilty of the Murder of the Person slain ?

Upon this Question all the Judges have been consulted, and we are all of Opinion, that *Benjamin Plummer* is not guilty of the Murder of *John Harding*.

1. It doth not appear, by the finding of this special Verdict, that *Glover*, or the Person unknown, that shot off the Gun, did discharge it against any of the King's Officers, but it might be, for ought appears, for another Purpose ; though upon the particular Circumstances in the special Verdict, there is Evidence that the Gun was discharged against the King's Officers, and so it might reasonably be intended, considering they were all armed, and in Prosecution of an unlawful Act in the Night, which they designed to justify and maintain by Force, especially when the Gun was shot off upon the Watchword given, the King's Officers were endeavouring to seize the Wool ; the Jury thereupon might well have found that the Fuzee was discharged against the King's Officers ; but since they have not found that Matter, we are confined to what they have found positively, and are not to judge the Law upon Evidence of a Fact, but upon the Fact as it is found.

Therefore it is fit to consider in this Case, 1. What Crime it is in the Party that shot off the Gun that killed *Harding* ?

2. How far the Rest of his Company that were with him shall be concerned in the Guilt of it.

1. He was upon an unlawful Design, and if he had in the Pursuance thereof discharged the Fuzee against any of the King's Officers that came to resist him in that Design, and by Accident had killed one of his own Accomplices, it would have been Murder in him. As if a Man, out of Malice to *A*, shoots at him to kill
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him,

him, but misses him, and kills *B*, it is no less a Murder, than if he had killed the Person intended.

But 2^{dly}, it not appearing that he discharged his Fuzee against the King's Officer; it may be, that he discharged it either out of some Provocation from *Harding*, or wilfully out of some precedent Malice against him.

1. It seems to me hard upon a special Verdict to construe, that the Fuzee went off by Accident, but it must be understood to be voluntary; though even in an Indictment for Manslaughter it is requisite that it should be averred that he discharged it voluntarily, but in a Verdict it need not be so alledged, but the saying he did it, must be understood to be with, and not against his Will; for where any one, upon any killing of a Man, is to be discharged by an involuntary killing, it must be so found, without which it must be understood to be voluntary; for a Man being a free Agent, if he be found to do any Act, it must be supposed to be with his Will, unless it be specially, and particularly found to be against his Will. Therefore when a Man is indicted for a voluntary killing, if he did kill the Man by Misadventure, the special Circumstances of the Case must be found, that it may appear to the Court to be by Accident.

2. But in the next Place, suppose that he that shot off the Fuzee did it out of Malice prepensed against the Person slain, whereby it would be Murder in him. Then the Question will be, whether the Rest of his Accomplices shall be adjudged to be Principals to him, as Aiders, Abettors, or Assisters to that Murder, and we all held that they would not be Principals. For though they are all engaged upon an unlawful Act, and while they were actually in it, this Murder is committed by one of the Company so engaged; yet it does not appear to be done in Prosecution of that unlawful Act,

Act, but it may be upon another Account, and those who are in the unlawful Act, not knowing of the Design of him that killed the other, his Companion cannot be guilty of it. This Notion that hath been received, that if divers Persons be engaged in an unlawful Act, and one of them kills another, it shall be Murder in all the Rest, is very true; but it must be admitted with several Qualifications. First, the Abettor must know of the malicious Design of the Party killing. As for the Purpose, *A* and *B* having Malice, engage in a Duel; *C*, a Stranger, of a sudden, takes Part with *A*, who kills *B*. It is but Manslaughter in *C*, because he knew not of the Malice, though it be Murder in *A*.

If divers Men lie in wait to beat a particular Person, and one of them, while they are in Prosecution of that unlawful Design, out of Malice he had to another of his Companions, finding an Opportunity, kills him, the Rest are not concerned in the Guilt of the Fact.

At the Sessions at the *Old Bailey*, *December*, 1664. The Case upon the Evidence was, that the Secretary of State made a Warrant to apprehend divers suspected Persons, which was directed to a Messenger, who having Notice that they were in an House, desired several Soldiers to assist him in the apprehending of them, but in the doing thereof, they broke open the Doors, and some of the Soldiers stole some Goods. It was held, that the Warrant then produced, was not sufficient to break open the Doors of the House without a Civil Officer. Secondly, though the breaking open the Door was an unlawful Act, of which all were guilty; yet was it Felony only in those that stole the Goods, or knew of the Design of Stealing, and consented to it; but not in the others that were concerned in breaking open the Doors: No more in this Case can the Rest of the Company be said to be guilty of the killing of

Harding, unless they knew of the Person's Design to kill him.

2. The Killing must be in Pursuance of that unlawful Act, and not collateral to it. As for the Purpose; if divers come to hunt in a Park, and the Keeper commands them to stand, and resists them; if one of the Company kills the Keeper, it is not only Murder in him, but in all the Rest then present, that came upon that Design, for it was done in Pursuance of the unlawful Act.

But suppose that they coming into the Park to hunt, before they see the Keeper, there is an accidental Quarrel happens amongst them, and one kills the other, it will not be Murder, but Manslaughter; and in the Rest that were not concerned in that Quarrel, it will not be Felony. So if one kills his Companion upon a former Malice, the others will not be concerned in it, therefore cannot be Abettors, because strangers to the Design. And that, for ought appears, might be this Case, for my Brother *Gould*, that tried this Cause, informs us, that there was some Reason to believe, that he that discharged the Fuzee against the Persons slain, did it upon the Account, that he conceived that the other had betrayed their Design; and no Doubt it was Murder in him that shot off the Fuzee, but not in the others, unless privy to his Purpose, for it was not done in Prosecution of that unlawful Act; but if he had shot off the Gun against the King's Officers, and by Accident had killed one of his own Party, all the Rest of them would have been Abettors and Principals.

A and *B* are fighting together out of Malice prepen-
sed, *C* comes to part them, and *A* kills *C*, this is Mur-
der in *A*, and some said in *B* also, but the major Num-
ber were of a contrary Opinion; for though *B* was en-
gaged in an unlawful Act as well as *A*, yet the killing
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of *C* by *A*, was not in Pursuance of, but collateral to it, but the killing of *C* by *A*, was Murder, because he killed one doing his Duty, which was endeavouring to keep the Peace; and would have hindred him from killing *B*, against whom he had Malice.

3. There is another Qualification of this Rule, that the doing an unlawful Act, whereby a Person is slain, shall make the Killer to be a Murderer; that the unlawful Act ought to be deliberate. For if it be sudden, as upon an Affray that suddenly falls out, and the Parties are divided amongst themselves, and fall to fighting, and one kills the other, it is but Manslaughter. So if upon a sudden Affray, the Constable, or other Person, comes to keep the Peace, and some knowing him to be the Constable, or Person coming to keep the Peace, shall kill him, it is Murder in him, and all that assisted him in doing it; but in others that continue the Affray, and knew not that the Constable, or other Person was coming to keep the Peace, it will be no Crime: For first, though the Constable did come to keep the Peace, it is necessary that the Parties engaged in the Tumult have Notice that he comes for that Purpose, otherwise the killing him will not be Murder, but only Manslaughter in him that kills him; and in Consequence, no Crime in the Persons that did not know him to be there, and did not contribute towards his Death. At the Sessions after *Hil. Term*, 19 *Car. 2.* *Thompson* and his Wife were fighting together in the House of *Allen Daws*, who seeing them fighting, came in, and endeavoured to part them, thereupon *Thomas* thrust away *Daws*, and threw him down upon an Iron in the Chimney, which broke one of his Ribs, of which he died; this upon a special Verdict, was held to be only Manslaughter, though the Peace was broke, and the Person slain came only to keep the Peace; and it is the same if he

had been Constable. But then it was resolved, that if the Constable, or other Person, came to keep the Peace be killed, it is necessary the Person that kills him do know, or be acquainted that he came for that Purpose. Therefore he ought to charge them, in the King's Name, to keep the Peace, for otherwise, the Party fighting, may think he cometh in Aid of the other with whom he is fighting. And *Mackally's* Case doth not oppose this, but agrees with it in the Reason there given, which is in these Words, *viz.* when an Officer, or Minister of the King, corrects another in the Name of the King, or requires the Breakers of the Peace to keep the Peace in the King's Name; if any notwithstanding resist, and kill the Officer, it is Murder; but if he had not Notice that he was the Officer, it is only Manslaughter in him that killed; but then, by the same Reason, the others that are in the Affray, which was sudden, did continue in the Affray, but did not resist the Constable, it cannot be Murder or Manslaughter in them, for their Act cannot be extended farther than a Breach of the Peace.

But suppose the Riot, or the Assembly had been deliberate, and they designed doing an unlawful Act, in which they are opposed by the Constable or any other Person, and one kills the Person opposing, it is Murder in all. *George* came with divers Persons, in a riotous Manner, to the House of *B*, upon the Account of seizing some Goods, and using there some angry Speeches, a Kinswoman of them both travelling indifferently between them to appease, was suddenly stricken in the Head, with a Stone thrown over the Wall, by one of the Servants of *George*, whereof she afterwards died, and by much the greater Opinion of the Judges and King's Council, it was held to be Murder in all the Accomplices; and though she came as a Stranger, and was indifferent to all, yet they came
with

with Malice against *B*, and in Pursuance, and in Execution of that Riot, the Woman was killed.

4. As the unlawful Act ought to be deliberate to make the killing Murder, so it ought to be such an Act as may tend to the Hurt of another, either immediately, or by necessary Consequence. If Persons are in a Riot, and go with offensive Arms, or with Clubs and Staves, and in that Riot, one of the Company kills another, it is Murder in him, and in all the Rest that are engaged in the Riot, though but Lookers on. But if such unlawful Act doth not tend immediately, or by necessary Consequence to the Danger of another, though Death ensue hereby, it is but Manlaughter.

Shooting at a Deer in another's Park is an unlawful Act: If the Arrow glanceth and kills a Man, this is but Manlaughter, which is contrary to 3 *Inst.* 56. that holds it to be Murder: But Lord *Hale* 31. saith it is but Manlaughter, and the Rest of the Company will be guilty, for they were all Abettors to the unlawful Act.

The Design of doing any Act makes it deliberate; and if the Fact be deliberate, though no Hurt to any Person can be foreseen, yet if the Intent be felonious, and the Fact designed, if committed, would be Felony, and in Pursuit thereof, a Person is killed by Accident, it will be Murder in him and all his Accomplishes. As for the Purpose: Divers Persons design to commit a Burglary, and some of them are set to watch in a Lane to hinder any from going to the House to interrupt them, if any comes in their Way, and those that are to keep Watch kill him, those that are sent to rob the House will be guilty of that Murder, though they do not commit the Burglary.

So if two Men have a Design to steal an Hen, and one shoots at the Hen for that Purpose, and a Man be killed, it is Murder in both, because the Design is fe-

lonious. So is Lord *Coke*, 56. surely to be understood, with that Difference; but without this Difference, none of the Books quoted in the Margin, do warrant that Opinion; nor indeed can I say that I find any to warrant my Opinion, but only the Reason is submitted to the Judgment of those Judges that may at any Time hereafter have that Point judicially brought before them.

These Things I thought fit to mention, tho' some of them are not such Premisses from which the Conclusion to this Matter in Question may be drawn, yet they all tend to illustrate the Matter and Reason that we rely upon, which is, that though the Person that shot off the Fuzee against the Person slain, did it maliciously, and so it would be Murder in him, yet the others not knowing of his Design against that Person, cannot be adjudged to be Aiders and Abettors of that Murder.

Secondly, if it had appeared upon the Verdict, that the Fuzee had been discharged against the King's Officer, and by Accident, *Harding*, one of the Company, had been killed, it would have been Murder in the Rest, because it was done in Pursuance of that Design, which was deliberate, and in the Prosecution whereof Hurt and Mischief might ensue; and their being together, is an Evidence that they did intend to maintain their unlawful Design by Force, and that the shooting the Gun was against the Officer: But this Matter being only evidence of it, it ought to have been considered by the Jury, but we, as Judges, cannot take Notice of it.

Upon the Accession to the Throne of her late Majesty Queen *Anne*, there had been an Act made in the Reign of King *William* the *third*, empowering all Persons in Offices of Trust, to act therein after his Decease as before, for six Months, unless otherwise dis-

displaced by the Successor ; and particularly in the Office of Chief Justice, which was *quam diu se bene gesserit*, yet his Lordship held it to be determined by the Demise of the King, notwithstanding the above Act, and therefore politicly declined exercising the said Office, whereupon the Queen in Council gave Orders that he should have a new Writ.^g

On the *twenty-first* of February, 1703, ^h 2 Anne, James Boucher, formerly *Aid de Camp*, and Gentleman of the Horse to the Duke of Berwick, was arraigned before the Lord Chief Justice Holt, the Lord Chief Justice Trevor, the Lord Chief Baron Ward, the Justices Powel, Powis, Gould, and Tracy, and the Barons Bury and Price, appointed by a special Commission of Oyer and Terminer at the *Queen's Bench* Bar, upon two Indictments for High Treason ; one, for being in Arms in the Service of the late King James in Ireland ; and the other, for returning from France into England without Licence, against the Form of the Statute made in the *eighth* Year of King William. The Court being sat, and the Indictments read, Mr. Boucher pleaded guilty : And then having obtained Leave to speak, he endeavoured to extenuate his Crime by several Allegations, [particularly mentioned by Mr. Boyer, which did not seem to require much Notice here, and therefore are omitted] the Prisoner concluded with hoping that his Lordship (the Lord Chief Justice Holt) would represent his Case favourably to the Queen.

Then Dr. Sands begged Leave to speak in Behalf of the Prisoner ; but being told by the Lord Chief Justice Holt, that all he could do now (the Prisoner having pleaded guilty) would signify nothing ; and that if he had any Thing to say, he must apply himself elsewhere,

^f Stat. 12 & 13. Will. 3. Chap. 2.

^g Lord Raym. Rep. 2 Vol. P. 747. Fortesc. Rep. P. 389. Cro. Car. Rep. P. 1.

^h Boyer's History of Queen Anne, P. 120, 121.

where, and the Attorney General demanding Judgment against the Prisoner, upon his Confession of the two Indictments: “ Mr. *Boucher*, (said the Lord Chief Justice *Holt*) you are by your own Confession, convicted of High Treason; for which, Judgment of Death is to be pronounced upon you, and which you are to suffer, under those Circumstances which the Law has appointed. The Fact, of which you were accused, and have now confessed, is, that since the *eleventh* Day of *December*, 1688, you went into *France*, either from the late King, or Queen, and have returned since the *fourteenth* of *January*, 1697, without any Licence under the Privy Seal, either from the late King, or her Majesty that now is; which Fact is made High Treason by the ¹ Statute of the *eighth* Year of the late King. The Wisdom and Justice in making that Law, will be evident to any one, that will but reflect upon the Posture of our Affairs at that Time. For in the Year preceding to that of the making thereof, there was an horrid Conspiracy formed, from among the Party of Men who had then left the Kingdom, to assassinate the late King, to introduce a Popish and *French* Power, for the Subversion of the Protestant Religion, and the Liberties and Properties of the People of *England*; which was managed with that Privacy, and carried on with that Secrecy, that it was not discovered; nay, not so much as suspected, until it arrived to that Maturity, that it was come to the very Point of being put in Execution. In the following Year, the Peace of *Reswick* was made, whereby the Intercourse was restored between *England* and *France*; from whence it was evident, that divers of that Party of Men would return into the Realm, and thereby have an Opportunity to revive and carry on that horrid Design, in the Success whereof they had been so disappointed; for
which,

which, no doubt, they were not a little enraged: And it could not be otherwise expected, but they would make use of it; for those of the same Principles will be guilty of the same Practices. Therefore it was necessary to make a Returning into *England*, by any of those who were under these Circumstances, to be very penal; unless they should first give Satisfaction to the Government, either of their Innocence, or Repentance, and obtain a Licence and Approbation for their Return, under the Privy Seal. For their returning in any other Manner, is a Danger to the Queen's Person and her Kingdom. This Treason, though it seems, and is new in the Form, yet it is compounded of an old Treason, known in the antient Law of the Kingdom; which is, that of adhering to the King's Enemies. For what can be thought of those, who, in Time of War, shall abandon their own Country, be harboured and protected in any Enemy's Country, for being of an Interest inconsistent with, even repugnant to that of their own? What your Designs might be in returning in this Manner, whether to revive and pursue these wicked Practices, your own Conscience is your Witness, and will be your Judge: And if that shall acquit you, it will be for your Advantage in the World to come. But you are an Offender against the Law of this Land, which has made this your Offence to be High Treason." And thereupon his Lordship pronounced the Judgment appointed for one guilty of that Crime: Which done, the Prisoner was remanded to *Newgate*.

In *Trinity Term*, 1703, 2 *Anne*, Lord Chief Justice *Holt* delivered his Argument in another Case, and as my Lord * *Raymond* says, of great Consequence, it was after a Verdict for the Plaintiff, upon a Motion in Arrest of Judgment.

His

* Lord *Raym.* Rep. 2 Vol. P. 909.

His Lordship said, the Case was shortly this. “ The Defendant, [*William*¹ *Bernard*,^m] undertakes to remove Goods from one Cellar to another, and there lay them down safely, and he managed them so negligently, that for want of Care in him some of the Goods were spoiled. Upon not guilty pleaded, there has been a Verdict for the Plaintiff [*John*¹ *Coggs*] and that upon full Evidence, the Cause being tried before me at *Guildball*. There has been a Motion in Arrest of Judgment, that the Declaration is insufficient, because the Defendant is neither laid to be a common Porter, nor that he is to have any Reward for his Labour. So that the Defendant is chargeable by his Trade, and a private Person cannot be charged in an Action without a Reward.

I have had a great Consideration of this Case, and because some of the Books make the Action lie upon the Reward, and some upon the Promise, at first I made a great Question, whether this Declaration was good. But upon Consideration, as this Declaration is, I think the Action will well lie. In order to shew the Grounds, upon which a Man shall be charged with Goods put into his Custody, I must shew the several Sorts of Bailments. And there are six Sorts of Bailments. The first Sort of Bailment is, a bare naked Bailment of Goods, delivered by one Man to another, to keep for the Use of the Bailor; and this I call a *Depositum*, and it is that Sort of Bailment which is mentioned in *Southcote's* Case. The second Sort is, when Goods or Chattels that are useful, are lent to a Friend *gratis*, to be used by him, and this is called *commodatum*, because the Thing is to be restored in *Specie*. The third

¹ *Salk. Rep.* 2 Vol. P. 735.

^m *Lord Raym. Rep.* 2 Vol. P. 912. *Com. Rep.* P. 133. *Salk. Rep.* P. 26. pl. 12. *Salk. Rep.* 3 Vol. P. 11, 268. *Cas. Temp. Holt*, P. 13. pl. 14. P. 131. pl. 2. P. 528.

third Sort is, when Goods are left with the Bailee to be used by him for Hire: This is called *Locatio et Conductio*, and the Lender is called *Locator*, and the Borrower *Conductor*. The fourth Sort is, when Goods or Chattels are delivered to another as a Pawn, to be a Security to him for Money borrowed of him by the Bailor: And this is called in *Latin*, *Vadium*, and in *English*, a Pawn or a Pledge. The fifth Sort is, when Goods or Chattels are delivered to be carried, or something is to be done about them for a Reward to be paid by the Person who delivers them to the Bailee, who is to do the Thing about them. The sixth Sort is, when there is a Delivery of Goods or Chattels to somebody, who is to carry them, or do something about them *gratis*, without any Reward for such his Work or Carriage, which is this present Case. I mention these Things, not so much that they are all of them so necessary, in order to maintain the Proposition which is to be proved, as to clear the Reason of the Obligation, which is upon Persons in Cases of Trust.

As to the first Sort, where a Man takes Goods in his Custody to keep for the Use of the Bailor, I shall consider, for what Things such a Bailee is answerable. He is not answerable, if they are stolen without any Fault in him. Neither will a common Neglect make him chargeable, but he must be guilty of some gross Neglect. There is, I confess, a great Authority against me, where it is held, that a general Delivery will charge the Bailee to answer for the Goods if they are stolen, unless the Goods are specially accepted, to keep them only as you will keep your own. But my Lord *Coke* has improved the Case in his Report of it, for he will have it, that there is no Difference between a special Acceptance to keep safely, and an Acceptance generally to keep. But there is no Reason nor Justice in such a Case of a general Bailment, and where
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the Bailee is not to have any Reward, but keeps the Goods merely for the Use of the Bailor, to charge him without some Default in him. For if he keeps the Goods in such a Case with an ordinary Care, he has performed the Trust reposed in him. But according to this Doctrine, the Bailee must answer for the Wrongs of other People, which he is not, nor cannot be, sufficiently armed against. If the Law be so, there must be some just and honest Reason for it, or else some universal settled Rule of Law, upon which it is grounded; and therefore it is incumbent upon them, that advance this Doctrine, to shew an undisturbed Rule and Practice of the Law according to this Position. But to shew that the Tenor of the Law was always otherwise, I shall give an History of the Authorities in the Books in this Matter, and by them shew, that there never was any such Resolution given before *Southcote's Case*. The 29 *Aff.* 28. is the first Case in the Books upon that Learning, and there the Opinion is, that the Bailee is not chargeable, if the Goods are Stole: As for 8 *Edw.* 2. *Fitz. detinue*, 59. where Goods were locked in a Chest, and left with the Bailee, and the Owner took away the Key, and the Goods were stolen, and it was held that the Bailee should not answer for the Goods. That Case they say differs, because the Bailor did not trust the Bailee with them. But I cannot see the Reason of that Difference, nor why the Bailee should not be charged with Goods in a Chest, as well as with Goods out of a Chest. For the Bailee has as little Power over them, when they are out of a Chest, as to any Benefit he might have by them, as when they are in a Chest; and he has as great a Power to defend them in the one Case as in the other. The Case of 9 *E.* 4. 40 *b.* was but a Debate at Bar. For *Danby* was but a Counsel then, though he had been Chief Justice in the Beginning of *Edw.* 4. yet he was

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removed and restored again upon the Restitution of *Hen. 6.* as appears by *Dugdale's Chronica Series.* So that what he said cannot be taken to be any Authority. For he spoke only for his Client; and *Genney*, for his Client, said the Contrary. The Case in *3 Hen. 7. 4.* is but a sudden Opinion, and that but by half the Court, and yet that is the only Ground for this Opinion of my Lord *Coke*, which, besides, he has improved. But the Practice has been always at *Guildhall*, to disallow that to be a sufficient Evidence, to charge the Bailee, and it was practised so before my Time, all Chief Justice *Pemberton's* Time, and ever since, against the Opinion of that Case. When I read *Southcote's* Case heretofore, I was not so discerning as my Brother *Powys* tells us he was, to disallow that Case at first, and came not to be of this Opinion, till I had well considered and digested that Matter. Though I must confess Reason is strong against the Case, to charge a Man for doing such a friendly Act for his Friend, but so far is the Law from being so unreasonable, that such a Bailee is the least chargeable for neglect of any, for if he keeps the Goods bailed to him, but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them, for the keeping them as he keeps his own, is an Argument of his Honesty. *A fortiori*, he shall not be charged, where they are stolen without any Neglect in him. Agreeable to this, is *Bracton, Lib. 3. Cap. 2. 99. b. J. S. apud quem Res deponitur, Re obligatur, et de eâ Re, quam accepit, restituenda tenetur, et etiam ad id, si quid in Re depositâ Dolo commiserit; Culpæ autem Nomine non tenetur, scilicet Desidiæ vel Negligentiæ, quia qui negligenti Amico Rem custodiendam tradit, sibi ipsi et propriæ Fatuitati hoc debet imputare.* As suppose the Bailee is an idle, careless, drunken Fellow, and comes home drunk, and leaves all his Doors open, and by Reason thereof the Goods hap-

happen to be stolen with his own ; yet he shall not be charged, because it is the Bailor's own Folly to trust such an idle Fellow. So that this Sort of Bailee is the least responsible for Neglects, and under the least Obligation of any one, being bound to no other Care of the bailed Goods, than he takes of his own. This *Bracton*, I have cited, is, I confess, an old Author, but in this, his Doctrine is agreeable to Reason, and to what the Law is in other Countries. The Civil Law is so, as you have it in *Justinian's Inst.* Lib. 3. Tit. 15. There the Law goes farther, for there it is said, *ex eo solo tenetur, si quid Dolo commiserit : Culpæ autem Nomine, id est, Desidiæ ac Negligentiæ, non, tenetur. Itaque securus est qui parum diligenter custoditam Rem Furto amiserit, quia qui negligenti Amico rem custodiendam tradit, non ei, sed suæ Facilitati id imputare debet.* So that a Bailee is not chargeable without an apparent gross Neglect. And if there is such a gross Neglect, it is looked upon as an Evidence of Fraud. Nay, suppose the Bailee undertakes safely and securely to keep the Goods, in express Words, yet even that won't charge him with all Sort of Neglects. For if such a Promise were put into Writing, it would not charge so far, even then. A Covenant, that a Covenantee shall have, occupy, and enjoy certain Lands, does not bind against the Acts of wrong doers. So upon a Promise for quiet Enjoyment. And if a Promise will not charge a Man against wrong doers, when put in Writing, it is hard it should do it more so, when spoken. *Doct. & Stud.* 130. is in Point, that though a Bailee do promise to redeliver Goods safely, yet if he have nothing for the keeping of them, he will not be answerable for the Acts of a wrong doer. So that there is neither sufficient Reason nor Authority to support the Opinion in *Southcote's Case* ; if the Bailee be guilty of gross Negligence, he will be chargeable, but not for any ordinary Neglect.

As to the second Sort of Bailment, *viz. commodatum*, or lending *gratis*, the Borrower is bound to the strictest Care and Diligence, to keep the Goods, so as to restore them back again to the Lender, because the Bailee has a Benefit by the Use of them, so as if the Bailee be guilty of the least Neglect, he will be answerable; as if a Man should lend another an Horse, to go Westward, or for a Month; if the Bailee go Northward, or keep the Horse above a Month, if any Accident happen to the Horse in the Northern Journey, or after the Expiration of the Month, the Bailee will be chargeable; because he has made Use of the Horse contrary to the Trust he was lent to him under, and it may be, if the Horse had been used no otherwise than he was lent, that Accident would not have befallen him. This is mentioned in *Braeton, ubi supra*: His Words are, *Is autem cui Res aliqua utenda datur, Re obligatur, quæ commodata est, sed magna Differentia est inter mutuum et commodatum; quia is qui Rem mutuam accepit, ad ipsam restituendam tenetur, vel ejus Pretium, si fortè Incendio, Ruinâ, Naufragio, aut Latronum vel Hostium Incurfu, consumpta fuerit, vel deperdita, subtracta, vel ablata. Et qui Rem utendam accepit, non sufficit ad Rei Custodiam, quod talem Diligentiam adhibeat, qualem suis Rebus propriis adhibere solet, si alius eam diligentius potuit custodire; ad Vim autem majorem, vel Casus fortuitos non tenetur quis, nisi Culpa sua intervenerit. Ut si Rem sibi commodatam domi, secum desulerit cum peregrè profectus fuerit, non est Dubium quin ad Rei Restitutionem teneatur.* I cite this Author, though I confess he is an old one, his Opinion is reasonable, and very much to my present Purpose, and there is no Authority in the Law to the contrary. But if the Bailee put this Horse in his Stable, and he were stolen from thence, the Bailee shall not be answerable for him, but if he, or his Servants leave the House or Stable Doors open, and the

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Thieves

Thieves take the Opportunity of that, and steal the Horse, he will be chargeable, because the Neglect gave the Thieves the Occasion to steal the Horse. *Bracton* says, the Bailee must use the utmost Care, but yet he shall not be chargeable, where there is such a Force as he cannot resist.

As to the third Sort of Bailment, *scilicet Locatio*, or lending for Hire, in this Case the Bailee is also bound to take the utmost Care, and to return the Goods, when the Time of the Hiring is expired. And here again, I must recur to my old Author, Fol. 62. *b.* *Qui pro Usu Vestimentorum, Auri vel Argenti, vel alterius Ornamenti, vel Fumenti, Mercedem dederit vel promiserit, talis ab eo desideratur Custodia, qualem diligentissimus Paterfamilias suis Rebus adhibet, quam si præstiterit, et Rem aliquo Casu amiserit, ad Rem restituendam non tenebitur. Nec sufficit aliquam talem Diligentiam adhibere, qualem suis Rebus propriis adhiberet, nisi talem adhibuerit, de quâ superius dictum est.* From whence it appears, that if Goods are let out for a Reward, the Hirer is bound to the utmost Diligence, such as the most diligent Father of a Family uses; and if he uses that, he shall be discharged. But every Man, how diligent soever he be, being liable to the Accident of Robbers, though a diligent Man is not so liable as a careless Man, the Bailee shall not be answerable in this Case, if the Goods are stolen.

As to the fourth Sort of Bailment, *viz. Vadium*, or a Pawn, in this I shall consider two Things, first, what Property the Pawnee has in the Pawn or Pledge, and secondly, for what Neglects he shall make Satisfaction. As to the first, he has a special Property, for the Pawn is a Security for the Pawnee, that he shall be repaid his Debt, and to compel the Pawnor to pay him. But if the Pawn be such as it will be the worse for using, the Pawnee cannot use it, as Cloaths, &c.

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but if it be such, as will be never the worse, as if Jewels for the Purpose were pawned to a Lady, she might use them. But then she must do it at her Peril, for whereas, if she keeps them locked up in her Cabinet, if her Cabinet should be broke open, and the Jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the Reason is; because the Pawn is in the Nature of a Deposit, and as such is not liable to be used. And to this Effect is *Ow. 123*: But if the Pawn be of such a Nature; as the Pawnee is at any Charge about the Thing pawned, to maintain it, as an Horse, Cow, &c. then the Pawnee may use the Horse in a reasonable Manner, or Milk the Cow, &c. in Recompence for the Meat. As to the second Point, *Brañton 99. b.* gives you the Answer. *Creditor, qui Pignus accepit, Re obligatur, et ad illam restituendam tenetur; et cum hujusmodi Res in Pignus data sit utriusque gratiâ, scilicet Debitoris, quo magis ei Pecunia crederetur, et Creditoris, quo magis ei in tuto sit creditum, sufficit ad ejus Rei Custodiam Diligentiam exactam adhibere, quam si præstiterit, et Rem Casu amiserit, securus esse possit, nec impediatur creditum petere.* In Effect, if a Creditor takes a Pawn, he is bound to restore it upon the Payment of the Debt; but yet it is sufficient, if the Pawnee use true Diligence, and he will be indemnified in so doing, and notwithstanding the Loss, yet he shall resort to the Pawnor for his Debt. Agreeable to this is *29 Ass. 28.* and *Southcote's Case*. But, indeed, the Reason given in *Southcote's Case* is, because the Pawnee has a special Property in the Pawn. But that is not the Reason of the Case; and there is another Reason given for it in the Book of Assize, which is, indeed, the true Reason of all these Cases, that the Law requires nothing extraordinary of the Pawnee, but only that he shall use an ordinary Care for restoring the

Goods. But, indeed, if the Money for which the Goods were pawned, be tendered to the Pawnee before they are lost, then the Pawnee shall be answerable for them; because the Pawnee, by detaining them after the Tender of the Money, is a wrong doer, and it is a wrongful Detainer of the Goods, and the special Property of the Pawnee is determined. And a Man that keeps Goods by Wrong, must be answerable for them at all Events, for the detaining of them by him, is the Reason of the Loss. Upon the same Difference, as the Law is, in Relation to Pawns, it will be found to stand in Relation to Goods found

As to the fifth Sort of Bailment, *viz.* a Delivery to carry, or otherwise manage, for a Reward to be paid to the Bailee, those Cases are of two Sorts; either a Delivery to one that exercises a public Employment, or a Delivery to a private Person. First, if it be to a Person of the first Sort, and he is to have a Reward, he is bound to answer for the Goods at all Events. And this is the Case of the common Carrier, common Hovman, Master of a Ship, &c. which Case of a Master of a Ship was first adjudged 26 *Car.* 2. in the Case of *Mors* and *Slew*. The Law charges this Person thus intrusted, to carry Goods, against all Events, but Acts of God, and of the Enemies of the King. For though the Force be never so great, as if an irresistible Multitude of People should rob him, nevertheless he is chargeable. And this is a politic Establishment, contrived by the Policy of the Law, for the Safety of all Persons, the Necessity of whose Affairs oblige them to trust these Sort of Persons, that they may be safe in their Ways of Dealing; for else these Carriers might have an Opportunity of undoing all Persons that had any Dealings with them, by combining with Thieves, &c. and yet doing it in such a clandestine Manner, as would not be possible to be discovered. And this is the

the Reason the Law is founded upon in that Point. The second Sort are Bailies, Factors, and such like. And though a Bailee is to have a Reward for his Management, yet he is only to do the best he can. And if he be robbed, &c. it is a good Account. And the Reason of his being a Servant is not the Thing; for he is at a Distance from his Master, and acts at Discretion, receiving Rents and selling Corn, &c. and yet if he receives his Master's Money, and keeps it locked up with a reasonable Care, he shall not be answerable for it, though it be stolen. But yet this Servant is not a domestic Servant, nor under his Master's immediate Care. But the true Reason of the Case is, it would be unreasonable to charge him with a Trust, farther than the Nature of the Thing puts it in his Power to perform. But it is allowed in the other Cases, by Reason of the Necessity of the Thing. The same Law of a Factor.

As to the sixth Sort of Bailment, it is to be taken, that the Bailee is to have no Reward for his Pains, but yet, that by his ill Management, the Goods are spoiled. Secondly, it is to be understood, that there was a Neglect in the Management. But thirdly, if it had appeared, that the Mischief happened by any Person that met the Cart in the Way, the Bailee had not been chargeable. As if a drunken Man had come by in the Streets, and had pierced the Cask of Brandy; in this Case the Defendant had not been answerable for it, because he was to have nothing for his Pains. Then the Bailee having undertaken to manage the Goods, and having managed them ill, and so by his Neglect a Damage has happened to the Bailor, which is the Case in Question, what will you call this? In *Bracton*, Lib. 3. 100. it is called *Mandatum*. It is an Obligation which arises *ex Mandato*. It is what we call in *English* an acting by Commission for another *gratis*, and in the

executing his Commission behaves himself negligently, he is answerable. *Vinnius* in his Commentaries upon *Justinian*, Lib. 3. Tit. 27. 684. defines *Mandatum* to be, *Contractus, quo aliquid gratuito gerendum committitur et accipitur*. This undertaking obliges the Undertaker to a diligent Management. *Bracton, ubi supra*, says, *contrahitur etiam Obligatio non solum Scripto et Verbis, sed et Consensu. sicut in Contractibus bonæ Fidei; ut in Emptionibus, Venditionibus, Locationibus, Conductionibus, Societatibus, et Mandatis*. I do not find this Word in any other Author of our Law, besides, in this Place, in *Bracton*, which is a full Authority, if it be not thought too old. But it is supported by good Reason and Authority.

The Reasons are first, because in such a Case, a Neglect is a Deceit to the Bailor. For when he intrusts the Bailee upon his undertaking to be careful, he has put a Fraud upon the Plaintiff by being negligent, his Pretence of Care being the Persuasion that induced the Plaintiff to trust him. And a Breach of a Trust undertaken voluntarily will be a good Ground for an Action. *Rol. Abr. 10. 2 Hen. 7. 11.* a strong Case to this Matter. There the Case was an Action against a Man, who had undertaken to keep an hundred Sheep, for letting them be drowned by his Default. And there the Reason of the Judgment is given, because when the Party has taken upon him to keep the Sheep, and after suffers them to perish in his Default; in as much as he has taken and executed his Bargain, and has them in his Custody, if after he does not look to them, an Action lies. For here is his own Act, *viz.* his Agreement and Promise, and that after broke of his Side, that shall give a sufficient Cause of Action.

But secondly, it is objected, that there is no Consideration to ground this Promise upon, and therefore the Undertaking is but *nudum Pactum*. But to this I

answer, that the Owners trusting him with the Goods, is a sufficient Consideration to oblige him to a careful Management. Indeed, if the Agreement had been executory, to carry these Brandies from one Place to the other such a Day, the Defendant had not been bound to carry them. But this is a different Case, for *Assumpsit* does not only signify a future Agreement, but in such a Case as this, it signifies an actual Entry upon the Thing, and taking the Trust upon himself. And if a Man will do that, and miscarries in the Performance of his Trust, an Action will lie against him for that, though nobody could have compelled him to do the Thing. The 19 *Hen.* 6. 49. and the other Cases cited by my Brothers, shew that this is the Difference. But in the 11 *Hen.* 4. 33. this Difference is clearly put, and that is the only Case concerning this Matter, which has not been cited by my Brothers. There the Action was brought against a Carpenter, for that he had undertaken to build the Plaintiff an House within such a Time, and had not done it, and it was adjudged the Action would not lie. But there the Question is put to the Court, what if he had built the House unskilfully, and it is agreed in that Case an Action would have lain. There has been a Question made, if I deliver Goods to *A*, and in Consideration thereof he promises to redeliver them, if an Action will lie for not redelivering them, and in *Yelv.* 4. Judgment was given, that the Action would lie, but that Judgment was afterwards reversed, and according to that Reversal, there was Judgment afterwards entered for the Defendant in the like Case. *Yelv.* 128. But those Cases were grumbled at, and the Reversal of that Judgment in *Yelv.* 4. was said, by the Judges, to be a bad Resolution, and the contrary to that Reversal was afterwards most solemnly adjudged in *Cro. Jac.* 667. *Tr.* 21 *Jac.* 1. in the *King's-Bench*, and that

Judgment affirmed upon a Writ of Error. And yet there is no Benefit to the Defendant, nor no Consideration in that Case, but the having the Money in his Possession, and being trusted with it, and yet this is held to be a good Consideration. And so a bare being trusted with another Man's Goods, must be taken to be a sufficient Consideration, if the Bailee once enter upon the Trust, and take the Goods into his Possession. The Declaration in the Case of *Mors* and *Slew*, was drawn by the greatest Drawer in *England* in that Time, and in that Declaration, as it was always in all such Cases, it was thought most prudent to put in, that a Reward was to be paid for the Carriage, and so it has been usual to put it in the Writ, where the Suit is by Original. I have said thus much in this Case, because it is of great Consequence, that the Law should be settled in this Point. But I do not know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these Points, which wiser Heads in Time may settle. And Judgment was given for the Plaintiff, with the Concurrence of the other three ^a Judges.

^b There had been great Complaints long made, and which had encreased much within these few Years, of great Partiality and Injustice in the Elections of Parliament Men, both by Sheriffs in Counties, and by the returning Officers in Boroughs. In *Aylesbury*, the Return was made by four Constables, and it was believed, that they made a Bargain with some of the Candidates, and then managed the Matter, so as to be sure, that the Majority should be for the Person, to whom they had engaged themselves; they canvassed about the Town, to know how the Votes were set, and they resolved to find some Pretence for disabling those, who were.

^a *Com. Rep.* P. 134.

^b *Burnet's History of his own Times*, 2 Vol. P. 366, 367.

were engaged to vote for other Persons than their Friends, that they might be sure to have the Majority in their own Hands. And when this Matter came to be examined by the *House of Commons*, they gave the Election always for him who was reckoned of the Party of the Majority, in a Manner so barefaced, that they were scarce out of Countenance, when they were charged for Injustice in judging of Elections. It was not easy to find a Remedy, to such a crying Abuse, of which all Sides in their Turns, as they happened to be depressed, had made great Complaints; but when they came to be the Majority, seemed to have forgot all, that they had formerly cried out on. Some few excused this, on the Topic of Retaliation; they said, they dealt with others as they had dealt with them, or their Friends. At last, an Action was brought against the Constables of *Aylesbury*, at the Suit of one *Asbby*, who had been always admitted to vote in former Elections, but was denied it in the last Election. This was tried at the *Affizes*, and it was found there by the Jury, that the Constables had denied him a Right, of which he was undoubtedly in Possession, so they were to be cast in Damages; but a Motion was made in the *Queen's Bench*, in Arrest of Judgment, since no Action did lie, or had ever been brought upon that Account. ^c *Powel*, ^d *Powis*, and ^e *Gould*, were of Opinion, that no Hurt was done the Man; that the judging of Elections belong to the *House of Commons*; that as this Action was the first of its Kind, so if it was allowed, it would bring on an Infinity of Suits, and put all the Officers, concerned in that Matter, upon great Difficulties: Lord Chief Justice *Holt*, though alone, yet differed from the Rest. His Lordship gave his Opinion in

^c Lord *Raym.* Rep. 2 Vol. P. 946.

^d *Ibid.* P. 943.

^e *Ibid.* P. 941.

in the following excellent Argument ; it was delivered (after the Case having for the Difficulty been ordered to stand in the Paper, and argued in *Trinity* Term, 1702, 1 *Anne*,^f) in *Trinity* Term, 1703, 2 *Anne*.

^g The single Question in this Case is, whether, if a free Burgefs of a Corporation, who had an undoubted Right to give his Vote in the Election of a Burgefs to serve in Parliament ; be refused and hindered to give it by the Officer, an Action on the Case will lie against such Officer ? I am of Opinion, that Judgment ought to be given in this Case for the Plaintiff. My Brothers differ from me in Opinion, and all from one another in the Reasons of their Opinion ; but notwithstanding their Opinion, I think the Plaintiff ought to recover, and that this Action is well maintainable, and ought to lie. My Brother *Gould* thinks no Action will lie against the Defendant, because, as he says, he is a Judge ; my Brother *Powis*, indeed says, he is no Judge, but *quasi* a Judge ; but my Brother *Powel* is of Opinion, that the Defendant neither is a Judge, nor any thing like a Judge, and that is true : For the Defendant is only an Officer to execute the Precept, *i. e.* only to give Notice to the Electors of the Time and Place of Election, and to assemble them together in order to elect, and upon the Conclusion to cast up the Poll, and declare which Candidate has the Majority. But to proceed, I will do these two Things : First, I will maintain, that the Plaintiff has a Right and Privilege to give his Vote : Secondly, in Consequence thereof, that if he be hindered in the Enjoyment or Exercise of that Right, the Law gives him
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^f Id. Ibid.

^g Lord *Raym.* Rep. 2 Vol. P. 949. *Salk.* Rep. P. 20. *Mod.* Rep. 6 Vol. P. 50. *State Trials*, 8 Vol. P. 89. *Cases Temp. Holt*, P. 524. *Salk.* Rep. 3 Vol. P. 18. *Burnet's Hist. of his own Times*, 2 Vol. P. 367.

an Action against the Disturber, and that this is the proper Action given by the Law.

I did not at first think it would be any Difficulty, to prove that the Plaintiff has a Right to vote, nor necessary to maintain it, but from what my Brothers have said in their Arguments, I find it will be necessary to prove it. It is not to be doubted, but that the Commons of *England* have a great and considerable Right in the Government, and a Share in the Legislature, without whom no Law passes; but because of their vast Numbers this Right is not exercisable by them in their proper Persons, and therefore by the Constitution of *England* it has been directed, that it should be exercised by Representatives, chosen by and out of themselves, who have the whole Right of all the Commons of *England* vested in them: And this Representation is exercised in three different Qualities, either as Knights of Shires, Citizens of Cities, or Burgeses of Boroughs; and these are the Persons qualified to represent all the Commons of *England*. The Election of Knights belongs to the Freeholders of the Counties, and it is an original Right vested in and inseparable from the Freehold, and can no more be severed from their Freehold, than their Freehold itself can be taken away. Before the Statute of 8 *H. 6.* Cap. 7. any Man that had a Freehold, though never so small, had a Right of Voting, but by that Statute, the Right of Election is confined to such Persons as have Lands or Tenements, to the yearly Value of forty Shillings at least, because, as the Statute says, of the Tumults and Disorders which happened at Elections, by the excessive and outrageous Number of Electors; but still the Right of Election is as an original Right, incident to, and inseparable from the Freehold. As for Citizens and Burgeses, they depend on the same Right as the Knights of Shires, and differ only as to the Tenure,
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but the Right and Manner of their Election is on the same Foundation. Now Boroughs are of two Sorts; first, where the Electors gave their Voices by Reason of their Burghership; or, secondly, by Reason of their being Members of the Corporation. *Littleton*, in his Chapter of Tenure in Burgage 162. *Co. Lit.* 108. b. 109. says, Tenure in Burgage is, where an antient Borough is, of the which the King is Lord, of whom the Tenants hold by certain Rent, and it is but a Tenure in Socage: And Sect. 164. he says, and it is to wit, that the antient Towns called Boroughs, be the most antient Towns that be within *England*, and are called Boroughs, because of them come the Burgeses to Parliament. So that the Tenure of Burgage is from the Antiquity, and their Tenure in Socage is the Reason of their Estate, and the Right of Election is annexed to their Estate. So that it is part of the Constitution of *England*, that these Boroughs shall elect Members to serve in Parliament, whether they be Boroughs corporate or not corporate; and in that Case the Right of Election is a Privilege annexed to the Burgage Land, and is, as I may properly call it, a real Privilege. But the second Sort is, where a Corporation is created by Charter, or by Prescription, and the Members of the Corporation as such chuse Burgeses to serve in Parliament. The first Sort have a Right of chusing Burgeses as a real Right, but here in this last Case it is a personal Right, and not a real one, and is exercised in such Manner as the Charter or Custom prescribes; and the Inheritance of this Right, or the Right of Election itself, is in the whole Body politic, but the Exercise and Enjoyment of this Right is in the particular Members. And when this Right of Election is granted within Time of Memory, it is a Franchise that can be given only to a Corporation, as is resolved by all Judges against my Lord *Hobart*, in the

the Case of *Dungannon* in *Ireland*, 12 Co. 120, 121. That if the King grant to the Inhabitants of *Islington*, to be a free Borough, and that the Burgeffes of the same Town may elect two Burgeffes to serve in Parliament, that such a Grant of such Privilege to Burgeffes not incorporated is void, for the Inhabitants have not Capacity to take an Inheritance. See *Hob.* 15. The principal Case there was, the King constituted the Town of *Dungannon* to be a free Borough, and that the Inhabitants thereof should be a Body politic and corporate, consisting of one Provost, twelve free Burgeffes, and Commonalty, and by the same Name might sue and be sued; *et quod ipsi præfati Præpositi, et liberi Burgenses Burgi prædicti, et Successores sui in perpetuum habeant plenam Potestatem et Auctoritatem eligendi, mittendi, et retornandi duos discretos et idoneos Viros ad inseruiendum, et attendendum in quolibet Parlamento, in dicto Regno nostro Hiberniæ in posterum tenendo*, and so proceeds to give them Power to treat, and give Voice in Parliament, as other Burgeffes of any other antient Borough, either in *Ireland* or *England*, have used to do, and upon this Grant it was adjudged by all the Judges of *England*, that this Power to elect Burgeffes is an Inheritance of which the Provost and Burgeffes were not capable, for that it ought to be vested in the intire Corporation, *viz.* Provost, Burgeffes, and Commonalty, and that therefore the Law in this Case did vest that Privilege in the whole Corporation in Point of Interest, though the Execution of it was committed to some Persons, Members of the same Corporation. 12 Co. 120, 121, *Hob.* 14, 15. As to the Manner of Election, every Borough subsists on its own Foundation, and where this Privilege of Election is used by particular Persons, it is a particular Right vested in every particular Man; for if we consider the Matter, it will appear, that the

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particular Members and Electors, their Persons, their Estates, and their Liberties, are concerned in the Laws that are made, and they are represented as particular Persons, and not *quatenus* a Body politic; therefore, when their particular Rights and Properties are to be bound (which are much more valuable, perhaps, than those of the Corporation) by the Act of the Representative, he ought to represent the private Persons. And this is evident, from all the Writs, which were antiently issued for levying the Wages of the Knights and Burgeses that served in Parliament. As 46 *Edw. 3. Rot. Parl. Memb. 4. in dorso*. For when Wages were paid to the Members, they were not assessed upon the Corporation, but upon the Commonalty as private Persons, as the Writ shews, which, indeed, is directed to the Sheriff, or to the Mayor, &c. yet the Command is, *quod de Communitate, Civitatis, vel Burgi, habere faciat Militibus, Civibus, aut Burgesibus, 10l. pro Expensis suis*. But now if the Corporation were only to be represented, and not the particular Members of it, then the Corporation only ought to be at the Charge; but it is plain, that the particular Members are at the Charge. And all this is no new Thing, but agreeable to Reason and the Rules of Law, that a Franchise should be vested in the Corporation aggregate, and yet the Benefit of it to redound to the particular Members, and to be enjoyed by them in their private Capacity, as in the Case of *Waller and Hanger, Mo. 832, 833*, where the King granted to the Mayor and Citizens of London, *quod nulla Prisagia fuit soluta de Vinis Civium et liberorum Hominum de London*. And there it was resolved, that although the Grant be to the Corporation, yet it should not enure to the Body politic of the City, but to the particular Persons of the Corporation, who should have the Fruit and Execution of the Grant for their pri-

private Wines, and it should not extend to the Wines belonging to the Body politic ; and so is the constant Experience at this Day. So in the Case of *Millor* and *Spateman*, *Saund.* 343. where the Corporation of *Derby* claim common by Prescription, and though the Inheritance of the Commons be in the Body politic, yet the particular Members enjoy the Fruit and Benefit of it, and put in their own Cattle to feed on the Common, and not the Cattle belonging to the Corporation ; but that is not indeed our Case. But from hence it appears, that every Man that is to give his Vote on the Election of Members to serve in Parliament, has a several and a particular Right in his private Capacity, as a Citizen and Burgeſs. And ſurely it cannot be ſaid, that this is ſo inconfiderable a Right, as to apply that Maxim to it, *de minimis non curat Lex*. A right that a Man has to give his Vote to the Election of a Perſon to repreſent him in Parliament, there to concur to the making of Laws, which are to bind his Liberty and Property, is a moſt transcendent Thing, and of an high Nature, and the Law takes Notice of it as ſuch in diverſe Statutes : As in the Statute of 34 & 35 *H. 8.* Cap. 13. intituled an Act for making of Knights and Burgeſſes within the County and City of *Cheſter* ; where in the Preamble it is ſaid, that whereas the ſaid County Palatine of *Cheſter* is, and hath been always hitherto exempt, excluded, and ſeparated out, and from the King's Court, by Reason whereof the ſaid Inhabitants have hitherto ſuſtained manifold Diſheriſons, Loſſes, and Damages, as well in their Lands, Goods, and Bodies, as in the good, civil, and politic Governance, and Maintenance of the Common Wealth of their ſaid County, &c. ſo that the Opinion of the Parliament is, that the Want of this Privilege occaſions great Loſs and Damage. And the ſame farther appears, from the 25 *Car. 2.* Cap. 9.

an Act to enable the County Palatine of *Durham* to send Knights and Burgeſſes to ſerve in Parliament. Which recites, whereas the Inhabitants of the County Palatine of *Durham* have not hitherto had the Liberty and Privilege of electing and ſending any Knights and Burgeſſes to the high Court of Parliament, &c. The Right of voting at the Election of Burgeſſes, is a Thing of the higheſt Importance, and ſo great a Privilege, that it is a great Injury to deprive the Plaintiff of it. Theſe Reaſons have ſatiſfied me as to the firſt Point.

If the Plaintiff has a Right, he muſt of Neceſſity have a Means to vindicate and maintain it, and a Remedy if he is injured in the Exerciſe or Enjoyment of it; and, indeed, it is a vain Thing to imagine a Right without a Remedy; for want of Right, and want of Remedy, are reciprocal. As if a Purchaſer of an Advowſon in Fee-ſimple, before any Preſentment, ſuffer an Uſurpation, and ſix Months to paſs without bringing his *quare impedit*, he has loſt his Right to the Advowſon, becauſe he has loſt his *quare impedit*, which was his only Remedy; for he could not maintain a Writ of Right of Advowſon; and though he afterwards uſurp and die, and the Advowſon deſcend to his Heir, yet the Heir cannot be remitted, but the Advowſon is loſt for ever without Recovery. 6 Co. 50. Where a Man has but one Remedy to come at his Right, if he loſes that, he loſes his Right. It would look very ſtrange, when the Commons of *England* are ſo fond of their Right of ſending Representatives to Parliament, that it ſhould be in the Power of a Sheriff, or other Officer, to deprive them of that Right, and that they ſhould have no Remedy; it is a Thing to be admired at by all Mankind. Suppoſing then that the Plaintiff had a Right of Voting, and ſo it appears on the Record, and the Defendant has excluded him
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from it, Nobody can say, that the Defendant has done well; then he must have done ill, for he has deprived the Plaintiff of his Right: So that the Plaintiff having a Right to vote, and the Defendant having hindered him from it, it is an Injury to the Plaintiff. Where a new Act of Parliament is made for the Benefit of the Subject, if a Man be hindered from the Enjoyment of it, he shall have an Action against such a Person who so obstructed him. How else comes an Action to be maintainable by the Party on the Statute of 2 Ric. 2. C. 5. *de Scandalis Magnatum*, 12 Co. 134. but in Consequence of Law? For the Statute was made for the Preservation of the public Peace, and that is the Reason that no Writ of Error lies in the *Exchequer* Chamber by Force of the Statute of 27 Eliz. C. 8. in a Judgment in the *King's-Bench*, on an Action *de Scandalis*, for it is not included within the Words of the Statute; for though the Statute says, such Writ shall lie upon Judgments in Actions on the Case, yet it does not extend to that Action, although it be an Action on the Case, because it is an Action of a far higher Degree, being founded specially upon a Statute. If then, when a Statute gives a Right, the Party shall have an Action for the Infringement of it, is it not as forcible when a Man has his Right by the Common Law? This Right of Voting is a Right in the Plaintiff by the Common Law, and consequently he shall maintain an Action for the Obstruction of it. But there wants not a Statute too in this Case, for by *West. 1. Cap. 5.* it is enacted, that for as much as Elections ought to be free, the King forbids, upon grievous Forfeiture, that any great Man, or other, by Power of Arms, or by Malice or Menaces, shall disturb to make free Election. 2 *Inst.* 168, 169. And this Statute, as my Lord *Coke* observes, is only an Inforcement of the Common Law; and if the Parliament thought the Freedom of Election

to be a Matter of that Consequence, as to give their Sanction to it, and to enact that they should be free ; it is a Violation of that Statute, to disturb the Plaintiff in this Case in giving his Vote at an Election, and consequently actionable.

And I am of Opinion, that this Action on the Case is a proper Action. My Brother *Powell* indeed thinks, that an Action upon the Case is not maintainable, because here is no Hurt or Damage to the Plaintiff ; but surely every Injury imports a Damage, though it does not cost the Party one Farthing, and it is impossible to prove the contrary, for a Damage is not merely pecuniary, but an Injury imports a Damage, when a Man is thereby hindered of his Right. As in an Action for slanderous Words, though a Man does not lose a Penny by Reason of speaking them, yet he shall have an Action. So if a Man gives another a Cuff on the Ear, though it cost him nothing, no not so much as a little *Diackylon*, yet he shall have his Action, for it is a personal Injury. So a Man shall have an Action against another for riding over his Ground, though it do him no Damage ; for it is an Invasion of his Property, and the other has no Right to come there. And in these Cases the Action is brought *Vi et Armis*. But for the Invasion of another's Franchise, Trespass *Vi et Armis*, does not lie ; but an Action of Trespass on the Case ; as where a Man has *Retorna Brevium*, he shall have an Action against any one who enters and invades his Franchise, though he lose nothing by it. So here in the principal Case, the Plaintiff is obstructed of his Right, and shall therefore have his Action. And it is no Objection to say, that it will occasion Multiplicity of Actions ; for if Men will multiply Injuries, Actions must be multiplied too ; for every Man that is injured ought to have his Recompence. Suppose the Defendant had beat forty or fifty Men, the Damage done to each one

one is peculiar to himself, and he shall have his Action. So if many Persons receive a private Injury by a public Nuisance, every one shall have his Action, as is agreed in *Williams's Case*, 5 Co. 73. a. and *Westbury and Powell*, Co. Li. 56. a. Indeed, where many Men are offended by one particular Act, there they must proceed by Way of Indictment, and not of Action; for in that Case the Law will not multiply Actions. But it is otherwise, when one Man only is offended by that Act, he shall have his Action; as if a Man dig a Pit in a Common, every Commoner shall have an Action on the Case, *per quod Communiam suam in tam amplo Modo habere non potuit*; for every Commoner has a several Right. But it would be otherwise, if a Man dig a Pit in an Highway, every Passenger shall not bring his Action, but the Party shall be punished by Indictment; because the Injury is general and common to all that pass. But when the Injury is particular and peculiar to every Man, each Man shall have his Action. In the Case of *Turner* against *Sterling*, the Plaintiff was not elected, he could not give in Evidence, the Loss of his Place as a Damage, for he was never in it, but the *Git* of the Action is, that the Plaintiff having a Right to stand for the Place, and it being difficult to determine who had the Majority, he had therefore a Right to demand a Poll, and the Defendant by denying it, was liable to an Action. If public Officers will infringe Men's Rights, they ought to pay greater Damages than other Men, to deter and hinder other Officers from the like Offences. So the Case of *Hunt* and *Dowman*, *Cro. Jac.* 478. where an Action on the Case is brought by him in Reversion against Lessee for Years, for refusing to let him enter into the House, to see whether any Waste was committed. In that Case the Action was not founded on the Damage, for it did not appear that any Waste was done, but because the

Plaintiff was hindered in the Enjoyment of his Right, and surely no other Reason for the Action can be supposed.

But in the principal Case, my Brothers say, we cannot judge of this Matter, because it is a parliamentary Thing. O! by all Means be very tender of that. Besides it is intricate, and there may be Contrariety of Opinions. But this Matter can never come in Question in Parliament; for it is agreed, the Persons for whom the Plaintiff voted were elected, so that the Action is brought for being deprived of his Vote: And if it were carried for the other Candidates against whom he voted, his Damage would be less. To allow this Action, will make public Officers more careful to observe the Constitutions of Cities and Boroughs, and not to be so partial as they commonly are in all Elections, which is indeed a great and growing Mischief, and tends to the Prejudice of the Peace of the Nation. But they say, that this is a Matter out of our Jurisdiction, and we ought not to enlarge it. I agree we ought not to incroach or enlarge our Jurisdiction; by so doing, we usurp both on the Right of the Queen and the People: But sure we may determine on a Charter granted by the King, or on a Matter of Custom or Prescription, when it comes before us, without incroaching on the Parliament. And if it be a Matter within our Jurisdiction, we are bound by our Oaths to judge of it. This is a Matter of Property determinable before us. Was ever such a Petition heard of in Parliament, as that a Man was hindered in giving his Vote, and praying them to give him Remedy? The Parliament would undoubtedly say, take your Remedy at Law. It is not like the Case of determining the Right of Election between the Candidates.

My Brother *Powell* says, that the Plaintiff's Right of Voting ought first to have been determined in Parliament, and to that Purpose cites the Opinion of my Lord *Hobart* 318. that the Patron may bring his Action upon the Case against the Ordinary after a Judgment for him in *quare impedit*, but not before. It is indeed a fine Opinion, but I do not know whether it will bear debating, and how it will prove, when it comes to be handled. For at Common Law, the Patron had no Remedy for Damages against the Disturber, but the Statute gives him Damages; but if he will not make the Bishop a Party to the Suit, he has lost his Remedy which the Statute gives him. But in our Case the Plaintiff has no Opportunity to have a Remedy elsewhere. My Brother *Powys* has cited the Opinion of *Littleton* on the Statute of *Merton*, that no Action lay upon the Words, *si Parentes conquerantur*, because none had ever been brought, yet he cannot depend upon it. Indeed that is an Argument, when it is founded upon Reason, but it is none when it is against Reason. But I will consider the Opinion. Some Question had arose on the penning of that Statute on those Words, *si Parentes conquerantur*, &c. what was the Meaning of them, whether they meant a Complaint in a Court in a judicial Manner. But it is plain, the Word *conquerantur* means only, *si Parentes lamententur*, that is, only a Complaint in *Pais*, and not in a Court; for the Guardian in Socage shall enter in that Case, and shall have a special Writ, *de Ejectione Custodiæ Terræ et Hæredis*, but this saying has no great Force, if it had, it would have been destructive of many new Actions, which are at this Day held to be good Law. The Case of *Hunt* and *Dowman* before-mentioned, was the first Action of that Nature, but it was grounded on the Common Reason, and the antient Justice of the Law. So the Case of *Turner* and *Sterling*. Let us consider wherein

the Law consists, and we shall find it to be, not in particular Instances and Precedents, but on the Reason of the Law, and *ubi eadem Ratio, ibi idem Jus*. This Privilege of Voting does not differ from any other Franchise whatsoever. If the *House of Commons* do determine this Matter, it is not that they have an original Right, but as incident to Elections. But we do not deny them their Right of examining Elections, but we must not be frightened when a Matter of Property comes before us, by saying, it belongs to the Parliament; we must exert the Queen's Jurisdiction. My Opinion is founded on the Law of *England*. The Case of *Mors and Slue, Ventr.* was the first Action of that Nature, but the Novelty of it was no Objection to it. So the Case of *Smith and Crashaw, Cro. 15. W. Jones 93.* that an Action of the Case lay for falsely and maliciously indicting the Plaintiff of Treason, though the Objections were strong against, yet it was adjudged, that if the Prosecution were without probable cause, there was as much Reason the Action should be maintained, as in other Cases. So *15 Car. 2. C. B.* between *Bodily and Long*, it was adjudged by *Bridgman*, Chief Justice, &c. that an Action on the Case lay for a Riding, whenever the Plaintiff and his Wife fought, for it was a scandalous and reproachful Thing. So in the Case of *Herring and Finch, 2 Lev. 250.* Nobody scrupled, but that the Action well lay, for the Plaintiff was deprived of his Right. And if an Action is maintainable against an Officer for hindering the Plaintiff from voting for a Mayor of a Corporation, who cannot bind him in his Liberty nor Estate, to say, that yet this Action will not lie in our Case, for hindering the Plaintiff to vote at an Election of his Representative in Parliament, is inconsistent, therefore my Opinion is, that the Plaintiff ought to have Judgment.

Friday, the fourteenth of January, 1703, this Judgment was reversed in the House of Lords, and Judgment given for the Plaintiff, by fifty Lords against sixteen. Trevor, Chief Justice, and Baron Price, were of Opinion with the three Judges of the King's-Bench. Ward, C. B. and Bury and Smith Barons, were of Opinion with the Lord Chief Justice Holt, Tracy dubitante, Nevill and Blencowe absent.

(Note, Lord Chief Justice *Raymond* had it from good Hands, that *Tracy* agreed clearly, that the Action lay, but was doubtful upon the Manner of laying the Declaration.)

Upon the Arguments of this Case, *Holt*, Chief Justice said, the Plaintiff had a particular Right vested in him to vote, was it not then a Wrong and Injury to that Right, to refuse to receive his Vote? So if a Borough has Right of Common, and the Freemen are hindered from enjoying it by Inclosure, or the like, every Freeman may maintain his Action. This Action is brought by the Plaintiff for the Infringement of his Franchise. You would have nothing to be a Damage, but what is pecuniary, and a Damage to Property. If a Man has a *Retorna Brevium*, although no Fees were due to him at Common Law, yet if the Sheriff enters within his Liberty, and executes Process there, it is an Invasion of his Franchise, and he may bring his Action; and there is the same Reason in this Case, although this Matter relates to Parliament, yet it is an Injury precedaneous to the Parliament, as my Lord *Hale* said in the Case of *Bernardiston* and *Soame*. The Parliament cannot judge of this Injury, nor give Damage to the Plaintiff for it: They cannot make him a Recompence. Let all People come in, and vote fairly; it is to support one or the other Party, to deny any Man's Vote. By my Consent, if such an Action comes to be tried

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before me, I will direct the Jury to make him pay well for it; it is denying him his *English* Right, and if this Action be not allowed, a Man may be for ever deprived of it. It is a great Privilege to chuse such Persons, as are to bind a Man's Life and Property by the Laws they make.

Paty^h and ⁱ four others, being committed by the Speaker of the *House of Commons*, by Virtue of an Order of that House; moved for an *Habeas Corpus* to bring them before the Court of *Queen's Bench*, the Warrant was returned, which follows *in hæc Verba: Martis 5 die Decembris 1704.* By Virtue of an Order of the *House of Commons of England*, in Parliament assembled, this Day made, these are to require you forthwith, upon Sight hereof, to receive into your Custody the Body of *John Paty*, who, as it appears to the *House of Commons*, is guilty of commencing and prosecuting an Action at Common Law, against the late Constables of *Aylesbury*, for not allowing his Vote in the Election of Members to serve in Parliament, contrary to the Declaration, in high Contempt of the Jurisdiction, and in Breach of the known Privileges of this House; and him in safe Custody to keep, during the Pleasure of the said *House of Commons*; for which this shall be your Warrant. Given under my Hand this *fifth of December, Anno Domini 1704.* To the Keeper of his Majesty's Gaol of *Newgate*, or his Deputy. The Warrant was signed *Robert Harley*. This *Habeas Corpus* was moved for on the last *Monday* but one in *Hilary Term*, 1704, 3 *Anne*, and the Court granted the Writ returnable the *Saturday* after. Some Persons thought the Return too long, and the Court were much pressed to make it shorter; but the Court would not, but said, that in a Case of
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^h Lord *Raym.* Rep. 2 Vol. P. 1105, 1106.

ⁱ *Viz.* *John Oviat, John Paton, Jun. Henry Basse, and Daniel Horn of Aylesbury.* *Boyer's Hist. of Queen Anne*, P. 170.

this Consequence, they ought to give the Parties concerned Time to consider what Return to make, and if there were any Delay, the Parties were the Cause of it themselves, by not moving sooner. The Defendants were brought up upon the *Saturday*, and Mr. ^k *Mountague*, Mr. ^l *Page*, Mr. ^m *Lechmere*, and Mr. ⁿ *Denton*, argued that they ought to be discharged. There were no Council to maintain the Commitment. The Court put off delivering their Opinion till *Monday*, which was the last Day of *Hilary* Term, 1704, 3 *Anne*, and then all *Seriatim* delivered their Opinions.

Holt,

^k He was of *Lincoln's-Inn*, and afterwards knighted and appointed one of *Queen Anne's* Council. *Lord Raym. Rep.* 2 Vol. P. 1261. 25 *Apr.* 1707, 6 *Anne*, he was appointed Solicitor General; and 21 *Oct.* 1708, Attorney General. *Slif. Reg.* P. 160, 161. *Burnet's Hist. own Times*, 2 Vol. P. 553. On *Tuesday*, 26 *Oct.* 1714, 1 *Geo.* 1. he was made a Serjeant at Law, and gave Rings with this Motto; *plus quam speravimus*. *Lord Raym. Rep.* 2 Vol. P. 1261. Append. to *Chron. Juridicial.* P. 11. On *Monday, Nov.* 22d following, he was sworn a Baron of the *Exchequer*, and his Salary encreased from 1000*l.* to 1500*l.* per Annum, for which he had a distinct Patent from that, by which he was appointed a Baron. *Lord Raym. Rep.* 2 Vol. P. 1319. Append. to *Chron. Juridicial.* P. 11. He took his Seat as Chief Baron of the *Exchequer*, on the *twenty fifth* Day of *May*, in the Year 1722. *Bunbury's Rep.* P. 110. Append. to *Chron. Juridicialia.* P. 15. ¶

^l He was afterwards knighted and made a Serjeant to *Queen Anne*, 26 *Jan.* 1714. He succeeded Mr. Baron *Fortescue*, who came down into the *King's-Bench*, in *Easter* Term, 4 *Geo.* 1. 1716. *Stra. Rep.* P. 86. *Bunb. Rep.* P. 22. Append. to *Chron. Jurid.* P. 13. On *Friday*, the *fourth* Day of *November*, 13 *Geo.* 1. 1726, he was sworn Judge of the *Common Pleas*, in the Room of Mr. Justice *Tracy*. *Lord Raym. Rep.* 2 Vol. P. 1420. Append. to *Chron. Juridicial.* P. 15. as one of the Judges of the Court of *King's-Bench*, in *Michaelmas* Term, 1 *Geo.* 2. 1728. *Stra. Rep.* 2 Vol. P. 781. Append. to *Chron. Juridicial.* P. 17.

^m Afterwards Solicitor [*Lord Raym. Rep.* 2 Vol. P. 1318.] and Attorney General to his late Majesty King *George the first*. *Stra. Rep.* P. 86.

ⁿ He was constituted one of the Justices of the *Common Pleas*, 25 *June*, 1722. Append. to *Chronica Juridicial.* P. 15.

Holt, Chief Justice, argued to the following Effect.

° He said, That the Legality of the Commitment depended upon the Vote recited in the Warrant, and, for his Part, he thought the Prisoners ought to be discharged, though in this, his Opinion, he was so unfortunate as to go contrary to the *House of Commons*, and the Opinion of all the Rest of the Judges of *England*, whose Assistance they had desired, and there had been a Meeting for that Purpose. He said, this was not such an Imprisonment as the Freemen of *England* ought to be bound by; for that this, which was only doing a legal Act, could not be made illegal by the Vote of the *House of Commons*; for that neither House of Parliament, nor both Houses jointly, could dispose of the Liberty or Property of the Subject; for to this Purpose the Queen must join: And that it was the Necessity of their several Concurrences to such Acts, that the great Security of the Liberty of the Subject consisted. He said, that the first Matter, which was laid as a Breach of Privilege was none: And to that Purpose he cited *Binyon's Case*, where, in an *Assumpsit*, the Defendant pleaded the Statute of Limitations, and the Plaintiff replied, that the Defendant was a Parliament Man, &c. and the Plea was over-ruled, because one might file an Original against a Parliament Man, and continue it down, without Breach of Privilege. And that it should be so is of absolute Necessity, in order to save the Statute of Limitations; for otherwise, as is held in that Case in *Lev. 111.* that Case not being provided for by an Exception, the Plaintiff would be barred of his Action, notwithstanding that he could not file an Original. So a Man, whilst Member of Parliament, may alien his Estate by Fine with Proclamations, and a Person that has Right may be
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° Lord *Raym.* Rep. 2 Vol. P. 1112. Cas. Tem. *Holt*, P. 526. pl. 4. *Salk.* Rep. 2 Vol. P. 504. pl. 2.

necessitated to commence an Action to save the Bar that would incur against him by the Statute of 4 *Hen.* 7. So one may commence an Action against a Member of Parliament, that is Executor; and consequently the commencing an Action against the Constables of *Aylesbury*, is no Breach of Privilege. As to prosecuting the Action, which was the second Matter; he said, it was uncertain what Sort of prosecuting they meant. For prosecuting might be only continuing the Original, which, as was said before, would be no Breach of Privilege, though taking out a *Capias*, or a *Distringas* would. The third Thing is, the Persons the Action is brought against, *viz.* the Constables of *Aylesbury*; now it does not appear, that the Constables of *Aylesbury* have any Privilege, and if they have any, it ought to have been set out, because as Constables of *Aylesbury*, they have no more Privilege than the Constables of *St. Martin's in the Fields*. The fourth Matter, he said, was for bringing an Action at Common Law, for not allowing his Vote in the Election of Members to serve in Parliament. Now to bring an Action against a Person, who is not privileged, he said was no Offence, though no Action would lie in this Case, or though the Matter upon which the Action was grounded was false. And so is 2 *R.* 3. 9. And if a Peer be charged with any false and scandalous Matter, yet if it be by Way of Action, he cannot have *Scandalum Magnatum*. A Man who brings an Action against another, who is not a privileged Person, is not to have his Action stopped, especially if he has a good Cause of Action, which that the Plaintiffs in this Case have, appears by the Reversal of the Judgment of this Court *in Domo Procerum*, in the Case of *Ashby and White*. And this Action, which was brought in this Case, appears by the Description of it in the Vote of the *House of Commons*, to be for the same Cause of Action that that was.

I will suppose, that the bringing such Actions was declared by the *House of Commons* to be a Breach of Privilege; but that Declaration will not make that a Breach of Privilege that was not so before. But if they have any such Privilege, they ought to shew Precedents of it. The Privileges of the *House of Commons* are well known, and are founded upon the Law of the Land, are nothing but the Law. As we all know they have no Privilege in Cases of Breach of the Peace. And if they declare themselves to have Privileges, which they have no legal Claim to, the People of *England* will not be stopped by that Declaration. This Privilege of theirs concerns the Liberty of the People in an high Degree, by subjecting them to Imprisonment for the Infringement of them, which is what the People cannot be subjected to without an Act of Parliament. As to what was said, that the *House of Commons* are Judges of their own Privileges, he said, they were so, when they come before them. And as to the Instances cited, where the Judges have been cautious in giving any Answer in Parliament in Matters of Privilege of Parliament; he said, the Reason of that was, because the Members know probably their own Privileges better than the Judges. But when a Matter of Privilege comes in Question in *Westminster-hall*, the Judges must determine it as they did in *Binyon's Case*. Suppose these Actions against the Constables of *Aylesbury* had gone on, and the Defendants had pleaded this Privilege; we must have determined, whether there were any such Privilege or no. And we may as well determine it upon the Return of this *Habeas Corpus*, for the Defendants are in a proper Course of Law, and the Matter appears to us upon Record, as well this Way, as if it was pleaded to an Action. We must take Notice of the *Lex Parliamenti*: My Lord Coke, in his *I Inst. 11. b.* enumerates the several that are within this Realm, and
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the *Lex Parliamenti* is one of them, and the *Lex Parliamenti* is the Law of the Land. As to what my Lord Coke says in the same Place, that the *Lex Parliamenti est a multis ignota*, that is, because they will not apply themselves to understand it. He gave a great *encomium* of my Lord Clarendon, and cited a Passage out of his History, relating to the same Doctrine with this, that was then set up, that the *House of Commons* were the only Judges of their own Privileges, and therefore whatever they said was their Privilege, was such: It is in his first Part, Fol. 310, &c. and is very applicable to the present Case, but too long to be transcribed. He said, he would cite a greater Author than he, King Charles the first, in his Answer to the Declaration and Votes of the two Houses concerning *Hull, Clarendon*, 1 Part, 399, 400, and *Rushworth's Collections*, [3 Vol. P. 438, 725, 730.] wherein among other Things he says, he very well knew the great and unlimited Power of a Parliament, but he knew as well, it was only in that Sense, as he was a Part of that Parliament, without him, and against his Consent, the Votes of either, or both Houses together must not, could not, (should not if he could help it, for his Subject's Sake as well as his own) forbid any Thing that was enjoined by the Law, or injoin any Thing that was forbidden by the Law. And the Chief Justice said, if the Votes of both Houses could not make a Law, by Parity of Reason they could not declare Law. That the bringing this Action is no Breach of the Privilege of the *House of Commons*, appears by the Judgment in the Case of *Ashby* and *White*, in the Argument of which Case before the *House of Lords*, this Argument of Privilege of the *House of Commons* was insisted on. Besides, if the bringing this Action was a Breach of the Privilege of the *House of Commons*, why was not *Ashby* committed, when he first brought the Action? But the suffering
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him to go on with his Action is an Argument, that this Pretence of Privilege is a new Thing. *Ashby* recovered in his Action, and these Men have followed his Steps, and yet they are here said to have acted in Breach of the Privilege of the *House of Commons*. I shall say nothing to the Case of *Ashby* and *White*, because the Reasons upon which that Judgment was given are ^p printed. He said, the bringing this Action is said to be in high Contempt of the Jurisdiction of the *House of Commons*; but that he said could not be, because neither House of Parliament could hold Plea in any Action; and besides, the Defendants might waive their Privilege. He said, he made no Question of the Power of the *House of Commons* to commit; they might commit any Man for offering an Affront to a Member, or for a Breach of Privilege; nay they might commit for a Crime, because they might impeach. He said, my Lord *Shaftesbury's* Case differed from this, because the Commitment there was for a Contempt done in the House. He said, the Cause of the Prisoner's Commitment being expressed in the Warrant, excluded any Intendment, that they might be committed for any other Cause than that expressed in the Warrant. He said, both Houses of Parliament were bound by the Law of the Land, and in their Actions were obliged to prove it. He cited my Lord ^q *Banbury's* Case, which, he said, would go a great Way in this. Though his Lordship's ^r Judgment was clear, solid, and convincing, yet the other Judges being of a ^s contrary Opinion, there was but one against

^p See his Lordship's excellent Argument in this Case, P. 74.

^q See it here at large, in P.

^r *Boyer's History of Queen Anne*, P. 172. *Burnet's Hist. of his own Times*, 2 Vol. P. 408.

^s *Burnet* as above.

gainst three, and the Majority prevailed, therefore the Prisoners were remanded to *Newgate*.

This Affair made great Noise, and the heroical Resolution of the Lord Chief ^t Justice was no less applauded than his Integrity, Penetration, and Learning universally acknowledged.

In *Hilary Term*, 5 *Anne*, 1706, the Chief Justice gave the Opinion of the Court in another Crown Case, of very great Consequence, which Mr. Justice ^u *Foster* says, the Chief Justice published, wherein, says ^w he, the learned Judge (Lord Chief Justice *Holt*,) after a short introductory Discourse, in which he cannot totally agree with him, entereth with great Learning and sound Reason, into the Point upon which the Case turned. He further ^x adds, that the Judgment in this Case was held to be good Law by all the Judges of *England*, in the Case of Major *r Oneby*. The first mentioned Case was as follows :

At the Sessions of ^z the Peace held at *Guildhall*, *London*, on the *first* of *July*, 1706, in the *fifth* Year of Queen *Anne*, *John Mawgridge* of *London*, Gent. was indicted, for that on the *seventh* of *June*, in the same Year, he did feloniously, voluntarily, and of his Malice fore-thought, make an Assault upon *William Cope*, Gent. and with a Sword, on the left Part of his Breast, near the left Pap, did him strike and pierce, giving him thereby a mortal Wound, of which he, the said *William Cope*, did instantly die. Which Indictment being delivered to the Justices of the Goal Delivery for *Newgate*, he was arraigned thereupon, and pleaded not Guilty.

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^t *Boyer*, Ib.

^u *Fost. Cr. Law*, P. 204.

^w *Id.* P. 296. Note *.

^x *Id.* ib.

^y *Lord Raym. Rep.* 2 Vol. P. 1489.

^z *Kely, Rep.* P. 119.

The Jury found this special Verdict :

That *William Cope* was Lieutenant of the Queen's Guards in the *Tower*, and the principal Officer then commanding there, and was then upon Guard in the Guard-room ; and that *John Mawgridge* was then, and there, by the Invitation of Mr. *Cope*, in Company with the said *William Cope*, and with a certain Woman of Mr. *Cope's* Acquaintance, which Woman *Mawgridge* did then Affront, and angry Words passed between them in the Room, in the Presence of Mr. *Cope*, and other Persons there present, and *Mawgridge* there did threaten the Woman ; Mr. *Cope* did thereupon desire *Mawgridge* to forbear such Usage of the Woman, saying, that he must protect the Woman, thereupon *Mawgridge* did continue the reproachful Language to the Woman, and demanded Satisfaction of Mr. *Cope*, to the Intent to provoke him to fight ; thereupon Mr. *Cope* told him, it was not a convenient Place to give him Satisfaction, but at another Time and Place he would be ready to give it him, and in the mean Time desired him to be more civil, or to leave the Company ; thereupon *John Mawgridge* rose up, and was going out of the Room ; and so going, did suddenly snatch up a Glass-bottle, full of Wine, then standing upon the Table, and violently threw it at him, the said Mr. *Cope*, and therewith struck him upon the Head, and immediately thereupon, without any Intermission, drew his Sword, and thrust him into the left Part of his Breast, over the Arm of one *Robert Martin*, notwithstanding the Endeavour used by the said Mr. *Martin* to hinder *Mawgridge* from killing Mr. *Cope*, and gave Mr. *Cope* the Wound in the Indictment mentioned, whereof he instantly died. But the Jury do farther say, that immediately in a little Space of Time, between *Mawgridge's* drawing his Sword, and the giving the mortal Wound by him, Mr. *Cope* did
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rise from his Chair where he sat, and took another Bottle that then stood upon the Table, and threw it at *Mawgridge*, which did hit and break his Head; that *Mr. Cope* had no Sword drawn in his Hand all the while; and that after *Mawgridge* had thrown the Bottle, *Mr. Cope* spake not. And whether this be Murder or Manslaughter; the Jury pray the Advice of the Court.

A Day being appointed for the Resolution of the Court, and the Marshal required to bring the Prisoner to the Bar, returned he was escaped; which being recorded, the Chief Justice gave the Opinion of the Court in this Manner:

This Record being removed into this Court, the Case hath been argued before all the Judges; and all of us, except my Lord Chief Justice *Trevor*, are of Opinion that *Mawgridge* is guilty of Murder.

This hath been a Case of great Expectation.

This Distinction between Murder and Manslaughter only, is occasioned by the Statute of 23 *H. 8. Cap. 1. S. 3.* and other Statutes that took away the Benefit of Clergy from Murder committed by Malice prepensed, which Statutes have been the Occasion of many nice Speculations.

The word Murder is known to be a Term or a Description of Homicide committed in the worst Manner, which is no where used but in this Island, and is a Word framed by our *Saxon* Ancestors, in the Reign of *Canutus*, upon a particular Occasion, which appears by an uncontested Authority, *Lamb. 141.* In the Laws of *Edward the Confessor*: *ⁱ Murdra quidem inventa fuerunt in Diebus Canuti Regis, qui post acquisi-*
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tam

^a *Cas. Temp. Holt, P. 484. pl. 5.*

^b See *Wilkin's Leges Anglo-Saxonicae, P. 202. pl. 16. Brafton, Lib. 3. de Coronâ, Cap. 15. No. 2, 3. Fol. 134 b.*

tam Angliam & pacificatam, Rogatu Baronum Angliæ remisit in Daciam Exercitum suum. Whereupon a Law was made, That if any *Englishman* should kill any of the *Danes* that he had left behind, if he were apprehended, he should be bound to undergo the *Ordeal Trial* to clear himself; and if the Murderer were not found within eight Days, and after that a Month was given, then if he could not be found, the *Ville* should pay forty six Marks, which if not able to pay, it should be levied upon the *Hundred*. *Brañton* 120, agrees with this Account.

Though this Law ceased upon the Expulsion of the *Danes*, yet *William* the Conqueror revived it for the Security of his *Normans*, as appears by his Laws, after he had confirmed King *Edward* the Confessor's Laws. *Henry* the first, *Anno primo Regni*, afterwards by his Law (as appears in the Addition to *Lambert*) establishes, That if a Man be found slain, he should be taken to be a *Frenchman*, if it was not proved that he was an *Englishman*, and the Country was bound to enquire whether the Person slain was an *Englishman*, or a *Frenchman*. These Inquisitions were taken before the Coroner, and returned to the Justices in *Eyre*, and if the Jury found him an *Englishman*, then the Country was to be discharged, which Law was called *Englishhire*, and the Justices in *Eyre* were also bound to enquire thereof, until the Statute of 14 *E. 3. Cap. 4.* which, as it is mentioned in *Stamford*, was abolished.

Hereby a Mistake, upon the Statute of *Marlebridge*, is rectified, which is *Cap. 26. Murdrum cætero non adjudicatur coram Justiciariis, ubi per Infortunium adjudicatum est, sed Locum habeat Murdrum de interfectis per Feloniam tantum, & non aliter.*

This was not made upon a Supposition, that he that killed the Person, slain by Misfortune, should be hang-

^c See *Wilk. Leg. Angl. Sax. P. 280.*

hanged, but only to explain, or rather to take off the Rigor of the Conquerour's Law, that the Country should not be compelled to find out the Manslayer; or if he were found out, he should not undergo the Penalty of that Law. For as the Law stood, or was interpreted before that Statute, if a Man was found to be slain, it was always intended, 1. That he was a *Frenchman*. 2. That he was killed by an *Englishman*. 3. That Killing was Murder. 4. If any one was apprehended to be the Murderer, he was to be tried by Fire and Water, though he killed him by Misfortune; which was extended beyond Reason and Justice, in Favour of the *Normans*: But if an *Englishman* was killed by Misfortune, he that killed him was not in Danger of Death, because it was not Felony. For saith *Bracton*, (who wrote the latter End of *H. 3.*) Fol. 136. He that killed a Man by Misfortune, was to be discharged. 5. If the Malefactor was not taken, then the Country was to be amerced. But by the Statute of *Marlebridge*, if it was known that the Prisoner slain was a *Frenchman*, and was killed by Misfortune, then the Country should not be amerced if the Manslayer was not taken; or if he were taken, he should not be put to his *Ordeal* Trial. This seems to be the true Meaning of that Statute.

But, secondly, it will appear to a Demonstration, that before that Statute, he that killed an *Englishman*, *per Infortunium*, was never in Danger of Death; for this Statute of *Marlebridge*, was made 52 *H. 3.* The Statute of *Magna Charta* was consummate, 9 *H. 3.* and that supposes, That every one imprisoned for the Death of a Man, and not thereof indicted, might of Right pursue the Writ, *de Odio & Atia*; and if it was found that the Person imprisoned killed him, *se defendendo*, or *per Infortunium*, and not *per Feloniam*, then he was to be bailed, which shews, that he was

not in Danger of Death ; for if he had, he would not have been let to bail.

Hereby I have given a true Account of the Sense of the Word Murder, that it was when (first in the Time of *Canutus*) a *Dane*, and since (in *William* the Conqueror) when a *Frenchman* was killed, for, as it was then supposed in the Time of *Canutus*, the *Englishmen* hated the *Danes* upon Account of their Nation that had subdued them, and would, upon all Occasions, seek their Destruction, as they did of a considerable Number of them in the Time of *Ethelred* the *Saxon* King, that preceded *Canutus* next, save one ; so the Conqueror had the same Reason to suspect the Safety of his *Normans*.

Afterwards, as appears by the Confessor's Laws, *Lamb.* 141. the secret or insidious killing of any other, as well as a Foreigner, was declared to be Murder. *Braeton* 120, 134, 135. Murder is thus defined, *est occulta Hominum extraneorum & notorum Occisio Manu Hominum nequitur perpetrata*. With which agrees the other old Books of *Britton* and *Fleta* : Only in Case of a Foreigner it was penal to the Country, not of a Native.^d

Next, it may be necessary to shew what was to be understood by Homicide or Manslaughter. *Braeton* 120, 121. mentioning the worst Part of it, which is a voluntary Homicide, defined in this Manner : *Si quis ex certâ Scientiâ & in Assaultu præmeditato, Irâ, vel Odio, vel Causâ Lucri, nequiter & in Feloniâ, ac contra Pacem Domini Regis aliquem interfecerit*. If one unknowingly, and by a premeditated Assault, by Anger or Hatred, or for Lucre-fake, should kill another, this was accounted Manslaughter ; if it be done *clanculo*, saith *Braeton*, it is Murder : That was all the Difference there was between the one and the other.

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^d See *Wilk. Leg. Angl. Sax.* P. 280. Note (k).

It appears, that since that of *Bracton*, the Notion of Murder is much altered, and comprehends all Homicides, whether privately or publicly committed, if done by Malice prepenfed. With this agrees *Stam. Pl. Cor. 18. b.* At this Day (saith he) a Man may define Murder in another Manner than it is defined by *Bracton*, *Britton* and *Fleta*: If any one of Malice prepenfed doth kill, be he *Englishman* or Foreigner, if secretly or publicly, that is Murder; this was the Definition long before the making of the Statutes of 4 *H. 8. Cap. 2.* 23 *H. 8. Cap. 1.* and the other Statutes that took away Clergy. To define Murder, there must be *Malitia præcogitata*, as also *murdravit*: So that if an Indictment be that the Party *murdravit*, and not *ex Malitiâ præcogitatâ*, it is but Manlaughter. So if it be *ex Malitiâ præcogitatâ*, omitting *murdravit*, it is but Manlaughter. The Parliament complained, that Murderers, &c. were encouraged to offend, because Pardons of Manlaughterers were granted so easily; the Act therefore prohibits the Granting thereof. 13 *R. 2. St. 2. Cap. 1.* recites the same Mischief and great Damage by Treasons, Murders, &c. because Pardons have been easily granted: Therefore the Act doth provide, That if a Charter for the Death of a Man be alledged before any Justice, in which Charter it is not specified, that he, of whose Death any such is arraigned, was murdered or slain by Await, Assault, or Malice prepenfed, it shall be enquired whether he was murdered, or slain by Assault, Await, or Malice prepenfed; and if it be so found, the Charter of Pardon shall be disallowed. This is a plain Description of Murder, as it was taken to be according to the common Understanding of Men.

Ever since the killing of a Man by Assault of Malice prepenfed hath been allowed to be Murder, and to comprehend the other two Instances. But because

that Way of Killing, by Poison, did not come under the antient Definition of *Braſton*, &c. which is ſaid to be *Manu Hominum perpetrata*, or of this Statute of 13 R. 2. St. 2. Cap. 1. Therefore, by the Statute of 1 E. 6. Cap. 12. it was enacted, That wilful poisoning of any Perſon ſhould be accounted wilful Murder of Malice prepenſed.

One Thing more is fit to be obſerved, that in all Indictments for Murder, a Man is not charged poſitively, that he did murder the Perſon ſlain, but that he *ex Malitiâ præcogitatâ, in ipſum Inſultum fecit, ac cum quodam Gladio*, he gave him a Wound whereof he died: *Et ſic ex Malitiâ præcogitatâ ipſum murdravit*, ſo the Murder is charged upon him by Way of Conclusion, and as a Conſequence from the antecedent Matter that is poſitively alledged. To come cloſe to a State of the preſent Queſtion, it doth appear, that *Mawgridge* threw the Bottle at Mr. *Cope*, without any Provocation given him; for the Difference was between him and the Woman that was there in Company, and his Behaviour was ſo rude and diſtaſtful, as did induce Captain *Cope* to deſire him to leave the Room, where he was only a Gueſt to him, and there, by his Permiſſion; this *Cope* might reaſonably do, which could be no Cauſe to provoke *Mawgridge* to make the leaſt Aſſault upon him: Therefore I ſhall maintain theſe three Poſitions.

1. That in this Caſe there is expreſs Malice by the Nature and Manner of *Mawgridge*'s throwing the Bottle, and drawing his Sword immediately thereupon.

2. That Mr. *Cope*'s throwing a Bottle at *Mawgridge*, whereby he was hit and hurt before he gave Mr. *Cope* the mortal Wound, cannot make any Alteration in the Offence by reducing it to be of ſo low a Degree as Manſlaughter.

3. I shall consider what is such a Provocation as will make the Act of Killing to be but a Manslaughter only.

1. Here is express Malice, that appears by the Nature of the Action, some have been led into Mistake by not well considering what the Passion of Malice is; they have construed it to be a Rancour of Mind lodged in the Person killing, for some considerable Time before the Commission of the Fact, which is a Mistake arising from the not well distinguishing between Hatred and Malice. Envy, Hatred, and Malice, are three distinct Passions of the Mind.

1. Envy properly is a repining or being grieved at the Happiness and Prosperity of another, * *Invidus alterius macrescit Rebus opimis.*

2dly, Hatred, which is *odium*, is as Tully saith, *Ira inveterata*, a Rancour fixed and settled in the Mind of one towards another, which admits of several Degrees. It may arrive to so high a Degree, and may carry a Man so far as to wish the Hurt of him, though not perpetrate it himself.

3dly, Malice is a Design formed of doing Mischief to another; *Cum quis datâ Operâ male agit*, he that designs and useth the Means to do ill is malicious, *Odium* signifies Hatred, *Atia* Malice, because it is eager, sharp, and cruel. He that doth a cruel Act voluntarily, doth it of Malice prepenfed, By the Statute of 5 H. 4. Cap. 5. if any one out of Malice prepenfed, shall cut out the Tongue, or put out the Eyes of another, he shall incur the Pain of Felony. If one doth such a Mischief on a sudden, that is Malice prepenfed; for saith my Lord Coke, if it be voluntarily, the Law will imply Malice. Therefore when a Man shall, without any Provocation, stab another with a Dagger, or knock out his Brains with a

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* *Horace* Epist. 2. Lib. 1. Line 57.

Bottle, this is exprefs Malice, for he defignedly and purpofely did him the Mifchief. This is fuch an Act that is malicious in the Nature of the Act itfelf, if found by a Jury, though it be fudden, and the Words *ex Malitiâ præcogitatâ* are not in the Verdict, *Cro. Car.* 131. *Holloway's* Cafe, who was *Woodward* of *Austerly* Park: A Boy came there to cut Wood, whom by Chance he efpying, and the Boy being upon a Tree, he immediately calls to him to defcend, which the Boy obeying, *Holloway* tied him to an Horfe's Tail with a Cord that the Boy had, then gave him two Blows, the Horfe run away and brake the Boy's Shoulder whereof he died. This was ruled to be Murder by all the Juftices and Barons, except Juftice *Hutton*, who only doubted thereof; and that was a ftronger Cafe than this, for there was fome Kind of Provocation in the Boy, who was ftealing the Wood in the Park, of which *Holloway* had the Care; and it cannot be reasonably thought that he defigned more than the Chafifement of the Boy, and the Horfe running away was a Surprife to *Holloway*; yet in Regard the Boy did not refift him, his tying him to the Horfe-Tail was an Act of Cruelty, the Event whereof proving fo fatal, it was adjudged to be Malice prepensed, though of a fudden, and in the Heat of Paffion. This Cafe is reported in *Jones* 198. *Palm.* 585. and there held, that the Court could determine it to be Malice prepensed upon the fpecial Matter found. Two playing at Tables, fall out in their Game, one, upon a fudden, kills the other with a Dagger: This was held to be Murder, by *Bromley*, at *Chefter* Affizes, 27 *Eliz.* So in this Cafe, if the Bottle had killed Mr. *Cope*, before he had returned the Bottle upon *Mawgridge*, that would have been Murder without all Manner of Doubt.

In the fecond Place, I come now to confider, whether Mr. *Cope's* returning a Bottle upon *Mawgridge* before

fore he gave him the mortal Wound with the Sword, shall have any Manner of Influence upon the Case: I hold not. First, because *Mawgridge*, by his throwing the Bottle, hath manifested a malicious Design. Secondly, his Sword was drawn immediately to supply the Mischief which the Bottle might fall short of. Thirdly, the throwing the Bottle by Captain *Cope* was justifiable and † lawful; and though he had wounded *Mawgridge*, he might have justified it in an Action of Assault and Battery, and therefore cannot be any Provocation to *Mawgridge* to stab him with his Sword. That the throwing the Bottle is a Demonstration of Malice is not to be controverted; for if upon that violent Act he had killed Mr. *Cope*, it had been Murder. Now it hath been held, that if *A*, of his Malice premeditated, assaults *B*, to kill him, and *B* draws his Sword and attacks *A*, and pursues him, then *A*, for his own Safety, gives back, and retreats to a Wall, *B* still pursuing him with a drawn Sword, *A*, in his Defence, kills *B*. This is Murder in *A*, for *A* having Malice against *B*, and in Pursuance thereof, endeavouring to kill him, is answerable for all the Consequences, of which he was the original Cause. It is not reasonable for any Man that is dangerously assaulted, and when he perceives his Life in Danger from his Adversary, but to have Liberty for the Security of his own Life, to pursue him that maliciously assaulted him; for he that hath manifested that he had Malice against another, is not fit to be trusted ‡ with a dangerous Weapon in his Hand, and so resolved by all the Judges, 18 *Car.* 2. when they met at *Serjeant's-Inn*, in Preparation for my Lord *Morley's* Trial. If *A*, of Malice premeditated, discharge a Pistol at *B*, and then runs away, *B* pursues him, and *A* turns back, and in
his

† See *Fost. Cr. Law*, P. 274, 296.

‡ See *Fost. Cr. Law*, P. 274, 275.

his own Defence kills *B*, it is Murder. This I hold to be good Law: For *A* had a malicious Intent against *B*, and his Retreat after he had discharged his Pistol at *B*, was not because he repented, but for his own Safety.

In a set Duel, there are mutual Passes made between the Combatants, yet if there be original Malice between the Parties, it is not the Interchange of Blows will make an Alteration, or be any Mitigation of the Offence of Killing. Therefore I hold, if *Mawgridge* had thrown the Bottle at *Mr. Cope*, and *Mr. Cope* had returned another upon him and hit him, and thereupon *Mawgridge* had drawn his Sword and killed *Mr. Cope*, it would have been Murder. Some will say, that there is a Difference between the Cases, for that the Assault by the Pistol, and the fighting a Duel was express Malice, but this is only Malice implied. Surely there is no Difference, for Malice implied is prepened, as much as if there had been a Proof of Malice, or Hatred for some considerable Time before the Act; for the Stroke given, or an Attempt made by Malice implied, is as dangerous as a Stroke given upon Malice expressed, therefore may be as lawfully resisted. This very Point was also considered by the 12 Judges at *Serjeant's-Inn*, and by them resolved to be Murder upon the Occasion of my Lord *Morley's* Case. When a Man attacks another with a dangerous Weapon, without any Provocation; that is express Malice from the Nature of the Act, which is cruel. The Definition of Malice implied, is where it is not express in the Nature of the Act, as where a Man kills an Officer that had Authority to arrest his Person: The Person who kills him in Defence of himself from the Arrest, is guilty of Murder, because the Malice is implied, for properly and naturally it was not Malice, for his Design was only to defend himself from the Arrest.

3. I come now to the third Matter proposed, which is to consider what is in Law such a Provocation to a Man to commit an Act of Violence upon another, whereby he shall deprive him of his Life, so as to extenuate the Fact, and make it to be a Manslaughter only. First, negatively what is not. Secondly, positively what is. First, no Words of Reproach or Infamy are sufficient to provoke another to such a Degree of Anger as to strike, or assault the provoking Party with a Sword, or to throw a Bottle at him, or strike him with any other Weapon that may kill him; but if the Person provoking be thereby killed, it is Murder.

In the assembly of the Judges, 18 *Car.* 2. this was a Point positively resolved.

Therefore I am of Opinion, that if two are in Company together, and one shall give the other contumelious Language (as suppose *A* and *B*) *A*, that was so provoked, draws his Sword and makes a Pass at *B*, *B* (then having no Weapon drawn) but misses him. Thereupon *B* draws his Sword and passes at *A*, and there being an Interchange of Passes between them, *A* kills *B*. I hold this to be Murder in *A*, for *A*'s Pass at *B* was malicious, and what *B* afterwards did was lawful. But if *A*, who had been so provoked, draws his Sword, and then before he passes, *B*'s Sword is drawn, or *A* bid him draw, and *B* thereupon drawing, there happen to be mutual Passes: If *A* kills *B*, this will be but Manslaughter, because it was sudden; and *A*'s Design was not so absolutely to destroy *B*, but to combat with him, whereby he run the Hazard of his own Life at the same Time. But if Time was appointed to fight (suppose the next Day) and accordingly they do fight; it is Murder in him that kills the other. But if they go immediately into the Field and fight, then but Manslaughter. Suppose upon pro-
voking

voking Language given by *B* to *A*, *A* gives *B* a Box on the Ear, or a little Blow with a Stick, which happens to be so unlucky that it kills *B*, who might have some Impostume in his Head, or other Ailment which proves the Cause of *B*'s Death, this Blow, though not justifiable by Law, but is a Wrong, yet it may be but Manslaughter, because it doth not appear that he designed such a Mischief.

2. Secondly, as no Words are a Provocation, so no affronting Gestures are sufficient, though never so reproachful; which Point was adjudged in an Appeal of Murder.

There having been a Quarrel between *A* and *B*, and *B* was hurt in the Fray; and about two Days after, *B* came and made a wry Mouth at *A*, who thereupon struck him upon the Calf of the Leg, of which he instantly died. It was Murder in *A* for the affronting him in that Manner was not any Provocation to *B* to use that Violence to *A*.

There hath been another Case, which I fear hath been the Occasion of some Mistake in the Decisions of Questions of this Kind, *Jones* 432. *D. Williams's* Case, he being a *Welshman*, upon *St. David's Day*, having a Leak in his Hat, a certain Person pointed to a *Jack of Lent* that hung up hard by, and said to him look upon your Countryman; at which, *D. Williams* was much enraged, and took a Hammer that lay upon a Stall hard by, and flung at him, which missed him, but hit another and killed him: He was indicted upon the Statute of stabbing. Resolved, he was not within that Statute, but guilty of Manslaughter at Common-Law. I concur with that Judgment, that it is not within the Statute of Stabbing, for it is not such a Weapon, or Act that is within that Statute, neither could be found guilty of Murder, but only of Manslaughter, for the Indictment was for no more. But if
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the Indictment had been for Murder, I do think that the *Welshman* ought to have been convicted thereof, for the Provocation did not amount to that Degree as to excite him designedly to destroy the Person that gave it him.

3. Thirdly, if one Man be trespassing upon another, breaking his Hedges or the like, and the Owner, or his Servant shall, upon Sight thereof, take up an Hedge-stake, and knock him on the Head; that will be Murder, because it was a violent Act, beyond the Proportion of the Provocation, which is sufficiently justified by *Holloway's* Case, who did not seem to intend so much the Destruction of the young Man that stole the Wood, as that he should endeavour to break his Skull, or knock out his Brains, yet using that violent and dangerous Action of tying him to the Horse's Tail, rendered him guilty of Murder.

If a Man shall see another stealing his Wood, he cannot justify beating him, unless it be to hinder him from stealing any more (that is) that notwithstanding he be forbid to take any, he doth proceed to take more, and will not part with that which he had taken. But if he desists, and the Owner or *Woodward* pursues him to beat him so as to kill him, it is Murder.

If a Man goes violently to take another Man's Goods, he may beat him off to rescue his Goods, but if a Man hath done a Trespass, and is not continuing in it; and he that hath received the Injury shall thereupon beat him to a Degree of killing. It is Murder, for it is apparent Malice; for in that Case he ought not to strike him, but is a Trespassor for so doing.

4. Fourthly, if a Parent, or a Master be provoked to a Degree of Passion by some Miscarriage of the Child or Servant, and the Parent or Master shall proceed to correct the Child or Servant with a moderate Weapon, and shall by Chance give him an unlucky Stroke,
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so as to kill him, that is but a Misadventure, but if the Parent or Master shall use an improper Instrument in the Correction, then if he kills the Child or Servant, it is Murder : And so was it resolved by all the Judges of the *King's-Bench*, with the Concurrence of the Lord Chief Justice *Bridgman*, in a special Verdict in one *Gray's Case*, found at the *Old Baily*, 10 Oct. 18 Car. 2. and removed into this Court. *Gray* being a Smith, *B* was his Servant ; he commanded *B*, his Servant, to mend certain Stamps belonging to his Trade ; afterwards, he and his Servant being at Work at the Anvil, *Gray* asked his Servant whether he had mended the Stamps, as he had desired him, but *B*, the Servant, having neglected his Duty, acknowledged it to his Master, upon which the Master was angry, and told him if he would not serve him, he should serve in *Bridewell* ; to which the Servant replied, that he had as good serve in *Bridewell* as serve the said *Gray* ; whereupon the said *Gray* took the Iron Bar, upon which he and his Servant was working, and struck his Servant with it upon the Skull, of which the Servant died. This was held to be Murder, yet here was a Provocation on a Sudden, as a sudden Resentment, and as speedy putting it in Execution ; for though he might correct his Servant, both for his Neglect and Unmannerliness, yet exceeding Measure therein, it is malicious. Every one must perceive that this last is a much stronger Case than this at Bar.

1. First, *Gray* was working honestly and fairly at his Trade, and justly calling to his Servant for an Account of his Business ; this Miscreant was in the actual Violation of all the Rules of Hospitality.

2. Secondly, *Gray's* Action was Right, as to the striking his Servant by Way of Correction ; but the Error was in the Degree, being too violent, and with an

an improper Weapon. This of *Mawgridge* was with a Resolution to do Mischief.

3. Thirdly, he had not the least Provocation from *Mr. Cope*, until after he had made the first and dangerous Assault, and then pursued it with the drawing his Sword to second it, before *Mr. Cope* returned the other Bottle. But *Gray* had a Provocation by the Disappointment his Servant gave him in neglecting his Business, and returning a saucy Answer.

The like in obstinate and perverse Children, they are a great Grief to Parents, and when found in ill Actions, are a great Provocation. But if upon such Provocation the Parent shall exceed the Degree of Moderation, and thereby in chastising kill the Child, it will be Murder. As if a Cudgel, in the Correction that is used, be of a large Size, or if a Child be thrown down and stamped upon: So said the Lord *Bridgeman* and Justice *Twisden*, and that they ruled it so in their several Circuits.

5. If a Man upon a sudden Disappointment by another, shall resort violently to that other Man's House to expostulate with him, and with his Sword shall endeavour to force his Entrance, to compel that other to perform his Promise, or otherwise to comply with his Desire; and the Owner shall set himself in Opposition to him, and he shall pass at him, and kill the Owner of the House, it is Murder, 2 *Roll. Rep.* 460. *Clement* against *Sir Charles Blunt*, in an Appeal of Murder. The Case was, that *Clement* had promised a Dog to *Sir Charles Blunt*, and being requested accordingly to deliver him, refused, and beat the Dog home to his House; at which *Sir Charles Blunt* fetched his Sword, and came to *Clement's* House for the Dog, *Clement* stood at the Door, and resisted his Entry; *Blunt* thereupon kills *Clement*. The Jury were merciful, and found this Fact in *Sir Charles Blunt*, to be but Manslaughter. *Dodderidge*

ridge was clearly of Opinion it was Murder. But the Lord Chief Justice was a little tender in his Direction to the Jury. But *Rolls* makes this Remark, that it was not insisted upon by the Appellant's Council, that *Clements* was in the Defence of his House, and that *Blunt* attacked *Clement* to force it. It was without all Question Murder, though of a sudden Heat, for there was no Assault made by *Clement* upon him, nor any of his Friends, but all the Violence and Force was on Sir *Charles Blunt's* Side.

Having in these Particulars shewn what is not a Provocation sufficient to alleviate the Act of Killing, so as to reduce it to be but a bare Homicide. I will now, secondly, give some particular Rules, such as are supported by Authority and general Consent, and shew what are always allowed to be sufficient Provocations.

1. First, if one Man upon angry Words shall make an Assault upon another, either by pulling him by the Nose, or filliping him upon the Forehead, and he that is so assaulted shall draw his Sword, and immediately run the other through, that is but Manslaughter; for the Peace is broken by the Person killed, and with an Indignity to him that received the Assault. Besides, he that was so affronted, might reasonably apprehend, that he that treated him in that Manner might have some further Design upon him.

There is a Case in *Stiles* 467. *Buckner's* Case. *Buckner* was indebted, and *B* and *C* came to his Chamber upon the Account of his Creditor to demand the Money, *B* took a Sword that hung up, and was in the Scabbard, and stood at the Door with it in his Hand undrawn, to keep the Debtor in until they could send for a Bailiff to arrest him; thereupon the Debtor took out a Dagger which he had in his Pocket, and stabbed *B*. This was a special Verdict, and adjudged only Manslaughter,

slaughter, for the Debtor was insulted, and imprisoned injuriously without any Process of Law, and though within the Words of the Statute of Stabbing, yet not within the Reason of it.

2. Secondly, if a Man's Friend be assaulted by another, or engaged in a Quarrel that comes to Blows, and he in the Vindication of his Friend, shall, on a sudden, take up a mischievous Instrument and kill his Friend's Adversary, that is but Manslaughter. If two be fighting together, and a Friend of the one takes up a Bowl on a sudden, and with it break the Skull of his Friend's Adversary, of which he died, that is no more than Manslaughter. So it is, if two be fighting a Duel, though upon Malice prepenfed, and one comes up and takes Part with him, that he thinks may have the Disadvantage in the Combat, or it may be that he is most affected to, not knowing of the Malice, that is but Manslaughter.

3. Thirdly, if a Man perceives another by Force to be injuriously treated, pressed, and restrained of his Liberty, though the Person abused doth not complain, or call for Aid or Assistance; and others out of Compassion shall come to his Rescue, and kill any of those that shall so restrain him, that is Manslaughter, 18 *Car.* 2. adjudged in this Court, upon a special Verdict found at the *Old Baily*, in the Case of one *Hugett*, 18 *Car.* 2. *A*, and others in the Time of the *Dutch War*, without any Warrant, impressed *B* to serve the King at Sea. *B* quietly submitted, and went off with the Press-masters: *Hugett* and the others pursued them, and required a Sight of their Warrant; but they shewed a Piece of Paper that was not a sufficient Warrant: Thereupon *Hugett* with the others drew their Swords, and the Press-masters theirs, and so there was a Combat, and those who endeavoured to rescue the Press-man, killed one of the pretended Press-masters. This

was but Manslaughter, for when the Liberty of one Subject is invaded, it affects all the rest: It is a Provocation to all People, as being of ill Example and pernicious Consequence. All the Judges of the *King's-Bench*, viz. *Keilyng*, *Twisden*, *Wyndham*, and *Moreton*, were of Opinion, that it was Murder, because he meddled in a Matter in which he was not concerned: But the other eight Judges of the other Courts conceived it only Manslaughter, to which the Judges of the *King's-Bench* did conform and gave Judgment accordingly.

4. Fourthly, when a Man is taken in Adultery with another Man's Wife, if the Husband shall stab the Adulterer, or knock out his Brains, this is bare Manslaughter; for Jealousy is the Rage of a Man, and Adultery is the highest Invasion of Property.

If a Thief comes to rob another, it is lawful to kill him. And if a Man comes to rob a Man's Posterity and his Family, yet to kill him is Manslaughter, so is the Law, though it may seem hard, that the Killing in one Case should not be as justifiable as the other. 20 *Leviticus*, 10 Ver. *If one committed Adultery with his Neighbour's Wife, even he, the Adulterer, and the Adultrers, shall be put to Death*, so that a Man cannot receive an higher Provocation. But this Case bears no Proportion with those Cases that have been adjudged to be only Manslaughter, and therefore the Court being so advised, doth determine that *Mawgridge* is guilty of Murder. More might be said upon this Occasion; yet this may at present suffice to set the Matter now in Question in its true Light, to shew how necessary it is to apply the Law to exterminate such noxious Creatures. Upon this Conviction, the Court did direct that Process should be issued against *Mawgridge*, and so to proceed to Outlawry if he cannot be retaken in the mean Time.

In the Year 1708, Lord Chief Justice *Holt* published the following Report, with some Notes of his own upon them.

“ *A Report of divers Cases in Pleas of the Crown, adjudged and determined, in the Reign of the late King Charles the second, with Directions for Justices of the Peace, and others, collected by Sir John Keyling, Knt. late Lord Chief Justice of his Majesty’s Court of King’s-Bench, from the original Manuscript under his own Hand. To which is added, the Report of three modern Cases, viz. Armstrong and Lisle; The King and^b Plummer; The Queen and^c Mawgridge.*”

Note; *Thursday*,^d 9 February, 1709, was the last Time his Lordship sat in Court.

He married^e *Anne*, Daughter of Sir *John*^f *Cropley*, of *Clerkenwell*, in the County of *Middlesex*, Baronet, whom he left without Issue, and^g departed this Life on the *fifth* Day of *March*, 1709, about 3 o’Clock in the Afternoon, at his House in *Bedford-Row*, after a long lingering Illness, in the *sixty-eighth* Year of his Age; and was succeeded by Sir *Thomas*^h *Parker*, Knight, her Majesty’s youngest Serjeant at Law, who was sworn into the Office the 13th of the said Month of *March*, at the Lord Chancellor *Cowper*’s.

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Lord

^a *Fost. Cr. Law*, P. 204. *Boy. Remarkables of the Year 1710*. P. 410.

^b See it at large, in P. 47.

^c See it at large, in P. 95.

^d *Mod. Rep.* 11 Vol. P. 263.

^e She died, *Jan. 25*, 1712; and was buried at *Redgrave* in *Suffolk*. *Le Neve’s Monumenta Anglicana*. P. 253.

^f He died in *December 1713*, *Id.* P. 272.

^g *Lord Raym. Rep.* 2 Vol. P. 1309. *Mod. Rep.* 11 Vol. P. 276. *Tind. Contin. Rap. Hist. Engl.* 4 Vol. P. 156.

^h *Lord Raym. &c. Mod. Rep.* as above. *Collins’s Peerage of England*, 3 Vol. P. 493. *Gazette*. N^o. 4665. *Bishop Burnet* says, that immediately upon Lord Chief Justice *Holt*’s Death, *Parker*

Lord Chief Justice *Holt's* Remains lie interred in the Parish Church of *Redgrave* in the County of *Suffolk*, under a most sumptuous marble Monument, upon which there is a Figure of his Lordship in full Proportion, in his Robes of Chief Justice, setting in a Chair, and under him the following Inscription :

ⁱ M. S.

D JOHANNES HOLT, Equitis Aur.
 Totius Angliæ, in Banco Regio,
 Per XXI Annos continuos,
 CAPITALIS JUSTITIARII,
 Gulielmo Regi, Annæq; Reginae,
 Confiliarii perpetui,
 Libertatis, ac Legum Anglicarum
 ASSERTORIS, Vindicis, Custodis,
 Vigilis, acris, et intrepidi,
 Rolandus Frater unicus, et Hæres,
 Optime de se merito,
 Posuit.

Die Martii v^{to}. MDCCIX, sublatus est ex Oculis nostris.
 Natus xxx Decembris, Anno MDCXLII.

But soon after a much more durable Monument than this was erected to his Memory ; for his Lordship's Integrity and Uprightness as a Judge were celebrated by one of the best Writers of the Age (an Age characterized

was made Lord Chief Justice. This great Promotion (says *Burnet*) seemed an evident Demonstration of Queen *Anne's* approving the Prosecution against Doctor *Sacheverel* ; for none of the Managers had treated him so severely as *Parker* had done ; yet secret Whispers were very confidently set about, that though the Queen's Affairs put her on acting the Part of one that was pleased with this Scene, yet she disliked it all, and would take the first Occasion to shew it. *Burnet's Hist. of his own Times*, 2 Vol. P. 543.

¹ *Le Neve's Monument. Anglican.* P. 168.

terized for inimitable ones) the Monument alluded to, is N^o. 14 of the *Tatler*; it has been observed, and very justly too, that most of the Papers published in the *Tatlers*, *Spectators*, and *Guardians*, are written on Subjects which never vary, but are and will be for ever the same in all Ages, and in all Countries; that the Reader therefore may judge, whether the *Tatler* referred to is not one of that Sort, it is here inserted at large, and is as follows:

“ It would become all Men, as well as me, to lay before them the noble Character of *Verus* the Magistrate, who always sat in Triumph over, and in Contempt of Vice: He never searched after it, or spared it when it came before him: At the same Time, he could see through the Hypocrisy and Disguise of those, who have no Pretence to Virtue themselves, but by their Severity to the vicious. The same *Verus* was, in Times long past, Chief Justice (as we call it amongst us) in *Felicia*. He was a Man of profound Knowledge of the Laws of his Country, and as just an Observer of them in his own Person. He considered Justice as a cardinal Virtue, not as a Trade for Maintenance. Wherever he was Judge, he never forgot that he was also Council. The Criminal before him was always sure he stood before his Country, and, in a Sort, a Parent of it. The Prisoner knew, that though his Spirit was broken with Guilt, and incapable of Language to defend itself, all would be gathered from him which could conduce to his Safety; and that his Judge would wrest no Law to destroy him, nor conceal any that could save him. *In his Time there was a Nest of Pretenders to Justice, who happened to be employed, to put Things in a Method for being examined before him at his usual Sessions: These Animals were to Verus, as Monkeys are to Men, so like, that you can hardly disown them; but so base, that*

you are ashamed of their Fraternity. It grew a Phrase, 'who would do Justice on the Justices?' That certainly would *Verus*. I have seen an old Trial where he sat Judge on two of them; one was called *Trick-Track*, the other *Tearshift*: One was a learned Judge of Sharpers, the other the Quickest of all Men at finding out a Wench. *Trick-Track* never spared a Pick-pocket, but was a Companion to Cheats: *Tearshift* would make Compliments to Wenches of Quality, but certainly commit poor ones. If a poor Rogue wanted a Lodging, *Trick-Track* sent him to Gaol for a Thief: If a poor Whore went only with one thin Petticoat, *Tearshift* would imprison her for being loose in her Dress. These Patriots infested the Days of *Verus*, while they alternately committed and released each others Prisoners. But *Verus* regarded them as Criminals, and always looked upon Men as they stood in the Eye of Justice, without respecting whether they sat on the Bench, or stood at the Bar."

His Lordship died, seized of a very considerable real Estate, Part of which he purchased of the Barons of *Redgrave* in *Suffolk*, premier Baronets of *England*; in what Manner his Lordship was pleased to dispose of it, and also of a very large personal Estate may be seen in the following Abstract of his Lordship's Will and Codicils.

ABSTRACT of Lord Chief Justice
HOLT'S WILL and CODI-
 CILS, &c.

SIR JOHN HOLT, Knight, Lord Chief Justice of the Court of *Queen's-Bench* at *Westminster*, to her late Majesty Queen *Anne*, by his last Will and Testament, bearing Date the 4th Day of *September*, 1708, revoked all former Wills, and after reciting, that he had by Deed, out of his Manor of *Redgrave*, and other his Manors and Hereditaments in the County of *Suffolk*, made one Demise to Trustees, to secure for his Wife the yearly Sum of 700*l.* for so long Time as she should live; he did, by his said Will, ratify and confirm the said Deed in as large a Manner as was therein expressed, and (subject unto the said Charge) he devised all his Manors, Messuages, Lands, Tenements, and Hereditaments in the said County of *Suffolk*, and likewise in *Bray*, in the County of *Berks*, and of *Royston*, and elsewhere, in the Counties of *Hertford* and *Cambridge*, and each of them, and in *Tilby*, or elsewhere, in the County of *Norfolk*, and in the City of *Oxford*, in the County of *Oxon*; and all other his Lands and Inheritance whatsoever and wheresoever, to his Brother *Rowland Holt*, for, and during his Life, without Impeachment of Waste, and from and after the Determination of that Estate, to *William Longueville*, of the *Inner Temple*, *London*, Esq; and *Silvester Petyt*, of *Barnard's-Inn*, *London*, Gentleman, and their Heirs, during the Life of his said Brother in Trust, to preserve the contingent Remainders therein, after devised, from being barred, but to permit his said Bro-

ther to take the Rents and Profits thereof, to his own Use for his Life, and from and after the Decease of his said Brother, to *John Holt* (his eldest Son) for his Life, without Impeachment of Waste, and from and after the Determination of that Estate, to the said *William Longueville* and *Silvester Petyt*, and their Heirs, during the Life of the said *John Holt*, in Trust, to preserve the contingent Remainders therein, after devised, from being barred, but to permit the said *John Holt*, to take the Rents and Profits thereof to his own Use for his Life, and from and after the Decease of the said *John Holt*, to the first and every other Son and Sons of the Body of the said *John Holt*, to be begotten successively, and the Heirs male of the Body and Bodies of such first and other Son and Sons to be begotten severally and respectively; the eldest of such Sons, and the Heirs male of his Body, to be begotten, being always to be preferred before the younger of such Sons, and the Heirs male of his and their Body and Bodies issuing. And in Default of such Issue, the Testator devised all his said Estates in like Manner to *Thomas Holt* (second Son of his said Brother) and in Default of such Issue, the said Testator further devised all his said Estates in like Manner to *Rowland Holt* (third Son of his said Brother) and in Default of such Issue, to *Henry Holt* (fourth Son of his said Brother) and in Default of such Issue, to all and every other the Sons of his Brother the said *Rowland Holt*, and the Heirs male of their several and respective Bodies, lawfully issuing the elder of such Sons, and the Heirs male of his Body, being to be preferred before the younger of such Sons, and the Heirs male of their Bodies respectively. And in Default of such Issue, the said Testator further devised all his said Estates in like Manner to *Edward Leman* (Son of his Sister *Leman*) and in Default of such Issue, to *John Levett* (eldest Son of his Sister *Levett*) and for Default of such Issue, to
Richard

Richard Levett (second Son of his Sister *Levett*) and in Default of such Issue, to his own right Heirs for ever. And if all his Brother's Issue male should fail, so as the said *Suffolk* Estate, or the capital Messuage of *Redgrave*, and the Manor of *Redgrave* (Part of the said *Suffolk* Estate) should come to and be vested in the said *Edward Leman*, or any his Issue male, or in the said *John Levett*, or any his Issue male, then he willed, that when, and as he and they should come to and be in Possession of the said *Suffolk* Estate, or the said capital Messuage of *Redgrave*, and Manor of *Redgrave*, by Virtue of his Will, such of them, who from Time to Time, should so be in Possession, should use the Name of *Holt* only, for his and their Sirname: The Testator further willed, that his Brother, and each, and every other of the Persons therein before made Tenants for their respective Lives, and who should, by Virtue of his said Will, thereafter be made Tenants for their respective Lives, of any other Hereditaments, when, and as in Possession of any of the Manors, Messuages, Lands, and Hereditaments, of which they were to be but Tenants for their Lives respectively, by Virtue of his said Will, should, and might, by any Writing indented and executed before two or more Witnesses, from Time to Time, Lease all, or any Parts of the said Hereditaments, for any Term or Terms of Years, not exceeding one and twenty Years, provided that no such Lease was made dispunishable of Waste, nor made to commence in Remainder or Reversion, and so as there was reserved yearly, during the Continuance of every such Lease, the best improved Rent, which at the Time of making thereof, could, or might be gotten for the same, without taking any Fines for making thereof. And the Testator willed, that every of his Brother's Sons, and the said *Edward Leman*, *John Levett*, and *Richard Levett*, when, and as they should

should be in Possession of any of the Premises limited to them for their Lives respectively as aforesaid, and when, and as they should be in Possession of any other the Premises as thereafter might be limited to them respectively for their Lives, by Virtue of his said Will might, and should have Power and Authority for, and in Respect of every one thousand Pounds, which every Woman whom he and they respectively should marry, should bring or should have brought as a Marriage Portion, to settle as, and for a Jointure, upon every such Woman, Lands, Tenements, and Hereditaments, of the Value of one hundred Pounds *per Annum*, for, and during the Term of every such Woman's Life, to commence from, and after the Decease of them who should so settle any such Jointure, and so for more and for less. The Testator devised to the said *William Longueville* and *Silvester Petyt*, (whom he made Executors of his Will,) their Heirs, Executors, and Administrators, all such real and personal Estates as were or should be in Mortgage to him, or to any Person or Persons in Trust for him; and all Moneys which should be due and owing to him at his Decease, upon Securities by Bond, Mortgage, Judgment, or otherwise. The Testator directed his funeral Charges, Debts, and Legacies, to be paid, and to be buried at *Redgrave*; his Funeral to be ordered as his Wife should direct, as privately as could be with Decency. And to his Wife he devised two hundred Pounds of lawful Money of *Great Britain*, to be paid her out of the Arrears of Rents and Interest that should be due to him when he died, and so soon as might be after his Decease; and he devised to her also, the Sum of 2100*l.* of like Money, secured by the Mortgage of *Mr. S.* made to him and her; and the Sum of 600*l.* of like Money, secured to him and her by *Sir P. B.* on Mortgage, and 300*l.* more of like Money, which he

he had put out as his own Money, and for which she had his Note. And he gave to her all her wearing Apparel, and Linen, and all the Jewels, Necklaces, Watches, Rings, Plate, Pictures, and Linen, and likewise the Household-Goods, which he should have at the Time of his Death in the House where he lived in *Bedford-Row*, or in any other House which he should dwell in, except what should be in and about his House at *Redgrave*; and also such Coach and Horses as she should have used during his Life. He directed his Brother should be paid by his Executors and Trustees, so much *per Annum*, out of his personal Estate, as during his Wife's Life should, and might make up the Residue of the Rents and Profits of his Estates in *Suffolk*, and elsewhere, devised to him for his Life, the yearly Sum of 1000*l.* of like Money, over and above all Parliament and other Taxes and Charges whatsoever. The Testator further devised to his Sister *Leman*, 200*l.* a Year of like Money for her Life, to be paid her by half-yearly Payments, from the Time of his Decease, that is to say, at the Feast of *St. Michael* the Archangel, and of the Annunciation of the Blessed Virgin, the first Payment to be made at such of the said Feasts as should first and next happen after his Decease. To his Sister *Levett*, he devised the Sum of 200*l.* of like Money, to be paid her within one Year after his Decease. To his Executors he gave 50*l.* of like Money apiece. To the Poor of the Parish where he should be buried, he gave 50*l.* of like Money. To Mr. *John Ince*, and to *Robert Hyde*, *Joseph Mason*, and *Edward Ventris*, he gave twenty Pounds of like Money apiece for Mourning; and his Will was, that the Rents and Profits of all his Manors, Lands, and Tenements, and all such Interest-Money as should be due when he died, (his Debts, Legacies, and funeral Expences being first paid) and all Interest-Money that should

should accrue after his Death (over and above the 1000*l.* *per Annum*, to be made up as aforesaid to his Brother) should be, by his said Trustees, disposed of, at Interest, until, from thence, the Sum of 7000*l.* should be raised for his Brother's Daughters, and younger Sons, in Manner as was therein after expressed (that is to say) the said 7000*l.* should be divided amongst his said Brother's Daughters, and younger Sons, in equal Proportions, and be paid, and payable to the Daughters, at their respective Days of Marriage, or Ages of 21 Years, which should first happen. And to the younger Sons, when they should respectively attain their Ages of 21 Years, or sooner if his Executors and Trustees, or the Survivor of them should think fit, for the Good of any of the younger Sons, to have his or their Portion or Portions, or Part of the same to be paid sooner; as for placing any of them out Apprentices, or otherwise. And the Interest or Proceed of the said 7000*l.* after such Time, as the said Sum of 7000*l.* should be raised, the Testator directed to be paid, to for and among the said Daughters and younger Sons of his Brother, for their Maintenance, in equal Proportions, until their Portions respectively, should become due and payable as aforesaid, and if any of his said Brother's Daughters, or younger Sons, should die before their Portions became payable, then he directed the Portion and Portions of her, him, or them, so dying, to go and be together with Interest thenceforth to be due for the same, to the Survivors of the said Daughters and younger Sons equally. He desired that his Executors and Trustees should be allowed all their Expences and Charges occasioned by their being his Trustees and Executors. He empowered them to make such Agents under them, from Time to Time, as they should see needful, with reasonable Allowances. And he willed, that they should

not be answerable one for another, and by no Means for involuntary Losses, or the Miscarriages of any Person or Persons whom they, or either of them, should use or trust in the receiving, returning, keeping, or Payment of any the Monies which should belong unto those Trusts which he had reposed in them. The Use of the Household Goods and Furniture which he should have in or about his House at *Redgrave*, he directed should, from Time to Time go with the said House, from his Brother to his Son, and Sons who was and were to succeed in the Enjoyment of the said House; and, likewise, to the said *Edward Leman*, *John Levett*, and *Richard Levett*, as they, or any of them should succeed in the Enjoyment of the said House. All his Books, whether manuscript or printed, he bequeathed to his Nephew *John Holt*, and desired the same might be preserved in his Family. And he also desired, that all the Rest and Residue of his Monies and personal Estate (which should be on Securities when he died) should be continued at Interest, until Purchases were made, and as his Executors and Trustees aforementioned, or the Survivor of them should, from Time to Time, think good, and that the same should be laid out and disposed in the Purchase of Lands and Tenements of Inheritance by his said Executors, or the Survivor of them, as soon as convenient. And he directed that the same should be settled on the same Persons, and to and for the same Uses, Estates, and Purposes, and with the same Powers and Authorities as his Manor of *Redgrave*, and capital Messuage of *Redgrave*, and other Lands and Hereditaments were therein before limited.

The said Testator, by a Codicil to his Will, bearing even Date therewith, did further devise unto his Brother, the abovenamed *Rowland Holt*, all the Profits of the Chief Clerk, for inrolling of Pleas in the Court of
Queen's-

Queen's-Bench; the Dutcheſs of *Grafton* being firſt paid, and after her Death, the whole Profits to the ſaid *Rowland Holt's* own Uſe, he allowing to *Robert Coleman*, Gent. ſuch annual Sum as ſhould be reaſonable for his Care and Pains.

By a ſecond Codicil to his ſaid Will, dated 20th of *December*, 1709, after reciting, that he had by an Indorſement upon his ſaid Will, deviſed unto his Brother, *Rowland Holt*, all the Profits of the Chief Clerk, of inrolling of Pleas in the Court of *Queen's-Bench*, the ſaid *Rowland Holt*, allowing to *Robert Coleman*, Gent. ſuch annual Sum as might be reaſonable for his Care and Pains; and alſo reciting, that the ſaid *Robert Coleman* was joint Clerk with his ſaid Brother for inrolling of Pleas, and the ſaid *Robert Coleman* had ſurrendered his Intereſt therein, and *Edward Ventris*, Eſq; was admitted into the Place of the ſaid *Robert Coleman*; the ſaid Sir *John Holt*, did revoke, diſannul, and make void the Allowance to be by his ſaid Brother made to the ſaid *Robert Coleman*; and he did thereby order, that his ſaid Brother ſhould allow unto the ſaid *Edward Ventris*, ſuch annual Sum of Money as might be reaſonable for his Care and Pains, in and about the Execution of the ſaid Office of Chief Clerk.

The abovenamed Sir *John Holt*, by a third Codicil to his ſaid Will, dated 23d of *February*, 1709, did further deviſe unto his ſaid Brother, the abovenamed *Rowland Holt*, his Executors and Aſſigns, all the Profits of the Chief Clerk, of inrolling of Pleas in the abovementioned Court of *Queen's-Bench* (he and they paying and allowing as abovementioned) for and during the Lives of his ſaid Brother, and of the abovenamed *Edward Ventris*, and of the Survivor of them; and he did thereby republish his Will.

The ſaid Sir *John Holt*, did, by a fourth Codicil, dated 24th of *February*, 1709, appoint, that out of his

his personal Estate, should be paid for such Mourning as his Wife should think fit to give to any of his Relations, not exceeding Nephews and Neices. He did thereby, give to the Parish of *St. Andrew Holborn*, wherein he dwelt, twenty Pounds, to be paid to the Church-Wardens of the same Parish, for the Benefit of the Poor therein. And he willed, that his Wife should bespeak and dispose of so many Mourning Rings to such Persons, and of such Value such Rings should be, as she should think fitting, which, with the said 20*l.* should also be paid by, and out of his personal Estate. And he did thereby, give unto ^k *Knighly Danvers*, Esq; to be paid out of his personal Estate, twenty Guineas, as a Token of his Respect to him, *which he would sooner have done, had he had an Opportunity.* He willed, that the Agreements, if any, made by *R. B.* Esq; or which should be made by him, with any of his Tenants in *Suffolk*, should stand and be performed; and that the said Writing should be taken as Part of, and a Codicil to his Will.

The said Sir *John Holt*, by a fifth Codicil, dated 1st of *March*, 1709, to be added to his Will, and which he desired might be taken for, and as Part of it; to all such Servants as attended him in his Sickness he gave Legacies, which he directed to be paid soon after his Decease; and to each of them he gave five Pounds apiece for Mourning. His Will was, that for one calendar Month, next after his Decease, his domestic Servants might be maintained at the Executor's Charge. To *T. P.* he gave five Pounds, and five Pounds for Mourning. To *R. B.* Esq; he devised ten Pounds for Mourning. To *Mr. J. H.* he gave ten Pounds. To his Executors he left Mourning.

N. B.

^k He was the Author of the Abridgment, which he dedicated to the Chief Justice.

N. B. *His Lady, and one of his Trustees and Executors, were the only two Witnesses to this Codicil.*

Octavo Die Mensis Julii Anno Dni millesimo septingentesimo decimo emanavit Commissio Roberto Raymond, Arm. Solicitatori Generali Dnæ nostræ Reginae et Edwardo Ventris, Arm. ad administrandum Bona, Jura, Credita, præhonorandi Viri Dni Johannis Holt, Militis Capitalis Justiciarii Dominae nostræ Reginae ad Placita coràm ipsâ Regina tenenda assignati Defuncti habentis, &c. juxta Tenorem et Effectum Testamenti et quinque Codicillorum ejusdem Defuncti eo quod Guilielmus Longueville, Arm. et Silvester Petyt, Generosus, Executores in dicto Testamento dicti Defuncti nominat. Oneri Executionis eorundm Testamenti et Codicillorum expresse renunciaverint de bene et fideliter administrando eadem ad sancta Dei Evangelia jurata Dna Anna Holt, Vidua Relicta dicti Defuncti et Legataria in dicto Testamento nominata nostris Admnis. cum dicto Testamento annexo prius renunciante prout ex Actis Curiaë liquet.

On the fifth Day of March, 1745, Administration (with the Will and five Codicils annexed) of the Goods, Chattels, and Credits of the said Sir John Holt, deceased, left unadministrated by Robert Raymond, Esq; her late Majesty Queen Anne's Solicitor General (afterwards Robert Lord Raymond, late Lord Chief Justice of his Majesty's Court of King's-Bench) and Edward Ventris, Esq; now also respectively deceased, was granted to Thomas Thurston, Esq; the lawful Attorney of Rowland Holt, Esq; the great Grand Nephew and Heir at Law of the said Sir John Holt, deceased; and as such the residuary Legatee substituted in the said Will, for the Use and Benefit of the said Rowland Holt, now at Rome (for that William Longueville, Esq; and Silvester Petyt, the Executors, named in the said Will, formerly renounced the Execution of the said Will and Codicils, and Dame Ann Holt, Widow, the Relict

Relict of the said deceased and Legatee, named in the said Will; also *formerly* renounced Letters of Administration (with the said Will and Codicils annexed) of the Goods of the said deceased; the said *Thomas Thurston* being first sworn duly to administer.

On the *second* Day of *December*, 1762, Administration, with the Will, &c. [as before] of the Goods, Chattels, and Credits of the Right Honourable Sir *John Holt*, Knight, late Lord Chief Justice of her late Majesty Queen *Ann's* Court of *Queen's-Bench*; deceased; left unadministred by *Robert Raymond*, Esq; (afterwards *Robert Lord Raymond*) and *Edward Ventriss*, Esq; now also respectively deceased, was granted to *Rowland Holt*, Esq; the Grand Nephew, Devisee in Tail, and as such the residuary Legatee, substituted in the said Will, having been first sworn duly to administer; (for that *William Longueville*, &c. [*verbatim* as before] and the Letters of Administration (with the said Will and Codicils annexed) of the Goods unadministred of the said deceased, granted to *Thomas Thurston*, Esq; as the lawful Attorney of the said *Rowland Holt*, then at *Rome*, being ceased and expired by Reason of the Death of the said *Thomas Thurston*.

The last mentioned *Rowland Holt*, one of the present Knights of the Shire for the County of *Suffolk*, enjoys the Chief Justice's Estate at this Day, being his Lordship's own Brother's third Son's eldest Son and Heir.

POINTS OF LAW, resolved by *H O L T*,
Chief Justice, upon Evidence in Tri-
als at *Nisi Prius*.

N. B. The Cases are inserted in Order of Time.

Lent Assizes, 1693, 5 Wil. & Mar. at Cambridge.

THE Dispute^a was between the Lord of the Manor and the Devisee of a Copyhold of the same Manor. And he ruled,

That the Recital of the Will, in the Copy of the Admittance, was good Evidence of the Devise against the Lord or any other Stranger. But if the Suit had been between the Heir of the Copyholder and the Devisee, the Will itself ought to have been produced:

2. That the fowl Draught of the Steward of the Manor of the Admittance was good Evidence.

At the Sittings for Middlesex, Mich. 5 Wil. & Mar.

In Debt upon Bond, brought by *J. S.* Sheriff of the County of, &c.^b The Defendant pleaded, that the said Bond was acknowledged by *J. N.* to the Plaintiff for the Office of Under-sheriff, and that he was Surety in the said Bond; and then he pleaded the Stat. of 5 & 6 *Edw. 6.* Cap. 16. against buying and selling Offices, &c. and upon the Trial, *A* was produced as a Witness, to give an Account, upon what Occasion this Bond was acknowledged, &c. and the Chief Justice refused to admit *A* to be a Witness, because it

^a Lord *Raym.* Rep. P. 735.

^b Lord *Raym.* Rep. P. 733.

appeared, that he was privately intrusted by both Parties, to make the Bargain, and keep it Secret. And a Trustee shall not be a Witness, in order to betray the Trust.

Nisi Prius, Easter, 6 Wil. & Mar. 1694.

Where *A* purchased the Interest of a Lease for Years, and the Writings were left in the Hands of *B* an Attorney, to draw an Assignment of; *B* drew it, and it was sealed, but *B* refused to deliver it, until *A* paid for it; upon which *A* brought *Trover* against *B* for the Deed: It was ruled, that the Action well lay; because *B* might have an Action for what he deserved, but he could not detain for it.

At Guildhall, Trin. 7 Wil. 3. 1695.

In Case of ^d foreign Bills of Exchange, the Custom is, that three Days are allowed for Payment of them; and if they are not paid upon the last of the said Days, the Party ought immediately to protest the Bill, and return it, and by this Means the Drawer will be charged: But if he does not protest the last of the three Days, which are called the Days of Grace; there, although he upon whom the Bill is drawn fails, the Drawer will not be chargeable; for it shall be reckoned his Folly, that he did not protest, &c. but if it happens, that the last of the said three Days is a *Sunday*, or a great Holiday, as *Christmas Day*, &c. upon which no Money used to be paid, there the Party ought to demand the Money upon the second Day; and if it is not paid, he ought to protest the Bill the said second Day; otherwise it will be at his own Peril, for the Drawer will not be chargeable. Merchants in Evi-

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dence,

^c Lord *Raym.* Rep. P. 738.

^d Lord *Raym.* Rep. P. 743.

dence, swore the Custom of Merchants to be such, which was approved by the Chief Justice.

2. There is no Custom for the Protest of inland Bills of Exchange, nor any certain Time assigned by the Custom for the Payment of them ; therefore the Money ought to be demanded in reasonable Time, after it is payable ; and then if it is not paid, the Drawer will be charged. See the Statute of 9 *Will.* 3. Cap. 17.

3. If the Indorsee of a Bill accepts but two Pence from the Acceptor, he can never after resort to the Drawer.

4. The Notes of Goldsmiths (whether they be payable to Order or to Bearer) are always accounted among Merchants as ready Cash, and not as Bills of Exchange.

5. The Time of receiving Money upon a Goldsmith's Note is immediately, or else it will be at the Peril of him who has the Note. He who delivers over the Note will not be charged, if the Goldsmith fail, as the Drawer of a Bill of Exchange would be ; but the Receiver is supposed to give Credit to the Goldsmith, and the Note is looked upon as ready Money, payable immediately ; and if he does not like it, he ought to refuse it ; but having accepted it, it is at his Peril. (But note, if the Party to whom the Note is delivered, demands the Money of the Goldsmith, in reasonable Time, and he will not pay it, it will charge him who gave the Note. *Hopkins^e & Geary, Hill. 1 Ann. B. R. Guildball.*)

6. A Goldsmith's Note, indorsed, is as a Bill of Exchange against the Indorfor. *Tassel & Lee against Lewis.*

At

At *Guildhall, Easter, 8 Wil. 3. 1696.*

A Creditor was ^f admitted to prove his Bond, and the Debt due upon it, upon *plene administravit* pleaded, he having before received it of the Administrator, and delivered up the Bond. *Kingston* against *Grey*.

At the Sitting at *Westminster, Hil. 9 Wil. 3. 1697.*

In an ^g Indictment for a Nufance, it was ruled, that the Building of an House in a larger Manner than it was before, whereby the Street became darker, is not any public Nufance, by Reason of the darkening. The King against *Webb*.

At *Lent Affizes at Winchester, 1697, 9 Wil. 3.*

If *A, B, C* and *E*, claim ^h Common in a Place called *Dale*, exclusively of all other Persons, and the Common of *A* comes in Dispute, *B* may be a Witness to prove that *A* has Right of Common there; because in Effect it charges himself, *viz.* he admits another to have Common with himself; but if the Prescription be, that all the Inhabitants of *Blackacre* ought to have Common there; one of the Inhabitants cannot be a Witness, to prove that another of the said Inhabitants ought to have Common there, because in Effect he would swear to give himself Right of Common there. *Hockley* against *Lamb*.

At same Time and Place.

Upon a Trial at *Nisi Prius*, it was ruled,

1. That if *A* ^g plants a Tree upon the extremest Limits of his Lands, and the Tree growing, extends its Root into the Land of *B* next adjoining, *A* and *B* are Tenants in Common of this Tree. But if all the Root

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grows

^f Lord *Raym.* Rep. P. 745.

^g Lord *Raym.* Rep. P. 737.

^h Lord *Raym.* Rep. P. 731.

grows into the Land of *A*, though the Boughs overshadow the Land of *B*, yet the Branches follow the Root, and the Property of the Whole is in *A*.

2. If there be two Tenants in Common of a Tree, and one cuts the whole Tree; though the other cannot have an Action for the Tree, yet he may have an Action for the special Damage by this cutting; as where one Tenant in Common destroys the whole Flight of Pigeons. *Waterman* against *Soper*.

At *Nisi Prius*, at *Guildhall*, *Tuesday*, *Jan. 31*, *Hil.*
10. *W. 3.* 1698.

It was ruled upon Evidence in Trial,

1. That if the Goods of *A** be seized upon a *Fieri facias* issued upon a Judgment obtained against *A*, and after the Seizure, *A* become Bankrupt; this Act of Bankruptcy cannot affect the Goods levied in Execution as aforesaid. But if *A* was a Bankrupt before the Seizure, and after the Bankruptcy, the Sheriff, upon a Writ of *Fieri facias* to him directed upon a Judgment obtained against *A*, seizes the Goods and sells them, and a Commission of Bankruptcy is granted, and the said Goods assigned by the Commissioners, the Assignee of the Commissioners may maintain *Trover* against the Vendee of the Goods; but no Action will lie against the Sheriff, because he obeyed the Writ.

2. If a Trader, hearing that a Writ of *Fieri facias* was issued against him, to the Intent to preserve his Goods from being levied in Execution, clandestinely conveys them out of his House, and conceals them privately; that does not amount to an Act of Bankruptcy.

3. That a Seizure of Part of the Goods in an House, by Virtue of a *Fieri facias*, in the Name of the Whole, is a good Seizure of all.

4. It

* *Lord Raym. Rep. P. 724, 725.*

4. It was resolved in this Case, that if Goods of *A* are seized upon a *Fieri facias*, and sold to *B*, *bonâ Fide*, upon valuable Consideration; though *B* permits *A* to have the Goods in his Possession, upon Condition that *A* shall pay to *B* the Money, as he shall raise it by the Sale of the Goods, this will not make the Execution fraudulent. And in such Case a subsequent Act of Bankruptcy by *A* will not defeat the Sale. But though the original Debt was just, yet if the Execution was fraudulent, *viz.* upon any Trust, a subsequent Act of Bankruptcy will defeat it. *Cole against Davies.*

At *Westminster*, 14 *February*, 1698, 10 *Wil.* 3.

A Constable¹ may execute the Warrant of a Justice of Peace, &c. out of his Liberty, but he is not compellable to execute it there. ——— against *Norman* and others.

At *Winchester*, *Lent Assizes*, 10 *Wil.* 3. 1698.

It was ruled, 1. That a Man^m may prescribe for Common, for Cattle, *levant* and *couchant* upon a Messuage. And the Chief Justice said, that he knew *Hale*, Chief Justice, to have been of the same Opinion at *Norfolk Assizes*.

2. By him a Man cannot prescribe for common appurtenant to a Farm; because it is uncertain, of what a Farm consists, perhaps, of ten Acres, or of an hundred Acres; but the Prescription ought to be laid, to a Messuage and so many Acres of Land. But if there is an antient Farm, and the same Lands always occupied with it; a Man may have Common of Pasture, to depasture his Cattle tilling that Farm. *Hockley against Lamb.*

K 4

At

¹ Lord *Raym.* Rep. P. 736.

^m Lord *Raym.* Rep. P. 726.

At the same Assizes.

A makes his Will in these ⁿ Words, *viz.* “ I Devise to *J. S.* all those my Lands in *Bramsted*, in the County of *Surrey*, in the Possession of *John Ashley* ;” whereas, in Fact, *A* had not any Lands in *Surrey*, but he had Lands in *Bramsted* in *Hampshire*, in the Possession of *John Ashley*. And in an Ejectment brought by the Heir of *A*, for these Lands in *Hampshire*, against the Devisee ; it was ruled, that these Lands in *Hampshire* would pass by this Devise, and the Plaintiff was Nonfuit. *Hastead* against *Searle*.

At *Hertford*, Lent Assizes, 1698, 10 *Will.* 3.

In Trespass ^o brought against the Sheriff for Goods taken, upon not guilty pleaded, he gave in Evidence, that he levied them in Execution, by Virtue of a *Fieri facias*. The Plaintiff made Title to the Goods by a prior Execution, but fraudulent, and by Bill of Sale made of them to him by the Officer, *viz.* the Sheriff, Predecessor to the Defendant. And upon this Trial, it was ruled, after Argument of the Council of both Sides, that the Defendant, though Sheriff, ought to give in Evidence, a Copy of the Judgment, but it would have been otherwise, if the Trespass had been brought by the Person against whom the *Fieri facias* issued. *Lake* against *Billers* and others.

At *Dorchester*, Lent Assizes, 10 *Wil.* 3. 1698.

At a Trial at *Nisi Prius*, it was ruled, that if a Man ^p prescribes for Common for a certain Number of Cattle, as appurtenant, &c. it is not necessary, nor material to shew that they were *levant* and *couchant* ; because it is

ⁿ Lord *Raym.* Rep. P. 728.

^o Lord *Raym.* Rep. P. 733.

^p *Id.* 726.

no Prejudice to the Owner of the Soil, for that the Number is ascertained. *Richards* against *Squibb*.

At same Time and Place.

It was ruled, that if *A* possessed ^a of a Term for an hundred Years, grants the Land, *habendum* for forty Years, to begin after his Death; it is a good new Lease; And a Man possessed of a Term for twenty Years, may grant the Lands for nineteen Years, to commence after his Death, and it will be good for so many of the twenty Years, as shall be unexpired at the Time of his Death.

At Guildhall, 1698. 10 Wil. 3.

A Bank ^r Bill was payable to *A*, or Bearer, *A* gave it to *B*, *B* lost it, *C* found it, and assigned it over to *D* for valuable Consideration. *D* went to the Bank and got a new Bill in his own Name; *A* brought *Trover* against *D* for the former Bill, and ruled, than an Action did not lie against *D*, because he had it for valuable Consideration.

At Guildhall, May 31, in Easter Term, 10 Wil. 3.
1698.

In an Action brought ^s upon a Policy of Insurance of a Ship, if it appears upon the Evidence, that the Ship was condemned by Process of Law, and seized; by this Sentence the Property and Ownership are destroyed, and there is no Remedy upon the Policy of Insurance.

At same Time and Place.

That in an Action ^t upon a Policy of Assurance of a Ship, if the Plaintiff's Witness swears, that the Ship
was

^a Lord *Raym.* Rep. P. 737.

^r Lord *Raym.* Rep. P. 738.

^s Lord *Raym.* Rep. P. 724.

^t Lord *Raym.* Rep. P. 732.

was condemned by Proceſs of Law, it is good Evidence to prove it; but if the Defendant had offered that Matter in Evidence by his Witneſſes, it would not have been ſufficient without producing the Sentence of Condemnation.

At *Brentwood*, Summer Affizes, 10 *Wil.* 3.

It was ruled, upon Evidence at *Niſi Prius*,^u that if Copyhold Land be ſurrendered to the Uſe of a Will, &c. and afterwards the Will deviſes this Land to *B*, and his Heirs, upon Condition that he pay 100*l.* within ſix Months after the Death of the Deviſor to *J. S.* If the Money is not paid, *J. S.* ought to be admitted, and then he muſt make an actual Entry before he can ſurrender, and therefore in the preſent Caſe, a Surrender made by *J. S.* before actual Entry was held ill. *Clerke* againſt *How*.

At *Rygate* in *Surry*, in Summer Affizes, 10 *Wil.* 3.

It was held, ^u upon Evidence at a Trial, that Coparceners may join in Ejectment. And that the Caſe in *Moor*, 682, n. 939, was not Law. *Boner* againſt *Juner*.

At ſame Time and Place.

It was ruled, upon^x the Evidence, that becauſe in the Spiritual Court, after Probate of a Will, 6 Months are allowed to register it, and when it is regiſtered, it is regiſtered by the Original, but the Probate is ſigned by the Register only upon the Atteſtation of the Proctor, and the Examination of him; therefore a Will proved in 1666, in the Archdeacon's Court of *London*, and the Office was burnt in the Fire of *London* ſoon after, and the Probate was produced in Evidence to
prove

^u Lord *Raym.* Rep. P. 726.

^x Lord *Raym.* Rep. P. 732.

prove the Will with all these Circumstances ; it was denied to be good Evidence to prove the Will.

At same Time and Place.

It was ruled, that the Service of an Apprenticeship seven Years beyond the Sea, though the Defendant was not bound, excuses from the 5 *Eliz.* Cap. 4. *Fritb* ^y against *Torin*.

At Summer Assizes, 10 *Wil.* 3. 1698, at *Canterbury* in *Kent*.

At at a Trial in Ejectment, upon the ^z Evidence it appeared, that a Will was made by *William Horn*, in 1647, of the Lands in Question, which Will was lost, but Mention was made of it in the Calendar (which is the Index of the Register of the Spiritual Court) and also in the Seal-Book. A Commission issued in *April*, 1648, to examine the Executors upon their Oaths, &c. and that being returned, Probate was granted the *eleventh* of *May*, 1648, which Probate was produced in Evidence. And the Chief Justice, allowed it to be good Proof of the Will, but he reserved it for his further Consideration. Afterwards the Parties agreed. But he afterwards, as well in the *King's-Bench*, as at *Nisi Prius*, upon other Trials declared, that he held it to be good Evidence, and that he continued of his former Opinion. And he then said, that without Doubt the Register's Book is good Evidence to prove a Will. *St. Leger* against *Adams*.

At *Hertford*, Summer Assizes, 10 *Wil.* 3. 1698.

In Case for stopping the Plaintiff's Lights, the Defendant ^a pleaded, not guilty ; and gave in Evidence, that

^y Lord *Raym.* Rep. P. 738. Cas. Temp. *Holt*, P. 675. pl. 2. *Salk.* P. 67. pl. 5.

^z Lord *Raym.* Rep. P. 731.

^a Lord *Raym.* Rep. P. 732.

that the Corporation of *Hertford*, were Lords of the Soil where, &c. and prescribed to set up Stalls there, being near the Market-place. And it was admitted to be given in Evidence upon the general Issue, because this is to claim Property in the Soil; but where the Defendant, or he under whom he claims, claim only a particular Benefit, as Common, or Easement, as a Way, and not the Property in the Soil; he ought to plead it specially, and cannot give it in Evidence upon the general Issue pleaded. *Kent* against *Wright*.

At same Time and Place.

Justices^b of Peace make a Warrant to levy a Poor's Rate upon *J. S.* which was directed to the Constables of the Parish of *A.* *J. S.* had Land in *A.* upon which he had no Chattels; but his House stood in the adjoining Parish of *B.* in the same County, in which *J. S.* had Goods. The Constables of *A.* levied these Goods by Virtue of the said Warrant, and ruled upon Evidence, at the Trial, that the Goods were well levied. *Hampton* against *Lammas*.

Mich. 10 Wil. 3.

The^c Inhabitants of every Parish of common Right, ought to repair the High-ways; and, therefore, if particular Persons are made chargeable to repair the said Ways, by a Statute lately made, and they become insolvent, the Justices of Peace may put that Charge upon the Rest of the Inhabitants.

Same Term.

He said,^d that if a Man destroys a Thing that is designed to be Evidence against himself, a small Matter will

^b Lord *Raym.* Rep. P. 735.

^c Lord *Raym.* Rep. P. 725.

^d Lord *Raym.* Rep. P. 731.

will supply it; and therefore the Defendant having tore his own Note signed by him, a Copy sworn was admitted to be good Evidence, to prove it.

Same Term.

If a Man ^e be hung in Chains upon my Land; after the Body is consumed, I shall have the Gibbet and Chain. Said upon a Motion for a new Trial.

At Guildhall, same Term.

It was ruled, that if *A* being a Pawn-broker, employs *B* his Servant, in the Way of his Trade, and *B*, upon Pawn of Goods, lends Money to *C*, *C* tenders the Money to *B* at the Day, and demands the Goods, *B* says that the Goods are sold; *Trover* will lie for *C* against *A*. *Jones* ^f against *Hart*.

At *Nisi Prius* at *Westminster*, the first Sitting after *Michaelmas* Term, 10 *Wil.* 3. 1698.

It was ruled, that every Man ^g of common Right may justify the going of his Servants, or of his Horses, upon the Banks of navigable Rivers, for towing Barges, &c. to whomsoever the Right of the Soil belongs. And if the Water of the River impairs and decreases the Banks, &c. then they shall have reasonable Way for that Purpose in the nearest Part of the Field next adjoining to the River. And he compared it to the Case, where there is a Way through a great open Field, which Way becomes foundrous; the Travellers may justify the going over the Outlets of the Land not inclosed next adjoining. *Young* against —.

At

^e Lord *Raym.* Rep. P. 738.

^f Lord *Raym.* Rep. P. 738, 739. *Cas. Temp. Holt*, P. 642. pl.

3. *Salk.* 441. pl. 2.

^g Lord *Raym.* Rep. P. 725.

At *Lent* Assizes at *Tbetford*, 11 *Will.* 3. 1699.

Depositions ^g in *Chancery*, referred to be admitted in Evidence, after the Bill was dismissed. But it was reserved as a Point for further Consideration; and after Consideration, and Conference had with the Practicers in *Chancery*, *Holt* gave his Opinion, that notwithstanding such Dismission of the Bill, the Depositions were good Evidence. *Smith* against *Veale*.

At the Sittings for *Middlesex*, 14 *Feb.* 11 *W.* 3. 1699.

In *indebitatus assumpsit* upon a Taylor's Bill, upon *non assumpsit* pleaded, and Trial, the Plaintiff produced in Evidence his Shop-book, written by one of his Servants, who was dead. And upon Proof of the Death of the Servant, and that he used to make such Entries of Debts, &c. It was allowed to be good Evidence, without Proof of the Delivery of the Goods, &c. and this was said to be as good Proof, as the Proof of a Witness's Hand (who was dead) subscribed to a Bond, &c. And notwithstanding the Statute of 7 *Jac.* 1. Cap. 12. says, that a Shop-book shall not be Evidence after the Year, yet the Chief Justice did not hold such Book to be good Evidence within the Year alone. *Pitman* against ^h *Maddox*.

At *Lent* Assizes at *Kingston*, 1699, 11 *Wil.* 3.

It was ruled, that such Lease for three Years of Land, as ⁱ will be good without Deed, within the 29 *Car.* 2. Cap. 3. must be for three Years, to be computed from the Time of the Agreement, and not for three Years to be computed from any Day after. *Rawlins* against *Turner*.

At

^g Lord *Raym.* Rep. P. 735.

^h Lord *Raym.* P. 732, 733. 2 *Salk.* 690. pl. 2. *Cas. Temp. Holt*, 298. pl. 24.

ⁱ Lord *Raym.* Rep. P. 736. 12 *Mod.* 610.

At *Lent* Assizes at *East Grinstead*, in *Sussex*, 1699,
11 *Wil.* 3.

In ¹ *indebitatus assumpsit* upon an *insimul computasset*, and *non assumpsit* pleaded, it appeared upon the Evidence at the Trial, that the Debt for which the Account was made, was in Right of *A*, to whom the Plaintiff was Executor. And *Holt* seemed to be of Opinion, that it was against the Plaintiff; but ordered that it should be saved as a Point for his Opinion, and that, in the mean Time, the Plaintiff should have a Verdict subject to his Opinion.

At same Time and Place.

It was ruled, that if an Answer to Interrogatories in ^m *Chancery* be given in Evidence at a Trial, they ought to be proved by the Examiner himself, to have been taken the same Day that is mentioned upon them. *Goring* against *Evelin*.

At *Derby*, Summer Assizes, 1699, 11 *Wil.* 3.

Debt ^q against the Heir upon the Bond of the Ancestor, *Et c. Riens per discent* was pleaded. The Heir gave in Evidence, an Extent against him upon a Debt owing by his Father upon Bond to the King. And it was ruled, that a Copy of the Bond sworn, or the Bond itself, ought to be given in Evidence, the Suit being by a Creditor, otherwise the Extent should be allowed. And for want of this, such Extent was disallowed, and next Morning, in another Trial between *Horne* and the said Defendant *Adderley*, the Bond acknowledged by his Ancestor to the King, was produced in Evidence, the Issue being the same as in the other Action. *Sherwood* against *Adderley*.

L

At

¹ Lord *Raym.* Rep. P. 733.

^m Lord *Raym.* Rep. P. 734.

^q Lord *Raym.* Rep. 734, 735.

At *Summer Assizes at Warwick*, 1699, 11 *Wil.* 3.

It was ruled, ^s that if *A* be seized of the Manors of *B* and *C*, and during his Seisin of both, he causes a Survey to be taken of the Manor of *B*, and afterwards the Manor of *B* is conveyed to *E*, and after a long Time there are Disputes between the Lords of the Manors of *B* and *C* about their Boundaries; this old Survey may be given in Evidence; and so it was done in this Case. *Contra*, if the two Manors had not been in the Hands of the same Person at the Time of the Survey taken. *Sir John Bridgman* against *Jennings*.

At same Time and Place.

A Deed ^s was produced, to which there were two Witnesses, one of whom was blind. It was ruled, that such Deed might be proved without proving that this blind Witness is dead, or without having him at the Trial, proving only his Hand; and so it was done in this Case. *Wood* against *Drury*.

At same Time and Place.

Upon a Trial at *Nisi Prius*, it was ruled, ^e that if *A*, not having any Thing in certain Land, demises it by Indenture to *B*, and afterwards *A* purchases the Land, this will be a good Lease by Estoppel. But if it appear by Recitals in the Lease, that *A* had nothing at the Time of the Demise, and afterwards he purchases the Land as aforesaid, that will not enure by Estoppel. *Hermitage* against *Tomkins*.

At same Time and Place.

If the ^u Sheriff upon an Extent for the King against *A*, seizes the Goods of *B*, *B* cannot have *Trover* against the

^s Lord *Raym.* Rep. P. 734.

^e Lord *Raym.* Rep. P. 729.

^u Lord *Raym.* Rep. P. 736.

the Sheriff, because by the Seizure, the Property vested in the King. The King against *Woodward*.

At same Time and Place.

An ^w Extent in Aid, found *Andrews* Debtor to the King, and *Thomas Woodward* Debtor to *Andrews*; upon which the Goods of *Thomas Woodward* were seized in the Hands of *John Woodward*; *John Woodward* came in, and traversed the Inquisition, that they were not the Goods of *Thomas Woodward*, but of himself, and the Verdict was for Part for the King, and for Part for the Defendant. And the Question was, who should pay the Fees in Court, &c. because the Defendant is Actor, for if it were found for the King, no Judgment should be given; but if, &c. for the Defendant, an *amoveas Manus* must be awarded. And it was ruled, that the Defendant ought to pay the Fees. *Same Case.*

At Summer Assizes at *Lincoln*, 1699, 11 *Wil.* 3.

Ruled in Evidence, at a Trial, in an Action of false Imprisonment;

If *A* * has a Chamber adjoining to the Chamber of *B*, and has a Door that opens into it, by which there is a Passage to go out; and *A* has another Door which *C* stops, so that *A* cannot go out by that, that this is no Imprisonment of *A*, by *C*, because *A* may go out by the Door in the Chamber of *B*, though he be a Trespasser by doing it. But *A* may have a special Action upon his Case against *C*; the Plaintiff was nonsuit. *Wright* against *Wilson*.

L 2

At

^w Lord *Raym.* Rep. P. 736.

* Lord *Raym.* Rep. P. 739.

At the same Time and Place, and at Aylesbury.

If *H* has Possession of Land for twenty Years uninterrupted, and then *B* gains Possession, upon which *H* brings Ejectment; though *H* is Plaintiff, yet his Possession for twenty Years will be a good Title for him, as well as if *H* had been then in Possession; because Possession for twenty Years now, by Virtue of the Statute, 21 Jac. 1. Chap. 16. is like a Descent at Common Law, which tolls the Entry. *Stocker* against *Berny*.

At Lent Assizes at *Tbetford*, 16 March, 12 Wil. 3.
1700.

It was ruled, upon Evidence, at a Trial at *Nisi Prius*,^y that a Ship-Carpenter is within the Statutes of Bankrupts; but a Case was made of it for the Chief Justice's farther Consideration.

2. He held, that if *A* becomes Bankrupt, and then sells Goods to *B*. *B* sells them to *C*, which is a Conversion; then a Commission of Bankrupt is sued, and an Assignment made by the Commissioners to *E*, who brings *Trover* against *C*, the Action well lies; but that Point was also reserved for his Consideration.

3. If the Petition to the Lord Chancellor, mentioned in the Declaration recites, that the Bankrupt was indebted in 300*l*. and the Petition produced at the Trial recites, that he was indebed in 150*l*. yet that is no material Variance.

4. There is no need to produce, at the Trial, the Petition made to the Lord Chancellor, because it may have been by Parol, though the Practice hath been otherwise. *Kirne* against *Smith* and others.

At

At the Affizes at *Bury*, in *Lent*, 12 *Will.* 3. 1700.

*A*ⁿ demised Ground to *B*, which was Pasture, except the Trees; *B* put in his Cattle to feed, which barked the Trees; *A* cannot have a Trespass against *B*. *Glenham* against *Hanby*.

At *Lent* Affizes, 12 *Wil.* 3. 1700, at *Bedford*.

In ^p Case upon a special Promise, to deliver good merchandisable Wheat, upon *non assumpsit* pleaded; at the Trial, the Plaintiff's Witness swore, that it was agreed, that he should deliver good second Sort of Wheat; and held this a Variance, and the Plaintiff was nonsuited.

At *Norwich*, Summer Affizes, 12 *Wil.* 3. 1700.

It was ruled, upon Evidence, at a Trial at *Nisi Prius*, that if in *indebitatus assumpsit* for Goods, ^z sold and delivered, upon *non assumpsit* pleaded, the Defendant gives in Evidence, that the Debt was attached by foreign Attachment in *London*, upon a Plaint levied by *J. S.* (to whom the Plaintiff was indebted) against the Plaintiff, &c. the Defendant will be driven to prove, that the Plaintiff was indebted to *J. S.* because the Plaintiff has no Notice of the foreign Attachment; and therefore it may be only a Contrivance by the Defendant and *J. S.* to bar the Plaintiff of his present Action.

2. In such Case, the Plaintiff may shew in Evidence, that the Suit in *London* was after an Original filed by the Plaintiff in some one of the superior Courts; and that will avoid the Operation of the foreign Attachment.

3. If

ⁿ Lord *Raym.* Rep. P. 739.

^o This was ruled upon a Point, made and referred to the Chief Justice, upon hearing Council several Times; Note, at first he was of a contrary Opinion. Lord *Raym.* Rep. P. 739.

^p Lord *Raym.* Rep. P. 735.

^z Lord *Raym.* Rep. P. 727.

3. If the Original did not issue before the Plaint was entered in *London*, but only was antedated, and bore *Teste* before, and no Arrest was made before upon it; that will not avoid the foreign Attachment. But this latter Point *Holt* reserved for his farther Consideration. But (as Lord Chief Justice ^a *Raymond* heard) he was afterwards of the same Opinion. *Palmer* against *Hooke* or *Gouche*.

At same Time and Place.

Ruled upon Evidence, at a Trial in false Imprisonment, that the ^b Officer cannot justify the Imprisonment of a Man for Non-payment of Taxes under the general printed Warrant, which the Collectors have, signed by two Justices of Peace; but they ought to have a special Warrant. *Masters* against *Butcher*.

At Bury, Summer Assizes, 12 Wil. 3. 1700.

In an Indictment ^c for Forgery at Common Law, tho' it is not shewn, that the Party was prejudiced, yet the Indictment is good. *Contra*, in an Action of *forger des faux Faits*. Therefore where the Indictment was for Forgery of a Surrender of the Lands of *J. S.* and it was not shewn in the Indictment, that *J. S.* had any Lands; yet upon Motion in Arrest of Judgment it was held good; and Judgment was given against the Defendant, being an Attorney, that he should stand in the Pillory. Another Exception was, that the Indictment was, *quod falso contrafecit Scriptum*, which is repugnant; yet held good. *The King* against *Goate*.

June

^a Lord *Raym.* Rep. P. 727.

^b Lord *Raym.* Rep. P. 740.

^c Lord *Raym.* Rep. P. 737.

June 4, 1700, at Guildhall, at *Nisi Prius*.

If a ¹ Ship be bound for the *East-Indies*, and from thence to return to *England*, and the Ship unlades at a Port in the *East-Indies*, and takes Freight to return to *England*, and in her Return she is taken by the Enemies; the Mariners shall have their Wages for the Voyage to the *East-Indies*, and for half the Time that they stayed there to unlade, and no more.

At the Sittings at *Westminster*, 13 February, 12 *Wil. 3.*
1700.

Mr. *R. Vaughan* ^e sent a Box with an hundred Guineas, &c. in it, by *Tiley*, the *Bath* Carrier, to *London*, upon which Box, the Direction was only, "To Mr. *Vaughan*, Member of Parliament". *Tiley* carried the Box to *London*, and upon his Arrival, *Cowling*, an Inn-keeper in *Piccadilly*, came to *Tiley's* Inn for Goods directed to be left at *Cowling's* House. Afterwards, this Box being lost, *Tiley* pretended that it was delivered to *Cowling* among other Goods, upon which *Tiley* brought an Action of *Trover* against *Cowling*; and at the Trial, Mrs. *Vaughan*, the Wife of Mr. *Vaughan*, was produced to be a Witness, to prove what was in the Box, and *Holt* refused to admit her to be a Witness; because, whether *Tiley* recovered or not, this Verdict might be given in Evidence by Mr. *Vaughan*, in an Action to be brought by him against *Tiley*, with Oath made of what was sworn for *Tiley* in this Trial. *Tiley* against *Cowling*.

At Guildhall, Nov. 23. Mich. 12 *Wil. 3.* 1700.

In Case ^d upon a Bill of Exchange, upon the Evidence at the Trial, the Case was thus. Adrew a Bill of
Ex-

¹ Lord *Raym.* Rep. P. 739.

^d Lord *Raym.* Rep. P. 742, 743.

^e Lord *Raym.* Rep. P. 744.

Exchange upon *B*, payable to *C*, at *Paris*; *B* accepted the Bill, *C* indorsed it, payable to *D*; *D* to *E*; *E* to *F*; *F* to *G*; *G* demanded the Bill to be paid by *B*, and upon Non-payment, *G* protested it within the Time, &c. and then *G* brought an Action against *D*, and it was well brought, and he recovered. Afterwards, *D* brought an Action against *B*, and though *D* produced the Bill and the Protest, yet, because he could not produce a Receipt for the Money paid by him to *G* upon the Protest, as the Custom is among Merchants, as several Merchants upon their Oaths affirmed, he was nonsuit. But *Holt* seemed to be of Opinion, that if he had proved Payment by him to *G*, it had been well enough. *Mendez* against *Carre-roon*.

At *Maidstone*, Lent Assizes, 13 *Wil.* 3. 1701.

William Denne, ^f possessed of a Farm for a thousand Years, assigned it to *Ralph Philpot*, for a collateral Security, against a Bond in which *Philpot* was bound jointly with *Denne* for the Debt of *Denne*, in 1655. *Philpot* died, leaving *R. Philpot*, his Son, his Executor. *William Denne* died, leaving *Katherine Denne*, his Wife, his Executrix, and *Katherine Denne*, his Daughter, his Heir. In 1674, *R. Philpot*, Executor of *Ralph Philpot*, and *Katherine Denne*, the Executrix of *William Denne*, and *Katherine Denne*, the Heiress of *William Denne*, assigned this Term of a thousand Years to *John Harrison*, with Condition, that upon Payment of 20*l.* the Consideration of the said Assignment, by *Katherine Denne*, the Executrix, &c. *Katherine Denne* received the Profits till 1691, and she paid the Interest to the same Time. And it was ruled, in an Ejectment brought by the Executor of *Harrison*.

I. That

^f Lord *Raym.* Rep. P. 740.

1. That he was not barred by the Statute of Limitations, because the Statute did not prejudice at the Time of the Assignment, there being but nineteen Years elapsed; and then the joining of him in the Assignment, who had the Title to take the Advantage of the Statute, gives a new Title.

2. If a Man makes a Mortgage for collateral Security, although the Mortgagee is not in Possession for twenty Years and more; yet, if the Interest be paid upon the Bond, according to the Agreement of the Parties, it shall not be barred by the Statute of Limitations. *Hatcher against Fineux.*

At same Time and Place.

Debt for Rent. § Upon *nil debit* pleaded, the Plaintiff gave in Evidence, a Note in Writing, by which the Defendant was to hold for one Year, rendering Rent of 15*l.* and, in Fact, he was Grantee of a Reversion expectant upon an Estate for Life, which Life was dead at the Time of the giving of the Note, which Grant was forty Years before, and he was never in Possession, but the Tenant for Life was all the Time in Possession during his Life. The Defendant gave in Evidence, a Prior Grant of the said Reversion. And it was ruled, that the Defendant, in this Case, may give in Evidence, *nil habuit in tenementis*, the Plaintiff having never been in Possession, notwithstanding the Note signed by the Defendant, by which he agreed to hold, &c. but if the Plaintiff had been in Possession, though but Tenant at Will, &c. then the Defendant could not have given this in Evidence, without having been evicted. Plaintiff was nonsuit. *Chettle against Pound.*

M

At

At the Sitting in *Middlesex*, after *Easter Term*, 13
Wil. 3. 1701.

A Jewel ^h cannot be an Heirloom, but only Things ponderous, as Carts, Tables, &c. Ruled, in *Trover*, for a Chain of Pearl. See *Co. Lit. 18. b.* That the antient Jewels of the Crown are Heir-looms. Lord *Petre* against *Heneage*.

Trinity, 13 *Wil. 3. 1701*, *Guildhall, London.*

In Debt ^k upon Bond, brought against the Defendant, as Heir to his Father, &c. *Riens per descent* pleaded, the Plaintiff replied Affets, and Issue thereupon. And the Evidence was, that the Obligor, the Defendant's Father, devised to the Defendant, his Son and Heir, certain Messuages in *Excbequer-alley* in Fee, but chargeable with an Annuity, or Rent-charge, payable to the Defendant's Mother. And it was held, that these Messuages descended to the Defendant, and were Affets. For the Difference is, where the Devise makes an Alteration of the Limitation of the Estate, from that which the Law would make by Descent; and where the Devise conveys the same Estate, as the Law would make by Descent, but charges it with Incumbrances. In the former Case, the Heir takes by Purchase, in the latter by Descent. *Emerson* against *Inchbird*.

At *Brentwood*, Summer Assizes, 13 *Wil. 3. 1701.*

In Case for Words, ^l which imported the committing of Adultery by the Plaintiff, with *Jane at Stile*, the Defendant, in Mitigation of Damages, may give in Evidence, that the Plaintiff committed Adultery
with

^h Lord *Raym.* Rep. P. 728.

^k Lord *Raym.* Rep. P. 728.

^l Lord *Raym.* Rep. P. 727.

with *Jane at Stile*, but not with any other Woman.
Smithies against *Dr. Harrison*.

At the Summer Assizes at *Horsbam* in *Suffex*, 13 *Wil.* 3.
1701.

Claxmore ^m brought an Ejectment against *Searle*, *Field*, and *Falkner*; *Field* appeared, and confessed Lease, Entry, and Ouster. *Searle* and *Falkner* did not appear, nor confess Lease, Entry, and Ouster. Upon which, by the Direction of *Holt*, Verdict was given by the Jury for the Plaintiff against *Field* generally; and Verdict was given against the Plaintiff for *Searle* and *Falkner*; and Indorsement was made upon the *Postea*, that this Verdict was for *Searle* and *Falkner*, because they did not appear and confess Lease, Entry, and Ouster: And for this Reason, that they should not have Costs against the Plaintiff, and that the Plaintiff should have Judgment against the casual Ejector, for such Land as were in the Possession of *Searle* and *Falkner*. *Claxmore* against *Searle*, *Field*, and *Falkner*.

At *Guildball*, the Sitting after *Hilary* Term, 1 *Anne*,
1702.

Depositions ^o in *Chancery*, admitted in Evidence after the Bill was dismissed. *Smith* against *Veale*.

At *Hertford*, *Lent* Assizes, *Mar.* 25, 1702, 1 *Anne*.

In *assumpsit* ^p upon *non assumpsit infra sex annos* pleaded, the Evidence was, that after the six Years the Defendant assumed to pay, if the Plaintiff would come to Account. And it was ruled, that this did not revive the Promise, because it was not an actual Promise. *Sparling* against *Smith*.

At

^m Lord *Raym.* Rep. P. 729.

^o Lord *Raym.* Rep. P. 735.

^p Lord *Raym.* Rep. P. 741.

At *Lent Assizes at Maidstone*, in 1702, 1 *Anne*.

In Ejectment upon the Trial, ^a the Copy of the Register of a Will was produced in Evidence, to prove a Pedigree, and not to derive any Title by the Will; and also the Probate of the same Will was offered for the same Purpose. But they were refused to be admitted. For,

1. As to the Probate, it is only Evidence of a Will as to Chattles.

2. *Holt* said, that there was the same Reason to admit the Copy of the Register to be Evidence, as the Copy of Court-rolls, or of a Register of a Church; but the Practice has been always otherwise, which he would not subvert; and therefore the Copy of the Register not being Evidence to prove the Will, it cannot prove the Pedigree, because that depends upon the Credit of its being a Will, which is not proved by the Copy of the Register; therefore the Evidence was denied to be admitted by him. *Dike* against *Polhill*.

At *Guildhall*.

The ⁿ Servants of a Carman run over a Boy in the Streets, and maimed him by Negligence; and an Action was brought against the Master, and the Plaintiff recovered. The Servants of *A*, with his Cart, run against the Cart of *B*, in which there was a Pipe of Wine, *viz.* Sack, and overturned it, whereby the Sack was spoiled and run into the Street; and an Action was brought against the Master, and held good.

^a Lord *Raym.* Rep. P. 744, 745.

^p Lord *Raym.* Rep. P. 739.



AN ALPHABETICAL

TABLE of REFERENCES

To all Lord Chief Justice *HOLT*'s

ARGUMENTS and RESOLUTIONS

IN THE

Several Volumes of REPORTS, digested under
proper general Heads.



A

P R E F A C E.

LORD Chief Justice *Holt's* Arguments and Resolutions, were the Glory and Happiness of the Age in which they were pronounced, they have been the Guide and Imitation of succeeding ones, and will continue to be so to all future ones. *England* is as much obliged to his Lordship's Administration, as to the Law itself: For though the Law is projected upon the finest Polity in all the known World; yet, without a Magistrate, it is but a dead Letter: Let it's Excellency be what it will, it's good Influence and Effects will entirely depend upon the Integrity and Abilities of those who are to carry it into Execution.

The following Table is calculated to refer the Reader to innumerable Instances of that Integrity, and of those Abilities. The Plan, the Author confesses, he took from the Table at the End of *Jacob's* Law Dictionary, which he flatters himself he has much improved. The Books having an Asteric before them, were either not published when *Jacob* wrote, or omitted by him. The Account of the respective Authors in the Notes, it is hoped, will be useful as well as amusing.

C.

<i>Carth.</i> (a) ———	<i>Carthew's</i> Reports. 1728.
* <i>Cas. Temp. Holt,</i> (b) ———	Cases determined while <i>Holt</i> was Chief Justice. 1738.
<i>Comb.</i> (c) ———	<i>Comberback's</i> Reports. 1724.
* <i>Com. Rep.</i> (d) ———	<i>Comyn's</i> Reports. 1744.

F.

* <i>Fortesc. Rep.</i> (e) ———	<i>Fortescue's</i> Reports. 1748.
* <i>Freem.</i> (f) ———	<i>Freeman's</i> Reports. 1742.

P R E F A C E.

K.

Kel. (g) ——— *Kelyng's Reports.* 1708.

L.

Lev. (h) ——— *Levinz's Reports.* 1702.

M.

3, 4, 5. *Mod.* (i) ——— *Modern Reports.* 1757.

6. *Mod.* (i) ——— *Modern Cases.* 1757.

7. *Mod.* (i) ——— *Modern Cases by Farresley.* 1757.

* 11. *Mod.* (i) ——— *Cases in the King's-Bench.* 1737.

* 12. *Mod.* (i) ——— *Cases in King William the third's
Reign.* 1741.

R.

* 1, 2. *Lord Raym.* (k) *Lord Chief Justice Raymond's
Reports.* 1743.

S.

1, 2. *Salk.* (l) ——— *Salkeld's Reports.* 1742.

* 3. *Salk.* ——— *Id.* 1724.

* *Set. and Rem.* ——— *Cases of Settlements and Remo-
vals.* 1742.

Show. Rep. (n) ——— *Showers's Reports.* 1708.

Skin. ——— *Skinner's Reports.* 1728.

* *Stra. Sel. Caf. Evid.* (p) *Select Cases of Evidence, by Sir
John Strange.* 1754.

W.

* *Wil. Rep.* ——— *Peere William's Reports.* 1740.

N. B. No Books are referred to, but such wherein the Reporter expressly says, that the Argument or Resolution was the *Dictum* of the Chief Justice.

(a) He was called to the honorary Degree of a Serjeant at Law, 1 *Oct.* 1701, 13 *Wil.* 3. *Append. to Chron. Juridical.* P. 7.

(b) *Jacob*, who wrote the Law Dictionary, is reputed the Collector, or at least the Publisher of it.

(c) He was Recorder of the City of *Chester*, and one of the Justices of *North-Wales.* See the Title Page of his Reports.

(d) He

P R E F A C E.



(^d) He was called to the honorary Degree of a Serjeant at Law, 8 June, 1705, 4 Anne. Append. to *Chron. Juridicial*. P. 7. On Monday, 7 Nov. 1726, 13 Geo. 1. he was sworn a Baron of the *Exchequer*, in the Room of Mr. Baron Page, who on Friday, Nov. 4, preceeding, was sworn a Judge of the *Common Pleas*, in the Room of Mr. Justice Tracy, (who resigned his Office by Reason of his ill State of Health, and his Majesty, as a Reward for his past Services, granted him a Pension of 1500*l. per Annum.*) Lord Raym. Rep. 2 Vol. P. 1420. *Bunb. Rep.* P. 221. Append. to *Chron. Juridicial*. P. 15. In January, 1735, 8 Geo. 2. he was made one of the Judges of the *Common Pleas*. *Bunb. Rep.* P. 341. Append. to *Chron. Juridicial*. P. 19. On 7 July, 1738, 11 Geo. 2. before Mich. Term, he received the Lord the King's Letters Patent, dated the same Day, appointing him Chief Baron of his *Exchequer*. *Com. Rep.* P. 587. *Bunb. Rep.* P. 343. Append. to *Chron. Juridicial*. P. 19.

(^e) On Friday, Oct. 22, 1714, 1 Geo. 1. he was appointed Solicitor General to his Royal Highness the Prince of Wales. Lord Raym. Rep. 2 Vol. P. 1318, 1319. *Stra. Rep.* P. 1. January 24, 1716, 3 Geo. 1. he was made a Baron of the *Exchequer*. *Bunb. Rep.* P. 10. Append. to *Chron. Juridicial*. P. 13. May 15, 1718, 5 Geo. 1. he was made a Judge of the *King's-Bench*, *Bunb. Rep.* P. 22. *Stra. Rep.* P. 86. Append. to *Chron. Juridicial*. P. 13. His Patent was superseded by his late Majesty, King George the second. Lord Raym. Rep. 2 Vol. P. 1510. 27 Jan. 1728, 2 Geo. 2. he was constituted one of the Justices of the *Common Pleas*. Append. to *Chron. Juridicial*. P. 17. List of Chief Justices, &c. in P. 260. of 4 Vol. of *Tind. Rap. Hist. Engl.* Edit. 1747.

(^f) He was Lord Chancellor of *Ireland*, in the Year 1706, 5 Anne. See Preface to his Reports.

(^g) Mr. Justice Foster tells us, that Lord Chief Justice Holt published these Reports. *Fost. Cr. Law*, P. 204. Kelyng was of the *Inner-Temple*, and called to the honorary Degree of a King's Serjeant at Law, [6 Nov. *Dugd. Chron. Ser.* P. 115. *Chron. Juridicial*. P. 20.] in Michaelmas Term, 13 Char. 2. 1661. He gave Rings with this Inscription, *aDest CaroLVs MagnVs*, the large Letters [MDCLVV] made the Year [of the Restoration] 1660. *Sid. Rep.* P. 4. *Show. Rep.* 2 Vol. P. 102. pl. 99. He was made one of the Judges of the *King's-Bench*, 18 June, 1663. *Dugd. Chron. Ser.* P. 114. *Chron. Juridicial*. P. 201. in the Room of Sir Tho. Mallet, who retired from Town to his Country Seat; having first petitioned the King to dispense with his Attendance, by Reason of his great Age, which the King granted, and also continued to him his Patent and Salary, and so there were five Judges, tho' but four attended. *Sid. Rep.* P. 150. pl. 15. He was constituted Chief Justice of the *King's Bench*, 21 Nov. 1665, 17 Car. 2. *Dugd. Chron. Ser.*

Ser: P. 116. *Chron. Juridicial.* P. 201. *Sid. Rep.* P. 275. pl. 1. In *Mich: Term*, 1669, 21 *Char.* 2. Mr. Serjeant *Powys* coming to the *King's-Bench Bar*, who was the Junior of 17 who had been made a Day or two before in that Term; the Lord Chief Justice *Kelyng* told him, that he had something to say to him, *viz.* That the Rings, which he and the Rest of the Serjeants had given, weighed but eighteen Shillings apiece, whereas *Fortescue*, in his Book "*De Laudibus Legum Angliæ*," [Chap. 50, P. 114, Edit. 1741] says, "That the Rings given to the Chief Justices, and to the Chief Baron, ought to weigh twenty Shillings apiece:" And that he spake not this expecting a Recompence, but that it might not be drawn into a Precedent; and that the young Gentlement there, might take Notice of it. *Mod. Rep.* P. 9. pl. 30. He is said to have prepared the Act of Uniformity. [Stat. 13 & 14 *Char.* 2. Cap. 4.] *Burnet's Hist.* own Times, P. 184.

About the Year 1666, the Lord Chief Justice *Kelynge* was questioned in Parliament for over-awing and putting a Restraint upon Juries; and the House came to several Resolutions upon his Case, and ordered him to be prosecuted; but by Reason of the House's being prorogued, and he himself, not long after, dying in Discontent, we do not find there were any further Proceedings made therein. Pref. to *Fortesc. de Laudibus*, &c. XIII. Triumphs of Justice, Fol. Lond. 1681, P. 29, 36.

Siderfin says, the Complaint was for Misdemeanors done in his Office, as *fining* Juries, &c. that there was an Inquiry made into them, and the Chief Justice appeared in Person before the Committee, and also in the *House of Commons*, and afterwards he was discharged. *Sid. Rep.* P. 338. pl. 1.

Lord Chief Justice *Kelyng* was obliged to make *Denzel*, Lord *Holles*, Satisfaction for the Affront put upon his Lordship by him, at the Trial of certain *French* Gentlemen, (for a Robbery) in the Court of *King's-Bench*, in *Easter Term*, 1670, 22 *Char.* 2. The Affront was, that when Lord *Holles* attempted to speak to the Characters of the *Frenchmen*, the Chief Justice stopped him, saying, he must not interrupt the Court; and Lord *Holles* replying, that it was neither to interrupt the Court nor to do them any Wrong, to inform them as much as possible of all Passages, &c. The Chief Justice answered again, very angrily, *My Lord, you wrong not the Court, but you wrong yourself; and it is not the first Time you have been observed to appear too much for Strangers.* "So, says Lord *Holles*, I was snubbed and set down again, but I must say it was Language I had not been used to, nor, I think, any of my Condition, that had the Honour to serve the King, in the Quality I do, of a Privy Councillor." The Lord Chief Justice also, upon *Walrond's* Evidence, declared (looking fully at Lord *Holles*, whence the whole Court understood it to be meant of him) that there had been

been some foul doings. Upon these Injuries, he petitioned the House of Lords, who on *Friday, March 10, 1670*, made the following Order. “ This Day the Lord *Holles* produced several Witnesses to be examined concerning his Complaint on his Petition of several Indignities put upon him by the Lord Chief Justice of the *King’s-Bench*, at the Trial of some *French* Gentlemen in the said Court of *King’s-Bench*, who were there falsely accused of a Robbery by four Butchers in *Easter Term* last. After the Hearing of which Witnesses, the Lord Chief Justice made his Defence, and denied, that he intended any Thing against the Lord *Holles*, when he spoke those Words at the said Trial, that it was a foul Contrivance, &c. as in the Petition is set forth; to which Defence the Lord *Holles* made a short Reply, and then voluntarily withdrew himself, and the Lord Chief Justice withdrew himself also. Upon which the House took the whole Matter into serious Consideration, and ordered, that the Lord Chief Justice should be called to his Place as a Judge; and openly (in the Presence of the Lord *Holles*) the Lord-Keeper should let him know, that this House is not satisfied, with his Carriage toward the Lord *Holles* in this Business, and therefore has ordered, that he should make this Acknowledgment, which is to be read by the Clerk as followeth, that he did not mean it of the Lord *Holles* when he spoke these Words (that it was foul Contrivance) and that he is sorry, that by his Behaviour or Expressions, he gave any Occasion to interpret it otherwise, and asks the Pardon of this House and the Lord *Holles*. Then the Lord Chief Justice of the Court of *King’s-Bench* was called to his Place, and (the Lord *Holles* being also present) the Lord Keeper performed the Directions of the House, and the Lord Chief Justice read the Acknowledgment aforesaid, only changing the Stile into the first Person.”

John Brown, Cleric. Parliamentorum.

Journal-Book of the House of Peers, *Anno 1671*. See “ *A true Relation of the unjust Accusation of certain French Gentlemen charged with a Robbery (of which they were most innocent) and the Proceedings upon it, with their Trial and Acquittance in the Court of King’s-Bench, in Easter Term last, published by Denzel Lord Holles, partly for a further Manifestation of their Innocency (of which, as he is informed, many do yet doubt) and partly for his own Vindication, in regard of some Passages at that Trial, which seemed very strongly to reflect upon him.*” *Lond. 1671, Quarto, 44 Pages.* The Chief Justice died in *Easter Term, 23 Char. 2.* Sir *Tho. Jones’s Rep. P. 42. Ventr. P. 113.*

(^h) He was 25 *Oct. 1679, 31 Char. 2.* appointed his Majesty’s Attorney General. Sir *Tho. Raym. Rep. P. 312.* 2 *Show. Rep. P. 85.* 12 *Feb. in Hil. Term, 32 & 33 Char. 2. 1680-1.* he was called to the honorary Degree of a Serjeant at Law, and gave
Rings

Rings with this Inscription, "*Regi servire, Jura servare.*" Sir *Tho. Raym.* Rep. P. 430. 7 Feb. 1684, 1 *Jam.* 2. he was constituted one of the Justices of the *Common Pleas.* *Chron. Juridicial.* P. 209. he was afterwards removed, *Lev. Rep.* 3 Vol. P. 257. and came to the Bar again. *Show. Rep.* 2 Vol. P. 471. pl. 437. He died 29 *Jan.* in *Hil* Term, 1700-1, 12 & 13 *Wil.* 3. at *Serjeant's-Inn* in *Fleet-street.* *Lord Raym.* Rep. P. 622.

(ⁱ) These are esteemed good Reports.

(^k) They are the best Reports extant in *civil* Cases. The Author of them was sworn Solicitor General on *Saturday, May* 13, 9 *Anne,* 1710, at the Lord Chancellor *Co-wpers.* *Lord Raym.* Rep. 2 Vol. P. 1309. On *Thursday, Oct.* 14, 1714, 1 *Geo.* 1. a *Su-persedeas* passed the Great Seal, to remove Sir *Robert Raymond* from being Solicitor General. *Lord Raym.* Rep. 2 Vol. P. 1318. On 9 *May,* 1720, 6 *Geo.* 1. he was declared Attorney General. *Gazette,* N^o. 5849. On *Friday, 31 Jan.* 1723, 10 *Geo.* 1. he was called to the honorary Degree of a Serjeant at Law. *Append. to Chron. Juridicial.* P. 15. The Motto of his Ring was "*Salvâ—Liber-tate potens. Lucan.*" He was the same Evening, sworn one of the Justices of the Court of *King's-Bench,* at the Lord Chancellor's House in *Lincoln's-Inn Fields*; in the Room of Sir *Robert Eyre,* who in the *Mich.* Vacation before, had been made Lord Chief Baron of the *Exchequer,* in the Room of the late Lord Chief Baron *Montague,* who died in *Mich.* Term. Sir *Robert* took his Place on *Monday, February* 3, 1723. *Lord Raym.* Rep. 2 Vol. P. 1331. *Gazette,* N^o. 6239. The Earl of *Macclesfield* surrendering the Great Seal into his Majesty's Hands, 7 *January,* 1724-5, 11 *Geo.* 1. He was pleased to deliver it in Council, at *St. James's,* to Sir *Joseph Jekyll,* Knight, Master of the Rolls, Sir *Jeffery Gilbert,* Knight, one of the Barons of the *Exchequer,* and to Sir *Robert Raymond,* Knight, one of the Justices of the *King's-Bench,* where they took their Oaths of Office, as Lords Commissioners for the Custody of the Great Seal. *Stra. Rep.* P. 619. *Gazette,* N^o. 6363.

Note; there is a Chasm in Sir *Robert's* Reports of *Hilary* Term, 1724-5, he attending all that Term in Chancery, as one of the Commissioners of the Great Seal. *Lord Raym.* Rep. 2 Vol. P. 1380.

Sir *Robert* was created Lord Chief Justice of the *King's-Bench,* (in the Room of Sir *John Pratt,* Knight, deceased, Father of the present Chief Justice of the *Common Pleas*) by a Writ, bearing *Teste,* *March* 2, 1725, 11 *Geo.* 1. *Gazette,* N^o. 6351, and was sworn into the Office, *March* 3, following, before the said Sir *Joseph Jekyll,* and Sir *Jeffery Gilbert,* then two of the Lords Commissioners of the Great Seal, at the *Rolls:* notwithstanding which, I was, (says Sir *Robert*) continued one of the Lords Commissioners. *Lord Raym.* Rep. 2 Vol. P. 1381. and on 25 *April,* 1725, was sworn at *St. James's*
of

of his Majesty's most honourable Privy-Council. *Gazette*, No. 6363.

Sir *Rob. Raymond* seeming to remark it as something extraordinary that he should be continued one of the Commissioners of the Great Seal, after his being created Chief Justice of the *King's-Bench*, it was thought proper to give the Readers some Instances of the like Kind.

Sir *John Knevet*, Knight; was Chief Justice of the *King's-Bench*, and Chancellor together, in *Edward the third's* Time. *Spelm. Gloss.* P. 111, 342. *Dugd. Chron. Ser.* P. 48, 50. *Fortesc. Rep.* P. 382, 383. *Chron. Juridicial.* P. 101, 105. *Dy.* P. 159. in *Marg. Co. Rep.* P. 58.

Humphry Starkie held the Places of Chief Baron of the *Exchequer*, and Justice of the *Common Pleas*, both together, in the Reign of *Henry the seventh.* *Spelm. Gloss.* P. 344. *Dugd. Chron. Ser.* P. 74. *Chron. Juridicial.* P. 141. *Fortesc. Rep.* P. 382. *Dy.* P. 159. *Year-Book*, 1 *Hen. 7.* P. 10. pl. 13.

Sir *Richard Brooke*, Knight, was both Chief Baron of the *Exchequer*, and a Justice of the *Common Pleas* at the same Time, to *Henry the eighth.* *Spelm. Gloss.* P. 344. *Dugd. Chron. Ser.* P. 80. *Chron. Juridicial.* P. 153, 155. *Fortesc. Rep.* P. 382.

Sir *James Dyer*, Knight, was made Judge of the *King's-Bench*, in *Easter Term*, 4 & 5 *Phil. & Mar.* being then a Judge of the *Common Pleas*; and the Question was, whether by the Acceptance of this last Patent, the Force and Effect of the former was not ceas'd? And held by the Majority of the Judges, it was gone, because an inferior Authority is taken away and sunk by the superior Authority, as a Benefice becomes void by the Incumbent's taking a Bishoprick, [*Latch. Rep.* P. 32.] so the Authority of the *King's-Bench* drowns all other inferior Authority; besides, it is absurd and impertinent for a Man to reverse his own Judgment, as he should do in this Case, if a Writ of Error was brought in the *King's-Bench* of a Judgment in the *Common Pleas.* *Dy.* P. 158 *b.* P. 159. *a.* *Fortesc. Rep.* P. 382. *Dugd. Chron. Ser.* P. 90. *Chron. Juridicial.* P. 165.

Sir *Edward Saunders*, Knight, Chief Justice of *England*, in the same Reign, was made so from a Judge of the *Common Pleas*, but did not surrender his Patent, yet it was a Surrender in Law, otherwise he would be intitled to the Fees of both Places. *Dy.* P. 159. *Fortesc. Rep.* P. 383. *Spelm. Gloss.* P. 343. *Dugd. Chron. Ser.* P. 90. *Chron. Juridicial.* P. 165.

Sir *Edward Littleton*, Chief Justice of the *Common Bench*, to *Charles the first*, was made Lord Keeper of the Great Seal, and yet, notwithstanding he continued Chief Justice of the *Common Bench*, and the said Lord Keeper sat in the *Common Bench*, as Chief Justice there, not in his Robes, but in his long Gown and Hat,

as the Lord Keeper useth to sit, and swore a Philacer there, which Office he gave as Chief Justice of the *Common Bench*, and afterwards went into *Chancery*. *Cro. Car. Rep.* P. 600. pl. 2. *Dugd. Chron. Ser.* P. 110. *Chron. Juridicial.* P. 193. *Cro. Car. Rep.* P. 568.

Sir *Orlando Bridgman*, Knight and Baronet, Chief Justice of the *Common Pleas*, to King *Charles the second*, was made Lord Keeper of the Great Seal of *England*, and yet he continued Chief Justice of the *Common Pleas*: And it was said, that these two Places were not inconsistent. *Sid. Rep.* P. 338. pl. 1. His Lordship took Fines, &c. in his Chamber, and received the Profits, but did not sit in Court. *Sid. Rep.* P. 365. pl. 2. *Fortesc. Rep.* P. 392. *Sid. Rep.* P. 3. *Dugd. Chron. Ser.* P. 114, 116. *Chron. Juridicial.* P. 199, 203.

The Earl of *Hardwicke* was Lord High Chancellor, as well as Chief Justice of the *King's-Bench*, and his Lordship came into the *King's-Bench* Court, 29 *April*, in *Easter* Term, 1736, 10 *Geo.* 2. took the Oaths, and heard Mr. Solicitor *Stranges's* Motion. *Strat. Rep.* 2 Vol. P. 1071. *Kel. Rep.* P. 134. *Andr. Rep.* P. 1. Append. to *Chron. Juridicial.* P. 10.

To conclude, it is recent in every Body's Memory, that on the Resignation of the Earl of *Hardwicke*, and Appointment of the late Lord Chief Justice *Willes*, Mr. Justice *Wilmot*, and Mr. Baron *Smythe*, Lords Commissioners for the Custody of the Great Seal of *Great-Britain*, they continued Justices of their respective Courts all the Time they were Commissioners.

It is not doubted, but that upon diligent Search, many more Precedents might be produced, and, perhaps, more pertinent to the Subject, and more in Point than the above; however, these already mentioned, may be generally thought sufficient.

Sir *Robert Raymond* was advanced to the Dignity of Peerage, by the Style and Title of Lord *Raymond*, Baron of *Abbots-Langley*, in the County of *Hertford*, by Letters Patent, dated 15 *January*, 1730, 4 *Geo.* 2. [This Title is now extinct. *Addenda* to 5 Vol. *Collins's* Peerage] 5 Vol. P. 365. On the 29th of *June* following, his Lordship was elected one of the Governors of the *Charter-House*, in the Room of *Thomas Lord Trevor*, deceased.

His Lordship departed this Life [2 *Strat. Rep.* P. 948. *Kel. Rep.* P. 243.] at his House in *Red-Lyon Square*, in the 60th Year of his Age, on the 15th of *April*, 1732, and was buried at *Abbots-Langley* in *Hertfordshire*, where a Monument is erected to his Memory. Note; the Inscription thereon is too long to be inserted here, but may be seen in *Col. Peer.* P. 365.

(1) These are esteemed exceeding good Reports; the Collector of them was made a Serjeant at Law, 20 *December*, 1714, 1 *Geo.* 1. Append. to *Chron. Juridicial.* P. 11.

P R E F A C E!

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(ⁿ) Sir *Bartholomew Shower* was Deputy Recorder under Sir *John Holt*, and held the Sessions often, as he tells us, in 2 Vol. of his Reports, P. 466. He was chosen Recorder two Years afterwards, viz. 20 February, 1687, 4 Jam. 2. *Mait. Hist. Lond.* 2 Vol. P. 1206.

(P) He was King's Council, and appointed Solicitor General about *Hilary Term*, 10 Geo. 2. 1737. *Stra. Rep.* 2 Vol. P. 1068. And on 13 November, 1739, 12 Geo. 2. he was chosen Recorder of the City of *London*, [*Mait. Hist. Lond.* 2 Vol. P. 1206.] in which Offices he continued till *Michaelmas Term*, 16 Geo. 2. 1743, when having received a considerable Addition to his Fortune, and some Degree of Ease and Retirement, being judged proper for his Health; he resigned his Offices of Solicitor General, King's Council, and Recorder of the City of *London*, and left off his Practice at the House of Lords, Council Table, Delegates, and all the Courts in *Westminster-Hall*, except the *King's-Bench*, and there also, at the Afternoon Sittings. His Majesty, when at a private Audience, Sir *John* took Leave of him. expressed himself with the greatest Goodness towards him, and honoured him with his Patent to take Place for Life next to his Attorney General. *Stra. Rep.* 2 Vol. P. 1176.

By Patent, dated 11 January, 1749, 22 Geo. 2. Sir *John* was created Master of the Rolls, and sworn into Office 12th of the same Month, in which his Honour died about May 1754, 27 Geo. 2.

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Account. 11 Mod. 92. pl. 16, 12 Mod. 509, 517. 11 Mod. 187. *Comb.* 474. Lord Raym. 341.

Account. 6 Mod. 216, 217. *Caf. Temp.* Holt. 4. 5 Mod. 405. 3 *Salk.* 16. *Carth.* 416. *Caf. Temp.* Holt. 9.

Actions. *Salk.* 15, 16. Lord Raym. 492. *Salk.* 26. pl. 12. 2 Lord Raym. 912. 12 Mod. 4, 565. *Freem.* 500. *Show. Rep.* 30, 104. 2 *Salk.* 440. pl. 1. *Comb.* 117. *Carth.* 62, 63. *Skin.* 278. pl. 1. *Carth.* 289. *Stra. Sel. Caf. Evid.* 15. *Caf. Temp.* Holt. 74. pl. 3. 12 Mod. 73. *Salk.* 10. pl. 2. *Comb.* 333. 12 Mod. 544. *Caf. Temp.* Holt. 12. pl. 13. *Salk.* 11. pl. 5. Lord Raym. 40. 2 Lord Raym. 751. *Salk.*

25. pl. 9. 2 Lord Raym. 760, 899, 941. *Salk.* 20. *Salk.* 18. 6 Mod. 49. *Caf. Temp.* Holt. 524. pl. 3.

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Additions. 6 Mod. 198, 199. 12 Mod. 198, 199, 249.

Administrators. *Salk.* 251. pl. 2. Lord Raym. 685. *Salk.* 285. pl. 17. 3 *Salk.* 161. pl. 7. 295. pl. 2. 3 Mod. 276. 11 Mod. 137. pl. 4. Lord Raym. 635, 563, 668. 12 Mod. 443. 2 Lord Raym. 1210, 1307.

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3	Note (m)	P. 455.	P. 369.
9	10	<i>potet</i>	<i>patet.</i>
32	15	stuck	struck.
58	10	either from the late King or Queen	without Li- cence either, &c.
59	33	was	being.
115	Note (e)	after <i>Anglicana.</i>	add 3 Vol.
116	Note (i)	after <i>Anglican.</i>	add 2 Vol.
118	21	Barons	<i>Bacon's.</i>
131	8	after <i>of</i>	add <i>it.</i>
141	24	compaired	compared.
153	17	Land	Lands.





