MODERN REPORTS;

OR,

SELECT CASES

ADJUDGED IN

THE COURTS

OF

KING'S BENCH,

CHANCERY, COMMON PLEAS,

AND

EXCHEQUER.

VOLUME THE FIFTH.

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VOLUME THE FIFTH;

BEING,

A Continuation of several Special Cases argued and adjudged in the Court of KING'S BENCH, in the Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Years of the Reign of KING WILLIAM THE THIRD; and Judgments thereupon: together with *Special Pleadings* to most of the Cases.

THE FIFTH EDITION,

CORRECTED:

WITH THE ADDITION OF MARGINAL REFERENCES AND NOTES,

By THOMAS LEACH, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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THE PREFACE.

THE REPORTS of Caſes adjudged in former ages, which BRACTON calls "*the Judgments of* "*the Juſt*," are ſo very beneficial to the Publick, that it has been the care of ſeveral Kings to tranſmit them to poſterity; and for that purpoſe *King Edward the Third*, and ſeveral of his ſucceſſors, did, in their reſpective reigns, appoint four diſcreet men to report the judicial deciſions in the great courts of juſtice, that thoſe judgments which were given there might be eſtabliſhed by time and uſage, and that parallel Caſes might receive uniform and certain determinations.

THE Reporters thus appointed by THE STATE, had a conſtant and fixed ſalary from the Government, as a juſt reward for their labours, which have been long ſince publiſhed in ſeveral volumes, called THE YEAR-BOOKS, containing the arguments of Counſel at the bar, and the reſolutions of Judges on the bench, in a continued courſe of time, from the firſt year of *Edward the Third* to the twelfth year of *Henry the Eighth*, for almoſt two hundred years.

See the firſt Volume of Mr. Chriſtian's Edition of Blackſtone's Commentaries, page 72; and Mr. Reeves' Hiſtory of Engliſh Law, vol. ii. page 357, and vol. iii. page 147. 254.

AFTER the firſt twelve years of *King Henry the Eighth*, this method was diſcontinued. It is true, there are ſome Caſes from that time to the twenty-ſeventh year of *Henry the Eighth*, which are bound up with THE YEAR-BOOKS; but *Mr. Fleetwood* tells us, "They are "collected with ſo little judgment, that he did not "think them worthy to be placed in the Tables which "he made of thoſe Books," and therefore compoſed A TABLE of them by itſelf.

See Mr. Reeves' Hiſtory of Engliſh Law, vol. iv. page 185.

IT is very remarkable, that there are no memorials extant who theſe Reporters were, not ſo much as the initial letters of their names, or of what HOUSES they were; but it is probable by their number, that each of them was choſen from the reſpective Inns of Court, and it is certain they were very induſtrious men; we have my LORD COKE's word for it, who extols their diligence, and metaphorically tells us, "that if it had "not been for their Writings, the judgments of ſo "many ſages of the law had, with their bodies, been "worn away with the worm of oblivion." And though this may be the fate of their books, yet the ſame great Judge has recommended them to our reading, aſſuring us, "that out of the old fields the new corn muſt "ſpring."

Plowd.

THE next, in order of time, was MR. PLOWDEN, *a Middle-Temple-man*, who collected two volumes of Caſes, from the ſecond year of the reign of *Edward the Sixth* to the twenty-ſecond year of the reign of *Queen Elizabeth*, for his private uſe; but having lent his *manuſcript* to ſome lawyers, whoſe clerks were ſo diligent, in thoſe days, as to ſit up whole nights to tranſcribe it, deſigning it for the preſs, he therefore reſolved to publiſh it himſelf, and hath aſſured us, "that all the "pleadings are on ſpecial verdicts, or demurrers; that

"he

"he had the copies of the records, and ſtudied the "Caſes before they were argued;" and we have his word for it, "that for ſurety of law, his books paſſed "all former Reports."

ABOUT two years afterwards, the nephews and executors of SIR JAMES DYER, another lawyer of *the Middle-Temple*, publiſhed his Reports, being aſſailed (as they call it) "by men of good countenance for that "purpoſe." Theſe were the only Reports which were publiſhed in eighty years after THE YEAR-BOOKS; but we have been told, that this defect has been amply recompenſed by the grandeur and authority of this ſingle Judge; and yet his book is compoſed of very ſhort notes, which, my LORD COKE ſays, "is leſs "painful, but not leſs profitable, than more elaborate "Works." 1601. See Mr. Vaillant's Edition of Sir James Dyer's Reports.

ABOUT the ſame time SIR JOHN COKE, the eldeſt brother of the Judge of that name, and who was afterwards a Judge himſelf, having gotten MR. KEILWAY's manuſcript of Law Caſes, committed ſo many of them to the preſs as he thought fit to publiſh, and told his reader, that there he might find "*multa ſubtiliter* "*diſputata, et ſumma cum judicio determinata, quæ alibi* "*non leguntur*;" which is very true; for there are many Caſes argued and adjudged in the reign of *Henry the Seventh*, and his ſon *Henry the Eighth*, which are not printed in any of the former Reports. 1601. Keilway.

IN the ſame year the LORD CHIEF JUSTICE COKE publiſhed the firſt volume of his Reports, and having for twenty years before "obſerved the true reaſons of "ſuch matters in law wherein he was of Counſel, and "which were adjudged upon great and mature deli-"beration," he afterwards conſented to the printing ten volumes more, which were nineteen years in publiſhing; and it is remarkable, that in all that time there 1601. See the Preface to the Firſt Report.

was no other Report printed; as it became all the reſt of the lawyers to be ſilent whilſt their ORACLE was ſpeaking. But notwithſtanding the character of this great Judge, his works were cenſured even in his life-time; for being removed from the ſeat of Chief-Juſtice of *England*, in *Michaelmas Term*, in the fourteenth year of *James the Firſt*, a commiſſion was granted to SIR HENRY MOUNTAGUE, his immediate ſucceſſor in that place, and to others, to review and reform his Reports; ſome part whereof, he tells us himſelf, "were writ in the *tempeſt of buſineſs*, and therefore he "could not poliſh them as he deſired."

IT is likewiſe to be obſerved, that there was not any Report publiſhed in the ſpace of twenty-two years after my LORD COKE's laſt volume came forth; though, he tells us, "there was a flouriſhing ſpring of learning at "that time, and that he encouraged the lawyers of that "age to follow his example, to regiſter in books the "ſayings and doings which were in their time worthy of "note and obſervation:" But none would undertake it, unleſs it was SIR HENRY HOBART, his immediate ſucceſſor in the *Common Pleas*, who collected a volume of Caſes adjudged in that Court, but did not think fit to publiſh them in his life time. However, it was ſet forth ſixteen years after his death by an unſkilful hand; but, as my LORD CHANCELLOR FINCH obſerved, it was beautiful even in confuſion; and I may very well affirm, that now it is corrected by his pen, it infinitely excels moſt other books of that kind, both in purity of language, and in ſoundneſs of reaſon.

March, 1643

SOON after the martyrdom of King *Charles the Firſt*, there came forth a flying ſquadron of thin Reports, of which MR. MARCH led the van, moſt of them very good; but the beſt of that number are the Caſes which were adjudged in that reign collected by SIR GEORGE CROKE, and publiſhed by his ſon-in-law SIR HAR-

1651. See a fourth Edition of theſe Reports, publiſhed in 8vo, in the year 1790.

HARBOTTLE GRIMSTONE, during the Uſurpation; in which time, and within the ſpace of twelve years, there were twenty-one Reports publiſhed in the names of Judges, Serjeants at Law, Prothonotaries, and other lawyers of leſs characters; as may be ſeen in the margin; inſomuch as MR. BULSTRODE, who was made Chief Juſtice of *North-Wales* by CROMWELL, and who was the firſt Lawyer after my LORD COKE who publiſhed a Report in his life-time, complained of thoſe flying Reports, which he compared to the ſoldiers of *Cadmus* daily ariſing, and juſtifying each other: and yet there were very fair pretences made at that time for the publiſhing all theſe volumes; ſome from the manuſcripts of judicious perſons; ſome from the copies taken out of the libraries of eminent Judges, or Serjeants at Law, where they had been a long time hoarded for their private uſe; but falling then into the hands of men of public ſpirits, and who were more communicative of learning, they either out of a hearty zeal to the common good were willing, or by importunities were prevailed on, to tranſmit them to the preſs. And I remember a particular reaſon was given for printing JUSTICE HUTTON's Reports, which was, "that he being cotemporary with my LORD HOBART, "both thoſe Judges might, like *Cicero* and *Roſcius*, "make one incomparable man;" which (by the way) was no very good compliment to either.

Godb. 1652
Gouldſ. 1653
Poph. Hutt. Ow. Noy, } 1656
Win. Lane, Hetl. 1. Bul. } 1657
2. Cr. 2. Bul. Style, 1. Le. } 1658
2. Le. Ley, Brid. 3. Bul. } 1659

IT is true, the fertility of the preſs was, even at that time, accounted a fault; but it was in a reforming age, which made the lawyers conſult the Scriptures, that they might, with authority, reject all thoſe "*ſpurious* "*births without living fathers*;" which is the beſt character MR. STYLE gave them, and who had as little reaſon as any man to expreſs himſelf in that manner. But he is the perſon who tells us, "Theſe Reports "ſpoke ſo plain in the language of *Aſhdod*, that a wiſe "man could never believe they ſprang from *Iſraelitiſh* parents.

SOON

1661 Yelv. Cr.E. Bend. SOON after the Reſtoration of *Charles the Second* a check was given to the preſs by a ſtatute, "prohibiting
1662 Latch. "all law-books to be printed without the licence
1663 Moore "of the Lord Chancellor or Keeper, the Chief Juſtices
1664 1. And. "of each Court, the Chief Baron, or one or more of
1665 2. And. "them, or of one by their appointment;" which act, after ſeveral continuances, expired in *King William*'s reign.

1675 Jones 1. Ro. 4. Le. BUT in conformity to this law, moſt of the Reports which were printed, whilſt it was in being, were licenſed
1676 2. Roll. by the Chancellor and Judges, only the Firſt Part of the
1677 Vaugh. LORD ANDERSON'S Reports and the FIRST MODERN
1678 Palmer had not that advantage; for an advantage it muſt ne-
1682 1. Mod. ceſſarily be in many reſpects for any book to come
1683 1. Sid. Lit. Rep. forth with ſo great a ſolemnity. Notwithſtanding, SERJEANT MAYNARD, in his argument of the ſpecial verdict between *Hitchins* AND *Baſſett*, in the court of king's bench, in the year 1684, citing a caſe taken by himſelf fifty years before, told the Court, "It was of as
(a) 3. Mod. 203. 1. Show. 537. "good authority as any which had been printed "ſince (*a*);" which takes in every Report of my LORD COKE'S.

2. Sid. 1684 3. Keb. 1695 Saund. 1686 Aleyn, 1688 IN the reign of *James the Second* there were ſeven Reports publiſhed, ſome of them inferior to none before: but I cannot help taking notice, that ſome other Reports, at that time, were licenſed in a very unuſual manner a year after the books were printed, with the bare "*allowance*" only of the impreſſion, without certifying to the world (as is uſual in ſuch caſe) the great judgment, learning, and wiſdom of "the author."

Hardr. 1693 Jones, 1695 AFTER THE REVOLUTION, and during the reigns of KING WILLIAM and her late Majeſty, there have been thirteen Reports publiſhed, moſt of which, to expreſs myſelf

myſelf in my * LORD COKE's words, "ſet open the "windows of the law to let in the gladſome light, "whereby the reaſon thereof may be clearly diſ- "cerned." And though ſome of them, as JUSTICE SHELLEY merrily ſaid, might be compared to *Banbury cheeſes*, whoſe ſuperfluities being pared away there would not be enough left to bait what my LORD HALE called "*the mouſe-trap* of the law;" yet to ſpeak ſtill in the language of a Judge, "I think the meaneſt of "them may, † like the little birds, add ſomething to "the building the eagle's neſt."

* Preface to 6. Rep. Ve.2. } Ray. } 1696
2. Mod. 1698
3. Mod. 1700
Levinz, 1702
4. Mod. 1703
2. Lutw. 1704
Shower, 1708
5. Mod. 1711
† Preface to 8. Rep.

AND thus I have given an hiſtorical account of our Reports, which a country lawyer (who was afterwards advanced to the ſeat of juſtice) told THE BAR were too voluminous; for when he was a ſtudent, he could carry a complete library of books in a wheelbarrow; but that they were ſo wonderfully encreaſed in a few years, that they could not then be drawn in a waggon.

WHAT would he have ſaid if he had looked into the *Codes*, the *Pandects*, the *Inſtitutes*, the *Novels*, and a vaſt number more of gloſſes and explanations of THE CIVIL LAW, not only by the old commentators, but by *Budæus*, *Duarer*, *Tiraquel*, *Hottoman*, and many more of the laſt century? And if this grave lawyer accounted eighty volumes of the Common-Law Reports to have been too great a number, though they have been almoſt four hundred years in publiſhing, certainly he would have been amazed at the *Theodoſian* and *Juſtinian* Codes, the *Capitularies*, the *Decrees* and *Decretals*, the *Orders* and *Conſtitutions of Biſhops*, the *Curſus Canonicus*, the *Clementines*, *Concordates*, and an infinite number of volumes of THE CANON LAW, too tedious to be repeated.

I SHALL only add, that let the volumes of Law-Books be what they will, the ſufficiency of every author muſt appear

appear from his works, and not from his picture before the title-page, or from any other artificial embelliſhment there, which was never attempted by the publiſher of theſe Reports who was induced to commit them to the printer, being aſſured long ſince, by a moſt learned Judge, that this way of reporting is the moſt perſpicuous courſe of teaching the law.

It is a ſatisfaction to him who is in obſcurity to ſee ſome of his labours accepted by the Publick, who would likewiſe be very well pleaſed to ſee thoſe who cenſure them attempt ſomething of this nature themſelves; and therefore he will conclude this Preface to his *laſt** Report as my Lord Coke did that of his *firſt*:

Cum tua non edas, his utere, et annue, lector,
Carpere vel noli noſtra, vel ede tua.

W. N.

* Note, The Fourth Part is intitled *the Laſt* by miſtake.

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MICHAELMAS TERM,

The Sixth of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir William Gregory, *Knt.*
Sir Giles Eyre, *Knt.* } *Juſtices.*
Sir Samuel Eyres, *Knt.*
Sir Edward Ward, *Knt. Attorney General.*
Sir Thomas Trevor, *Knt. Solicitor General.*

Memorandum.

Caſe 1.

AT the beginning of this Term, SIR ROBERT ATKINS, *Chief Baron*, reſigned his office of Chief Baron.

Memorandum.

Caſe 2.

JOHN HAWLES, of *Lincoln's Inn*, was made King's Counſel during the Vacation.

* [1]

* Pope *againſt* St. Leiger.

Caſe 3.

MIDDLESEX, *to wit.* } JOHANNES ST. LEIGER *nuper, &c. alias dictus, &c. ſummonitus fuit ad reſpondend.* ROGERO POPE, *armiger. de placito quod reddat ei centum et ſeptem libras et decem ſolidos quos ei debet et injuſte detinet, &c. Et unde idem* ROGERUS *per* A. B. *attornatum ſuum dicit quod cum prædict.* J. ST. LEIGER *et* R. POPE *octavo die Julii anno Domini* 1691, *apud parochiam* SANCTI MARTINI IN CAMPIS *in com.* MID. *latrunculis luſer. ad ludum* ANGLICE *vocat.* "Back-gammon." A DECLARATION in an action of *debt* for a hundred guineas, on *a wager* concerning the manner of playing a caſt at BACK GAMMON *viz.* that if a player *touches* a man he is obliged to move it, to be decided by THE GROOM PORTER.—Clift. Ent. 200. 4 Mod. 409. 1. Salk. 344. Lutw. 484. 487.

Pope against St. Leiger.

Cumq. ad ludum illum præd. Rogerus *adtunc et ibidem uno jactu jecit quatuor super unam aleam, quatuor super alteram aleam* Anglice "threw two fours." *Cumque super inde præd.* R. *adtunc et ibidem tetigit et paulatim movit duos latrunculorum suorum illorum* Anglice "two of his table-men" *sed non amovit illos a statione sua* Anglice "off from the point they stood on." *Cumque super inde adtunc et ibidem pignore certat. fuit* Anglice "a wager was laid" *inter præd.* J. St. Leiger *et præfat.* R. *modo sequen. videlicet quod præd.* R. *solveret præfat.* Joh. St. Leiger *centum et quinquaginta nummos aureos* Anglice *vocat.* "guineas" *si præfat.* R. *tenebatur jure ludus illius amovere* Anglice "to play" *duos latrunculos illos quos ita movit; quodque præd.* J. St. Leiger *solveret præfat.* Rogero *centum nummos aureos si præd.* R. *non tenebatur jure ludus illius amovere* Anglice "to "play" *duos latrunculos illos quos ita movit; et præd.* J. St. Leiger *et* R. *adtunc et ibidem pro determinatione* * *pignorationis illius* Anglice "of that wager" *ponere se super judicium atrienſis Angliæ* Anglice "of the groom-porter of England." *Cumque præd.* Johannes St. Leiger *eisdem die et anno suprædict. apud parochiam præd. per scriptum suum sigillo suo sigillat. curiæque domini regis et dominæ reginæ nunc hic ostens. cujus dat. est eisdem die et anno cognovit pignus adtunc præd.* Anglice "the said wager." *Et præd.* J. St. Leiger *per idem scriptum obligavit seipsum solvere præfat.* R. P. *vel ordini suo centum nummos aureos* Anglice *vocat.* "guineas," *quando atrienſis* Anglice "so soon as the groom-"porter" *adjudicaret* Anglice "should give his judgment" *in casu illo si accideret quod judicium illud foret contra præd.* J. St. Leiger. *Et in facto idem* Rogerus *dicit quod postea post confectionem scripti præd. et ante impetrationem brevis originalis præd.* Rogeri *in causa hac, scilicet* 31 *die Julii anno Domini* 1691 *suprad. to, quidam* Thomas Neale *armig. tempore confectionis scripti præd. et diu antea et adhuc existen. atrienſis Angliæ* Anglice "the groom-porter of England" *in casu præd. adjudicat. contra præd.* J. St. Leiger, *scilicet quod præd.* Rogerus *non tenebatur jure ludus illius amovere* Anglice "to "play" *duos latrunculos illos quos ita movisset nisi movisset illos a statione sua* Anglice "off from the point;" *quodque centum nummi aurei* Anglice *vocat.* "guineas" *tempore confectionis scripti præd. et diu ante, et adhuc exist. valoris præd. centum et septem librarum et decem solidorum, scilicet apud parochiam præd. in com. præd.; unde præd.* J. St. Leiger *adtunc et ibidem habuit talem, præd. tamen* Johannis St. Leiger *licet sæpius requisit. præd. centum et septem libras et decem solidos eidem* Rogero *non reddidit, sed illi eam eaque omnino contradixit, et adhuc contradicit, in hac parte quod deterioratus est et damnum habet ad valentiam* 40*l.*; *et inde producit sectam.*

* [2]

The terms of the wager reduced into writing.

The groom-porter decides in favour of the plaintiff.

The defendant makes default and demands over of the writing which is read to him.

Et præd. Johannes, *per* Edigendum Hubberfeild *attornatum suum, venit et defendit vim et injuriam quando, &c. et petit auditum scripti præd. et legitur in hæc verba ſſ.* "I John St. Leiger

"of

" of &c. do own, that I have betted with *Lieutenant Colonel* " *Roger Pope* an hundred guineas againſt one hundred and fif- " ty, concerning a diſpute ariſing on the manner of playing a " caſt at BACKGAMMON, which is ſtated and ſigned by us both, " and *Captain Francis Chantrel*, and referred to the deciſion of " THE GROOM-PORTER of *England*. And I do by theſe preſents " oblige myſelf, on the word and honour of a gentleman, to " pay to the ſaid *Roger Pope* or his order, or whom he ap- " points to receive it, an hundred guineas ſo ſoon as THE " GROOM-PORTER gives his judgment on the caſe, if it ſo " happen that the judgment be againſt me. The queſtion to " THE GROOM-PORTER is ſtated under the letters *A. B.* * and " *C.*; *John St. Leger* is meant by *A.* and *Roger Pope* by *B.* " Given under my hand and ſeal *July* 8, 1691" *Quibus* *literis et auditis id. m* JOHANNES *dicit quod ipſe de debito præd. virtute ſcripti præd. onerari non debet; quia dicit quod in ſtatuto in parliamento* DOMINI CAROLI SECUNDI *nuper regis Angliæ inchoat. apud Weſtm. in com.* MIDDLESEX *octavo die Maii anno regni dicti domini nuper regis decimo tertio et per diverſas prorogationes et adjournamenta ibid. ex tunc et tunc. uſque diem veneris in feſtum ſancti Martini anno regni ejuſdem nuper regis decimo ſexto (inter alia) made fuit quod ſi aliqua perſona vel perſonæ ad aliquod tempus vel tempora poſt ſeſſionem ejuſdem parliamenti in anno Domini* 1664 *ludere et ſe ludere ad et cum pecuniis ſive* ANGLICE " cards," *aliis ludis* ANGLICE " tennis," *globulis* ANGLICE " bowls," *clavis ligneis* ANGLICE " ſkittles," *menſa lubrica* ANGLICE " ſhovelboard," *vel ad aliquem luſum* ANGLICE " paſ- " time," *ludum vel ludos quocunque (alterius quorum) cum et pro pecuniis depoſit.* ANGLICE " ready money," *vel pignoravit* ANGLICE " ſhall bett" *ex parte ejus* ANGLICE " upon the ſides," *vel ſuper manus eorum qui ludunt vel ludere ad inde et perdere aliquam ſummam vel ſummas monetæ vel aliquem vel res ſic in luſum poſit.* ANGLICE " played for" *exceden. ſummam centum librar. ad aliquod unum tempus vel congreſſum ſuper notam* ANGLICE " upon " ticket," *vel creditam* ANGLICE " credit," *vel aliter, et non ſolveret ead. in manibus* ANGLICE " ſhall not pay down the " ſame" *ad tempus quando ill. vel illi ſic perdent ead. perſona vel perſonæ quæ perdiderunt ſive perdiderint dict. monet. vel aliam rem ſive res ſic in luſum poſit. hoc ponend.* ANGLICE " ſo played or to " be played for" *ultra ſummam centum librar. in tali caſu non obligaretur ſeu compellet. vel compellend. erit ſolvere ſeu reſpondere* ANGLICE " to make good" *eadem, ſed contrarium. per iiſdem et pro qualibet parte inde et omnia et ſingula judicia ſtatuta recogn.* ANGLICE " recognizances," *mortgagia* ANGLICE " mortgages," *conveyanciæ, aſſurancæ, obligationes* ANGLICE " bonds," *billæ, ſpecialitates, promiſſiones, conventiones, agreamenta, et alia acta facta et ſecuritates quæcunque quæ exiſtunt obtent. facit. dat. cogn. ſive intrat.* ANGLICE " entered into" *pro ſecuritat. ſive ſatisfaction. eorundem vel pro eiſdem vel aliqua parte inde exiſtunt vacua et nullius effectus prout per eundem actum inter alia plenius apparet. Et idem*

Pope againſt ST. LEGER.

* [3]

The defendant then pleads *in* *bar* of the action the ſtatute 16. Car. 2. c. 7. againſt exceſſive gaming.

POPE *against* ST. LEIGER.

JOHANNES *in facto dicit quod poſt* 29. *diem Septembris anno Domini* 1664 *ſupradict. et ante confect. ſcripti prædict. ſcilicet præd. octavo die Julii anno Domini* 1691 *ſupradict. apud parochiam præd. in com. præd. ipſe idem* JOHANNES *et præd.* ROGERUS *ludebant cum aliis ad quendam ludum vocat.* "backgammon;" *quodque præd. nummi aurei vocat.* "guineas" *in præd. ſcripto mentionat. adtunc et ibidem ad unum tempus et unum congreſſum* ANGLICE "meeting" *fuerunt pignorat.* ANGLICE * "betted" *per eundem* JOHANNEM *cum præd.* ROGERO *et perdit. in luſu illo et non cum vel pro pecuniis depoſit.* ANGLICE "ready money;" *quodque præd. centum nummi aurei vocat.* "guineas" *tempore pignorationis illius* ANGLICE "at the time of the ſaid bett" *necnon tempore adjudicationis in narratione* ROGERI *præd. per* THOMAM NEALE *in eadem narratione mentionat. fieri ſuppoſit. fuer. valoris ultra ſummam centum librarum* VIDELICET *valoris centum et ſeptem librarum et decem ſolid. ſuperius petit.* VIDELICET *apud paroch. præd. in com. præd. et; quodque præd. centum nummi aurei tempore luſus illius non fuer. pignorat.* ANGLICE "betted" *in pecuniis depoſity* ANGLICE "ready money", *neque tempore adjudicationis præd. in narr. præd. fier. ſuppoſit. ſolut. ſed pro ſecuritate ſolution. præd. centum nummor. aureor. per ipſum* JOHANNEM *cum præd.* ROGERO *ut præfertur pignorat.* ANGLICE "betted." *Idem* JOHANNES *poſtea ſcilicet præd. octavo die Julii anno Domini* 1691 *ſupradict. apud parochiam præd. in com. præd. ſcriptum præd. in narratione præd. mentionat. præd.* ROGERO *dedit ſigillavit et ut factum ſuum deliberavit, per quod eo tempore ſtatut. præd. in eo caſu inde edit. et provid. ſcriptum præd. fuit et eſt vacuum et nullius vigoris in lege. Et hoc paratus eſt verificare; unde petit judicium ſi ipſe de debito prædicto* [illegible] *præd. onerari debeat, &*

[4]

C. LEVINZ.

Demurrer. To this the plaintiff, *Roger Pope*, demurs generally.

FR. PEMBERTON.

Judgment for plaintiff. JUDGMENT was given in the court of common pleas, upon the above record, in favour of the plaintiff.

Writ of error. And upon that judgment the defendant brought a writ of error.

Qu. If an action of DEBT will lie on a wager reſpecting the *mode of playing* BACKGAMMON, on a written agreement whereby the parties refer the deciſion to *the groom-porter*, and one of them (the loſer) binds himſelf in theſe words, "I do by theſe preſents oblige myſelf, on the word and honour of a gentleman, to pay, &c."—S. C. 4. Mod. 409. S. C. 1. Lut. 484. S. C. N. Lut. 147. S. C. Salk. 344. S. C. Comb. 327. S. C. Skin. 572. S. C. Carth. 322. S. C. 12. Mod. 81. S. C. Holt, 550.

BRODERICK *for the plaintiff* in error. The plaintiff in an action of debt in the common pleas demands one hundred guineas, of the value of one hundred and ſeven pounds ten ſhillings. The defendant pleads, that when the wager was laid, he and the plaintiff were at a play called *back-gammon*, and pleads the ſtatute of gaming, and avers that this was for money won at play at tables, being for above the ſum of one hundred pounds, and ſo was void

by

by the ſtatute; to which the then plaintiff demurs, and judgment was given for him in the common pleas. And we bring error.

POPE *againſt* ST. LEIGER.

* FIRST, I think *debt* will not lie (*a*) on this wager, &c.

* [5]

SECONDLY, The plaintiff ought not to declare of ſo many guineas *valoris*, &c. I agree to the caſes of *Raſtil v. Draper (b)*, and *Willſhalge v. Davige (c)*; but here *a guinea* is *Engliſh money*, of which the Court takes notice; and in ſuch caſes it is never declared *ad valentiam* (*d*). A guinea in law is no more than twenty ſhillings, and in an action on the caſe, damages ſhall be given for them according to the value; but in debt for them, the plaintiff never declares for more than twenty ſhillings, and ſo you lately adjudged in this court, in the caſe of *Harriſon v. Byron*; in which caſe it was adjudged, that the Court judicially takes notice of *a guinea*; and that the legal value of it is but *twenty ſhillings*, though by conſent it may paſs for more (*e*); ſo that this judgment is erroneous.

Qu. If a declaration in debt for ſo many pieces of gold coin called *guineas*, of ſuch a value, is good.

1. Salk. 9. 22. 25. 446. Pal. 407. 2. Keb. 463. Poſt. 7. Raſt. Ent. 158. b.

THIRDLY, The deed being entered of record, is parcel of the plea; and if by that it appear that the plaintiff has not cauſe of action, he cannot have judgment, though the defendant has miſbehaved himſelf (*f*); and therefore our admittance of the value of the guineas will not hurt us, and we need not to have mentioned this variance from the deed; and this was a point not touched in the common pleas.

A deed entered of record, is parcel of the plea.

FOURTHLY, Then *non conſtat* in what caſe "*in caſu illo*," for it is not mentioned before, and the money is not to be paid by the deed before the GROOM-PORTER has given judgment in that caſe; and as to that the declaration is, that *Pope* ſtirred two of his tablemen, "*ſed non amovit illos a ſtatione ſua*, ANGLICE from the point they ſtood on:" and a wager was laid, Whether the ſaid *Pope* was bound by the law of the play, to play thoſe men which he ſo ſtirred? And they put it to the determination of the GROOM-PORTER, "*cumque præd.* J. ST. LEIGER *(dic, anno, et loco) per* "*ſcriptum ſuum ſigillat. curiæq. dom. regis et dom. reginæ nunc hic* "*oſtenſ. cujus, &c. cognovit pignorationem præd.* ANGLICE "the "ſaid wager;" *et præd.* J. S. *per idem ſcriptum obligavit ſeipſum* "*ſolvere præfat.* R. POPE *vel ordini ſuo centum nummos aureos* "ANGLICE *vocat.* "guineas, *quando atrienſis* ANGLICE ſo ſoon "as the GROOM-PORTER *adjudicaret* ANGLICE ſhould give his "judgment" *in caſu illo ſi accideret judicium illud fore contra* "*præd.* J. ST. LEIGER." *In caſu illo:* in what caſe? for it is not mentioned before, and the money is not to be paid by the deed, before the GROOM PORTER has given his judgment in that caſe.

Caſes in Law & Equity, 336.

Ante, 2.

(*a*) See Bovey *v.* Caſtlemain, 1. Ray. 69.; Hard's Caſe, Salk. 23.; and Walker *v.* Walker, poſt. 13.
(*b*) Yelv. 80. S. C. Cro. Jac. 88.
(*c*) 1. Leon. 41.
(*d*) Ward *v.* Ridgwin, Latch. 84.
(*e*) See the 7. & 8 *Will.* 3. c. 19. ſ. 12.
(*f*) 1. Saund. 316.

If two perſons play at *back-gammon*, and one of them touch *a table man* without making his move, A WAGER laid between the players "that by the laws of the game, whoever touches "a man is obliged to play it," is not within the ſtatute 16. *Car.* 2. c. 7. againſt *gaming*, for the wager was not on *the game*, but on the *mode of playing it*.

FIFTHLY, Then our plea is good; for we plead the ſtatute of gaming, and that being at *back-gammon*, theſe hundred guineas were wagered on that game; and ſo not being for ready money, it is void by the ſtatute: now we may aver by the ſtatute * againſt our own deed *(a)*, and the demurrer has confeſſed this. And though the averment be not good, yet it appears by the declaration to be within the words and intention of the ſtatute of gaming, for the money is above a hundred pounds, and is loſt on tick; and it appears by the declaration how it was loſt, that it was at *back-gammon*, and that the money was won at play at that game, though the judgment of the GROOM-PORTER was at another time. The ſtatute of gaming would be of little uſe, if it is not extended to by-bets, but only to the gaming itſelf. This act has always been conſtrued liberally; and therefore where a man loſt eighty pounds at one day, and then the parties agreed to play at another day, when eighty pounds more was loſt, this was adjudged *(b)* to be within the ſtatute, and to be but one loſs; and that ſtatute was made to prevent great miſchiefs. If any of theſe points are for us, then I pray that judgment may be reverſed.

Poſt. 131, 175. 3. Lev. 118 2. Vent. 175. 1. Salk. 484 2. H. Bl. Rep. 43. 4. Com. Dig. "Juſtice of "Peace" (B 42.). Eſſpinaſſe Dig. 19. 2. Bac. Abr. 623. Cowp. 281. 1. Term Rep. 56. 2. Term Rep. 610. 616. 3. Term Rep. 693. 4. Term Rep. 1.

HOLT, *Chief Juſtice*. Do you make laying *a wager* to be within the ſtatute of gaming? It is true, they were at play when the wager was laid.

EYRE, *Juſtice*. Suppoſe the wager had been, that the tables were made of brazil, had this been within the ſtatute? Certainly no: no more ſhall this.

PEMBERTON, *Serjeant*. It is plain that this is not within the ſtatute of gaming; for to make it ſo, it muſt be betted on the hand of the plaintiff or defendant; but this wager was laid on a collateral matter on the right of play, which is not within the act *(c)*.

E contra. FIRST as to the declaration. The writing produced maintains it, for it is the very ſame with the declaration.

SECONDLY, Then we lay it, that the hundred guineas are *valoris* 107*l.* 10*s.* of which you muſt take notice, for it is a coin by itſelf, and is not any noted money or coin of the kingdom, as the twenty-ſhilling pieces are, for there is no proclamation to make them paſs; but a guinea is in nature of a medal, and is more like a foreign coin, and is much of that nature. And there are ſeveral declarations of ſo many dollars *valoris* ſo much, and yet you know the value of *a dollar*: this is like that, which you cannot take notice of, becauſe it is not the current coin of the kingdom.

(*a*) Cro. Jac. 253. Moor, 641. 2. Sid. 88. Lutw. 734. 1. Salk. 162. 197. 227. 2. Salk. 676. 6. Mod. 306.

(*b*) See Hill *v.* Pheaſant, 2. Mod. 54. and Edgebury *v.* Roſſender, 1. Lev. 94.

(*c*) By 13. *Geo.* 2. c. 19. ſ. 9. all games played with dice, except the game of *back-gammon*, and games played with *back-gammon tables*, are declared illegal; and therefore it is decided that no action will lie on a wager reſpecting the *mode of playing* HAZARD, that being an illegal game. Brown *v.* Leeſon, 2. H. Bl. Rep. 43.

HOLT,

*HOLT, *Chief Juſtice.* Guineas were coined at THE MINT for twenty ſhillings only, and there was never any proclamation to make them paſs, though there was one to take the twenty-ſhilling pieces. It is true, by conſent they may paſs for more than twenty ſhillings, but legally no more is to be demanded for them than twenty ſhillings. The guinea was coined according to the twenty-ſhilling piece; we call them guineas by agreement; but how can we take notice of what value they are? If the plaintiff had declared of twenty-ſhilling pieces, we muſt have judicially taken notice of them: but do you think that it is not high treaſon to counterfeit guineas? Certainly it is; though the indictment ſhall not run for counterfeiting guineas, but of ſo many pieces of twenty ſhillings value. A guinea is the current coin of the kingdom, and we are to take notice of it. The guineas were coined after the proportion of *Carolus's* (that is) ſixteen penny-weight leſs, to the value of twenty-ſhillings only: the queſtion is, Whether we can take notice of the allegation of the value of guineas, becauſe there are other ſorts of them, as five-pound guineas? Where you declare on a *foreign coin*, you muſt declare in the *detinet* only, and not in the *debet:* ſo in an action of debt for goods, as corn, &c. though DEBT lies on the contract, yet it muſt be in the *detinet* only, and the value muſt be ſhewed: it is always ſo, unleſs the debt be for *Engliſh money.* Now theſe are called *guineas* here, which if it were a coin not known in our law, we muſt take them to be as goods.

Pope *againſt* St. Leiger.

Vide 2. Salk. 446.

Ante, 5.

1. Salk. 9. 22. 25.

How to declare on foreign coin.

Ante, 5.

8. Mod. 57. 187.

EYRE, *Juſtice.* Then the defendant confeſſes the value of them, as the plaintiff has alledged.

HOLT, *Chief Juſtice.* But it is *centum nummos aureos* ANGLICE "guineas." What is that? It is very uncertain indeed: If it had been *centum pecias auri vocat.* "guineas," it had been well enough.

Adjournatur.

But in *Trinity Term*, in the ſeventh year of *William the Third*, (HOLT, *Chief Juſtice*, and *Juſtice* EYRE only preſent) the judgment was reverſed, chiefly for this reaſon, Becauſe the plaintiff had ſhewed the caſe, play, and wager, and then the deed by which the parties bound themſelves "*in pignoratione præd.*;" and, upon *oyer* of the deed, it appeared, that it was to ſtand to the judgment of THE GROOM-PORTER upon the "caſe ſtated and ſigned by us "both," which is not the ſame: and therefore the writing comprehending the caſe and averment taken, that the caſe in this and in the * declaration are all one, and although that the inducement of the caſe and this ſtated are all one, and therefore whether the averment be before the deed or after is not material.

Variance between the *declaration* and the *writing* on which the action is brought.

Cowp. 178.

3. Term Rep. 351.

4. Term Rep. 561.

*[8]

Yet THE CHIEF JUSTICE was of another opinion, becauſe the declaration ſuppoſes the deed to be, to perform a wager compriſed in the deed, where it is to perform a caſe extrinſical, and which is to be coupled by averment.

Caſe 4. . Waytes *againſt* Briggs.

In an action of debt on an *eſcape*, a declaration that the defendant was *committed*, &c. is good, without ſaying *prout patet per recordum*, for being inducement it need not be averred.

S. C. 2. Salk. 565.
S.C. Holt, 613.
Hob. 210.
Moor, 888.
1. Sid. 216.
1. Lev. 137.
1. Show. 4.
6. Mod 103.
1. Salk. 298.
3. Lev. 393.
Comb. 299.
5. Com. Dig. "Pleader" (C. 82.).
2. Bac. Abr. 247.

THIS IS AN ACTION OF DEBT ON ESCAPE. It is ſaid, that the priſoner was brought before MR. JUSTICE GREGORY, and by him committed. It has been objected, becauſe we do not conclude *prout patet per recordum.*

HALL. I conceive this is good on a general demurrer, and that it is within the 27. *Eliz.* c. 5. of demurrers, becauſe it is but matter of form, and is within the rule laid down in *Hob.* 233. and within the reaſon of it too; and on the trial the commitment muſt have been given in evidence. The caſe of *Hancock v. Proud* (*a*) is in point: In debt on bond againſt executor, the defendant pleads ſeveral judgments in bar, *ultra quod*, *&c.* and the plaintiff replies, *quod placitum prædt. eſt minus ſufficiens* to bar him, becauſe upon one of the judgments (naming it) ſatisfaction is acknowledged; and as to the others kept on foot by fraud; *et hoc paratus eſt verificare*, without ſaying *per recordum:* and, by the Court, it is good on a *general demurrer*; otherwiſe upon a *ſpecial demurrer*; and judgment was for the plaintiff.

HOLT, *Chief Juſtice.* It ſeems but matter of form, and ſo it was adjudged twice in the caſe of *Hancock v. Proud*, in 1659, and *Clegat v. Barbury* (*b*).

EYRE, *Juſtice.* The alledging of the commitment is but inducement, and not the point of the action. I think the caſe of *Middleton v. The Manucaptors of Silveſter* (*c*) is in point, and this is but matter of evidence (*d*). Where the record is the ſubſtance of the plea, there it muſt conclude *prout patet per recordum*; but where it is but inducement, it need not; for which there is a good difference in *Co. Lit.* 303. *a.* Where a matter of record is the foundation or ground of the ſuit of * the plaintiff, or of the ſubſtance of the plea, there it ought to be certainly and truly alledged; *aliter* where it is but conveyance; and ſo in this caſe.

* [9]

1. Saund. 9. 10. 268. 269.
1. Salk. 520. 565. 630.

HOLT, *Chief Juſtice.* In debt on a judgment, it is ſaid, *quod cum recuperaſſet*, *&c.*; and though it is not ſaid *prout patet per recordum*, yet it is good, and ſo it has been held; for it was but inducement; and yet it is agreed, that in ſuch caſe the defendant may plead *nul tiel record.* THE ESCAPE is *the giſt* of the action, and THE COMMITMENT is but *the inducement* to it, though it can be no eſcape without it. The record is not the matter of the action; but the eſcape; for if the record had been the matter of the action, then the plaintiff ought to have concluded *prout patet per recordum*; but here the omiſſion of it is but matter of form, for it ought to have

(*a*) 1. Sid. 429. S. C. 1. Saund. 336.
(*b*) 2 Sid. 15.
(*c*) 1. Sid. 216.
(*d*) So in an action againſt the ſheriff for the eſcape of a priſoner, on *meſne proceſs*, whether there was a good cauſe of action againſt the party who eſcaped is matter of evidence; and therefore unleſs it be proved, the plaintiff will be non-ſuited. Alexander *v.* Macauley, 5. Term Rep. 613.

been

been given in evidence on "*nil debet*" pleaded, which is the plea for the defendant in this caſe, becauſe *the giſt* of the action is grounded on matter of fact, and not on the record; for if it was, then the plaintiff could not plead "*nil debet*" to it, but only "*nul tiel record.*" Carth. 145.

WAYTES *againſt* BRIGGS.

EYRE, *Juſtice.* The defendant is not eſtopped to ſay *quod* the priſoner *non fuit* committed, though it be ſaid on the record *quod committitur.*

HOLT, *Chief Juſtice.* The record is only alledged to make it an eſcape; and though the record be proved, that does not make it an eſcape only.

NORTHEY. In laſt *Hilary Term* in the court of common pleas in debt on eſcape, it was not ſaid *prout patet per recordum*, and the Court on the firſt argument were of opinion, that judgment ſhould be given againſt the plaintiff; but afterwards conſidering that the defendant's plea had admitted the commitment, judgment was given for him.

CURIA. That caſe is no authority for you.

Judgment for the plaintiff, *niſi*, &c. *(a)*.

(a) By 4. & 5. *Ann.* c. 16. "where any *demurrer* ſhall be joined in any action, in any court of record, the Judges ſhall proceed and give judgment without regarding any imperfection, omiſſion, or defect in any writ, return, plaint, declaration, or other pleading, &c. except thoſe ſpecially ſet down in the cauſe of demurrer, notwithſtanding the ſame might have been taken to be matter of ſubſtance, and not aided by 27 *Eliz.* c. 5. and no advantage ſhall be taken of or for the not alledging *prout patet per recordum*, except the ſame be ſpecially and particularly ſet down, and ſhewn for cauſe of demurrer."

The Earl of Bath *againſt* Batherſea.

Caſe 5.

TREVOR, *Solicitor General.* The depoſitions which were read againſt my *Lord Bath* in the other cauſe, are no evidence in this, becauſe that trial is not between the ſame parties; and depoſitions are never evidence but where they are mutual; and this defendant does not claim under any one that was party to the former ſuit.

Depoſitions in one cauſe, where they are evidence in another, or not.

1. Salk. 278. 281. 286.
2. Salk. 555. 691.
Poſt. 277.
1. Chan. Caſes, 73. 175. 236.
2. Vern. 517.

CURIA. They may be read becauſe the defendant ſhelters himſelf under the other's title, and the title of the land is not in queſtion, but the queſtion is to whom the rent ſhall be paid.

2. Chan. Caſes, 250. 8. Mod. 181. 1. Vern. 53. 161. 254. 308. 366. 413. 555. 603. Cowp. 17. 594.

* [10]

If the * defendant give the plaintiff's anſwer in chancery in evidence, he may inſiſt only to read ſuch part as he will, for it is like examination of witneſſes; but then the other ſide may inſiſt to have the whole read after.

The party againſt whom an anſwer in chancery is produced in evidence, may "Evidence"

have the whole of it read.—Chan. Caſ. 154. Cowp. 594. 4. Com. Dig. (C. 3.). Bull. N. P. 237. Eſpinaſſe Digeſt, 752. Gilb. L. E. 50.

NOTA,

THE EARL OF BATH *againſt* BATHERSEA.

NOTA, There was a verdict for the plaintiff in this cauſe after a trial from nine o'clock in the morning till nine the next day; and the Judges ſat up all night long.

Caſe 6.

The King *againſt* the City of Cheſter.

A return, to a *mandamus* to reſtore a common council man, "that they were "choſen *yearly*, "and that before "the coming of "the writ they "were choſen "and conti- "nued for a "*year*, and at the "end of the year "were duly a- "moved from "their offices "by the elec "tion of o- "thers," is bad for its uncertainty; for it ought to have ſhewed *the time* they were elected, ſo as it might have appeared they were not amoved before *the year* expired. S.C.Comb. 307. S.C.3.Salk.230. S. C. Holt, 438. Poſt. 256. 275. 1. Show. 258. 381. 364. * [11] 2. Salk. 428. 433, 434, 435. Carth. 170. 6. Mod. 18. 1. Salk. 433. 436. 8. Mod. 309. 5. Com. Dig. "Mandamus" (D. 5.). 3. Bac. Abr. 542. 543.

THIS was *a mandamus* to reſtore nine perſons to their places of common-councilmen in *Cheſter*.

They return, that by charter granted to them in the twentieth year of *Henry the Seventh*, amongſt many other things of which they take no notice, they are impowered to chooſe forty common-councilmen yearly, and that *ante adventum* of this writ, theſe nine perſons were choſen common-councilmen, and ſo continued for a year; and that at the end of the year *debitè amoti fuere ab officio per electionem aliorum.*

SIR THOMAS POWYS. This is no good return, becauſe it does not ſet forth any certain time when theſe perſons were choſen or removed; and in returns to *mandamus's*, there ought to be the greateſt certainty, becauſe it is the ground of the judgment of the Court, and are to conclude the party, who has no opportunity to plead to them, and therefore they muſt be poſitive too, that if they be falſe, the party may have his action. Now to ſay, that theſe nine perſons were *ante unum annum integrum ante adventum brevis* choſen and removed, is altogether uncertain; for it may be forty years ago, and yet the return be true; and if we bring an action on this return, we cannot know what certain time they meant.

SECONDLY, They ſay, that the year being ended, *debite ab officio amoti fuer.* which is not good *(a)*; for it ought to be direct and poſitive: "*Non fuit debito modo admiſſus*" is an ill return of *a mandamus*; it ought to be *non fuit admiſſus*. *H.* brought *a mandamus* to be reſtored to the place of town-clerk of *Hereford*; the mayor returned, *nunquam fuit debito modo admiſſus*; and held ill; he ought to have returned *non eſt admiſſus*; for if the return be falſe, the party grieved may have his action on the caſe.

* CURIA. The caſe of *amotion*, or putting out, differs from the matter of *election*. There is a difference between *debitè amotus fuit*, and *non fuit debitè electus*; for this caſe and all others of like nature admit that he was removed; but in caſe of election the *mandamus* is to admit him, and therefore in the return it muſt be ſhewed *non fuit electus* poſitively, and muſt not ſay *non fuit debitè electus*, for that implies an election; but it was not according to the conſtitution of the corporation, and therefore in ſuch caſe the return ought to have ſhewed how he was elected. But in this caſe all are agreed that he was removed, and they ſay that it was duly done, and ſhew the reaſon of it. But the return ought to have ſhewed what *time* they were elected,

(a) 1. Sid. 209.

EYRE,

EYRE, *Juſtice.* They may alledge a cuſtom to chooſe *a common-councilman*, and to turn him out *ad libitum*, and that is *Warren's Caſe (a)*; for he has no freehold in his place, as an *alderman* has; for a common-councilman is collateral to the corporation. THE KING *againſt* THE CITY OF CHESTER.

HOLT, *Chief Juſtice.* The return is too ſhort. But we will not reſtore you on this writ: agree to take a declaration, and try it next Term on the merits.

And here you ought to have brought ſeveral *mandamus's*; for nine perſons cannot join in a *mandamus* as here; perhaps you were choſen at nine ſeveral times. You cannot all join in one writ, for the election of one is not the election of another. This is an innovation, to join nine men in one writ of *mandamus*: can we grant a joint reſtitution to them? It is a ſeveral intereſt. *Tenants in common* cannot join in one action, though they come in by one feoffment *(b)*; the amotion of the one is not the amotion of the other; and it may be for ſeveral faults, one for forfeiture, the others for other reaſons. I think the writ ought to be quaſhed *(c)*.

If ſeveral *common-councilmen* be removed, they cannot all join in one *mandamus* to be reſtored; but each muſt have a ſeparate writ.

S. C. 1. Salk. 436. Poſt. 420. 2. Inſt. 197. 4. Bac. Abr. 663. 5. Burr. 2742.

EYRE, *Juſtice.* And ſo do I.

(*a*) Salk. 430.
(*b*) But ſee 1. Lev. 109. Ray. 70.
(*c*) See the Caſe of Andover, 2. Salk. 433.; and Rex *v.* Mayor of Hull, 9. Mod. 210. *accord.*; Rex *v.* Mayor of Kingſton, Stra. 578. But ſee Rex *v.* Mayor of York, 5. Term Rep. 74.; where it is ſaid, that after a return had been made to a *mandamus*, it is too late to make any objection to *the writ* itſelf.

* [12]

Green *againſt* Moore. Caſe 7.

THE caſe was thus:—The declaration was in *Trinity Term*; the defendant imparls till *Michaelmas Term*; in the vacation the plaintiff was outlawed; and then in *Michaelmas* * *Term* the defendant pleads the outlawry *in bar*, but does not ſay the outlawry was *puis darrein continuance*; upon this the plaintiff demurs.

If the plaintiff be outlawed after the defendant imparls, he may plead the *outlawry* in diſability without ſaying *puis darrein continuance*.

An executor may, after declaration and imparlance, confeſs judgment and then plead this *in bar*, and need not ſay *puis darrein continuance*, as in *Savil's Caſe (a)*. So here the plea of outlawry after imparlance is good, without ſaying *puis darrein continuance*, for it appears to be ſo here. So *Mich.* 3. *Will. & Mary*, *Roll.* 395.

S. C. 1. Salk. 178. 2. Vent. 282. Lut. 1514. 1. Lutw. 39. N. Lutw. 15. 2. Lutw. 1512. 1514. Comb. 253. 357. 4. Bac. Abr. 144. 5. Term Rep. 224.

E contra. In the caſe of *Surby v. Gile (b)*, an outlawry was pleaded after imparlance, but becauſe it was not ſaid *puis darrein continuance*, the plea was diſallowed. So in the caſe of *Ewer v. Moyle (c)*, it is no good plea to ſay *poſt darrein continuance* ſuch a thing happened; but ought to be preciſe in the day.

(*a*) Jones, 299.
(*b*) Trin. Term, 35. *Car.* 2. Roll. 1118.
(*c*) Yelv. 141.

HOLT,

GREEN *againſt* MOORE.

HOLT, *Chief Juſtice.* The plea is good enough.

EYRE, *Juſtice.* Since the record appears, why ſhould it not be pleaded?

But PER CURIAM, Let it go over till the next Term, becauſe it being a juſt action, you may in the mean time reverſe the outlawry, and then may plead *puis darrein continuance.*

Caſe 8. The King *againſt* Lammas.

While law proceedings were in *Latin*, the return of a conviction on a penal ſtatute, though in *Engliſh*, was good.

S. C. 1. Salk. 149.
S. C. Comb. 326. Comb. 212.

NORTHEY moved to quaſh an indictment for ſelling low wines in a cellar, without giving notice to THE EXCISEMAN, againſt the ſtatute of 3. & 4. *Will. & Mary*, becauſe it is returned in *Engliſh*, and ought to be in *Latin*.

HOLT, *Chief Juſtice.* I cannot tell that; no writ of error lies on it; the remedy is by appeal. You may as well take this exception to an order for keeping a baſtard-child; though indeed all convictions for deer-ſtealing are in *Latin*.

In an information on a penal ſtatute, it is ſufficient to ſay that the defendant is convicted "*of the ſaid offence, &c.*"

S. C. Skin. 562.

NORTHEY. Then the conviction is not according to the indictment and the ſtatute, becauſe they do not find that he is a *common diſtiller*, as the words of the ſtatute are; for if another perſon diſtil wines, a man may ſell them in a private cellar without offending the ſtatute.

* CURIA. They convict him of "*the offence aforeſaid*," which muſt be as he was *a common diſtiller*.

* [13]

Caſe 9. The King *againſt* Wadſworth.

The Court will not quaſh an indictment for *extortion*.

1. Vent. 370.
1. Sid 54.
1. Salk. 372.
1. Wilſ. 325.

COUNSEL moved to quaſh an *indictment* againſt *a miller* for taking too great toll, becauſe it was not ſaid *jurat.* nor *onerat.* nor the jurors named.

THE COURT. It is againſt the courſe of the court to quaſh an indictment againſt a perſon for extortion or oppreſſion; we cannot do it. Demur to it.

Stra. 1211. 1088. 2. Burr. 1127. 3. Burr. 1468. 1841. Andr. 230. 4. Com. Dig. "Indictment" (H.). 3. Bac. Abr. 745.

Caſe 10. Walker *againſt* Walker.

A general *indebitatus aſſumpſit* will not lie on a *wager* to recover the money from the *loſer*; but if the ſtakes be depoſited, it lies by the *winner* againſt the *ſtakeholder*.—S. C. Comb. 303. S. C. 12. Mod. 69. 258. S. C. 1 Ld. Raym. 328. Ante, 5. Poſt. 351. 2. Vent. 175. 3. Lev. 118. 4. Mod. 409. 6. Mod. 128. 1. Salk. 72. 125. Skin. 196. Comb. 361. 2. Bac. Abr. 15 620. Fitzg. 302. Cowp. 37. 1. Term Rep. 616.

no

no debt (*a*), and the verdict being general, and entire damages given, it cannot be good. There are caſes on both ſides; and the point is now depending in a cauſe in the exchequer chamber.

E contra. Though it is, yet in the caſe of *Egleſton v. Lewen* (*b*), in *Hilary Term*, in the thirty-third and thirty-fourth year of *Charles the Second*, in SIR FRANCIS PEMBERTON'S time, a judgment in this point was affirmed.

HOLT, *Chief Juſtice.* It was ſo; but ſince we came hither we have held the contrary, that it does not lie: it is merely a wager, and no *indebitatus aſſumpſit* lies for it; for to make that lie, there muſt be a work done, or ſome meritorious action for which debt would lie; but it does not for this wager, becauſe this is due in a collateral reſpect: it is true, the caſt of a die alters the property if the money be ſtaked down, becauſe it is then a gift on condition precedent, and an *indebitatus aſſumpſit* lies againſt him that holds the wager, becauſe it is a promiſe in law to deliver it if won (*c*). If a man ſay to a ſurgeon, "Cure ſuch a man and I will pay you," a good *aſſumpſit* lies upon that, becauſe it is an original contract, and there is a labour done in the way of his profeſſion (*d*). No *indebitatus aſſumpſit* lies on a bill of exchange, and a judgment was ſtayed on that point in my LORD HALE'S time (*e*), and the like in the exchequer (*f*); and it is not material, whether he againſt whom the bill is drawn, has effects * in his hands when he accepted the bill, or not (*g*). It is not like *a liberate* to pay money on a tally; when the officer has the money, the propriety of it is veſted out of the king, and is in the party (*h*). I am ſure my LORD CHIEF JUSTICE POLLEXFEN was of opinion, that that judgment in *Egleſton v. Lewen* (*i*) was not well affirmed.

[14]

Let it ſtay; we will ſpeak with the Judges in THE EXCHEQUER CHAMBER. After this verdict, if it could be any ways made good, we would do it; but a verdict cannot make that good which is bad in law (*k*). Though, on the loſs of the wager, the defendant had promiſed the next day to pay it, yet an *aſſumpſit* would not lie on it (*l*), becauſe it wants conſideration, it being but executory.

Adjournatur (*m*).

(*a*) See Cowper, 38.
(*b*) 3 Lev. 118.
(*c*) See Sands *v.* Trevilian, Cro. Car. 107 193.
(*d*) 1. Salk. 27. Bull. N. P. 280.
(*e*) 1. Salk. 125. 1. Mod. 285.
(*f*) 12. Mod. 37. 1. Vent. 152.
(*g*) See Kyd on Bills, 100.
(*h*) Poſt 28.
(*i*) 1. Danv. 28. pl. 12.
(*k*) See 5. Bac. Abr. 296.
(*l*) 4. Mod. 409
(*m*) It is ſaid S. C. 12. Mod. 258. that in Michaelmas Term 10. *Will* 3. judgment was given for the defendant. See alſo Lutw. 180.

HILARY

HILARY TERM,

The Sixth of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir William Gregory, *Knt.*
Sir Giles Eyres, *Knt.*
Sir Samuel Eyres, *Knt.* } *Juſtices.*

Sir Edward Ward, *Knt. Attorney General.*

Sir Thomas Trevor, *Knt. Solicitor General.*

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* The King *againſt* Croſby.

Caſe 11.

CROSBY was indicted for *High Treaſon*; and at a trial at bar *Aaron Smith* was ready to give evidence againſt the priſoner, when he produced the record of *Smith*'s conviction and judgment to ſtand in THE PILLORY, and he had ſtood in it.

Quære, Whether a perſon convicted and ſet on the pillory as the author of an *infamous libel*, is thereby rendered an incompetent witneſs.

S. C. Skin. 578. S. C. 2. Salk. 689. S. C. Holt, 753. S. C. 12. Mod. 72. Poſt. 75. 1. Hale, 304. Gilb. L. E. 140.

THE COUNSEL *for the priſoner* objected, that this made him *infamous*, and diſabled him from being a witneſs.

WARD, *Attorney General.* This does not take away his evidence: the cauſe for which he was convicted was only giving inſtructions to *Stephen Colledge* to be uſed by him at his trial; but there was no publication of them, and it was not a cauſe that deſerved THE PILLORY.

HOLT, *Chief Juſtice.* The cauſe is not material if the court had a juriſdiction; if he ſtood on the pillory, and ſuffered an *infamous puniſhment*, the queſtion is, whether he be a good witneſs.

TREVOR, *Solicitor General.* It is not the putting in the pillory, but the fact for which he was convicted that takes away his evidence; as *perjury*, and not *a libel* only, as here.

HOLT,

THE KING *againſt* CROSBY.

HOLT, *Chief Juſtice.* It is the *infamous puniſhment*, and not the cauſe (*a*).

A pardon operates as a charter of *reſtoration*, and removes the *inteſtability* reſulting from being ſet on the pillory for an *infamous offence*. Poſt. 75.

3. Lev. 427. Kely. 37. Raym. 369. 3. Peer. Wms. 457. 2. Hawk. P. C. ch. 33. ſ. 129, ch. 37. ſ. 48. ch. 46. ſ. 19. 2. Hale, 278. Gilb. L. E. 142. Skin. 578.

If one is convicted of *perjury*, and ſtands in THE PILLORY for it, if he get a patent of pardon, it does not reſtore him to his *liberam legem*. Here has been a general pardon; the pardon does not revive his old credit, but it gives * him a new one. If one attainted of treaſon be pardoned, it makes him a good witneſs, though before the pardon he could not be ſo; but where a man lies under a civil diſability, without any conviction, the king cannot pardon that; but where there is a conviction for a criminal offence, the king can, though not to reſtore him, but to give him credit for the future. This is the ſame diſability as is on a judgment in villenage or attainder, and it is every day's practice to allow them to be witneſſes after pardon; the diſability is as much a conſequence on one as the other, and the general pardon diſchargeth the offence. I will not give any opinion now as to the firſt point, Whether he had been a good evidence without a pardon? But I take it, that the general pardon makes him a good one, and has taken off the diſability; for it not only takes away the crime, but the diſability too (*b*). And by EYRE, *Juſtice*, he was allowed to give evidence.

But the jury acquitted *Croſby*.

(*a*) It is ſaid, in the caſe of Pendock *v.* Mackender, to be now ſettled, that it is *the crime* that creates the infamy and takes away competency, and not *the puniſhment*, 2. Wilſ. 18. See alſo Davis *v.* Carter, poſt. 75. The party himſelf may be examined as to the fact, Priddle's Caſe, Caſes in Crown Law, 2d edit. 349.; and perhaps the Court will infer the infamy of the crime from the nature of the puniſhment; for if a witneſs, on being aſked the queſtion, admit that he has ſtood in *the pillory*, the Court will not permit him to become bail. Rex *v.* Edwards, 4. Term Rep. 440.

(*b*) See the caſe of Cuddington *v.* Wilkins, Hob. 67. 82.; Reilley's Caſe, Caſes in Crown Law, 2d edit. 362.

Caſe 12. Walker *againſt* Slackoe.

IF THE CURSITOR, in making out a *writ of error* on a judgment againſt five, omit to ſtate, in purſuance of *the note* from THE ATTORNEY, that one of them is dead, yet it cannot be amended.

THE NOTE from THE ATTORNEY to THE CURSITOR was thus: "*Inter* A. in treſpaſs, and five, naming them, defendants. [NOTE, *E.* one of the defendants is dead: make out a writ of error.]" The curſitor omits to ſay that he is dead, and takes no notice of him, but makes it out in the name of four only.

CARTHEW. This is not like *Blackmore's Caſe* (*b*), for this is an error in judgment, which is not amendable; and there is no caſe comes up to this.

—S. C. Poſt. 69. S. C. Comb. 354. S. C. Carth. 367. S. C. Holt, 54. S. C. Ld. Ray. 71. 1. Salk. 49. 52. 6. Mod. 263. 310. Carth. 520. Skin. 165. 253. Comb. 5. Fitzg. 201.

(*b*) 8. Co. 156.

HOLT,

HOLT, *Chief Juſtice*. I will tell you one (*a*). In debt on a bond againſt an heir where he was bound, THE CURSITOR made out a writ, wherein he did not expreſs that the heir was bound, as perhaps thinking him bound without it; yet after verdict it was amended and put in; which was an error in his judgment, and yet amendable, becauſe he had the bond before him. In this caſe before us *the notes* were as large to THE CURSITOR as need to be. WALKER *againſt* SLACKOE.

NORTHEY. In the caſe of *Powel v. Brazen-Noſe College* (*b*), the writ was, "PRÆCIPE *quod reddat* twenty acres *H-lington*," the word "* *in*" being omitted; and it was amended, it being only the default of the clerk; for he had writ it out of a paper delivered to him to make the writ, wherein this word "*in*" was, which THE CURSITOR confeſſed upon oath, though this was an original: and our caſe is the ſame with *Blackmore's Caſe*, for THE CURSITOR is to draw the writ, and THE ATTORNEY is only to ſtate the fact to him, and here was as full inſtruction to him as could be. * [17]

At another day,

HOLT, *Chief Juſtice*. The defendant here is not party to the writ of error; for if the defendant die before *non eſt erratum* pleaded, you ſhall go on (*c*).

(*a*) Forger *v.* Sales, Cro. Car. 147, 24.

(*a*) Cro. Eliz. 644.

(*c*) This caſe was moved again in Michaelmas Term 7. *Will.* 3. and the writ of error was quaſhed; the Court being of opinion, that it was not amendable, becauſe it was a writ to reverſe a judgment, and the ſtatutes of amendment extend only to amend writs which ſupport judgment. S. C. Poſt. 69. But by 5. *Geo.* 1. c. 13. "all writs of "error wherein there ſhall be any "variance from the original record, or "other defect, may and ſhall be amended "as and made agreeable to ſuch record "by the reſpective courts where ſuch "writ ſhall be made returnable." See Lady Cas *v.* Title, Stra. 692.; Sword Blade Company *v.* Dempſey, Stra. 892.; Verſel and Smith *v.* Raſhel, Cowp. 425. and 1. Bac. Abr. 95. 105.

Herbert *againſt* Morgan. Caſe 13.

FORMEDON IN REMAINDER. The plaintiff intitles himſelf to maintain the action, for that the *iſſue in tail* is dead *without iſſue*, and ſays not, that *tenant in tail* is dead *without iſſue*.

In a FORMEDON *in remainder*, it is not enough to ſay, "*the iſſue* "is dead without "iſſue," but it muſt be averred that "the "*tenant in tail* "died without "iſſue."

LEVINZ, *Serjeant*. This *formedon* does not intitle the plaintiff to maintain his action; for it is not enough to ſay, that *the iſſue* is dead without iſſue, but alſo, that the *tenant in tail* is ſo. That is the very title of the demandant; and it ſhall never be intended that he died without iſſue; for the eſtate was a fee ſimple at common law; and, now it is an eſtate-tail, it is ſuppoſed it will endure for ever, and the plaintiff muſt always ſet forth as much as will entitle him to his action; and the intendment is ſtrong againſt him here, becauſe the law ſuppoſes the eſtate-tail will continue for ever;

Lut 961, 962. N. Lutw. 305. 309. Hob. 282. 1. Mod. 219. 2. Bac. Abr. 531. 2. Mod. 94. 10. Mod. 140. 362. Dyer, 216. Booth, 155.

HERBERT *against* MORGAN.

and if the tenant in tail be not dead without iſſue, the demandant can have no title, though his iſſue be dead without iſſue, and therefore is not to be received (*a*). And let me admit what I will, if the plaintiff have no title he ſhall never recover. *Buckmer's Caſe* (*b*) is in point.

HOLT, *Chief Juſtice.* It is a FORMEDON *in remainder*, becauſe it remains over on the determination of the eſtate-tail: and muſt not you ſhew that the *tenant in tail* is dead without iſſue according to the limitation, for without that you can have no remainder? It is the very point of the action, and you muſt ſhew that the firſt donee is dead without iſſue; and * it is not implied at all that becauſe *the iſſue* is dead without iſſue, that therefore the *tenant in tail* is; for he may have other ſons beſides his eldeſt. Suppoſe it be a *condition precedent* that when *A* is dead without iſſue the remainder ſhall be to *B.* in fee, it will not be ſufficient to aver, that the ſon of *A.* died without iſſue, but alſo that *A.* is dead without iſſue: and this is in nature of a *condition precedent* before the remainder can come in poſſeſſion.

* [18]

(*a*) Fitz. N. B. 220. The Regiſter, 242. The Year Book 3. *Hen.* 4. pl. 1. a. Bro. Abr. "Formedon," pl. 21. Raſtal. Ent. 364. a.—See alſo Year Book 8. *Edw.* 3. pl. 19. 38. *Edw.* 3. pl. 26. Hob. 51. 282.

(*b*) 8. Co. 86. 2. Brownl. 4,5. 1. Leon. 213.

Caſe 14.

The King *againſt* Wood.

Obtaining goods upon a *falſe pretence* is not indictable at common law, unleſs it be of a *public nature.*

AN INDICTMENT ſet forth, that *J. S.* having ſeventeen yards of ſilk, *Wood deceptive* told him, that a young woman had occaſion for it to make her wedding-clothes; on which he ſold it to her under colour of that falſe pretence.

MONTAGUE moved to quaſh it,

S. C. 1. Seſſ. Caſes, 277. 1. Salk. 150. 379. 6. Mod. 42. 61. 105. 301. 311. 2. Ld. Ray. 1013. 7. Mod. 40. 2. Bac. Abr. 611. Fitzg. 122. Comp. 323. 1. El. Rep. 273. 2. Term Rep. 581. 3. Term Rep. 98.

FIRST, Becauſe no indictment lies for this matter, for there was no truſt; and if there were any, an action lies for it (*a*).

An indictment for a fraud, omitting the *ubi revera*, &c. is bad.

SECONDLY, It is not averred, that the young woman did not marry, or that ſhe had not occaſion for it.

PER CURIAM. Let it be quaſhed.

(*a*) By 30. *Geo.* 2. c. 24. obtaining goods by *falſe pretences* is an indictable offence. But ſee 1. Hawk. P. C. ch. 71.

Caſe 15.

The King *againſt* Grove.

Defendant in *barratry* muſt have *a note* of particulars.

PER CURIAM. In an indictment for *barratry* the defendant muſt have *a note* of the particulars, that he may know how they intend to charge him, otherwiſe they will not proceed to trial.

1. Mod. 288. 6. Mod. 261. 311. 1. Sid. 282. 1. Hawk. P. C. ch. 81. ſ. 13. 1. Bac. Abr. 281. 1. Ld. Ray. 430.

Anonymous.

Anonymous. Caſe 16.

PER CURIAM. 'If a ſpecial matter be pleaded which looks like the *colour* of a plea, but amounts to the *general iſſue*, it is no cauſe of *demurrer*; as if in debt you plead *a releaſe*, though you might have given it in evidence on *nil debet*, yet it is no cauſe of *demurrer*: ſo in debt for rent, if you plead *entry and expulſion*, it is no cauſe of demurrer, though it may be given in evidence on *nil debet*.

Where matter, though a ounting to the *general iſſue*, may be *ſpecially pleaded*.

Anonymous. Caſe 17.

NOTE, After demurrer joined we cannot give leave to the defendant to waive his demurrer and plead the general iſſue; and here the demurrer is entered on THE ROLL. It is a record of court when it is brought into court, and put into THE PAPER to be read as a record.

6. Mod. 38. 2. Salk. 515.

After demurrer joined, the defendant ſhall not waive, and plead the general iſſue.

EASTER TERM,

The Seventh of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir William Gregory, *Knt.*
Sir Giles Eyres, *Knt.* } *Juſtices.*
Sir Samuel Eyre, *Knt.*
Sir Edward Ward, *Knt. Attorney General.*
Sir Thomas Trevor, *Knt. Solicitor General.*

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* The King *againſt* Bethel.

Caſe 18.

A priſoner in NEWGATE for a *fine* cannot ſurrender in diſcharge of his *bail* in a *civil action* without leave of the Court, although the arreſt was previous to his being apprehended for the *miſdemeanor*.

S. C. Salk. 348. S. C. Holt, 145.

BETHEL was convicted at THE OLD BAILEY for buying of broad money, and was fined a thouſand pounds. Being arreſted at the ſuit of a private perſon ſome time before his proſecution for that offence, or before any knowledge of it, and two perſons being bail for him in the king's bench, he moved for a *habeas corpus*, and was brought up by the keeper of NEWGATE.

It was moved in behalf of his bail, that he, being now in court, might, as he alſo deſired, ſurrender himſelf in diſcharge of his bail, and be committed to THE MARSHALSEA.

CURIA. You cannot diſcharge the king's priſoner without leave of the Court; it was denied in *Clayton's Caſe*. We know very well the meaning of turning him over to THE KING'S BENCH PRISON.

S. C. 12. Mod. 741. S. C. 1. Ld. Ray. 47. 1. Salk. 149. 1. Mod. 118. 184. 2. Jo. 13. 1. Keb. 322. 1. Sid. 78. Style, 147.

A return to a *habeas corpus*, that the prisoner was *committed* to the custody of the gaoler, "safely to be "kept in custody by virtue of a certain order of "the court of "sessions at "THE OLD "BAILEY, the "tenor of "which order "is in the "words following, *viz.* "that *A. B.* "is known to "have exchanged "broad money "for clipped, "therefore it is "considered by "the Court, "that the said "*A. B.* pay "1000l. for a "fine, and *remain* in the "gaol of NEWGATE until, &c." is *informal*, inasmuch as THE WARRANT does not shew that he was *committed* by the time; yet as, upon the whole return, there appears a good cause of commitment, it is sufficient. Post. 83.

SIR B. SHOWER. Then we hope we shall be discharged on these exceptions to the return.

It does not appear by the return that there was any commitment of *Bethel*; it says, he was committed *virtute ordinis qui sequitur*, which was, that being convicted and fined a thousand pounds, *remaneat in custodiâ gaolæ de* NEWGATE *quousque*, &c. Now it ought to have said, that he was *in execution* before, and that then he was charged for this fine, or that he was present in court and committed by the Court for the fine, as it ought to be where the commitment is by commissioners of *oyer* and *terminer*. And we are at liberty to take these exceptions on a return to a *habeas corpus*, as well as on a writ of error (*a*).

* NORTHEY *ad idem*. The order is only the judgment of the Court, which is, that he should be taken; yet there must be process for that, as there is a *capias pro fine* here. The judgment is no commitment, but there must be a process; so that here does appear no cause of detention of *Bethel*, because it does not appear he was in custody before, or that being in court he was committed by them for this fine.

WARD, *Attorney General, contra*. In returns by an officer, if there appear a sufficient cause of detainer, though not of his caption, yet it will be sufficient (*b*); for the complaint is, that he is in prison for a cause that is not lawful; and here the keeper returns, that here is a judgment against *Bethel* and a fine, and that he is in prison for that cause, which is a sufficient signification of the cause, though it be not expressly said *quod committitur*.

TREVOR, *Solicitor General*. Though the return be not so formal as it might have been, yet it is good in substance, for the order is a sufficient judgment of a *committitur*; for the *remaneat* may as well go to his putting in prison as his continuing there if he was there before, and amounts to a new commitment of him for this offence and fine.

LOVEL, *Serjeant*. This is only the certificate and return of the gaoler, and not the words of the judgment of record; it is not traversable, but must be taken for truth, which answers the intent of the *habeas corpus*.

COWPER. It appears, that *Bethel* was committed by sufficient authority, by commissioners of *oyer* and *terminer*, which is in court. —Then here a sufficient cause of commitment appears on conviction and fine of a thousand pounds, and this is no return of the judgment; which if it be so as here, it is erroneous; but they cannot take advantage of it now; here is only returned the cause of detainer and commitment to prison: In *Bushel's Case* there was no sufficient cause of commitment. Returns need not be so

March, 52. Vaugh. 135. Comb. 125. 1. Mod. 119. 184. Fort. 272. Stra. 915. 2. Term Rep. 255. 4. Com. Dig. "Habeas Corpus" (E. 2.). 3. Bac. Abr. 15. 1. Hale, 584. 2. Hale, 144.

(*a*) Bushel's Case, Vaugh. 135. S. C. 1. Mod. 119. 184. S. C. 2. Jones, 13.
(*b*) 1. Salk. 78. 143. 1. Keb. 146. 305. 514.

certain

certain as other things; it is ſufficient if the words imply as much as will make the detainer lawful; that is here by *remaneat*, which could not be unleſs he had been in priſon before. THE KING *againſt* BETHEL.

*SHOWER *contra*. It had been ſufficient if he had returned *quod commiſſus fuit per commiſſioners de oyer et terminer*: but if he return the order, and that appears not to be ſufficient or not good, the priſoner ſhall be diſcharged; for the judgment is not a commitment, and, for aught appears, a ſtranger might have taken him up and carried him to NEWGATE. I agree, that this return does not require ſo much certainty as returns to a *mandamus*, yet a ſufficient commitment and cauſe of it muſt appear. * [21]

HOLT, *Chief Juſtice*. This is a caſe of conſequence, and the return of it is *primæ impreſſionis*, the firſt precedent. The commitment ought to be to the ſheriff, or generally *quouſque* he paid the fine. It is true, juſtices of the peace commit felons to the keeper of the priſon; but where the Court commits, it is to the ſheriff, who is their officer, to whom the Court muſt award a *capias*, and not to the keeper. It is true, a *habeas corpus* lies to any perſon as well as the gaoler, but then here he ought to return ſpecially, that he was committed to the ſheriff for the fine, and is now in the gaol of NEWGATE under his cuſtody. 1. Sid. 144. 1. Keb. 508. 2. Hawk. P.C. ch. 16. ſ. 15.

Then as to *the remaneat*: Suppoſe he was wrongfully in cuſtody before, no one but the proper officer can take him. If a judgment be given againſt a man, any of the courts of *Weſtminſter-Hall* may ſend a tipſtaff to take him in view of the court, but they could not do ſo if they heard that he was at *Charing-Croſs*.

Then you cannot ſtop a lawful detainer on a wrongful commitment, and you muſt ſatisfy us by the return that he was lawfully in cuſtody. There ought not only a good cauſe to appear, but alſo a good commitment, both as to the manner and ſubſtance of it; for the writ requires *cauſam captionis et detentionis*, and here is only the cauſe of detention and not of the caption; and where the liberty of the ſubject is concerned, we muſt be certified of the cauſes.

Adjournatur.

At another day,

HOLT, *Chief Juſtice*. It does not appear to us that *Bethel* was in execution; for a commitment to the gaoler is not any commitment in execution; but it muſt be to the ſheriff, for the gaoler is but an under-officer: and it makes no difference that this commitment was in court; for the commitment there is in lieu of proceſs. We in this court * cannot commit to the gaoler, but to the ſheriff; for though we have a marſhal, and a priſon of our own, yet we may commit to the ſheriff; and we have often committed to THE GATE-HOUSE, and the ſheriffs of *London* have often taken away a priſoner from this bar for a fine. It is true, 1. Bac. Abr. 380. * [22] *Vide* 1. Salk. 348. 350.

THE KING *againſt* BATHEL.

true, the gaoler muſt take notice of a commitment to him, but it is no otherwiſe good than as he is a ſervant to the ſheriff. His ſhort notes are not a good return to a *habeas corpus*. All the men condemned at THE OLD BAILEY are hanged by this ſhort note, "*Suſpenſ. per coll. (a)*; and yet that would never be a good return to a writ of error: but here is the matter; the offender knowingly gets a *habeas corpus* to the gaoler, who haſtily makes a return to it, and ſo the ſheriff ſhall be made liable to the ſervant's fault or negligence.

Comb. 14. 214. 325. 398. Stiles, 281. 323. 1. Roll. 309. 1. Sid. 78. 143. 1. Salk. 3

COWPER. There is a ſtronger caſe than this *(b)*, where the Court was moved for a *habeas corpus* for one that was taken in execution by the ſheriff, and was afterwards ſet at liberty, and after that was retaken on the ſame execution by the ſheriff; and the Court told them they were in the wrong way, for they ought to bring *audita querela*.

Vide 1. Salk. 349. 353, 354. Carth. 278. 282. 303. 2. Saund. 149.

HOLT, *Chief Juſtice*. When a man comes in by *habeas corpus*, by the favour of the Court he may be bailed to appear *de die in diem* till the caſe is determined, and then he may be remanded to the ſame priſon: and ſo it was ruled in *Ralph Hornwood's Caſe (c)*, who married a city orphan. By THE PETITION OF RIGHT *(d)* we are to bail or diſcharge a priſoner in *three days*; but when we bail and remand him, it is no eſcape; for the entry is "*remittitur*," and that is a commitment grounded on the old one.

LOVEL. There is nothing judicially before the Court till the return be filed, and then the entry is *committitur marſchallo*, and within three days ſitting they may remand; and then the entry is "*remittitur*," or they may bail him *(e)*.

HOLT, *Chief Juſtice*. No doubt of that, after the return filed, but he may be remitted and brought up by rule of court, and in the mean time he is in the cuſtody of the gaoler; and when we give judgment on the return, it has relation to the firſt day.

* [23]

The court of king's bench may bail a priſoner pending a debate whether the return to *hab. cor.* is ſufficient.

* At another day the queſtion was, Whether pending the debate about the return to the *habeas corpus*, which was filed, the party ſhould be bailed? for which the caſe of *Sir William Bronker (f)* was quoted: Information to a juſtice of peace againſt *Sir William Bronker* for cheating him at play; upon refuſal to find ſureties the juſtice committed him to priſon, and, upon *habeas corpus*, the Court took bail for his appearance.

1. Sid. 78. 143. 1. Keb. 146. 305. 514. 1. Salk. 348. 1. Vent. 330. 346. 3. Bac. Abr. 15.

(*a*) See Staunford P. C. 182. 4. Bl. Com. 396. 2. Hawk. P. C. cl. 48. f. 7.

(*b*) Stiles, 147.

(*c*) 1. Mod. 79. 1. Vent. 178. 2. Lev. 32.

(*d*) 3. *Car.* 1. c. 1.

(*e*) Zach. Croſton's Caſe, 1. Sid. f. 7.

(*f*) Stiles, 16.

Upon

Upon this the Court thought fit to deliver their opinion.

If the return to a *habeas corpus* be insufficient, yet the court of king's bench are not bound to bail a prisoner, if enough appear to shew a good cause of commitment.

EYRE, *Justice*. I do agree that the return is not sufficient, but I think there is enough returned for us to remand him. The judgment is that he shall be fined a thousand pounds, which is returned; therefore I do not know the consequence of this bailing. I ground my opinion on *Shiela's Case* (*a*): The defendants were fined and imprisoned *quousque* before the council of the marches of *Wales*, on information of unlawful practice and combination in marrying a servant-maid to *Powell*, a gentleman's son; and upon the return the prisoners were remanded, because it appeared that their fines were not paid, without any other respect had to the matters of the return; and if we let him at large the king may lose his fine. This seems to be a case *primæ impressionis*, and it might encourage others guilty of the same fault. Then it might rid all the gaols in *England*, if the gaoler's return should be taken so strictly: therefore I think he must be remanded.

See Rex v. Judd, 2. Term Rep. 255.

HOLT, *Chief Justice*. That this return contains something not so regular is plain; but however it appears, that he was committed by a court that had jurisdiction of the matter. The law takes notice of the gaoler as one who has the actual custody of the body, and therefore it is criminal in him to suffer a voluntary escape: so justices of the peace commit prisoners to the gaoler's custody, and yet at the sessions of *oyer* and *terminer* the Court takes notice of him as a servant to the sheriff; and the custody of the gaoler is the custody of the sheriff. But now the question is, Whether we shall avoid the commitment upon a *habeas corpus*; or whether you are not put to your *writ of error*? And truly I think we cannot avoid it on a *habeas corpus*. This word "*remand*" is an improper word; it should have been "*remandetur*:" but indeed they could not make him *remain* there unless there had been a *commitment*. * Besides, since it appears here that he was *committed* for the fine, I think he must be remanded.

14. Edw. 3. c. 14. 1. Hen. 7. c. 10. 31. & 32. Car. 2. c. 2. 1. Salk. 272. 341. Comb. 436. 12. Mod. 145. 1. Show. 117.

* [24]

PER CURIAM. Let him be remanded.

(*a*) Mich. 32.

Memorandum.

Case 19.

THE latter end of this Term died SIR GILES EYRE, one of the Judges in the Court of King's Bench; a person of a quick apprehension and a good distinguishing head, but most remarkable for his experience in matters relating to the justices of peace at their sessions, &c. he having practised the most part of his time in the country.

The death of Sir Giles Eyre, and the promotion of Sir Thomas Rokeby. Post. 62.

The Term following SIR THOMAS ROKEBY, KNIGHT, one of the Justices in the Common Pleas, was advanced to the Court of King's Bench in his room.

* Memorandum.

Caſe 20.

Memorandum.

WARD made *Chief Baron*, and TREVOR and HAWLES *Attorney* and *Solicitor General.*

1. Ld. Ray. 46. 58.

THIS Term SIR EDWARD WARD, the King's Attorney General, was called to be a Serjeant at Law, and was afterwards made Lord Chief Baron of the Exchequer.

And SIR THOMAS TREVOR, the King's Solicitor General, was made Attorney General in his place.

And in the Vacation following JOHN HAWLES, of *Lincoln's Inn*, Eſq. was made the King's Solicitor General, and was knighted by the king ſoon after his return from *Flanders*.

TRINITY

TRINITY TERM,

The Seventh of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir William Gregory, *Knt.*
Sir Samuel Eyres, *Knt.*
Sir Thomas Rokeby, *Knt.* } *Juſtices.*

Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

Caſe 21.

* Ward *againſt* Evans.

Hilary Term, 7. Will. 3. Roll 718.

REPLEVIN. The defendant makes conuſance as bailiff to *C. H.* and *E. J.* and ſets forth, that *Sir Robert Carr*, in 1638, was ſeiſed of the *locus in quo, &c.* in fee, and did by indenture grant and demiſe to *C. H.* and *E. J.* and three others (now dead) an annuity of one hundred pounds a-year, to be equally divided between them, *videlicet*, twenty pounds to each, *habendum* the ſaid hundred pounds to them and their aſſigns for their lives, *videlicet*, twenty pounds to each of them reſpectively, and to be iſſuing out of the *locus in quo, &c.* And that he did farther grant, that if any one of the five died, the annuity of twenty pounds payable to ſuch ſhould be paid equally to the other four; and ſo if two died; and if three died, that the two ſurvivors ſhould have fifty pounds each, but that there ſhould be no ſurvivor of either of their parts. And further, that if any part of this were arrear, that they might diſtrain; *virtute cujus* the five were ſeiſed of the annuity of twenty pounds each, and being ſo ſeiſed three of them died, and that their the ſhare of the party ſo dying ſhall be paid equally to the others, but that there ſhall be no ſurvivor of either of their parts; *Quære*, Whether the grantees, in ſuch caſe, are *jointenants* or *tenants in common?* and, Whether in *replevin*, on a *diſtreſs* for arrears of ſuch annuity, they may avow jointly, or muſt make ſeveral avowries?—S. C. Comb. 329. S. C. Carth. 340. S. C. 1. Salk. 396. S. C. 12. Mod. 227. S. C. Holt, 368. S. C. 1. Ld. Ray. 422. 1. Sid. 157. 2. Salk. 423. Poſt. 71. Comb. 329. 347. Cowp. 660.

If a grant be made of an annuity of one hundred pounds to *five perſons*, to be *equally divided* between them, *videlicet*, twenty pounds to each, HABENDUM the ſaid twenty pounds to them and their aſſigns for their lives, *videlicet*, twenty to each of them reſpectively, and that on the death of any of them

parts

WARD *against* EVANS.

parts ſurvived to the two living, and that the annuity was in arrear for ſeveral years, the arrears before the death and ſince amounting in the whole to two thouſand two hundred pounds; and for forty pounds the defendant makes conuſance. To this the plaintiff pleads in bar. On which iſſue is joined, which is found for the avowant.

PEMBERTON, *Serjeant*, now moved in arreſt of judgment, that this is no good conuſance, becauſe the defendants are *tenants in common* of this annuity; and therefore one conuſance cannot be made for both, but it ought to be ſeveral for each of them. The only * [26] * queſtion is, Whether a joint conuſance can be made for tenants in common? There has been a diſtinction taken between avowries, which though it ought to be ſeveral, yet a conuſance in the ſame caſe ought to be joint: but I ſhall take no notice of that. This is a gift in common to the five, to be equally divided between them, *viz.* twenty pounds to each, *habendum* to them and their aſſigns reſpectively, *viz.* twenty pounds to each for their lives; ſo that here is a ſeveral annuity to each of them: and when all but two are dead, then fifty pounds ſhall be to each of them; ſo that the grantor intended a ſeveral annuity to them, and not a joint one, and that the diſtreſs ſhould be by them reſpectively. And they ſay in the conuſance, that they were ſeiſed of the annuity ſeverally, yet now they would be *joint-tenants* of it, and not *tenants in common*, as on the face of the deed they appear to be by their own ſhewing, and are ſo concluded to be by their own conuſance. It is objected, that this is no more than what the law would import from the words of the deed; that the hundred pounds is jointly granted, and that it would ſurvive without any appointment of the grantor. I will not rely on the words "equally to be divided," which, without more, would not have made a ſeveral grant; but in the expoſition of deeds it is not unuſual to conſider the *habendum*, and the other clauſes after the grant, to explain the general intent of the whole deed. *Coke*, in his Comment on *Littleton* (*a*), ſays, that the *habendum* will alter it; and in *Dyer* (*b*), *Fitzherbert* (*c*), *Hobart* (*d*), and *Cooke* (*e*), the whole deed is to be taken together to explain the general words of the premiſes. Now here he grants a hundred pounds to be "equally divided;" but he does not reſt there, but that each ſhall have twenty pounds, which muſt ſignify ſomething, and muſt not be rejected; and ſo it is called a ſeveral annuity throughout the deed, and not a joint one; and that three are dead, and the ſurvivors ſhall have fifty pounds each for their lives, but that that ſhall not ſurvive. And though it ſhould be ſo, yet if the grant were good to the reſt of the tenants in common, the conuſance is bad, becauſe it is as well for the twenty pounds before their deaths as for what has been arrear ſince, when they have ſhewed that they were ſeverally ſeiſed of the twenty pounds for their lives. But they object, that the words "equally to be

2. Salk. 423. 1. Lev. 109.

Carth. 340. 441.

1. Salk. 226. 390, 391, 392 Poſt. 29.

11. Salk. 294, 5.

9. Mod. 157.

(*a*) Lit. ſect. 283.
(*b*) Dyer, 361.
(*c*) Fitz. Abr. "Charge," pl. 9.
(*d*) Hob. 171.
(*e*) Cro. Eliz. 25.

"divided"

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"divided" do not make a *tenancy in common* in a deed as it will in a will (*a*). But I do not reſt on that only, for the deed goes further, and gives twenty pounds to each of them. * Then they ſay, that though the conuſance is not good for the whole, yet it is for part, and that if any one of the plaintiffs have title for any part, he ſhall have a return. But if this conuſance be not good for any part, it is void for the whole; for they are *tenants in common* from the beginning. *Knight's Caſe* (*b*) is relied on by them, which was one reſervation and not ſeveral, which caſe I agree; but it is not like ours, for the reſervation was entire when the rent was once reſerved, and what followed was only to ſhew the rates of the lands: but here the grant is of a hundred pounds equally to be divided, *viz.* twenty pounds to each; and ſo is the *habendum*, which was not in *Knight's Caſe*, which was a demiſe of divers houſes in *London* for years, rendering the yearly rent of five pounds ten ſhillings and eleven pence, *viz.* for one houſe three pounds eleven ſhillings, for another houſe twenty ſhillings. Now the reſervation was complete *eo inſtanti*. *Hill's Caſe* (*c*) has been cited too. *Hill* was ſeiſed of a cloſe called *Broom-Acre*, and of two other cloſes in fee; he and his wife *Agatha*, and *Robert* their ſon, let *Broom-Acre*, and the ſaid two cloſes, to *Hutchin*, for ninety years, if he ſo long live, "*reddendo annuatim* to the aforeſaid *Hill* and his wife "for *Broom-Acre* three ſhillings and four pence, *et pro una clauſura* "15. *et pro altera* 20s. *ad quatuor anni terminos*, and a re-entry for "non-payment:" *Hill* and his wife died; their ſon ſold the reverſion of *Broom-Acre*, rendering rent to *Smith*: the rent of *Broom-Acre* is behind: *Smith* enters and leaſes it to *Reynolds*, who being ejected brings ejectment; and judgment was given for him, for that they are ſeveral reſervations and ſeveral conditions, and the rent is originally ſeveral. There is no doubt when two cloſes are demiſed, two ſeveral rents may be reſerved: ſo is *Winter's Caſe* (*d*). The caſe of *Furſe v. Weeks* (*e*) has been cited too, which is only for the words "equally to be divided:" ſo, no doubt, *tenants in common* may join in avowry for *damage feaſant*; and ſo in treſpaſs.

Moore, 199, 200, 201, 202. 3. Leon. 124, 125, 126, 127. 1. And. 173, 174, 175, &c. 1. Lev. 109. Ray. 80. 1. Sid. 157. 1. Keb. 565, 572.

HOLT, *Chief Juſtice*. Suppoſe the words had been "equally "to be divided, *viz.* twenty pounds to one, &c." and there had been no *habendum*, would they not have been *tenants in common?* Certainly they would. Then where is the difference? Here the hundred pounds annuity is granted to five "equally, &c." The *habendum* is one twenty pounds to one, and ſo on; and there is to be a ſurvivor, but that is by a new grant; and there is to be no ſurvivor between the laſt two. As to the caſe of *Stukely v. Butler* (*f*), where *Hobart* puts a difference where the rents are reſerved ſeverally at the firſt, and where they are entire at the firſt, it

(*a*) See Den *v.* Gaſkin, Cowp. 660.
(*b*) 5. Co. 54.
(*c*) 4. Leon. 187.
(*d*) Dyer, 308, 309.
(*e*) 2. Roll. Abr. 90. pl. 5.
(*f*) Hob. 171, 172.

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is not yet determined; my *Lord Hobart* only * recites his own opinion there. Look at the ſame caſe in *Moore (a)*; the Court was divided there as to the word "*videlicet*:" Leſſor grants "all trees, woods, underwoods, growing in the manor of, "&c. *videlicet*, within the grounds called *A. B.* and *C.*" If the *videlicet* were void or not? was the queſtion.

CARTHEW *ad idem.* The intent of the grantor was, that there ſhould be ſeveral rents to the five grantees, and the Court will expound it accordingly. The intent appears by the grant in the premiſes, the *habendum*, and the clauſe of diſtreſs; in all which the words "ſeverally and reſpectively" are always uſed, which makes it the ſame as if they were applied to each perſon and grant diſtinctly; and this is proved by the pleading of ſuch words in many caſes, of which I will cite two or three. In the caſe of *Coryton v. Lithely* (*b*), *Coryton* and *Hartly* joined in action againſt *Lithely* for grinding at their mills; the declaration was demurred to, becauſe it appeared their intereſts were ſeveral; and by the Court, though their intereſts be ſeveral, yet the not grinding at any of their joint mills is an entire damage to both of them. And if theſe words ſhall be taken ſo in pleading, to divide that which otherwiſe would be joint, much more they ſhall in grants; and if the grantor had intended this for a joint grant, the ſubſequent clauſe of giving it by ſurvivor would be uſeleſs and void; and if it be an entire and joint grant, then it muſt ſurvive in the caſe of the laſt two, notwithſtanding the clauſe that it ſhall not; which is contrary to his expreſs meaning and intent. There are ſome caſes that come up to this (*c*). The caſe of *Bere v. Woodley* (*d*) is a ſtrong caſe for us; but they all over-rule this: for in thoſe caſes, either in the premiſes, in the *habendum*, or in the diſtreſs, there is ſome word abſolutely joint; but here throughout the deed the words are ſeveral. As to *Knight's Caſe*, which was objected, there the land was firſt charged with an entire rent, and then the "*viz.*" comes too late; but if the words had been ſeveral at the firſt, the reſervation had been ſo too; and ſo it little differs from *Winter's Caſe (e)*, and will not affect ours, which does not come under a *videlicet*; and the caſe of *Furſe v. Weeks* is not to the purpoſe.

2. Lev. 27. 1. Vent. 167, 168. 1. Rol. Abr. 361. 2. Keb. 601. 803. 838, &c.

DARNELL *contra.* This is a *joint-tenancy* on the whole deed. They have not anſwered the material part of the caſes cited by us. In the caſe of *Furſe v. Weeks* the difference * appears to be taken by the Court, and there diſtinct payments were appointed as here; and that was a ſtronger caſe, for it was on a will, and this is on a deed. The grant is joint of one rent of a hundred pounds a-year, and the clauſe of diſtreſs is, that if the hundred pounds be behind, and not if the ſeveral rents of twenty pounds is arrear; ſo that this is alſo joint, which ſhews his intent.

* [29]

(*a*) Moore, 880.

(*b*) 2. Saund. 115.—See alſo the Year-Book 11. *Hen.* 6. pl. 11. and Raſtal's Entries, 612. b. and 625. a.

(*c*) Whorwood *v.* Shaw, Yelv. 23, 24. S. C. Moor, 667. Owen, 127. 1. Brown, 82. Cro. Eliz. 729. Tanfield *v.* Rogers, Cro. Eliz. 340. Ards *v.* Watkin, Cro. Eliz. 637. 651. Winter's Caſe, Dyer, 308.—See alſo 17. Aſſize, pl. 10.

(*d*) Jones, 202. S. C. Cro. Car. 154.

(*e*) Dyer, 308.

HOLT,

HOLT, *Chief Juſtice.* I do not know why a *videlicet* ſhall not make a ſeparation, as well as an *habendum*; and this is alſo ſeparate in the *habendum*, for it is to each of them and their "aſſigns "reſpectively, for the lives of them and either of them reſpec- "tively." If you conſtrue it to be a ſeveral grant, all the parts of the deed are ſatisfied, but not if it be taken joint; for then a payment to one would be a payment to all, when the deed limits twenty pounds to each of them. And how can it be conſtrued according to the intent, when each of them would not have a remedy for his twenty pounds without partition? Then the diſtreſs is alſo ſeveral. The whole annuity is a hundred pounds in groſs, but it is diſtributed into twenty pounds to each; and as to the ſurvivor on the death of the three firſt, that amounts to a new grant, and it ſhall not ſurvive as to the two laſt: now if it be a ſeveral rent, the arrears ſhall not ſurvive, but go to their executors; the words of the deed cannot be ſatisfied unleſs it be made a ſeveral grant. "Equally to be divided" do not make it ſeveral, but all the clauſes are ſeveral of themſelves. You muſt agree, that if it had been ſaid, "*habendum* twenty pounds to one, and ſo to the reſt," that had been ſeveral; and that is the ſame in effect, though it ſays, "*habendum* the hundred pounds to them to be equally divided, "*viz.* twenty pounds to one," which is the ſame as if it had been the fifth part to one, and ſo to the reſt; in which caſe, one could not have avowed for twenty pounds, as here he muſt, but for the fifth part.—Let me have a copy of the deed, for it is ſet forth *in hæc verba*; for if on *oyer* of the deed you have avowed otherwiſe than you ought, they may take advantage of it, though after verdict, as they may of any thing that makes the avowry abateable; for we muſt judge on the whole record.

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Hob. 172. 276. Moore, 880. 1. Salk. 294. 1. Saund. 118. 169. 286. 2. Saund. 290.

Ante, 26. 1. Salk. 226. 390.

Adjournatur (a).

(a) It is ſaid, S. C. Holt, 368. that in Hil. 10. *Will.* 3. JUDGMENT was given for *the defendant* by the whole Court. So in S. C. 1. Ld. Ray. 423. S. C. 1. Salk. 391. S. C. 12. Mod. 228. But by *Comberbatch* the judgment was arreſted, and the defendant ordered to replead and avow *de novo*, S. C. Comb. 330; and *Carthew* ſays, that no judgment was given, but that afterwards the grantees took new diſtreſſes ſeverally, and, upon new replevins brought, made ſeveral avowries as for ſeveral rents; and then the parties agreed, and nothing farther was done. S. C. Carth. 342.

The King *againſt* Hornby; OR, THE BANKERS CASE.

Caſe 22.

A PETITION to the treaſurer and barons of the exchequer was exhibited by *Joſeph Hornby* in *Hilary Term* the firſt year of *William and Mary* for the allowance of *letters patents* granted

The revenue of THE EXCISE given by parliament to

Charles the Second, his heirs and ſucceſſors, in lieu of wards, liveries, purveyances, &c. was a gift to him *in fee*, and being, like other inheritances, *alienable*, A GRANT made by him of ſo much a-year out of the ſaid hereditary revenue of exciſe, for the payment of the intereſt of ſuch ſums of money as he had borrowed from *individual* ſubjects, was good and valid in law, and bound the king's ſucceſſors:—and to procure the payment of ſuch annuity, the patentees may *petition* the barons of exchequer.—S. C. Comb. 270. S. C. Carth. 388. S. C. 1. Freem. 331. S. C. Skin. 601, S. C. 11. State Trials, 137. 4. Bac. Abr. 206.

THE KING *against* HORNBY; OR, THE BANKERS CASE.

by *King Charles the Second* * for payment of an annuity out of the exciſe, &c. THE ATTORNEY GENERAL demurs generally, The Court gave judgment for the petitioner *Hornby*.

THE ATTORNEY GENERAL thereupon brought a writ of error, which was argued in the exchequer chamber, where the judgment was reverſed.

Record. Petition. et Morac. ſuperinde et Judicium, et Brevis de Error.

Termino Sancti Hillarii Anno 1. *Gulielmi et Mariæ, Regis et Reginæ.*

LOND. MID. *MEMORANDUM, quod* JOSEPHUS HORNBY *de* LOND. *gen. venit coram baronibus de ſcaccario viceſimo primo die Octobr. hoc termino in propria perſona ſua et exhibuit curiæ hic quaſdam literas patentes dom.* CAROLI SECUNDI *nuper regis* ANGLIÆ, &c. *ſub magno ſigillo* ANGLIÆ *confect. veren. dat. triceſimo die Aprilis anno regni ſui dict. dom.* CAROLI *nuper regis* ANGLIÆ *viceſimo nono et [illegible]. dom.* JOSEPHO HORNBY, *hæred. et aſſignat. ſuis confect. de annuali redditu ſive ſumma mille trecent. quinquagint. et duar libr. ſept. [illegible] ſolid. et decem denar. annuatim ſolvend. recipiend. [illegible] d.* ANGLICE "taken" *per præd.* JOSEPHUM HORNBY [illegible] *ſuos in perpetuum de reddit ibus reventionibus proficuis et [illegible] emolument. et ſolutionibus reſervat. ſurgen. erect. [illegible] provenien. cid. ſuper dom. regi* CAROLO SECUNDO *hæred. et ſucceſſoribus ſuis de proficuo ſive ratione debiti exciſæ* ANGLICE "duty of excise" *ſuper potum lupulat. et illupulat. et alios liquores infra regn.* ANGLIÆ *denin.* WALLIÆ *et vil.* BERWICI *ſuper* TWEDAM *virtute actus parliamenti fact. anno regni ejuſdem nuper regis* CAROLI SECUNDI *duodecimo intitul.* "An "Act for taking away the Court of Wards and Liveries and "Tenures *in capite*, and by Knights Service and Purveyance, "and for ſetling a Revenue upon His Majeſty in Lieu thereof," *dat. et conceſſ. ſolvend quarterratim* VIZ. *ad feſtum Annunciationis* BEATÆ MARIÆ VIRGINIS *Nativitatis* SANCTI JOHANNIS BAPTIST. SANCTI MICH. ARCH. *et Nativitatis* DOM. *per æquas et æquales portiones ſub fiducia in iiſdem literis patentibus expreſſa. Et præd.* JOSEPHUS HORNBY *fecit literas patent. de recordis hic ſecundo. Quas quidem literas patent. barones hic receperunt et illas legi et ſub ſerie verborum in iiſdem literis patent. content. irrotulari præceperunt. Et tenor earundem literarum patent. ſequitur in hæc verba, ſcilicet,*

[31] "CHARLES THE SECOND, by the Grace of God of "*England, Scotland, France* and *Ireland*, KING, Defender of the "Faith, &c. To all to whom theſe preſents ſhall come, greeting. "WHEREAS, ſince the time of our happy Reſtoration, WE have "been involved in great and foreign wars, as well for the ſafety "of our government, as for the vindication of the rights and "privileges of our ſubjects; in the proſecution whereof WE have "been conſtrained for ſome years paſt, contrary to our inclination, "to poſtpone the payment of the monies due from us to ſeveral

GOLDSMITHS,

" GOLDSMITHS and others, upon *tallies* ſtruck, and orders re-
" giſtered on and payable out of ſeveral branches of our revenue
" and otherwiſe. And although the preſent poſture of our affairs
" cannot reaſonably ſpare ſo great a ſum as muſt be applied to the
" ſatisfaction of thoſe debts, yet conſidering the great difficulties
" which very many of our loving ſubjects, who put their monies
" into the hands of thoſe goldſmiths and others, from whom WE
" received it, do at preſent lie under, almoſt to their utter ruin
" for want of their ſaid monies; WE have rather choſe, out of
" our princely care and compaſſion towards our people, to ſuffer
" in our own affairs, than that our loving ſubjects ſhould want
" ſo ſeaſonable relief: and having ſeriouſly conſidered of the ways
" and means to effect this our preſent purpoſe, we could not find
" any more effectual and leſs prejudicial to us in the preſent poſ-
" ture of our revenue, than by granting to each of them the ſaid
" goldſmiths and others, to whom WE are indebted as aforeſaid re-
" ſpectively, and to his and their heirs and aſſigns, an annual ſum
" or payment, anſwerable in value yearly to the intereſt of their
" reſpective debts, at the rate of ſix pounds *per cent. per annum*,
" for all ſuch monies that are due unto them. The conſideration
" whereof induced us to command our HIGH TREASURER OF
" ENGLAND to cauſe all the accompts of the ſaid goldſmiths to
" be ſtated and made up by *Richard Aldworth, Eſq.* one of our
" auditors, to the firſt day of *January* 1676; which having been
" accordingly caſt up and ſettled, it appears thereby that there is
" due and owing by us unto our truſty and well-beloved ſubject
" *Joſeph Hornby* of *London*, goldſmith, the ſum of twenty-two
" thouſand five hundred and forty-eight pounds five ſhillings and
" ſixpence. In ſatisfaction whereof, according to our intent in
" theſe preſents expreſſed, we have reſolved to grant unto him the
" ſum of one thouſand three hundred fifty-three pounds ſeventeen
" ſhillings and ten pence *per annum*, out of that part of our re-
" venue of exciſe which was granted to us, our heirs and ſuc-
" ceſſors for ever, by an act of parliament made in the twelfth
" year of our reign, intituled, " *An Act for taking away the Court*
" *of Wards and Liveries, and Tenures* * IN CAPITE, *and by* [32]
Knights Service and Purveyance, and for ſettling a Revenue upon
His Majeſty in Lieu thereof." KNOW YE THEREFORE, That
" WE, for the conſideration aforeſaid, and in ſatisfaction or lieu
" of the ſaid debt, or ſum of twenty-two thouſand five hundred
" forty-eight pounds five ſhillings and ſix pence, by us owing to
" the ſaid *Joſeph Hornby*, and of our eſpecial grace, certain
" knowledge, and meer motion, have given and granted, and by
" theſe preſents, for us, our heirs, and ſucceſſors, do give and
" grant unto the ſaid *Joſeph Hornby*, his heirs [illegible] one
" annual or yearly rent or ſum of one thouſand three hundred
" fifty-two pounds ſeventeen ſhillings and ten pence lawful
" money of *England*, to be yearly [illegible] by
" the ſaid *Joſeph Hornby*, his heirs and aſſigns for [illegible] of
" the rents, revenues, profits, and perquiſites, [illegible]

THE KING *against* HORNBY; OR, THE BANKERS CASE.

" payments reſerved, ariſing, accruing, or coming, or that
" hereafter ſhall or may be reſerved, ariſe, accrue or become
" due or payable to us, our heirs and ſucceſſors, out of, for or
" by reaſon of the duty of exciſe upon beer, ale and other liquors
" within our kingdom of *England*, dominion of *Wales*, and town
" of *Berwick upon Tweed*, by virtue of the ſaid act of Parliament,
" the ſaid ſum of one thouſand three hundred fifty-two pounds
" ſeventeen ſhillings and ten pence *per annum*, to be paid quar-
" terly at the four moſt uſual feaſts in the year, that is to ſay,
" at the feaſt of the Annunciation of the *Bleſſed Virgin Mary*, the
" Nativity of *St. John the Baptiſt*, *St. Michael the Archangel*,
" and the Birth of our Lord God, commonly called *Chriſtmas*,
" by even and equal portions, in truſt for ſuch of the creditors of
" the ſaid *Joſeph Hornby*, as within one year next enſuing the
" date hereof ſhall, upon notice of theſe preſents, deliver up their
" ſecurities, and accept of aſſignments of proportionable parts of
" the ſaid yearly ſum of one thouſand three hundred fifty-two
" pounds ſeventeen ſhillings and ten pence for ſatisfaction of
" their reſpective debts, according to the true intent and meaning
" of the covenant in that behalf herein after contained, for ſo
" much as their proportionable parts ſhall amount unto, and in
" the mean time ſhall not ſue or proſecute the ſaid *Joſeph Hornby*,
" his heirs, executors or adminiſtrators, for ſuch their debts; and
" the reſidue and overplus of the ſaid yearly ſum of one thouſand
" three hundred fifty-two pounds ſeventeen ſhillings and ten pence
" to remain and be to and for the proper uſe and benefit of the
" ſaid *Joſeph Hornby*, his heirs and aſſigns, without any truſt or
" account whatſoever; the firſt payment of the ſaid ſum of one
" thouſand three hundred fifty-two pounds ſeventeen ſhillings and
" ten pence to commence from the feaſt of the Birth of our
* [33] " Lord God one thouſand ſix hundred ſeventy and * ſix: AND
" WE DO HEREBY, for us, our heirs and ſucceſſors, authorize
" direct and appoint our high treaſurer, chancellor, under-trea-
" ſurer, chamberlain and barons of our EXCHEQUER, and the
" high treaſurer and commiſſioners of the treaſury, chancellor,
" under treaſurer, chamberlain and barons of the EXCHEQUER,
" of us, our heirs and ſucceſſors that hereafter ſhall be, and all
" other officers and miniſters of the ſaid court and of the receipt
" thereof now being or that hereafter ſhall be, that they and
" every of them, in their reſpective places, do from time to
" time, upon requeſt of the ſaid *Joſeph Hornby*, his heirs or
" aſſigns, reſpectively perform all acts neceſſary for the conſtant
" and due payment of the ſaid yearly rent or ſum of one thou-
" ſand three hundred fifty-two pounds ſeventeen ſhillings and
" ten pence to the ſaid *Joſeph Hornby*, his heirs or aſſigns, as
" the ſame ſhall grow due and become payable, and of every ſuch
" part and parts as the ſaid *Joſeph Hornby*, his heirs or aſſigns,
" ſhall grant or aſſign to any perſon or perſons, from time to time,
" according to the truſt and agreement in that behalf herein con-
" tained; and as occaſion ſhall be, levy or ſtrike, or cauſe to be
" levied or ſtricken in the receipt of the exchequer of us, our

" heirs

" heirs and ſucceſſors, from time to time, tallies of *pro* or aſſign-
" ment, or other tallies, as the caſe may require, and as ſhall be
" deſired, upon the commiſſioners, treaſurers, receivers, collec-
" tors or farmers of the ſaid duty and revenue for the time being;
" or upon ſuch other perſon or perſons as ought to be charged or
" chargeable therewith, or accountable to us, our heirs and ſuc-
" ceſſors for the ſame, who are hereby required and directed from
" time to time to make due payment thereof accordingly; ſo that
" the ſaid *Joſeph Hornby*, his heirs and aſſigns reſpectively, of all
" or any part or parts thereof, may certainly and duly, and on
" every of the ſaid quarterly feaſt-days afore-mentioned, for ever
" hereafter have and receive the ſaid yearly rent or ſum of one
" thouſand three hundred and fifty-two pounds ſeventeen ſhillings
" and ten pence, hereby granted out of our ſaid revenue, without
" any further or other warrant to be ſued for, had or obtained from
" us, our heirs and ſucceſſors, in that behalf, and without any ac-
" count, impreſt, or other charge to be ſet upon the ſaid *Joſeph*
" *Hornby*, his heirs or aſſigns, or any of them, for the ſame:
" and if it ſhall happen at any time hereafter, that the rents, iſ-
" ſues, or profits of our ſaid revenue ſhall be paid into the re-
" ceipt of our EXCHEQUER, or elſewhere, to the uſe of us, our
" heirs or ſucceſſors, before the levying of ſuch tallies, or before
" payment be made to the ſaid *Joſeph Hornby*, his heirs or aſſigns
" reſpectively, of the ſaid yearly rent or ſum of one thouſand
" three hundred fifty-two pounds ſeventeen ſhillings and * ten
" pence, or any part thereof, according to the true intent of theſe
" our letters patents; then, and in ſuch caſe, our expreſs will
" and pleaſure is, and we do hereby of our further eſpecial grace,
" certain knowledge, and mere motion, for us, our heirs and ſuc-
" ceſſors, authoriſe and require the high treaſurer, and commiſ-
" ſioners of the treaſury, chancellor or under-treaſurer, cham-
" berlain and barons of the EXCHEQUER, of us, our heirs and ſuc-
" ceſſors, for the time being, and all other officers and miniſters of
" the EXCHEQUER, and of the receipt thereof, that they or ſuch of
" them to whom it appertains, do from time to time, as often as
" need ſhall be, well and truly pay, or cauſe to be paid, unto the
" ſaid *Joſeph Hornby*, his heirs and aſſigns reſpectively, out of
" ſuch monies as ſhall be ſo paid into our EXCHEQUER, or elſe-
" where, to the uſe of us, our heirs and ſucceſſors, all ſuch, or ſo
" much of the ſaid yearly rent or ſum of one thouſand three hun-
" dred fifty-two pounds ſeventeen ſhillings and ten pence, as ſhall
" from time to time be in arrear, or unpaid, after the feaſt-days or
" times of payment aforeſaid, or any of them, without any further
" or other warrant to be ſued for, had or obtained in that behalf,
" and without any account, impreſt, or other charge to be ſet
" upon him the ſaid *Joſeph Hornby*, his heirs or aſſigns, for the
" ſame, or any part thereof: and theſe our letters patents, or the
" exemplification, entry or inrollment thereof ſhall be unto the
" high treaſurer, commiſſioners of the treaſury, chancellor and
" under-treaſurer, chamberlain and barons of the EXCHEQUER,
" of us, our heirs and ſucceſſors, and all other officers and miniſters

* [34]

THE KING *againſt* HORNBY; OR, THE BANKERS CASE.

" the ſaid EXCHEQUER, and to the commiſſioners, treaſurer, re-
" ceivers, collectors, farmers, and all other officers and miniſters
" of our ſaid revenue of exciſe, a good and ſufficient warrant and
" diſcharge for all and whatſoever they or any of them reſpectively
" ſhall do, or cauſe to be done, in or about the premiſes, pur-
" ſuant to our will and pleaſure herein before declared. And our
" further will and pleaſure is, and we do hereby of our eſpecial
" grace, certain knowledge, and meer motion, grant, direct and
" appoint, that all ſuch tallies of *pro* or aſſignment, or other tallies
" as ſhall be hereafter levied or ſtruck upon our ſaid revenue of
" exciſe, at the inſtance and deſire of the ſaid *Joſeph Hornby*, his
" heirs or aſſigns reſpectively, for or towards the ſatisfaction or
" ſecuring the payment of the ſaid yearly rent or ſum of one thou-
" ſand three hundred fifty-two pounds ſeventeen ſhillings and ten
" pence, or any part thereof, ſhall be well and truly paid and ſatiſ-
" fied out of the ſaid revenue quarterly, and every quarter as
" aforeſaid; and ſhall be preferable and preferred before any other
" quarterly payments out of the ſame, by virtue or colour of any
[35] " warrant, order or direction whatſoever * of any after date, ex-
" cepting only ſuch yearly ſums as are neceſſarily payable for the
" management of our ſaid revenue, and except the yearly ſums
" amounting to twelve thouſand two hundred and nine pounds
" fifteen ſhillings and four pence halfpenny, or thereabouts, pay-
" able thereout unto our deareſt conſort the queen, as parcel of
" her jointure; and the yearly ſum of twenty-four thouſand pounds,
" payable to our moſt dear brother JAMES *Duke of York*; which
" ſaid ſeveral ſums, we will and do hereby direct, ſhall be paid
" and ſatisfied unto our ſaid deareſt conſort, and to our ſaid moſt
" dear brother, out of the ſaid revenue, duly, conſtantly, and in
" the firſt place, before any of the ſaid payments, or any other pay-
" ments whatſoever to be made out of the ſame. And our will
" and pleaſure is, and the ſaid *Joſeph Hornby*, for himſelf, his heirs,
" executors, and adminiſtrators, doth covenant, grant and agree,
" to and with us, our heirs and ſucceſſors, that he the ſaid *Joſeph*
" *Hornby*, his heirs and aſſigns, ſhall and will, at any time or
" times, within one year next enſuing the date hereof, grant and
" aſſign proportionable part and parts of the ſaid yearly rent or
" ſum of one thouſand three hundred fifty-two pounds ſeventeen
" ſhillings and ten pence unto ſuch of his creditors, or others, by
" their appointment, as will be content to deliver up their ſecu-
" rities, and take ſuch aſſignments in ſatisfaction of their debts,
" according to the truſts herein before expreſſed: and that he the
" ſaid *Joſeph Hornby*, his heirs or aſſigns, ſhall not nor will, du-
" ring the ſaid ſpace of one year, make any grant or aſſignment
" of all, or any part of the ſaid yearly ſum of one thouſand three
" hundred fifty-two pounds ſeventeen ſhillings and ten pence
" unto any perſon or perſons but ſuch as are creditors of the ſaid
" *Joſeph Hornby*, or others by their appointment as aforeſaid:
" and that if any difference ſhall at any time or times, within the
" ſpace of one year and an half now next coming, ariſe between
" the

" the said *Joseph Hornby*, his heirs, executors, administrators or
" assigns, or any of them, and the said creditors, or any of them,
" touching the assigning or disposing of all or any part or parts
" of the said annuity or yearly sum of one thousand three hundred
" fifty-two pounds seventeen shillings and ten pence; that then
" the said *Joseph Hornby*, his heirs, executors, administrators and
" assigns, shall and will from time to time submit themselves, and
" all matters and things relating thereunto, to the controul of the
" lord high treasurer, or the commissioners of the treasury for the
" time being, and shall and will observe and fulfil all such orders
" and directions as the lord high treasurer, or the commissioners
" of the treasury, shall from time to time make or give concern-
" ing the same. PROVIDED ALWAYS, and our further will and
" pleasure, intent and meaning * is, and is hereby declared to be, [36]
" that all assignments to be made as well before as after the said
" space of one year, of any part or parts of the said yearly sum of
" one thousand three hundred fifty-two pounds seventeen shillings
" and ten pence hereby granted, shall, within the space of thirty
" days next after the execution thereof, be enrolled before the
" auditor of the receipt of THE EXCHEQUER, or the *clerk of the*
" *pells* for the time being, to the end it may appear what assign-
" ments have been granted, and payments may be made there-
" upon according to the intent of these presents, and that every
" assignment not so enrolled shall be of none effect. PROVIDED
" ALSO, that when we, our heirs or successors, shall at entire
" payments have actually paid the full sum of twenty-two thou-
" sand five hundred forty-eight pounds five shillings and six pence,
" of lawful money of *England*, to the said *Joseph Hornby*, his
" heirs and assigns, and to such person or persons to whom such
" assignment or assignments shall be made as aforesaid, respec-
" tively, in proportion amongst them, after the rate of one hun-
" dred pounds, principal money, for each and every six pounds
" *per annum*, which they, every, or any of them respectively shall,
" or ought to have and enjoy of the said yearly sum of one thou-
" sand three hundred fifty-two pounds seventeen shillings and
" ten pence, hereby granted by virtue of these presents, or such
" assignment or assignments as shall be made and inrolled as afore-
" said, and so after those proportions and rates for greater or lesser
" sums, as the respective cases shall happen, and also the arrears
" of the said yearly sum of one thousand three hundred fifty-two
" pounds seventeen shillings and ten pence, if any be: THAT
" THEN THESE PRESENTS, and the grant of the said yearly sum
" of one thousand three hundred fifty-two pounds seventeen shil-
" lings and ten pence shall cease and be void, any thing herein
" before contained to the contrary notwithstanding. And we do
" hereby of our further especial grace, certain knowledge, and
" meer motion, for us, our heirs and successors, grant unto the
" said *Joseph Hornby*, his heirs and assigns, and our express plea-
" sure is, that these our letters patents, and every clause, article,
" and sentence therein contained, whereupon any ambiguity or

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" doubt ſhall or may ariſe, that the ſame ſhall be at all times ex-
" pounded and taken moſt favourably and beneficially for the ad-
" vantage of the ſaid *Joſeph Hornby*, his heirs and aſſigns; and that
" theſe our letters patents ſhall be good and effectual in law, and
" ſhall be available to the ſaid *Joſeph Hornby*, his heirs and aſſigns
" reſpectively, for his and their receiving and enjoying the ſaid
" yearly rent or ſum of one thouſand three hundred fifty-two
" pounds ſeventeen ſhillings and ten pence, with all the arrearages
" thereof in manner aforeſaid, notwithſtanding the not reciting,
* [37] " or not * mentioning, or not truly and certainly reciting or
" mentioning of any act or acts of parliament, whereby the ſaid
" revenue was given and granted unto us, our heirs and ſucceſ-
" ſors, or by what title we have received or enjoyed the ſame:
" and notwithſtanding the not reciting, or not mentioning in this
" our grant, any leaſe or leaſes, grant or grants, charge or charges,
" made of or upon, or out of the ſaid revenue, or any part thereof
" alone on the ſaid revenue, or on the ſame, and any other part
" or parts of our revenue of exciſe, or generally on our revenue,
" or the date or contents of ſuch leaſes or grants, or of the perſons
" to whom the ſame are made: and notwithſtanding that no men-
" tion be herein of the direct and certain yearly and other rents
" and profits of the premiſes, or of the certain true or direct na-
" ture of ſuch rents and profits, or how or in what manner they
" ariſe, become due, or payable unto us, our heirs and ſucceſſors:
" and notwithſtanding the not mentioning how, and in what man-
" ner the ſaid debt due from us to the ſaid *Joſeph Hornby* ariſeth
" particularly, or any miſtake in the ſtating, or in the quantity or
" ſum of the aforementioned debt due, or herein mentioned to be
" due by us to the ſaid *Joſeph Hornby*: and notwithſtanding the
" ſtatute of *Henry the Fourth*, late king of *England*, publiſhed
" in the firſt year of his reign: and notwithſtanding the ſtatute
" of *Henry the Sixth*, late king of *England*, made and publiſhed
" in the eighteenth year of his reign: and notwithſtanding the
" ſtatute of *Henry the Eighth*, late king of *England*, made and
" publiſhed in the twenty-ſixth year of his reign: and notwith-
" ſtanding the ſtatutes or acts of this preſent parliament, made and
" publiſhed in the twelfth year of our reign, whereby the ſaid revenue
" was, or was mentioned or intended to be granted, ſettled, and con-
" firmed unto us, our heirs and ſucceſſors, or any article, clauſe,
" ſentence, or reſtraint therein contained: and notwithſtanding
" any defect in this our grant, or any act, ſtatute, ordinance,
" proclamation, proviſion or reſtraint whatſoever made or pro-
" vided, or any other act, matter, or thing whatſoever to the con-
" trary hereof, in any wiſe notwithſtanding. And laſtly, our will
" and pleaſure is, and we do hereby of our more abundant grace,
" certain knowledge, and meer motion, for us, and our heirs and
" ſucceſſors, covenant and grant to and with the ſaid *Joſeph*
" *Hornby*, his heirs and aſſigns, that due payment ſhall be made
" of the ſaid yearly ſum of one thouſand three hundred fifty-two
" pounds ſeventeen ſhillings and ten pence, hereby granted, and

" all

" all other things hereby directed to be done on our part, ſhall be
" from time to time done and performed, according to the true
" intent and meaning of theſe preſents: and that if at any time
" hereafter, any defect or * queſtion ſhall be found or made of or
" in the validity of this our preſent grant, that then upon the hum-
" ble petition of the ſaid *Joſeph Hornby*, his heirs and aſſigns, we,
" our heirs and ſucceſſors, will be graciouſly pleaſed to make ſuch
" further grant, aſſurance, and confirmation of the ſaid yearly rent
" or ſum of one thouſand three hundred fifty-two pounds ſeventeen
" ſhillings and ten pence to the ſaid *Joſeph Hornby*, his heirs or
" aſſigns, as by our attorney general ſhall be approved of and ad-
" viſed, and by the counſel learned in the law of the ſaid *Joſeph*
" *Hornby*, his heirs or aſſigns, ſhall be adviſed and deſired, and with
" ſuch beneficial clauſes therein to be contained, as ſhall be thought
" expedient and moſt conducing to the performance of our will
" and pleaſure herein before declared. IN WITNESS whereof, &c."

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Quibus quidem literis patentibus lectis præd. JOSEPHUS HORNBY *dicit, quod vigore præmiſſorum ipſe idem* JOSEPHUS HORNBY *ſeiſit. fuit de et in præd. annuali redditu ſive ſumma mille trecent. quinquagin. et duarum libr. ſeptendecim ſolid. et decem denar. ut de feodo et jur. Et ſic inde ſeiſit. exiſten. ipſe idem* JOSEPHUS HORNBY *poſtea ſcilicet quinto die Auguſti anno regni domini (nuper regis)* CAROLI SECUNDI *triceſimo tertio apud* WEST. *præd. per quoddam ſcriptum ſuum ſigillo ſuo ſigillat. et in cur. hic de record. debit. modo et debit. juris forma irrotulat. cujus dat. eſt eiſdem die et anno ult. mentionat. pro conſideration. in eodem ſcript. mentionat relaxavit præfat. domino* CAROLO SECUNDO *hæredibus et ſucceſſoribus ſuis annual. ſum. ſexcent. libr. parcel. præd. annual. ſum. mille trecent. quinquagint. duar. libr. ſeptendecim ſolid. et decem denar. præfat.* JOSEPHO *ut præfert. conceſs. prout per record. cur. il. liquet et apparet; et ipſe idem* JOSEPHUS HORNBY *continuavit et adhuc ſeiſit. exiſt. ut de feodo et jure de et in annuali redditu ſive ſumma ſeptingen. quinquagint. duar. libr. ſeptendecim ſolid. et decem denar. reſid. præd. annualis redditus ſive ſummæ mille trecent. quinquagint. duar. libr. ſeptendecim ſolid. et decem denar. in literis patentibus præd. mentionat. et per eaſdem eid.* JOSEPHO *ut præfert. conceſs. et eundem annualem redditum ſive ſummam ſeptingent. quinquagint. et duar. libr. ſeptendecim ſolid. et decem denar. reſid. præd annualis redditus ſive ſummæ mille trecent. quinquagint. duar. libr. ſeptendecim ſolid. et decem denar. de jure habere et recipere debuit et debet vigore literarum patentium præd. Et præfat.* JOSEPHUS *ulterius dicit, quod ipſe recepit et ſatisfactus fuit, et exiſtit de et pro omnibus arrearagiis præd. annualis ſummæ ſeptingent. quinquagint. et duar. libr. ſeptendecim ſolid. et decem denar. debit. et ſolubil. ad feſtum et pro feſto Annunciationis* BEATÆ MARIÆ VIRGINIS *anno regni domini (nuper regis)* CAROLI SECUNDI *tricesimo quinto, et quod ſumma quinque mille octogint. et duar. libr. quatuor denar. et unius oboli, pro arrearagiis ejuſdem annualis ſummæ ſeptingent. quinquagint. et duar. * libr. ſeptendecim ſolid. et decem denar. poſt præd. feſtum Annunciationis* BEATÆ MARIÆ VIRGINIS *anno tricesimo quinto ſupradict.*

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ſupradict. debit. et ſolubil. ad feſtum et pro feſto Natalis Domini, communiter vocat. Chriſtmas ult. præterit. anno primo regnorum d ctorum domini regis et dominæ reginæ nunc modo debit. et inſolubil. exiſt t præfat. JOSEPHO HORNBY, *ſcilicet ſum. cent. octogint. et octo libr. quatuor ſolid quinque denar. et unius oboli, pro uno quarterio anni finit. ad feſtum Nativitatis* SANCTI JOHANNIS BAPTISTÆ *anno regni dicti (nuper regis)* CAROLI SECUNDI *triceſimo quinto, et ſimil. ſum. centum octoginta et octo librarum quatuor ſolidorum quinque denariorum et unius oboli, pro uno alio quarterio anni finit. ad feſtum* SANCTI MICHAELIS ARCHANGELI *anno triceſimo quinto ſupradict. et ſimil. ſum. centum octoginta et octo librarum quatuor ſolid. quinque denariorum et unius oboli, pro alio quarterio anni finit. ad feſtum Natalis Domini anno triceſimo quinto ſupradict. et ſimil. ſum. centum octoginta et octo libr. quatuor ſolid. quinque denar. et unius oboli, pro uno quarterio anni finit. ad feſtum Annunciationis* BEATÆ MARIÆ VIRGINIS *anno regni dicti (nuper regis)* CAROLI SECUNDI *triceſimo ſexto; et ſimil. ſum. cent. octoginta et octo libr. quatuor ſolid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad feſtum Na ivitatis* SANCTI JOHANNIS BAPTISTÆ *anno triceſimo ſexto ſupradict. et ſimil. ſum. centum octoginta et octo libr. quatuor ſolid. quinque denar et unius oboli, pro uno alio quarterio anni finit. ad feſtum* SANCTI MICHAELIS ARCHANGELI *anno triceſimo ſexto ſupradict. et ſimil. ſum. centum octoginta et octo libr. quatuor ſolid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad feſtum Natalis* DOMINI *anno triceſimo ſexto ſupradict. et ſimil. ſum. centum octoginta et octo libr. quatuor ſolid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad feſtum Annunciationis* BEATÆ MARIÆ VIRGINIS *anno primo (nuper regis)* JACOBI SECUNDI; *et ſimil. ſum. centum octoginta et octo libr. quatuor ſolid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad feſtum Nativitatis* SANCTI JOHANNIS BAPTISTÆ *anno primo ſupradict. et ſimil. ſum. centum octoginta et octo libr. quatuor ſolid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad feſtum* SANCTI MICHAELIS ARCHANGELI *anno primo ſupradict. et ſimil. ſum. centum octoginta et octo libr. quatuor ſolid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad feſtum Nativitatis D mini anno primo ſupradict. et ſimil. ſum. centum octoginta et octo libr. quatuor ſolid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad feſtum Annunciationis* BEATÆ MARIÆ VIRGINIS *anno ſecundo regni ejuſdem nuper* JACOBI SECUNDI *regis; et ſimil ſum. cent. octoginta et octo libr. quatuor ſolid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad feſtum Nativitatis* SANCTI JOHANNIS BAPTISTÆ *anno ſecundo ſupradict. et ſimil. ſum. centum octoginta et octo librarum quatuor ſolid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad feſtum* SANCTI MICHAELIS ARCHANGELI *anno ſecundo ſupradict. et ſimil. ſum.*

[40] *centum * octoginta et octo libr. quatuor ſolid. quinque denar. et unius oboli, pro alio quarterio anni finit. ad feſtum Natalis Domini anno ſecundo ſupradicto; et ſimil. ſum. centum octoginta et octo librarum quatuor ſolid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad feſtum Annunciationis* BEATÆ MARIÆ VIRGINIS

anno

anno tertio regni ejuſdem (nuper regis) JACOBI SECUNDI; *et ſimil. ſum. centum octoginta et octo librarum quatuor ſolid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad feſtum Nativitatis* SANCTI JOHANNIS BAPTISTÆ *anno tertio ſupradicto. et ſimil. ſum. centum octoginta et octo libr. quatuor ſolid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad feſtum* SANCTI MICHAELIS ARCHANGELI *anno tertio ſupradicto; et ſimil. ſum. centum octoginta et octo libr. quatuor ſolid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad feſtum Natalis Domini anno tertio ſupradicto; et ſimil. ſum. centum octoginta et octo libr. quatuor ſolid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad feſtum Annunciationis* BEATÆ MARIÆ VIRGINIS *anno quarto regni præd. (nuper regis)* JACOBI SECUNDI; *et ſimil. ſum. centum octoginta et octo libr. quatuor ſolid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad feſtum Nativitatis* SANCTI JOHANNIS BAPTISTÆ *anno quarto ſupradicto; et ſimil. ſum centum octoginta et octo libr. quatuor ſolid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad feſtum* SANCTI MICHAELIS ARCHANGELI *anno quarto ſupradicto; et ſimil. ſum. centum octoginta et octo libr. quatuor ſolid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad feſtum Natalis Domini milleſimo ſexcenteſimo octogeſimo octavo; et ſimil. ſum. centum octoginta et octo librarum quatuor ſolid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad feſtum Annunciationis* BEATÆ MARIÆ VIRGINIS *anno regnorum præd.* GULIELMI *et* MARIÆ *(nunc regis et reginæ) primo; et ſimil. ſum. centum octoginta et octo libr. quatuor ſolid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad feſtum Nativitatis* SANCTI JOHANNIS BAPTISTÆ *anno primo ſupradicto; et ſimil. ſum. centum octoginta et octo libr. quatuor ſolid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad feſtum* SANCTI MICHAELIS ARCHANGELI *anno primo ſupradicto; necnon alia conſimil. ſum. centum octoginta et octo libr. quatuor ſolid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad feſtum Natalis Domini nunc ult. præterit. et anno primo ſupradicto, attingen. in toto ut ſupra. Et petit idem* JOSEPHUS HORNBY, *quod præd. breve paten. in forma præd. fact. juxta tenor. et effect. earundem præfat.* JOSEPHO HORNEY *ollocentur, et quod præd. ſept. aliæ quarteriales ſummæ centum octoginta et octo librarum quatuor ſolid. quinque denar. et unius oboli, a feſto Annunciationis* BEATÆ MARIÆ VIRGINIS *anno regni dicti (nuper regis)* CAROLI SECUNDI *triceſimo quinto uſque ad feſtum et pro feſto Natalis Domini nunc ult. præterit. attingen. ut ſupra ad quinque mille octoginta et duas libr. quatuor denar. et unum obolum, ſicut præfertur debit. et aretro, et inſolut. exiſten.* * *præfat.* JOSEPHO HORNBY *ſolventur; quodque etiam præd. annual. reddit. ſive ſum. ſeptingen. quinquaginta et duarum libr. ſeptendecim ſoli. et decem denar. reſid. præd. annual. reddit. ſive ſum. mille trecent. quinquaginta et duarum libr. ſeptendecim ſolid. et decem denar. in literis patentibus præd. mentionat. a præd. feſto Natalis Domini ult. præterit. præfat.* JOSEPHO HORNBY, *hæred. et aſſign. ſuis, ad præd. ſeparalia feſta in dictis literis patentibus ſpecificat. in poſterum per æquas et æquales portiones ſecundum formam et effectum literarum patentium præd. ſolvetur; quodque talis toties quoties caſus requireret, levand. ad recept. hujus*

ſaccar.

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ſcaccar. pro dicto annuali redditu ſive ſumma ſeptingent. quinquaginta et duarum libr. ſeptendecim ſolid. et decem denar. reſid. præd. ſum. mille trecent. quinquaginta et duarum libr. ſeptendecim ſolid. et decem denar. quando et quoties idem reſid. reddit. ſive ſum. ſeu aliqua pars vel parcel. inde deveniret debit. levarentur ſecundum formam effectum et directionem earundem literarum patentium, et ſecundum curſum recept. hujus ſcaccarii, et quod omnes poteſtat. remed. et res quæcunque in et per dict. liter. patent. conceſſ. et mentionat. tangen. ſolution. denar. ſum. in dictis literis patent. mentionat. et pro beneficio præfat. JOSEPHI HORNBY *hæred. et aſſign. ſuorum exequerentur et capiant effectum ſecundum formam et effectum liter. patent. præd. cum hoc quod idem* JOSEPHUS HORNBY *verificare vult, quod ad præd. feſtum Natalis Domini ult. præter it. ſufficien. fuer. et ad hoc ſufficien. exiſtunt de reddit. revention. proficuis, perquiſitor.* ANGLICE "perquiſites" *emolumen. et ſolution. renovam. provenien. recept. et ſolut. de et pro debito de le exciſe præd. virtute actus parliamenti præd. ad ſolvend. et ſatisfaciend. præfat.* JOSEPHO HORNBY, *præd. ſummam ſeptingent. quinquaginta et duarum libr. ſeptendecim ſolid. et decem denar. ſicut præfertur ei debit. et arretro exiſtен. ultra et præter omnes annual. ſum. neceſſar. et ſolubil. uſque tempus illud pro gubernation.* ANGLICE "management" *dict. revention. et ultra et præter præd. ſum. duodecim mille duc. ent. et novem libr. quindecim ſolid. quatuor denar. et unius oboli, aut eo circiter, ſolubil. exinde* CATHERINÆ REGINÆ, *tunc conjort. nunc reginæ dotal. dicti domini (nuper regis)* CAROLI SECUNDI, *ut parcel. juncturæ ſuæ, in literis patentibus præd. mentionat. et ultra et præter præd. ſum. viginti et quatuor mille libr. ſolubil. præd.* JACOBO, *tunc* DUCI EBORAC. *fratri domini (nuper regis)* CAROLI SECUNDI, *in literis patent. præd. conceſſ. cum hoc etiam quod præd.* JOSEPHUS HORNBY *verificare vult, quod nec præd. dominus* CAROLUS SECUNDUS, *nuper rex Angliæ, &c. nec præd. dominus* JACOBUS SECUNDUS, *nuper rex Angliæ, nec præd. dom.* WILLIELMUS *et* MARIA, *modo rex et regina Angliæ, aut eorum aliqui vel aliquis hucuſque non ſolverit ſeu ſolvit præfat.* JOSEPHO HORNBY *aut aſſignat. ſuis præd. ſum. viginti duar. mille quingent. quadragint. et octo libr. quinque ſolid. et ſex denar. in dictis literis patent. mentionat. ſeu aliquam inde partem ſeu parcel. ultra ſeu præter ſum. decem mille libr. exiſtен. conſid. in dict. ſcript. relaxat.*

[42] *per præfat.* JOSEPHUM * HORNBY *præfat.* CAROLO SECUNDO, *nuper regi Angliæ, &c. ut præfertur fact. et pro qua ſum. ipſe idem* JOSEPHUS HORNBY *relaxavit eidem domino nuper regi præd. annual. ſum. ſexcent. libr. parcel. præd. annual. ſum mille trecent. quinquaginta et duarum libr. ſeptendecim ſolid. et decem denar. ſuperius mentionat.*

THE ATTORNEY GENERAL to this demurred generally, and the ſaid JOSEPH HORNBY *the petitioner* joined in demurrer.

THE COURT gave judgment for THE PETITIONER *Joſeph Hornby.*

THE ATTORNEY GENERAL thereupon brought a *writ of error* in THE EXCHEQUER CHAMBER.

NOTE,

NOTE, The judgment is recited in *the writ of error*; which is as follows:

DOM. *rex et dom. regina nunc* GULIELMUS *et* MARIA *mandaverunt theſaur. et baronibus de ſcaccar. ſuo breve ſuum clauſum in hæc verba ſcilicet* GULIELMUS *et* MARIA *Dei gratia Angliæ, Scotiæ, Franciæ et Hiberniæ, rex et regina, fidei defenſores, &c. theſaurario et baronibus ſuis de ſcaccar. ſuo ſalutem. Quia in record. et proceſſ. ac etiam in redditione judicii loquelæ cujuſdam petitionis cujuſdam* JOSEPHI HORNBY, *quæ fuit in curia noſtra coram vobis præfat. baronibus noſtris de ſcaccar. noſtro præd. Termino Sancti Hilarii anno regni noſtri primo exhibit. de allocatione quarundam literarum patent. dom. nuper regis* CAROLI SECUNDI *præd.* JOSEPHO HORNBY *et hæredibus ſuis conſic. et ſolution. cujuſdam annual. reddit. per caſd. literas patent. per eundem nuper regem eidem* JOSEPHO HORNBY *et hæredibus ſuis conceſſ. ſolvend. et percipiend. de revention. proficuis et ſolution. ſurgen. et provenien. nobis hæred. et ſucceſſ. de pro et ratione debit. exciſæ, ſup. potum lupulat. et illupulat. et alios liquores necnon arrearag. ejuſdem annual. reddit. pro ſeparal. quarter. anni finit. ad feſtum Nativitat. Domini anno primo ſupradict. error intervenit manifeſtus ad grave damnum noſtrum. Ac cum in ſtatuto in parliamento* DOM. EDWARD. *nuper regis Angliæ tertii, progenitoris noſtri, apud* WESTM. *anno regni ſui triceſimo primo tent. edit. inter cæterum concordat. fuit et ſtabilit. quod in omnibus caſibus regem aut alias perſonas tangen. ubi quis queritur de errore facto in ſcaccar. cancellar. theſaur. venire fac. coram eis in aliquam cameram conſilii juxta ſcac. record. et proceſſ. hujuſmodi extra dict. ſcaccar. et aſſumptis ſibi juſticiariis et aliis peritis talibus qualem ſibi videbit, fore aſſumen. vocari fac. coram eis baron. de ſcaccar. præd. ad audiend. information. ſuas et cauſas judiciorum ſuorum et ſuper hac negotium hujuſmodi debite fac. examinari. Et ſi quis error invent. fuit illum corrigi et rotulos emendari ac poſtea eos in dict. ſcaccar. ad executionem inde * faciend. remitt. fac. ſicut pertinet prout in eod. ſtatuto plenius continuitur. Nos igitur volentes errorem ſi quis fuerit juxta formam ſtat. præd. corrigi et celerem juſtitiam fieri in hac parte vobis mandamus quod ſit judicium inde redditum ſit tunc record. et proceſſ. præd. cum omnibus ea tangen. coram dom. commiſſionariis ad cuſtod. ſigillum magnum Angliæ et vobis vos præfat. theſaur. in cameram conſilii juxta ſcaccarium præd.* [*vocat.* THE COUNCIL CHAMBER] *die Martis videlicet nono die inſtantis menſis Februarii venire fac. ut quod dom. commiſſionarii et vos præfat. theſaur. viſis et examinar. record. et proceſſ. præd. auditiſq; informationibus veſtris vos præfat. barones ulterius in hac parte de conſilio juſtitium et aliorum peritor. hujuſmodi fieri fac. quod de jure et ſecundum formam ſtat. præd. fuerit faciend. T. Nobis ipſis apud* WESTM. *primo die Februarii, anno regni W. 3.* FISH. *Alloc.* R. ATKINS.

* [43]

RECORD. *et* PROCESS. *de quibus in* BREVI DE ERRORE *prædict. fit mentio ſequitur, &c.*

Et

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Et ſuper hoc GEORGIUS TREBY *miles attorn. dictor. dom. regis et dom. reginæ nunc general. qui pro eiſdem dom. rege et dom. regina in hac parte ſequitur. præſen. hic in curia in propria perſona ſua pro eiſdem dom. rege et dom. regina dicit quod in record. et in proceſſ. præd. necnon in redditione judicii præd. de et ſuper præd. morac. in lege manifeſte eſt errat. In hoc videlicet quod præd. literæ patent. ſuperius recitat. et materia in eiſdem content. et ſpecificat. ac præd. materia per dict.* JOSEPHUM HORNBY *in forma præd. allegat. minus ſufficien. in lege exiſtunt ad ipſos dom. regem et dom. reginam nunc de aut cum ſolution. denar. prædict. de arréarag. pro præd. ſeparalibus quarteriis anni aut cum præd. ſolution. præd. annual. reddit. ſive ſum. præfat.* JOSEPHO HORNBY *in forma præd. onerand. Eo tamen non obſtante adjudicat. exiſtit per barones præd. quod præd. literæ patent. præfat. dom. nuper regis* CAROLI SECUNDI *præfat.* JOSEPHO HORNBY, *ut præfertur conceſſ. et ſuperius recitat. et in hac parte inrotulat. juxta tenorem et effectum earundem ipſi præfat.* JOSEPHO HORNBY *allocar. Et quod præd. ſumma quinq. mille octingint. et duarum librarum quatuor denar. et un. obol pro arrearagiis dict. annual. reddit. ſive ſum. ſeptingent. quinquagint. duarum librarum ſeptendecim ſolid. et decem denar. reſid. præd. annual. reddit. ſive ſum. mille trecentar. quinquagint. duar. librar. decem ſolidor. et decem denar. in literis patent. præd. mentionat. ad præd. feſto Annunciationis* BEATÆ MARIÆ *præd. Virginis anno regni dict. dum. nuper regis* CAROLI SECUNDI *triceſimo quarto uſque ad feſtum et pro feſto Natalis* DOM. *anno primo regni dom.* GULIELMI *et dom.* MARIÆ *nunc regis et reginæ ſupradict. ſic ut præfertur arretr. et inſolut. exiſtent. ipſi præfat.* JOSEPHO HORNBY *ad recept. hujus ſcaccar. per man. commiſſionar. theſaur. et camerar. * ejuſdem recept. qui modo ſunt et per man. commiſſionar.* [44] *theſaur. et camerar. ejuſdem recept. pro et tempore exiſtent. de theſauro provenien. accreſcen. ex illa parte revention. de le exciſe in literis patent. præd. mentionat. fore conceſſ. dicto nuper regi* CAROLO SECUNDO *hæred. et ſucceſſ. ſuis imperpetuum per actum parliament. fact anno regni ejuſdem nuper regis duodecimo in man. eorund. commiſſionar. theſ. et camerar. jam exiſt. et in manus commiſſionar. theſ. theſaur. et camerar. impoſterum exiſtent. ſolvetur poſt et ultra annual. ſum. neceſſar. ſolubil. pro gubernation.* [ANGLICE management] *dict. revention. de* THE EXCISE, *et poſt et ultra annual. ſum. attingen. ad duodecim mille ducent. et novem libras quindecim ſolid. et unum obol. ſeu eo circiter in literis patent. prædict. mentionat. fore ſolubil. exinde annuatim* CATHERINÆ *nuper reginæ conſort. dicti nuper regis* CAROLI SECUNDI *et modo dom. reginæ dotiſſæ Angliæ et parcel. junctur. ſuæ, et poſt et ultra præd. ſummam vigint. et quatuor mille librarum in literis patent. præd. mentionat. fore ſolubil.* JACOBO *tunc* DUCI EBOR. *fratri dict. dom. nuper regis* CAROLI SECUNDI; *et quod præd. annual. reddit. ſive ſumma ſeptingent. quinquagint. et duarum librarum ſeptendecim ſolid. et decem denar. reſid. præd. annual. reddit. ſeu ſum. mille trecentar. quinquagint. et duarum librarum ſeptendecim ſolid. et decem denar. in præd. literis patent. mentionat. eidem* JOSEPHO HORNBY *ſicut præfertur allocat. et præd. feſto Natalis Dom. anno regni dict. dom.* GULIELMI

LIELMI *et dom.* MARIÆ *nunc regis et reginæ Angliæ, &c. primo ſupradict. ipſi eidem* JOSEPHO HORNBY *hæred. et aſſig. ſuis ad recept. hujus ſcaccar. per manus commiſſionar. theſ. theſaur. et camerar. ejuſdem recept. pro tempore exiſten. de theſauro de tempore in tempus provenien. accreſcen. et emergen. de præd. hæreditar. revention. de* THE EXCISE *in man. ſuis de tempore in tempus exiſten. poſt et ultra annual. ſummam neceſſar. ſolubil. pro gubernation.* [ANGLICE management] *dict. revention. de* THE EXCISE, *et poſt et ultra annual. ſummam attingen. ad duodecim mille ducent. et novem libras quindecim ſolid. quatuor denar. et unum obol. aut eo circiter in dictis literis patent. mentionat. fore ſolubil. exinde annuat. præfat.* CATHERINÆ *modo reginæ dotiſſæ Angliæ ut parcel. junctur. ſuæ, et poſt et ultra annual. ſummam viginti quatuor mille librarum in eiſdem literis patent. mentionat. fore annuat. nuper ſolubil. præfato* JACOBO DUCI EBOR. *et modo annuat. ſolubil. dom. regi et dom. reginæ nunc ad præd. ſeparal. feſta Annunciationis* BEATÆ MARIÆ VIRGINIS, *Nativitatis* SANCTI JOHANNIS BAPTISTÆ, SANCTI MICHAELIS ARCHANG. *et Nativitatis* DOM. DEI *noſtri communiter* [*vocat.* CHRISTMAS] *per æquas et æquales portiones annuatim ſolvetur. Et quod tall. toties quoties caſus requiret levand. ad dict. recept. ſcaccar. pro præd. annual. redditu ſive ſum. ſeptingent.* * *quinquaginta et duaram librarum ſeptendecim ſolid. et decem denar. reſid. præd. annualis redditus mille trecentarum quinquagint. duarum librarum ſeptendecim ſolid. et decem denar. idem reſid. redditus ſeu aliqua inde parcel. devcniret, debit. ſecundum formam et effectum literarum patent. præd. ſuper commiſſionarium theſaurarium, receptor. collector. ſive firmarium dict. hæreditariarum revention. de* THE EXCISE *per officiar. recept. hujus ſcaccar. pro tempore exiſten. ad quos levac. tallior. in ead. recept. pertinent ſeu pertinebit de tempore in tempus ad requiſition. ejuſdem* JOSEPHI HORNBY *hæred. et aſſign. ſuorum leventur ſecundum formam effectum et directionem literar. patent. prædict. et ſecundum curſum dict. recept. ſcaccar. ſalvo ſemper jure regis et reginæ nunc ſi, &c. Ideo in eo manifeſte eſt erratum; errat. eſt etiam in hoc quod per record. præd. apparet quod judicium præd. in forma præd. reddit. redd.t. exiſtit pro præfat.* JOSEPHO HORNBY *verſus eoſdem dom. regem et dom. reginam ubi per legem terræ hujus regni Angliæ judicium ill. reddi debuiſſet pro eiſdem dom. rege et dom. regina nunc verſus præfat.* JOSEPHUM HORNBY. *Ideo in eo manifeſte eſt erratum; et ſic idem* ATTORNAT. GENERAL. *pro eod. dom. rege et dom. regina dicit quod in record. et proceſſ. præd. ac in recordo judicii præd. manifeſte eſt erat. et ſuper inde idem attornat. dictor. dom. regis et dom. reginæ pro eiſdem dom. rege et dom. regina petit quod judicium illud ac errores præd. et alios in record. et proceſſ. exiſten re ceetur adnullatur et penitus pro nullo habeatur. Ac etiam brev. dictor. dom. regis et reginæ ad præmuniend. præfat.* JOSEPHUM HORNBY *ſuper. coram præfat. dom. cuſtod. magni ſigill. Angl. et comino theſaurario ad certum diem audit. record. ac proceſſ. præd. errores, et ulter. ad faciend. et recipiend. quod fuit juſtum in præmiſſis, &c. Et ulterius editur, &c.*

Super quo idem JOSEPH. HORNBY *dicit quod nec in record. et proceſſ. præd. nec in additione judicii præd. de et ſuper præd. mo-*

rac.

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rac. in lege in ullo eſt erratum. Et petit quod Curia dict. dom. regis et dom. reginæ nunc hic procedat tam ad examinationem record. et proceſſ. præd. quam materiæ præd. ſuperius pro erroribus aſſignat. Sed quia Curia vult adviſari in præmiſſis antequam, &c. ideo dies datus eſt partibus præd. in ſtatu quo ſicut nunc à die Paſch. uſq. in unum menſem proximum anno quarto regni dom. GULIELMI *et dom.* MARIÆ *nunc regis et reginæ de judicio ſuo inde audiend. eo quod Curia dict. dom. regis et dom. reginæ nunc inde nondum, &c. Ad quem diem vener. partes præd. et ob cauſam præd. habend. diem ulterior. in ſtatu quo nunc uſq. in octab. Sanct. Trin. ad judicium ſuum inde audiend. eo quod Curia hic inde nondum, &c.*

[46] * TREBY, *Chief Juſtice.* There are two points in this caſe:

FIRST, Whether theſe letters patents are valid in law, and ſufficient to bind the king?

SECONDLY, Whether the remedy that theſe petitioners have taken be proper?

As to THE FIRST, I am of opinion, that the letters patents are valid and ſufficient to bind the king. It is objected, that the word "*ſucceſſors*," in the ſtatute by which this revenue is given, intends that it ſhall be fixed in THE CROWN, and unalienable. To this I anſwer, that there are ſeveral other ſtatutes by which lands and other revenues were given to the king by the ſame words that are in this ſtatute; and yet the kings of *England* had always power to alien them, as appears by *Berkley's Caſe (a)*, by the *ſtatute of Monaſteries* and by *Vaughan (b)*. So *King Charles the Second* having an eſtate of inheritance in this branch of his revenue, had the ſame power to alien this as he had to alien any other part of it. It has been ſtrongly objected, that if the king ſhould have a power to alien all his lands and revenues, it might be of pernicious conſequence to his ſubjects, and that then our exchequer in *England* would be like THE SPANISH EXCHEQUER, of which it is ſaid, that it receives taxes and revenues from the general, only to pay them out to ſome particular perſons. To this I anſwer, that this might be ſome reaſon to induce the making an act of parliament to reſtrain the king's power of alienation; but ſince here the parliament has thought fit to give the king ſuch a power, we ought to acquieſce and ſubmit to it. But that which I ſhall chiefly proceed on is the judgment, which I think to be very extraordinary, and ſuch as THE BARONS could not give; for I do not think that they can award the king's treaſure out of THE EXCHEQUER.

Skin. 601. 611. Lord Somers Arg. 128. 5. Com. Dig. "Pleader" (3. B. 5.). 6. Com. Dig. "Prærogative" (D. 87.). Maddox, 271.

Qu. Whether the barons can award the King's treaſure out of the exchequer?

Then I take this judgment to be very erroneous and deficient in ſeveral particulars.

*[47] * FIRST, It leaves out THE TREASURER, who is the chief officer concerned in diſpoſing the king's money.

(a) Plowden, 234. to 248. (b) Vaugh. 62. See alſo 2. Roll.Abr. 198.

SECONDLY,

SECONDLY, The chamberlain of THE EXCHEQUER ought to have been mentioned as well as the treaſurer; and ſo is the judgment in the caſe of *Nevel* (*a*) and *Worth* (*b*), and alſo in *Cotton's Records*.

THIRDLY, This judgment appoints *tallies* to be ſtruck from time to time, and orders the method of payment of the ſeveral ſums of money, which I take it THE BARONS cannot do; for they ſeem to undertake to do what is proper work for an act of parliament, which only can appoint THE TREASURER to make payments in ſuch an order (*c*).

IN THE NEXT PLACE, I take it that this judgment cannot be amended, becauſe theſe are faults in ſubſtance, and the law is very nice and curious in judgments: ſo if a *miſericordia* be entered for a *capiatur*, the judgment is erroneous; ſo is it if it be *conceſſum eſt* inſtead of *conſideratum eſt*, &c. (*d*).

Now I come to the remedy, which I take to be the great and difficult point of the caſe. And I am of opinion, that no judgment can be given upon this petition to THE BARONS; for I do not think that the court of exchequer has any power to diſpoſe of the king's treaſure, and therefore I cannot ſee how this judgment can have any effect: indeed it is ſaid, that the petitioner will have a writ to the officers of the treaſury, or to THE TREASURER himſelf, and if they do not obey this *liberate*, that then they will enforce it by action; but this they cannot do, for I hold that the treaſurer may chooſe, upon bare warrant, to pay in what order he thinks fit.

Noy, 89. 8. Rol. Abr. 771. 774. 1. Roll. Rep. 278. Yelv. 130. 2. Cro. 386. 632. Hob. 194. 3. Cro. 442.

Then they have ſhewn no precedent that ever any ſuch action was brought; though indeed my LORD COKE (*e*) ſeems to hint at it, and ſo does *Plowden* (*f*), and the *Year Book* (*g*); but there the *liberate* always went to the ſubordinate officer, never to the treaſurer himſelf. By the treaſurer, I mean the treaſurer of the exchequer, and not the lord high treaſurer of *England*; for that great officer has long been diſcontinued, and when he was in being, the greateſt uſe of him was when he had the honour to be your lordſhip's colleague in this place (*h*).

* So that I take it, that THE TREASURER may, if he pleaſe, pay theſe annuities to the petitioners; but whether he will do it or no, is left to his conſcience and diſcretion; but he cannot be compelled to it but by authority of parliament. Then this remedy is not warranted by the courſe of THE EXCHEQUER: if there were any ſuch uſage there, I agree it would be the law of the land,

[48]

(*a*) Plowden, 378 to 381.
(*b*) Plowden, 457. 458.
(*c*) Year Book 9. *Hen.* 4. pl. 2?.
(*d*) Latch. 177. Popb. 203. 211.
(*e*) 4. Inſt. 116.
(*f*) Pl. Com. 186.
(*g*) Year Book 2. *Hen.* 7. pl. 8, 9, 10.
(*h*) See 2. Hawk. P. C. ch. 2. Forſter, 140.

and

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and ſo is *Rawlins's Caſe* (*a*), and *Plowden* (*b*), but there has been no ſuch uſage there; and in this point I concur with my brother LECHMERE, who perhaps has the greateſt experience in the court of exchequer of any judge that ever ſat there, for I think I lately heard him ſay, it was ſixty years ſince he practiſed there. I have reaſon to think, whatever *Mr. Plowden* ſays, that theſe *liberates* were granted upon petitions to THE KING himſelf, and not to THE BARONS; you may ſee abundance of them in *Ryley* (*c*). It appears indeed in *Brooke* (*d*), that upon delivery of this writ to the officer and aſſets in the exchequer, an action lay againſt the officer for non-payment; but that ever it could be brought againſt the treaſurer or chamberlain, was never heard of (*e*). But, ſay they, there is a clauſe in the patent which empowers the treaſurer, &c. to make payments, &c. and this they call a perpetual warrant. But this makes againſt the petitioners; for if it be ſo, why do they prefer a petition to the barons of the exchequer? If they can have their debt without a petition barely upon this patent, where there is a grant, a command, and warrant to the treaſurer and officers to pay the money (which, ſay they, amounts to a *liberate*), then it is a vain thing to ſue in the exchequer for a judgment; for it cannot be preſumed that a *liberate* under the ſeal of the exchequer *teſte* CHIEF BARON, ſhould be of more force than a *liberate* under the ſeal of *England teſte* MEIPSO (*f*).

The power of the *Court of Exchequer* over the king's treaſury.

To clear this point, it is neceſſary to enquire into the power of the court of the exchequer. I do agree that they are ſupreme auditors, and have authority over the king's treaſure; but it is *in tranſitu*, as upon the ſheriffs accounts, or any other of the king's officers concerning the bringing-in of the king's revenues into THE EXCHEQUER; but when the money is there, it is in its center, and THE BARONS have nothing to do with it; they are only conduits, but not products (*g*); and it would be of dangerous conſequence for ſo many to have to do with * the treaſury, leſt, as *Vernon* ſays in his Book (*h*), there be too many leaks in the ciſtern. I confeſs, the court of exchequer does uſe to enrol charters in the exchequer, and that is the foundation of the accounts, &c. and ſo is *Plowden* (*i*). But whether the barons of the exchequer have a power to control and command the treaſurer, is a great and arduous point; it is in effect, Whether the barons ſhall have the power to turn out the treaſurer when they pleaſe; and whether the petitions that were formerly preferred to the king, ſhall be now exhibited to the barons of the exchequer? which matters I muſt own I cannot be brought to imagine, though I

[49]

(*a*) 4. Co. 52.
(*b*) Plowd. 32.
(*c*) Ryley's Placita Parliamentaria.
(*d*) Bro. Abr. "Talley de Exche-"quer" T. ver. Eb. 136.
(*e*) Ante, 14.
(*f*) Regiſter, 191.
(*g*) 2. Inſt. 181. 4. Inſt. 115.
(*h*) Vernon's Conſiderations on the Court of Exchequer, printed in 1642; it was republiſhed in 1661 under the title of "The Exchequer Opened," &c. and, except the titles, both books are in every reſpect the ſame.
(*i*) Plowd. Comm. 320.

would

would think as favourably as poſſible in this caſe; for I give this opinion, not becauſe I would, but becauſe I muſt. But I take this power in the barons, to be againſt the nature and inſtitution of the court of exchequer; for they are originally empowered by the king to get in his revenue, and it is for the ſake of the revenue that they have any thing elſe to do; and all they do, is to convey the king's treaſure to its proper place, but they cannot diſpoſe of it; for there is no correſpondence between the barons and the officers of the treaſury. Upon reverſal of *attainders* we know there is no reſtitution of the money paid to THE KING; and the reaſon is, becauſe the barons cannot in ſuch caſe controul the treaſury. I remember ſeveral years ſince there was a ſolicitor who brought the rolls of a forfeited eſtate in diſpute into court; and they ordered the money to be put into the hands of THE REMEMBRANCER; for they ſaid, that if it was once paid into THE TREASURY there was no getting it out again.

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On reverſal of attainders, no reſtitution of money paid to the king.

The caſe in ſhort is no more than this: Suppoſe THE KING be indebted to THE PETITIONERS, and alſo to the army, the fleets, &c. now who ſhall direct the payment of theſe debts, the barons or the treaſurer? who is the beſt judge of the ſtate of the kingdom and of its neceſſities? So that ſuppoſe there was only four thouſand pounds in THE EXCHEQUER, and we were threatened with a foreign invaſion, How ſhall this money be diſpoſed? Says THE TREASURER, To raiſe men, to pay the army and our fleets, that by their aſſiſtance we may prevent the enemy from coming amongſt us. No, ſay THE BARONS, we muſt pay the bankers with this money, though at the ſame time we open the gates and let in *Hannibal* to our utter ruin and deſtruction. My LORD COKE, in treating of the court of the exchequer (*a*), takes notice of the oaths taken * by THE TREASURER, and alſo by THE BARONS. In the treaſurer's oath it is mentioned, that "he is "to keep and diſpenſe the king's treaſure ſafely;" but in the barons oath there is not a word of this matter taken notice of; which to me is an argument that the treaſurer is judge in point of iſſuing money, whether it be due and payable or not, and to whom, in what manner, and when it ſhall be paid, &c. And this I take to be the true reaſon, why no action can be brought againſt THE TREASURER, becauſe he acts as *a judge*, and not as *a miniſter* of the court, for he is not attendant to it, as ſheriffs, bailiffs, &c. are; ſo I take "it may be paid" is enough for THE BARONS to ſay; but "muſt be paid" is only for THE TREASURER to ſay (*b*). It is treaſon to counterfeit the great or privy ſeal, becauſe they only have to do with the king's revenue; but it was never thought treaſon to counterfeit the exchequer ſeal, which has nothing to do with it (*c*). In the conteſts heretofore between the king and the people, what was meant when they complained that the king's treaſure was miſpent and miſemployed? Not that it was paid away

* [50]

The treaſurer of the exchequer, his oath.

The nature of his office.

Vide Moore, 475. 11. Co. 90, 92.

(*a*) 4. Inſt. 103. to 116. (*b*) See Doddington's Caſe, Cro. Eliz. 545.
(*c*) Plowd. 223.

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without letters patents, or taken away without the king's grant; but it was this, they blamed THE TREASURER, becauſe he paid away the king's treaſure to perſons unworthy, to minions and favourites, though they had grants from the crown by letters patents. But yet it was left to THE TREASURER's diſcretion to have paid them or not; which he ſhould not have done, when, perhaps, the public good required it.

Now I come to the authorities in our books. I ſhall begin with the *Year Book* of *Edward the Third* (*a*), and *Book of Aſſizes* (*b*), wherein it is ſaid, by THE CHIEF BARON, that we ſhall take conuſance of all matters that may turn to the king's advantage, but not a word concerning the diſpoſal of the treaſury, and the Year Book of *Henry the Sixth* (*c*) and *Roll* (*d*) are expreſs. So in the caſe of *Stradling v. Morgan* (*e*) it is ſaid, that no pleas ſhall be held in the exchequer but for the advantage of recovery of the king's debts, and bringing in his revenues; ſo that the common pleas in the exchequer are only founded on the getting in of the king's revenue. I chooſe to cite *Mr. Plowden*, becauſe his book is ſo mightily relied on by the other ſide; I mean the caſes of *Nevill* and *Wroth* (*f*). I believe it was the authority of thoſe caſes that raiſed all this duſt, but I ſhall anſwer them by and by, and at preſent ſhall only
[51] obſerve, that there is not one law-book that * gives theſe caſes the credit to mention them, I mean as to this point of proceeding by petition to the barons, &c. So in the *Earl of Devonſhire's Caſe* (*g*) there is no notice taken of *Nevill's Caſe* (*h*), and *Wroth's Caſe* (*i*), though there was opportunity enough to have mentioned them, if they thought they had been of any weight and authority. So in *Roll's Abridgment* (*k*), and in *Roll's Reports* (*l*), the reſolution in the *Earl of Devonſhire's Caſe* (*m*) is cited, but not a word of *Nevill's Caſe* (*n*), or *Wroth's Caſe* (*o*).

In the next place I ſhall mention ſome treatiſes concerning the court of exchequer.

FIRST, There is *Gervaſius Tilburienſis* (*p*), who ſets forth the juriſdiction of the court of exchequer, but mentions nothing of this power in THE BARONS to controul the treaſury. The *capitalis juſtitiarius Angliæ* had indeed a controul over THE TREASURER himſelf, as appears from *Spelman* (*q*). So when *Hugo de Burgo*, who was the laſt great juſticiary, was in diſgrace, he was charged to render an account of the miſpending of the king's revenue; which

(*a*) 2. *Edw.* 3. pl. 25.
(*b*) 38 Aſſize, pl. 20.
(*c*) 19. *Hen.* 6. pl. 62, 63.
(*d*) 2. Roll. Rep. 301.
(*e*) Plowden, 207.
(*f*) Sir Henry Nevill's Caſe, Plowd. 377.; and Sir Thomas Wroth's Caſe, Plowd. 452.
(*g*) 11. Co. 92.
(*h*) Plow. 377.
(*i*) Plow. 452.
(*k*) 2. Roll. Abr. 260.
(*l*) 2. Roll. Rep. 180. 183.
(*m*) See Moor, 476. 2. Inſt. 555. Litt. Rep. 91.
(*n*) Plowd. 377.
(*o*) Plowd. 452.
(*p*) Gervaſius Tilburienſis de Rebus in Scaccario Geſtis.
(*q*) Spel. Gloſſ. 71. 331.

ſhews

ſhews that he had a power over THE TREASURER: but ever ſince this great office has been diſcontinued THE TREASURER has acted according to his own diſcretion. The next book that I ſhall quote is called the *Diverſity of Courts (a)*; it is mentioned in my *Lord Coke's Preface to the Tenth Report*: but there is nothing of this power in THE BARONS mentioned there. Neither is it taken notice of in *the Mirror (b)*, in *Fleta (c)*, in *Britton (d)*, in *Crompton (e)*, which book was printed fifteen years after *Mr. Plowden's*, nor in the *Second Inſtitute (f)*, nor in the *Fourth Inſtitute (g)*, where the full authority of this court is fully ſet forth. And I cannot but alſo obſerve, that *Mr. Prinn*, in a book which he printed on purpoſe to animadvert on my *Lord Coke's Fourth Inſtitute (h)*, does not take notice of any ſuch power. I ſhall beg leave alſo to mention *Mr. Vernon (i)*, and *Mr. Cambden (k)*, and *Sir Tho. Smith (l)*, who were great and learned men, though their books, I confeſs, are not of authority: but if there had been any ſuch power in THE BARONS of the exchequer, it is probable they would have taken notice of it. Next, there are *Savil's Reports*, *Lane's Reports*, and my brother *Hardreſs's Reports*, which treat chiefly of THE COURT OF EXCHEQUER; but yet they give not the leaſt countenance to any ſuch power: ſo in 1. *Roll. Abr.* 538, 539. in *Lane's Caſe*, 2. *Co.* 16. 2. *Roll. Rep.* 294. there is not one ſyllable of it.

*I ſhall conclude this point with this obſervation, that ſince there were two great powers in the barons (as is pretended), one of bringing in money into the exchequer, and the other of paying it out, that yet theſe books ſhould be all ſilent as to the greateſt power of paying it out, is very ſtrange and unaccountable; which indeed does induce me to believe, that there is no ſuch power in the barons, and that thoſe petitioners have mentioned in their petition the only way of having their annuities; that is, as their former payments were made, *viz.* by warrant from the lord treaſurer. * [52]

Now I come to the objections.

FIRST, They quote *Ryley's Placita Parliamentaria (m)*; but if I can apprehend them, thoſe words make againſt the petitioners. Then *Margery Parker's Caſe (n)* was mightily inſiſted on, and indeed at firſt I thought there was ſomething in it; but upon a ſtrict peruſal I find it is conſiſtent enough with my opinion: in-

(*a*) Originally publiſhed in French in 1525.; but there is an Engliſh edition of 1646.

(*b*) Horne's Mirror of Juſtices, cap. 1. ſ. 14.

(*c*) Fleta, lib. 2. c. 25.

(*d*) Britton, ch. 2. ſ. 6.

(*e*) Cromp. Juriſdiction of Courts, 165.

(*f*) 2. Inſt. 551.

(*g*) 4. Inſt. 103.

(*h*) Publiſhed in 1669.

(*i*) Vernon's Conſiderations on the Court of Exchequer.

(*k*) Cambden's Britannia.

(*l*) Smith's Commonwealth of England.

(*m*) Ryley, 251. 253. 257. 262. 337. 526 529. &c.

(*n*) Year Book, 9. *Hen.* 6. pl. 12, 13.

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deed BABINGTON mentioned there a remedy by petition to the barons, but this was only a word ſlipped out; but the Court gave no regard to it, and were of opinion againſt it, that there was no ſuch remedy. And it is obſervable, that *Brook* in his *Abridgment* takes no notice of BABINGTON's opinion, though he does of all the reſt of the caſe. The next thing objected is, that the barons do every Term ſend a *liberate* to the officers of the treaſury under the exchequer-ſeal to pay money for paper, pens, and other neceſſaries for the court of the exchequer; the charge of which, I am told, comes to two or three hundred pounds a-year. To this I anſwer, that firſt this writ goes without any judgment at all; ſo that according to this, the petitioners needed not to have had any judgment; but the true reaſon of iſſuing forth this writ is grounded on this: 'In the treaſurer's commiſſion there is this clauſe, that he ſhall pay out ſuch ſums of money as are required *pro neceſſariis ſcaccarii*: but of this writ they take no further notice than as a certificate when they make up their accounts.

Now for the precedents.

The court of exchequer is guided by multitudes of precedents *(a)*; but here they have not one precedent for ſuch a power over the king's revenue, to which the law has ſo great a regard; for there is nothing in the law ſo fenced, ſo guarded, and ſo ſecured, as the king's inheritance: * where that is concerned, there muſt be *petition of right*, an inquiſition found, beſides ſearches, &c.; ſo careful is the law of the king's inheritance and revenue. 'But now here the king muſt loſe his freehold without trial, which his ſubjects ſhall not do, as appears by MAGNA CHARTA *(b)*.

[53]

In the next place I ſhall anſwer the caſes, which indeed give life to the preſent caſe, and are the foundation of it. FIRST, as to *Nevill's Caſe* (*c*): I obſerve the petitioners counſel do not agree in their title to it: ſome ſay, it was grounded on a *petition of right*; others, that it was a *monſtrans de droit*; and others, that it was a complaint againſt the officers of the treaſury. But true it is, that *Mr. Plowden* is preciſe and expreſs in the point, though it ſeems to me to be but his own private opinion; and I muſt take the boldneſs to ſay that he is miſtaken, as will appear from theſe books, 13. *Hen.* 7. *pl.* 15. 4. *Edw.* 4. *pl.* 23. *b.* 1. *Leo.* 190. 1. *And.* 253. *Savile*, 125. all which caſes happened but twelve years after *Nevill's*, and yet are contrary to it. By the ſame books and the ſame reaſons it appears, that *Wroth's Caſe (d)* ought to have no more weight than *Nevill's*, &c.

(*a*) Lane's Caſe, 2. Co. 16, Moor, 565. Kemp *v.* Barnard, Cro. Car. 513. Plowd. 230. 320. 2. Roll. 524 Cro. Car. 528.

(*b*) 9. *Hen.* 3. ſtat. 1. c. 20.; the 3. *Edw.* 1. c. 24. ; the 25. *Edw.* 3. ſtat. 5. c. 4.; the 28. *Edw.* 3. c. 3. ; the 52. *Hen.* 3. c. 22.; the 15. *Rich.* 2. c. 12.; and the 16. *Rich.* 2. c. 2.

(*c*) Plowd. 377.

(*d*) Plowd. 452.

Therefore

Therefore I conclude, that this judgment given by the barons of the exchequer is an erroneous judgment, and ought to be reverſed.

HOLT, *Chief Juſtice, contra.* In this caſe there have been two points made:

FIRST, Whether this grant be good?

SECONDLY, Whether there be a proper courſe taken by the patentees?

There has indeed been A THIRD POINT ſtarted by my brother who argued laſt, and that reſpects the entering of the judgment.

As to THE FIRST QUESTION, I hold the grant to be good, and all who have argued here have concurred in the ſame opinion. I do confeſs, that this is the great point of the caſe, and 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 ſeiſed of an eſtate in fee of this revenue; for to ſuch an eſtate a power of alienation is incident (*a*). 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 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 ſeiſed in the right of his church; but the king has nobody required to conſent to his alienations. To ſay that he may alien by the 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 his 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 has 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 ſeiſed 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 ſeiſed *in jure coronæ*, and ſhall he then have leſs power

Comb. 270. 271.

* [54]

Whether, and in what caſes, the king may alien his revenue.

That the law will not permit the king to do wrong to the ſubject, *et à fortiori* to the whole kingdom.

Vide Co. Lit. 190. b. 2. Inſt. 631. 1. Co. 44. b. 7. Co. 12. b. 11. Co. 72. 1. Rol. R. 167. Noy, 182. Mo. 416. Godb. 317. Dav. 75. Cro. A. g. 60. Plo. 246. 487. b. 13 *E.* 4. 8. 1. *H.* 7. 90.

(*a*) Littleton's Tenures, ſect. 360.

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2. Sid. 137. 142. 1. Hale, 61. 101. Co. Lit. 16.

[55]

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 (*a*). 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 (*b*). And there ought to be a power in all governments to reward perſons that deſerve well, for rewards and puniſhments are the ſupporters 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 (*c*). And this has been allowed of by act of parliament, as appears by 34. *Hen.* 8. c. 20. But ſome perhaps will ſay, that I have been talking little to the purpoſe, for that they do not deny that the king might alien his own demeſnes, 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 alienating any ſort of their revenues. As for the lands in *ancient 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 ſuſtenance and huſbandry, not to be impanelled on any inqueſt; and yet, notwithſtanding all this, theſe lands were always alienable; and if theſe lands were alienable, What eſtates in the crown are not alienable? And our books do take notice that theſe eſtates are alienable (*d*). 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 (e)*? for he may grant a county palatine, which has *jura regalia*; ſo he has granted a power to pardon treaſon or felony, &c. Indeed theſe prerogatives are re-aſſumed to the crown by the ſtatute 27. *Hen.* 8. c. 24. 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

Ancient demeſne lands alienable, becauſe poſſeſſed by the king in his perſonal capacity.

(*a*) Plowden, 105. Dyer, 222. Staundford Prerogativa Regis, 38. 4. Bac. Abr. 205.

(*b*) Cotton's Poſt. 175.

(*c*) Selden's Tides of Honour, p. 838. and Calvin's Caſe, 7. Co. 12.

(*d*) Fitz. Nat. Brev. 13. 166. and

(*e*) 9. Co. 25. Moor, 474. Palm. 78. 1. Mod. 232. 4. Bac. Abr. 205.

belonged

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; as the *Year Books* 21. *Ed.* 3. 47. 29. *Ed.* 3. *Plowd.* 1, 2. 4. *Inſt.* 45. *Davis*, 7. 14. *Knighton*, 1684. 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 affect inheritances of another nature I cannot ſee; but even theſe inheritances were always in effect alienable, for they might have been releaſed. The king may grant to be free of paſſage, *Sir Thomas Waller's Caſe*; 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 *Britton* (*a*) is otherwiſe, and ſo is *Selden* (*b*). And *Bracton* himſelf ſeems to be of another opinion where he ſays (*c*), 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* alſo admits, that the king may grant away his revenues. *Forteſcue*, in his book *de Laudibus Legum Angliæ*, ſays, "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 the reign of *Henry the Fourth* (*d*), 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. * Then 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 ſubjects officers. But that does not follow, they are only a means to convey to their fellow-ſubjects their right, and that 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

27. *Hen.* 8. c. 28.
31. *Hen.* 8. c. 13.
32. *Hen.* 8. c. 24.
Skin. 602.

Fee farm rents granted by act of parliament, and why.
Skin. 607.
1. Lev. 29.
Plowd. 214.

[57]

(*a*) Britt. 87.
(*b*) Selden, 549. and 552.
(*c*) Bracton, bk. 2. c. 57.
(*d*) Year Book 6. *Hen.* 4. pl. 14.

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to the people. 4. *Inſt.* 162. 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. *Plo.* 554. So that I conclude this point, that theſe letters patents 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 the ſtatute 2. *Edw.* 6. c. 8. and that is by way of *traverſe* to the king's title. 4. *Co.* 54. 2. *Inſt.* 688

Remedies to recover againſt the king.

Skin. 608.

Petition of right, the nature of it.

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 pleaſe But it is not neceſſary for two reaſons: FIRST, 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 *(a)*. 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. SECONDLY, 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 appeared of record *(b)*. A *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 in *The Sadler's Caſe* (c). 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 *Ryley* (d) 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.

Monſtrans de droit, where it lies.

* [58]

THE NEXT OBJECTION is, that in this precedent there was a *liberate*. This writ is in its nature a *writ of allowance* (e); but this writ does not give any manner of juriſdiction, for the court may hold plea, and proceed without it. But the next anſwer that I give to this, and which may be ſatisfactory to any body, is the ſtatute of 5. *Rich.* 2. c. 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 I take it to be very

Power of the barons of the exchequer to anſwer demands.

(a) Year Book 9. *Hen.* 4. pl. 4. Co Ent. 462.
(b) Keilway, 178.
(c) Hob. 334. 4. Co. 54.
(d) Ryley's Placita Parliamentaria, 257. 351. Staundford, 72.
(e) Regiſter, 192.

plain,

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 has nothing to do with civil pleas (*a*) Indeed *Fitzherbert* (*b*) mentions the treaſurer; but that 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* (*c*); 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* (*d*) 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; the queen ſhall not have action againſt 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 Broughton's Caſe*, which happened in the twenty-fifth year of *Charles the Second*. 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 amoved. 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 might hold plea there of a *monſtrans de 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 right of bringing 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 the 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, and in 2. *Inſt.* 551. there you may ſee what pleas they may hold. But here the plea does 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, has obliged himſelf to make ſuch payments. As in the caſe of an

Of the treaſurer.

* [59]

(*a*) Regiſter, 137.
(*b*) Fitz. N. B. 129.
(*c*) Co. Ent. "Claim of Liberties," 93.
(*d*) In 9. *Hen.* 6. pl. 13.

obligation

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obligation where debt is brought upon it, and a recovery is had; it is not ſo much the judgment of the Court that 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. There is *Sir Thomas Wroth's Caſe*, in *Plowden (a)*, 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 the Eighth* had appointed *Sir Thomas Wroth* to be gentleman-uſher of the privy-chamber to *Prince Edward*, and he granted to the ſaid *Sir Thomas*, for the exerciſe of the ſame office, an annuity of twenty pounds, 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 them 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 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 (b)* under her great ſeal an annuity of forty pounds a-year, 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. *Hen.* 8. c. 39. proceeded in the ſame manner, and relieved grantees of rent-charges, &c. As to *Nevill's Caſe*, alſo in *Plowden (c)*, I take it likewiſe to be a full authority in point. An yearly rent-charge of three pounds ten ſhillings was granted to *Sir Henry Nevill*, and another for the exerciſe of the office of keeper of a park out of a manor for their lives; one is attainted; 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

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Court of augmentations.

(a) Plowd. 452. (b) Cro. Jac. 78. (c) Plowd. 377.

annuity

annuity were paid to *Sir Henry Nevill* at the * receipt of the exchequer by the hands of the treaſurer and the chamberlain.

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Firſt, I grant that thoſe lands were alſo under the ſurvey of the *court of augmentations*; but that, I conceive, makes nothing againſt me, for the reaſons before-mentioned.

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, in Trinity Term, in the firſt of *Queen Mary*, *Roll* 126.; in the ſecond of *Elizabeth*, *Roll* 145.; *Michaelmas Term*, 13. *Queen Elizabeth*, *Roll* 347.; *Hilary Term*, 13. *Elizabeth*, *Roll* 143.; *Eaſter Term*, 1. *Q. Roll* 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 purchaſe 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.

Money iſſuing out of THE EXCHEQUER by order of THE EXCHEQUER.

It has been objected, that money which once comes into the exchequer can never be taken out, *Reg.* 193. But if this be true in a general ſenſe, that none of the king's revenues that are brought into the exchequer can be paid out, it would deſtroy all annuities, rent-charges, and other payments, which the crown is obliged to make. It is true, if a man be outlawed in the king's bench, and the party's goods are ſeized into the king's hands, and then the outlawry is reverſed, there can be no reſtitution (*a*). 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 for 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.

Reſtitution of outlawed goods, and on attainder.

There remains after all a great objection, had it any weight, and that is, *Cui bono?* If the patentees 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. *Hen.* 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.

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Action of debt on a *liberate*, and why.

Ante, 13, 14. 48. Skin. 257. 1. Salk. 323. 1. Vent. 95. 2. Saund. 47. 344.

I ſhall only obſerve one thing more, and ſo conclude, and that is in anſwer to my brother who argued laſt; for he ſtruck very hard at the judgment given by the barons. He thought that it

(*a*) But ſee Cro. Eliz. 278. 2. Vern. 312. Bunb. 105.

was

THE KING *against* MONEY; OR, THE BANKERS CASE,

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 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. *Edw.* 3. And this last point was so ruled upon a debate in the house of lords, and was the case of *The King v. Sainthell*, in the thirtieth year of *Charles the Second.*

So that upon the whole I AM OF OPINION, that the judgment given by THE BARONS ought to be affirmed.

But afterwards SOMERS, *Lord 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 controul 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 TREBY, *Chief Justice*, went on (*a*).

(*a*) SOMERS, *Lord Keeper*, distinguished himself upon this occasion by one of the most elaborate arguments ever delivered in WESTMINSTER HALL, edit. 1733, in 4to.; but a majority of the Judges who argued in the exchequer chamber were unanimously of opinion on the first point, that the grant out of the excise was good, and a majority of them concurred with HOLT, *Chief Justice*, against the opinion of TREBY and LORD SOMERS, that the petition to the barons of the exchequer was the proper remedy. A question therefore was made, Whether the opinion of the majority of *the Judges* should prevail? or, Whether they were *mere assistants* to the LORD TREASURER and LORD KEEPER? And on this point being referred to THE TWELVE JUDGES, *seven* against *three* held, that the LORD TREASURER and LORD KEEPER were not concluded by the opinions of the Judges, and therefore that the LORD KEEPER (there being no LORD TREASURER) might give judgment in this cause according to his own opinion; and accordingly LORD SOMERS reversed the judgment of THE COURT OF EXCHEQUER. But the case was afterwards carried by writ of error into *Parliament*, when the judgment of the court of EXCHEQUER CHAMBER was *reversed*, and the judgment of THE COURT OF EXCHEQUER *affirmed*. 11. St. Trials, 137. But it was enacted by 12. & 13. *Will.* 3. c. 13. s. 15. "That in lieu and discharge of "the perpetual annual payments and of "all arrears thereof, granted by *Charles* "*the Second* out of the hereditary ex-"cise, the said excise should be charged "with the payment of three *per cent.* "*per annum* on the principal sums due "to the respective patentees, subject to "be redeemed on the payment of a "*moiety* of the principal sums mentioned "in their patents." The moiety of this debt due to the bankers amounted to the sum of 664,263l. By the statute of 3. *Geo.* 1. c. 7. this sum was provided for to be subscribed into a joint stock of annuities at five *per cent. per annum*, redeemable by parliament, and transferable at the Bank. Many of these debts, however, remained unclaimed, and in the year 1726 there remained in the exchequer the sum of 10,725l. 5s. 3d. which had been reserved to answer the *annuities* on such unclaimed DEBTS. By 13. *Geo.* 1. c. 3. the said sum is directed to make a part of the *sinking fund*, and to be applied towards the redemption of the annuities, as directed by the act.

MICHAELMAS

MICHAELMAS TERM,

The Seventh of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir William Gregory, *Knt.*
Sir Thomas Rokeby, *Knt.*
Sir Samuel Eyre, *Knt.* } *Juſtices.*

Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

Buſh *againſt* Allen.

Caſe 23.

If a teſtator deviſe the *iſſues and profits* of certain lands to his wife, to be paid *to her* by his executors, the executors ſhall take the lands *in truſt* to receive the rents and profits to *the uſe* of the wife.—S. C. poſt. 101. S. C. 1. Salk. 228. S. C. Comb. 375. Yelv. 73. Cro. Eliz. 674. 734. Cro. Car. 368. Allen, 45. Carter, 25. 2. Vent. 57. Lut. 824. Salk. 679. 3. Lev. 259. 3. Atk. 481. 5. Bac. Abr. 381. 2. Chan. Rep. 117. Cowp. 43. 299. 1. Term Rep. 346. 4. Term Rep. 89.

THE point is this: A man deviſes to *Jane Shore*, the wife of *J. S.* the iſſues and profits of certain lands to be paid by his executors.

The queſtion is, Whether this be a deviſe of *the land* to her for life; or whether the executors ſhall receive *the profits* to the uſe of the deviſee?

HOLT, *Chief Juſtice.* "To be paid by the executors to her" ſhews the teſtator's intent that the huſband ſhould have nothing to do with it *(a)*. Why ſhould not this be a deviſe to the executors

(a) A teſtator deviſed lands in truſt to pay the *rents and profits* to his daughter (whoſe huſband was then living) for her life, notwithſtanding her coverture, and *not to be ſubject to any controul, &c. of her huſband*, nor liable to any debts which he *had* or *ſhould* contract; afterwards the deviſor made a codicil, taking notice of the death of the daughter's huſband, in which codicil he ratified and confirmed his will. And it was held, that the intention of the teſtator clearly was, that his daughter ſhould enjoy the eſtate free from the controul of *any* huſband, Beable *v.* Dodd, 1. Term Rep. 193.

for

Bush *againſt* Allen.

for her life, upon truſt to pay the profits to her? And this is fully to perform the will, the intent of which was to exclude the huſband wholly.

Adjournatur.

At another day,

Holt, *Chief Juſtice.* The queſtion is, Whether this is a deviſe of *the lands* to his wife for her life, and that the other words ſhall be void; or whether it ſhall be to the executors for her life? It ſeems to me to be a deviſe to her; for a deviſe of *the rents and profits* is a deviſe of *the land* itſelf; and if this ſhall not be conſtrued a deviſe to her, then the laſt words contradict the former; and then you will make a deviſe by implication to the executors againſt an expreſs deviſe before.

Rokeby, *Juſtice.* But then the huſband ſhall intermeddle where the deviſor intended to exclude him. I rely upon the caſe of *Griffith v. Smith (a)*: A man poſſeſſed of * a term for years of lands, deviſed *the profits* thereof for ſo many years as he ſhould live; and after he deviſed *the profits* thereof to twenty of his poor kindred; and that after the death of his wife the lands ſhould be let by the advice of his overſeers, and the rent diſtributed to his ſaid poor kindred; and made his wife executrix: and it was reſolved by all the Judges in the exchequer chamber, that although a deviſe of *the profits* be a deviſe of *the land* itſelf, if there be no other circumſtance in the caſe, yet becauſe the deviſor had declared, that the poor kindred ſhould not have the property of the term, and he had appointed a leaſe to be made for rent, the executor had the term upon the conſideration to make the leaſe and diſtribution, and the poor kindred had only a truſt, and no intereſt.

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Holt, *Chief Juſtice.* In that caſe it remained in the executor, and not in the deviſees.

Eyre, *Juſtice.* I think the ſubſequent words make it a deviſe to the executors in truſt for the wife.

Judgment for the defendant, Holt, *Chief Juſtice, diſſentiente (b).*

(*a*) Moor, 753.

(*b*) Salkeld ſays, that Holt, *Chief Juſtice*, ſeemed ſtrongly to incline, that the executors were truſtees for the wife, S. C. 1. Salk. 228. It appears, however, that he was afterwards of opinion, that it was a deviſe of the land to the wife. But the other Judges were of a contrary opinion, S. C. Comb. 375. and in Trinity Term, 8. *Will.* 3. judgment was given for the defendant.

Lady

Lady Gerard *againſt* Lord Gerard.

Caſe 24.

LADY GERARD brought a *writ of dower*, and demanded the third part of a capital meſſuage called *Bromley Hall*.

The defendant pleads, that time out of memory it had been called as well by the name of *Gerard's Bromley* as *Bromley Hall*, of which *Sir Thomas Gerard*, *Knight*, was, in the firſt year of *James the Firſt*, ſeiſed in fee; and was by the ſaid *King James* created *Lord Gerard*, of *Gerard's Bromley*, he being reſident and commorant with his family in the ſaid capital meſſuage; and the ſaid meſſuage then became *caput baroniæ ſuæ*, and derives the title of the meſſuage and barony to himſelf by divers deſcents, and demands judgment if ſhe ſhall be endowed of it, and avers, that he had aſſigned to her a third part of his other lands, &c.

The demandant demurs generally.

The court of common pleas gave judgment for the demandant; and now a writ of error is brought in the court of king's bench.

COUNSEL *for the plaintiff* in error. With ſubmiſſion this is an erroneous judgment. * The reaſon of the judgment in the common pleas was, that now there is no ſuch thing as *caput baroniæ*; but I hope to prove there are at this day many *capita baroniæ*, and that they are exempted from dower: and this appears in the *Firſt Inſtitute (a)*, *Bracton (b)*, *Fitzherbert (c)*, the *Year Book (d)*, *Britton (e)*, and *Dugdale (f)*. Of the capital meſſuage the wife ſhall be endowed, *ſi non ſit caput comitatûs ſive baroniæ*; and that this privilege is perſonal appears in the *Inſtitutes (g)*, and in *Selden (h)*. The ancient way of creation of barons is altered: the king ſeldom creates a baron, and gives manors, &c. *ad ſuſtentandum nomen et onus*, VIZ. to give him lands to hold of him in chief, but grants an annuity. It is objected, that where a woman is once entitled to dower the king cannot deprive her of it, yet he may do it obliquely by this means of making a barony: ſo the king cannot exempt a man from arreſts, or being on juries, yet he may create a man a nobleman, and then he ſhall be exempted from all arreſts, and from ſerving on juries. ANOTHER OBJECTION is, that ſhe ſhall have an equivalent; but indeed that I take to be abſurd, for either ſhe has a right or not; if ſhe has a right, then there needs no equivalent. As for the recompence ſhe has in lieu of this dower, ſhe has the honour of being *a counteſs*; and there are many women in *England* would be contented to loſe a great part of their dower to be made *counteſſes*.

The *chief ſeat* or *capital manſion-houſe* of a particular family, although it has been in their poſſeſſion beyond the time of legal memory, is not converted into *caput baroniæ* by the poſſeſſor being created *a lord*; and therefore the wife of *a baronet*, though created *a peer*, ſhall ſtill have *dower* of ſuch chief ſeat or capital manſion-houſe.

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S. C. 3. Lev. 401. S. C. 1. Salk. 54. 253. S. C. Holt, 260. S. C. 1. Ld. Ray. 72. S. C. Ray. Ent. 342. S. C. Comb. 352. S. C. Skin. 592. S. C. 12. Mod. 74. S. C. Lev. Ent. 76. Co. Lit. 30. b. 31. b. Glanv. lib. 6. cap. 1. Bract. lib. 2. fol. 92, 93. 96. Brit. cap. 101. 103. Fleta, lib. 5. cap. 22, 23.

3. Com. Dig. "Dower" (A. 8.). Co. Lit. 9 b. 16 b. 4. *Hen.* 4. Fitz. 180. 9. *Hen.* 7. 1. Bro. "Dower," 102. Cro. Jac. 18. "Dower," 123.

(*a*) Co. Lit. 31.
(*b*) Bract. bk. 2. 93.
(*c*) Fitz. Abr. "Dower," 89.
(*d*) 4. *Hen.* 7. Rot. 7.
(*e*) Britton, 247.
(*f*) Dugdale's Summons to Parliament
(*g*) Co. Lit. 16. 2. Inſt. 9.
(*h*) Selden's Tit. Hon. 522. 557.

But,

LADY GERARD *aga* LORD GERARD.

But, SECONDLY, I take this judgment to be ill, becauſe of the double amerciament that is laid on my *Lord Gerard*; and for this I rely on *Specot's Caſe (a)*, that one ſhall not be twice amerced in one action againſt one and the ſame tenant, where the defendant pleads ſeveral iſſues, and are found againſt him. And prayed that judgment might be reverſed.

Skin. 592.

WRIGHT, *Serjeant*, *è contra*. By theſe pleadings it is not ſhewed how this houſe was made *caput baroniæ*; ſo that your lordſhip may judge it to be ſo. It is ſhewed, that *Sir Thomas Gerard* was made *a baron*, but it is not ſaid there was any barony made; and that there may be a baron without a barony appears in MAGNA CHARTA *(b)*, where it is ſaid, the heir of a baron ſhall pay no relief, unleſs he have a barony. The legal conſtitution of a barony is, when the king creates certain lands to be a * barony, and they were generally CASTLES fit for the defence of the realm. It is very ſtrange, that becauſe *Sir Thomas Gerard* was made a baron, that therefore his houſe muſt be a barony, and that his wife muſt be deprived of her third part of it, to which ſhe had once a good title. COKE ſays *(c)*, "the wife ſhall be endowed of all meſſuages," and this is one. As for the indecency that the wife might convert her third part to an inn, or introduce inmates, &c. the ſame may be ſaid of a commoner, but was never any objection. As for the authority of my LORD COKE, in his *Firſt Inſtitute*, it is not his own opinion, but only cited as the opinion of thoſe ancient authors. It is ſaid in the comment on MAGNA CHARTA, that the wife ſhall have her *quarantine* in the chief ſeat of her huſband, *niſi ſit caſtrum*, or *caput baroniæ*; ſo that they are the ſame, for their chief ſeats were frequently caſtles, and in ſuch caſe ſhe ſhould not have been endowed; but where ſhe ſhall have her *quarantine* there ſhe ſhall be endowed: that is a rule. As for the double amerciament, it is true a man ſhall not be twice amerced for the ſame thing; but here the demand is of two ſeveral things. FIRST, Of the hundred and rents, upon which judgment was preſently given. SECONDLY, For the houſe; and upon this my *Lord Gerard* has ſpecially pleaded, and we have judgment on the demurrer to that ſpecial plea. I pray judgment may be affirmed.

The legal conſtitution of a barony.

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9. *Hen.* 3. ſt. 1 c. 7.

20. *Hen.* 5. c. 1.

Baronies, what?

Vide Lib. Feud. lib. 2. Tit. 39. Seld. Tit. Honour, 880. 883. Dodda. of Hon. &c.

HOLT, *Chief Juſtice*. What is the barony? It is not becauſe it is the chief houſe. Baronies were anciently out of places. A barony is when the king gives lands or rents to the perſon he deſigns to make a baron, and thoſe he is to hold *per baroniam*; and in ſuch caſe ſomething might be ſaid to exclude a woman from dower; for there were caſtles alſo generally granted to do ſervice to the king: but indeed ſince the time of *Richard the Second*, that barons have been created by *patents*, there have been few baronies made. Then how can this houſe be made a barony that was always in the family of the *Gerards*? and here it was no caſtle neither.

(*a*) 5. Co. 38. (*b*) Mag. Char. Cap. 2. 2. Inſt. 9. (*c*) Ch. "Dower."

ROKEBY,

ROKEBY, *Juſtice*. When a barony was anciently granted, there was a caſtle with a territory alſo granted. Suppoſe there be a barony of *Stafford*, and all the houſes in the town of *Stafford* belonged before to the new baron, which houſe ſhall be called *caput baroniæ* ?

LADY GERARD *againſt* LORD GERARD.

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* HOLT, *Chief Juſtice*. As for the double amerciament, there may be ſeveral amerciaments for ſeveral offences. The reaſon of the amerciament is the delay, and if the defendant come in at the firſt day, it muſt be entered of record or it ſignifies nothing. Suppoſe there be an action brought on two deeds, and *non eſt factum* be pleaded to one, and a ſpecial plea to the other, and judgment be given for the plaintiff in both caſes, why certainly here ſhall be ſeveral fines if they enter ſeveral judgments. It is true, if they enter but one judgment, there ſhall be but one *capiatur (a)*. So it is of actions of aſſault and battery againſt two, where the one juſtifies, and the other confeſſes the action.

In dower, if judgment be given againſt the tenant on *confeſſion* and on demurrer, a *miſericordia* may be entered on each of the judgments.

8. Co. 61.
5. Co. 57.
Comb. 352.
2. Leon. 185.
1. Roll. Abr. 218. 1. Salk. 54. Skin. 503. 2. Saund. 296. 4. Com. Dig. 8vo. 708. 2. Bac. Abr. 512, 513.

The judgment was affirmed

(a) See 16. & 17. *Car.* 2. c. 8. ſ. 1. & 4. and 4. *Ann.* c. 16. ſ. 2.

Winchurſt *againſt* Maſely. Caſe 25.

MR. CARTHEW moved for leave to quaſh his own *writ of error* to reverſe a fine, becauſe one of the parties to the fine was omitted in the writ of error.

A writ of error to reverſe a fine, in which one of the parties to the fine is omitted, is erroneous; But the Court will not let the plaintiff in error quaſh his writ without a rule to ſhew cauſe, and then on payment of *coſts*.

HOLT, *Chief Juſtice*. We cannot do it. How can we take notice of any thing but what is on record? We cannot quaſh it on a foreign ſuggeſtion. There was a caſe in PEMBERTON's time, where a fine was levied by three, and two of them brought error to reverſe it, perhaps the other had nothing in the land, and it was reverſed.

But this is to be conſidered, that if a man be intitled to be tenant by the courteſy, and he joins in a fine with his wife of thoſe lands; whether his title to be tenant by the courteſy is not extinguiſhed if the fine be reverſed after her death. Indeed, if the fine be reverſed in her life-time, he may have a new title: if the huſband make a feoffment on condition of his wife's land, and ſhe dies, and then the condition is broken, ſhall he be tenant by the courteſy?

S. C. Holt, 271. 1. Salk. 45. 88. 194. 8. Mod. 316. 5. Com. Dig. 8vo. 714. 3. Com. Dig. 251. Stra. 139.

THEN you cannot have any *coſts* if the party enter a *non proſ.*; for the ſtatute 3. *Hen.* 7. c. 10. gives coſts on a *writ of error* only when it is *in ailatione executionis (a)*.

(a) But now by 4. & 5. *Ann* c. 16. ſ. 25. in order to prevent the great vexation of ſuing out defective writs of error, it is enacted, "that upon *quaſhing* "any writ of error for variance from "the original record, or other defect, "the defendants in ſuch error ſhall "recover, againſt the plaintiff ſuing "out ſuch writ, his coſts as he ſhould "have had if the judgment had been "affirmed, and to be recovered in the "ſame manner."

WINCHURST *againſt* MASELY.

We cannot let you *quaſh* it: but let them ſhew cauſe why you ſhould not *diſcontinue (a)*. Writs of error are rarely diſcontinued, but ſometimes they may be.

(*a*) By 8. & 9. *Will.* 3. c. 11. ſ. 2. "If judgment ſhall be given for the "defendant in any action, and the "plaintiff ſhall ſue a *writ of error*, and "the judgment ſhall be affirmed, or the "writ of error *diſcontinued*, or the plain-"tiff become nonſuit therein, the de-"fendant in error ſhall have judgment "to recover his coſts." See 3. Com. Dig. "Coſts" (B.).

* [68]

Caſe 26.

* Daſhwood's Caſe.

"Error pend-"ing" pleaded in abatement to debt on judg-ment.

PER CURIAM. In debt on a judgment obtained in the court of king's bench, "a writ of error pending" in the exchequer chamber, is a good plea in *abatement (a)*; but if the defendant conclude, "*non debet reſpondere quouſque*," it is not good, for we have no *re-ſummons*.

1. Sid. 236. 253. Pal. 187. 303. Ray. 100. 1. Lev. 153. 2. Mod. 194. Comb. 48. 199. 211. 219. 229. 332. 455. Skin. 388. 590. Carth. 200.

(*a*) But ſee Syms *v.* Tyms, 1. Show. 98. and Rotenhoffer *v.* Lenthall, 1. Show. 141. that in this caſe "a writ "of error depending" cannot be pleaded in abatement; but the Court will, according to the circumſtances of the caſe, ſtay the proceedings in the action on the judgment until the writ of error be determined. Faſwell *v.* Storce, 4. Burr. 2454.; Greble *v.* Abbot, Cowp. 72.; Entwiſt *v.* Shepherd, 2. Term Rep. 78.; Chriſtie *v.* Richardſon, 3. Term Rep. 78: Pool *v.* Charnock, 3. Term Rep. 79.; Evans *v.* Gilbert, 4. Term Rep. 436 —And ſee the caſe of Dighton *v.* Granville, 4. Mod. 248.

Caſe 27.

Lewſly *againſt* Budd.

If a ſtatute direct the ſtreets within the bills of mortality to be paved at the expence of *all the inhabitants*, not only thoſe inhabitants who live in *the ſtreets* which are paved, but thoſe whoſe houſes ſtand on the adjoining roads, not paved but within the pariſh, ſhall equally contribute to ſuch expence.

HOLT, *Chief Juſtice*. This caſe ſtands for the reſolution of the Court.

It is on two orders grounded on the ſtatute 2. *Will. & Mary*, c. 8. ſ. 8. and 9. for ſcavengers rates for cleanſing the ſtreets of *Newington*. One order ſtates that *all the inhabitants* ſhall contribute to it; the other ſtates, that only thoſe that live on *the pavement* ſhall contribute: and the queſtion is, Which of them is good? We are of opinion, that all the inhabitants ſhall contribute; for though it may be thought hard that they ſhall pay any thing towards *the pavement* who do not live on it, yet the words of the ſtatute are ſo ſtrong that it lays the charge on *all the inhabitants* without diſtinction; and where the ſtatute does not diſtinguiſh, we have no power to do it. Now in *Newington* there is a ſtreet that is paved and a great part of the town that is not, and there are ſeveral of the pariſh that live out of the town, and yet they are all bound to contribute. Beſides, they that live on *the pavement* are bound to pave

S. C. 1. Salk. 356. S. C. Skin. 643 S. C. Holt, 506. 2. Saund. 423. 2. Inſt. 653. 702. 2. Rol. 289. Cro. Eliz. 659. 843. 1. Bulſt. 20. 2. Rol. Rep. 262. 5. Co. 67. 1. Mod. 73. 3. Leon. 208. 1. Sid. 218. Poſt. 393.

their

their own doors: Then they are not exempted from repairing the highways; and therefore it is as reaſonable they ſhould repair *the pavement* of which they have the benefit; and an indefinite propoſition is equal to a general one. Then the ſtatute appoints, "that "they who do not live on *the pavement*, as well as they who do, "ſhall ſettle the rates;" and therefore it is reaſonable that they ſhould contribute to their own rates. Then the penalty of *the ſcavenger* is given to the overſeers generally. How this would be on the ſtatute 13. & 14. *Car.* 2. c. 12. we cannot tell; but on this ſtatute *all the inhabitants* ought to contribute towards the cleanſing of *the pavement*: And therefore one of the orders is good, and the other is bad, and ought to be quaſhed.

LEWSLY *againſt* BUDD.

* [69]

* Walker *againſt* Slackoe.

Caſe 28.

IN A WRIT OF ERROR all the parties to the firſt judgment did not join.

A writ of error in which ſome of the parties to the firſt judgment are omitted, is bad, and not amendable, although the omiſſion be the fault of THE CURSITOR.

HOLT, *Chief Juſtice*. The queſtion is, Whether this writ of error be amendable? It appears here, that the writ of error is not good, for all the parties to the firſt judgment ought to join in error, and it appears they have not done ſo here; for it not being ſaid that he who is omitted is dead, the writ of error is ill. But ſuppoſing that this is only a miſtake of THE CURSITOR, the queſtion is, Whether it be amendable? And we are of opinion that it is not, becauſe this is a writ to reverſe a judgment; and the ſtatutes were only made to amend writs for the ſupport of the judgment; and ſo is the ſtatute 8. *Hen.* 6. c. 12.

S. C. ante, 16. S. C. Comb. 354. S. C. Carth. 367. Vide 1. Sid. 164. 138, 139. 103. 1. Lev. 99. 3. Co. 2. 1. Mod. 153.

A defective writ of error cannot be amended on the motion of the defendant in error.

But if this fault were amendable, yet we think it muſt not be at the motion of the defendant; for no man can pray to amend another's plea or writ: he may take advantage of it, but cannot pray to have it amended; for every man may ſue or plead as he thinks fit, but this would force him to ſue in another manner; and it is not within any of the ſtatutes.

S. C. Holt, 54. S. C. 1. Ld. Ray. 71.

Amendments, when they tend to invalidate judgments, ſhall not be allowed.

The ſecond point is grounded on the reaſon in *Blackamore's Caſe (a)*. They have power of amendment in affirmance of judgments. And in no caſe whatever did the Court amend to ſet aſide a judgment, but only to ſupport it; and that was the deſign of all the ſtatutes.

6. Mod. 276. 285.

BY THE COURT. Let the writ of error be quaſhed *(b)*.

(*a*) 8. Co. 158. b. (*b*) See 5. *Geo.* 1. c. 13. Ante, 17. *notis.*

Case 29. Chamberlaine *against* Hewson.

If *a wife* obtain costs in the spiritual court in a suit against a woman for adultery with her husband, the husband may release them; but if the wife proceed in the spiritual court, and the *adulteress* plead the release, a *prohibition* shall go, except it appear that *the wife*, previous to the institution of her suit against the *adulteress*, was separated *à mensâ et thoro* from her husband, and allowed *alimony*.

THE CASE here was thus: *Mrs. Hewson*, the wife of *Colonel Hewson*, sued the plaintiff *Mrs. Chamberlaine* in the spiritual court for adultery with her husband, and had sentence there, and recovered eighty pounds costs against her. Then *Mrs. Chamberlaine* procures a release of *Colonel Hewson* under hand and seal; notwithstanding which the wife prosecuted her in the court christian for the costs. Upon which it was moved here for a prohibition, suggesting, that the ecclesiastical court had no conusance of this deed of release.

* WRIGHT, *Serjeant*, argued, that no prohibition ought to go to the spiritual court, for that they had conusance of all this matter; and that it was a rule in law, *Ubi cognitio principalis, ibi cognitio accessarii*; so that it is not material whether the release be good or not: but the point is, Whether this Court will think fit to meddle with it, since the original cause is cognizable by the spiritual court? There is a case *(a)* where a release was likewise pleaded in the spiritual court, as it is here, and a prohibition was denied; and if in such cases the husband's release should be good to bar the wife of her costs, all suits of this nature would be eluded; for it is the costs that are reckoned the most grievous punishment in this court. There are but two sorts of punishment there, *penance* and *costs*; and the penance too may be dispensed with for money.

S. C. 1. Salk. 115.
S. C. 12. Mod. 89.
S. C. Holt, 99.
S. C. 1. Ld. Ray. 73.
1. Roll. Rep. 426.
Quære, 2. Lev. 161.
1. Sid. 346.
2. Stra. 1167.
2. Com. Dig. "Baron and Feme," (O).
1. Bac. Abr. 211. 290.
3. Bac. Abr. 485.
4. Bac. Abr. 262.
Hullock on Costs, 599.
Plowd. 13.
2. Roll. Abr. 296.
2. Salk. 551.
1. Vent. 220. 146. Cro. Jac. 217. 666.

SIR B. SHOWER *à contra*. We hope that a prohibition shall go, since the ecclesiastical court has refused to allow this release, which, with submission, they ought not to do; for the costs, as soon as they are paid to the wife, belong to the husband; and therefore he may release them before they are [illegible] So the rule [illegible] by MR. SERJEANT is fallacious; for if [illegible] proceed in the spiritual court, the [illegible] cause be without their jurisdiction. So is *Goodwin (Esq.) (b)* [illegible] executor enters into a bond to pay a legacy; he is sued in the [illegible] for the legacy; the executor pleads payment according to the bond; they would not allow the plea, and a prohibition was granted; for the executor by giving bond for [illegible] of the legacy had extinguished the legacy, and made it a debt at common law. A wife divorced *causâ adulterii* of the husband sues in the spiritual court for a legacy *(c)*; the defendant pleads the release of the husband made after the divorce, which was disallowed in the spiritual court; and a prohibition was granted; for this release was void, for they remained man and wife notwithstanding the divorce *(d)*. Therefore we pray that the prohibition may stand.

HOLT, *Chief Justice*. After that rate they shall try the validity of letters patents and of feoffments, &c. if they have conusance

Mod. 286. 5. Co. 31. Cro. Eliz. 682. Carter, 55. Ray. 115. 1. Sid. 83.

(*a*) Roll. Abr. "Prohibition," 300.
(*b*) Yelv. 39.
(*c*) Stephens *v.* Totty, Cro. Eliz. 908.
(*d*) 2. Roll. Abr. 292. 301.

of

of the original. Indeed, if they make an ill conſtruction of the law, we prohibit them; ſo if they will not allow a releaſe unleſs proved by two witneſſes, we would prohibit * them; as in the caſe of *Shotter v. Friend (a)*. The ſpiritual court are confined within their compaſs, and if they go beyond their line, we will fetch them back by a prohibition; for under that notion of *ubi cognitio principalis, ibi cognitio acceſſarii*, they may do as they pleaſe, and ſo ſubvert and deſtroy the common law. Indeed, if the ſuggeſtion had been that they refuſed to receive this plea, it might be ſomething. CHAMBERLAINE *against* HEWSON. 8. Mod. 63.

ROKEBY, *Juſtice*. SIR BARTHOLOMEW SHOWER, your client does not deſerve any favour; but ſhe muſt have juſtice. *Vide* 2. Lev. 161. 1. Sid. 346. 1. Salk. 115. &c.

At another day, this matter being again ſtirred,

HOLT, *Chief Juſtice*. If a *feme covert* ſue alone in the eccleſiaſtical court for defamation, as ſhe may if ſhe cohabit with her huſband, he may releaſe the coſts, but if they are divorced *à menſâ et thoro*, there in ſuch caſe, or of incontinency, &c. he cannot releaſe the coſts; and the reaſon is, that if they are divorced *à menſâ et thoro*, the huſband allows his wife *alimony*, and the coſts of the ſuit are out of the *alimony*, and therefore he cannot diſcharge one more than the other. *Motteram's Caſe* is the very caſe *(b)*; and the ſame is in *Bulſtrode (c)*: *Baron* and *feme* divorced *cauſâ adulterii à menſâ et thoro* the *feme* ſues in the eccleſiaſtical court alone againſt one for ſlander; ſentence is for her; the huſband releaſes all actions, and this very ſuit, &c.; the defendant pleads this releaſe in the eccleſiaſtical court, which was diſallowed, yet no prohibition was granted: in caſe of a legacy *alter*, yet if the ſuit be there for a legacy deviſed to the wife, which is originally due to the *baron* and *feme*, and is not a part of the *alimony*, he may releaſe the ſuit and alſo the coſts, becauſe he may diſcharge the principal. My opinion is, that there ſhould be a prohibition in this caſe. But here you ſay alimony is ſentenced to *Hewſon's* wife; prove that, and then it is in our diſcretion not to grant a prohibition; as if it be ſuggeſted, that the party is cited out of the dioceſe, we prohibit them; but, on proof that it is upon requeſt to the archbiſhop, as is the exception in the ſtatute 23. *Hen.* 8. c. 9. we can ſtop the prohibition. 1. Salk. 115.* Comb. 105. 448. Carth. 33.

(*a*) 3. Mod. 283. 1 Show. 158. 2. Salk. 547. Carth. 142. (*b*) Motteram *v* Motteram, 2. Roll. 172. Comb. 160. 301. S. C. 1 Roll. Rep. 426. (*c*) 3. Bulſtrode, 264.

*[72]

Pullen *againſt* Palmer.

Caſe 30.

Trinity Term, 6. Will. & Mary, Roll 179.

CARTHEW. This is on *replevin*, in which the defendant *avows* in his own right; and it appears that *B.* aſſigned a rent to thirteen, four of whom are dead, and the defendant * is one of the

If a rent-charge be granted to *A. B.* and *C.* and *C.* die, and *A.* diſtrain for rent arrear, and aver the taking ſolely in his own right, the action, on demurrer, ſhall abate; for although a jointenant may *diſtrain* alone, he cannot *avow* for the whole, is in his own right, but ought to make conuſance for the reſt: *Sed quære*, If in ſuch caſe the Court will not grant a *replevin*.—S. C Poſt. 150. S. C. 3. Salk. 207. S. C. Carth. 328. 2. Lut. 1211. Ante, 25. Poſt. 73. 141. 2. Lev. 228. 1. Salk. 444. Thomp. Ent. 264. 3. Bac. Abr. 216.

PULLEN *against* PALMER.

nine ſurvivors, and avows the taking the diſtreſs in his own right becauſe the rent is arrear, which he cannot do; but it ought to be in his own right and as bailiff to the reſt, and they ought not to have ſevered.

NORTHEY. This is but form. If we had avowed for a ninth part, it had been ill in ſubſtance, becauſe there is no ſuch thing as a ninth part; but on this ſpecial matter ſhewn in the avowry, it is but form, and one *joint-tenant* by law may take the whole profits of all the reſt, and his diſcharge of it is good (*a*). Payment of rent to one *joint-tenant* is good. A rent-charge was granted to a *feme ſole* which was arrear, and ſhe married; and the avowry ſuppoſed twenty pounds to be in arrear, not paid to *baron* and *feme*, and it was held good.

CARTHEW. One *joint-tenant* cannot diſtrain for all the rent alone, for they muſt all join in avowry, and ſo muſt *tenants in common* even for *damage-feaſant*.

ROKEBY, *Juſtice*. It ſeems to be but form, for one joint-tenant may take all the profits.

HOLT, *Chief Juſtice*. If all ought to join, then it is not form but ſubſtance; for it ſhews, that the rent is not taken in the ſame right it was arrear. But the queſtion is, Whether they needs muſt join? All the entries are, that they do join not as bailiff to the reſt, but as joint-tenants; and he avows the taking of the rent as in lands liable to the diſtreſs of him and the reſt. If he had ſaid, "to his diſtreſs only," it had been bad; becauſe the rent is not due to him only, but to him and the reſt: but he need not avow as bailiff to them, for he needs no authority from the reſt to diſtrain, but he may do it by law; and ſo the defendant has avowed here as in lands liable to the diſtreſs of himſelf and the reſt.—One *joint-tenant* may diſtrain for the whole in point of intereſt, and not have any authority from the reſt as bailiff, for then he is to render an account.

* [73]

In replevin, if the avowant ſtate a rent granted to "him "and his heirs," and that he was *ſeiſed* thereof, it ſhall be intended a ſeiſin *in fee*.

CARTHEW. Then it is not ſaid through the whole record, that they were *ſeiſed in fee*, but it is only, generally, that they were ſeiſed.

HOLT, *Chief Juſtice*. They ſhould have ſaid ſo, for though by intendment, "*ſeiſed*" may be taken to be "*in fee*," yet they ought to ſhew it: but, however, this here is well enough; for you ſay the rent * was granted *to them and their heirs*, and that they were *ſeiſed* of it, which muſt be underſtood *in fee*.

Carth. 9. 10. Co. 34 Lut 1316.

CARTHEW. Then they ſay the *locus in quo* is parcel of the tenements hereafter mentioned, which he ſhews to be in ſeveral pariſhes, and does not ſhew in which pariſh the *locus* is.

HOLT, *Chief Juſtice*. That is not ſo well as it ought to be.

At another day,

CARTHEW. As to the caſe of *Wiſe v. Bellant* (*b*), which was in *replevin*, the defendant avows, becauſe his anceſtor was ſeiſed in fee, and let the land *in qua*, *&c.* for years rendering rent; and for rent due to him and his wife, he avows the taking; and on verdict for the avowant, an exception was taken in arreſt of

(*a*) See Bowles *v.* Poor, Cro. Jac. 282. 2. Co. 68. (*b*) Cro. Eliz. 442.

judg-

judgment, becauſe the *baron* ſole avowed, and did not join the wife with him; whereas it appears, that the rent was due to him and his wife, and he ought not to avow in his own name only; but becauſe he ſhewed the truth of the matter as it is, and did aver the life of the wife, and ſo the diſtreſs well taken by him, the avowry was adjudged good enough: That was, becauſe the rent belonged to him; but if it had not been in the caſe of *joint-tenants*, it had not been good. PULLEN *againſt* PALMER.

HOLT, *Chief Juſtice.* Suppoſe one joint-tenant ſhould bring debt for rent, and it appeared that the other was alive, it would be bad. He may diſtrain alone, but then he muſt avow in his own right, and as bailiff to the other; and then the return muſt be adjudged to him in his own right, and as bailiff to the other, in which caſe he is accountable to the other: but if we give judgment for him in this avowry, we muſt adjudge the return of the whole to him in his own right; and though payment to one joint-tenant is ſo to the other, yet we muſt not give judgment for him alone, to have it all in his own right. Ante, 25. 71. 4. Bac. Abr. 390.

I think the avowry ought to *abate*; but this being upon a *demurrer*, the queſtion is, Whether we ſhall give judgment that the whole avowry ſhall abate, and to begin *de novo*; or only that it ſhall abate, and there be *a repleader?* Poſt. 77, 78.

PER CURIAM. The avowry is naught.

* [74]

* Reynolds *againſt* Oſborn.

* Caſe 31.

COUNSEL moved for coſts on a verdict in treſpaſs, for breaking his cloſe, and breaking his ſoil, and one ſhilling damage given; for he ſaid it was not within the ſtatute of 22. & 23. *Car.* 2. c. 9. which does not extend to voluntary, but involuntary treſpaſſes only; as walking over the ground.

In treſpaſs for "breaking his "cloſe and "breaking his "ſoil," the plaintiff ſhall have no more *coſts* than *damages*, unleſs the Judge certify purſuant to the 22. & 23. *Car.* 2. c. 9. that the freehold or title was chiefly in queſtion.

E CONTRA. There have been attempts to turn *treſpaſs* into *caſe*, to get coſts; but no coſts ſhall be given in this caſe more than damage, unleſs the Judge who tries it certifies that the title was in debate. I agree that if the defendant take away any thing, he ſhall pay coſts; but here was only a little digging; if he had carried away the ſoil, then indeed the plaintiff ſhould have coſts.

ROKEBY, *Juſtice.* I remember a caſe in the court of common pleas, where it was laid *quòd ſolum ſubvertit cum aratro*, and coſts were allowed; and what difference is there in that from this? S. C. Carth. 224. Poſt. 315. 2. Vent. 48. 2. Lev. 124. Comb. 324. 399. 420. Carth. 224. 11. Mod. 198. Bull. N. P. 329.

HOLT, *Chief Juſtice.* Ploughing a man's ſoil is quite another thing. The ſtatute extends to treſpaſs on the freehold, and not to any treſpaſs on goods and chattels: it will be a hard matter for you to get coſts here. In the caſe of *per quod ſervitium amiſit*, the coſts are not there given for the battery, but for the degree of it, *viz.* the loſs of the ſervice *(a)*.

ADJORNATUR.

1. Stra. 577. 2. Ld. Ray. 1444. Salk. 193. 3. Burr. 1282. 2. Black. 1151. Hullock on Coſts, 66. 3. Com. Dig. "Coſts" (A. 3.).

(a) 1. Salk. 208.—And ſee alſo Rep. 854. 2. Ld. Ray. 831. 1. Bac. Batchelor *v.* Bigg, 3. Wilſ. 319. 2. Bl. Abr. 515. 3. Bac. Abr. 507.

Case 32.

The King *against* Davis *and* Carter.

The *affidavit* of perſons attainted of forgery, either at common law or on 5. *Eliz.* c. 14 cannot be read in evidence.

DAVIS and *Carter* being convicted for forging a bill under the ſeal of THE BANK OF ENGLAND, and having ſtood in the *pillory* for it *(a)*, were now brought up to the king's bench, and prayed that they might be turned over to THE MARSHALSEA, becauſe the ſheriff of *London* oppreſſed them in NEWGATE, where they were detained till they paid the fine, &c. and their own *affidavits* were offered to prove the oppreſſion.

*[75]

S. C. Holt, 501. 754. S. C. Salk. 461. Ante, 15. Co. Lit. 6. 3. Lev. 426. 2. Salk. 514. 689. 1. Vent. 349 1. Sid. 51. 2. Hale, 277. 2. Hawk. P. C. ch 46. ſ. 19. 2. Stra. 1148. 2. Wilſ. 225. Tidd's practice, 39. Gilb. L. E. 140.

HOLT, *Chief Juſtice*. If a man has had an *infamous judgment*, and has ſtood on *the pillory* for an offence which is contrary to the * faith, credit, and truſt of mankind, as *forgery* is, he cannot be a witneſs in any cauſe *(b)*. HALE ſays, if he has ſtood on the pillory, he cannot be a witneſs *(c)*; but that is to be underſtood for an *infamous judgment (d)*. But if a man be convicted for *a libel*, and has ſtood in the pillory for it, yet perhaps he may be a witneſs *(e)*.

SHOWER. *Canning*, who was convicted for a libel and ſtood on the pillory, was allowed to be a witneſs before the delegates, TREBY, *Chief Juſtice*, and other Judges being there: and ſo *Aaron Smith* was an evidence in *Croſby's Caſe (f)*.

HOLT, *Chief Juſtice*. *Aaron Smith* was pardoned, and we gave no opinion to this point: but for my part, I do not underſtand the nature of his offence; it was only for giving *Stephen College* notes how to defend himſelf on his trial.

IN the principal caſe, the *affidavits* were not read *(g)*: but the laſt day of the Term, THE COURT ordered the ſheriffs to return the money which they had taken from them; and remanded them to NEWGATE.

(*a*) But this is now made a capital offence by 8. & 9. *Will.* 3. c. 20. ſ. 36.; by 2. *Geo.* 2. c. 25. and 31. *Geo.* 2. c. 22. ſ. 78.; and ſee the 33 *Geo.* 3 c. 30.

(*b*) Co. Lit. 6. b. See 2. Salk. 461. 513. 689.

(*c*) 1. Hale P. C. 301. 2. Hale P. C. 280.

(*d*) See the caſe of Pendock *v.* Mackender, 2 Wilſ. 18.

(*e*) Gilb. Law Evid. 139.

(*f*) Ante 15.

(*g*) An affidavit to obtain a rule for an attachment made by one convicted of *forgery* has been refuſed to be read, Walker *v.* Kearney; but it is there ſaid, that the affidavit of one *Chetwerth*, who had been convicted of *forgery*, was read to *defend* himſelf againſt a complaint, 2 Stra. 1148.; and therefore the affidavit of one convicted of *perjury* has been allowed on a rule to ſet aſide a judgment againſt him for irregularity, Carter's Caſe, 2. Salk. 461. It is clear, however, that the teſtimony of a perſon attainted of any of thoſe offences which come under the denomination of the *crimen falſi*, cannot be received to *ſupport* a charge againſt another, Co. Lit. 6. Salk. 690. 2. Hak. 277. 2. Roll. 684. Gilbert L. E. 139. 2. Hawk. P. C. c. 46. ſ. 19. Caſes in Crown Law, 2d edit. 349. 4. Term Rep. 440. For it is now ſettled, that it is the infamy of the *crime*, and not the nature or the mode of *puniſhment*, which deſtroys the teſtimony of the offender, Pendock *v.* Mackender, 2. Wilſ. 18. Therefore a perſon convicted of *petty larceny*, and whipped, was held an incompetent witneſs to a will, 2. Wilſ. 19. But as the tranſportation inflicted on this offence by 4. *Geo.* 1. c. 11. and 6. *Geo.* 1. c. 23. did not, as in grand larceny, operate as a ſtatute pardon, it is enacted by 31. *Geo.* 3. c. 35. "that no perſon ſhall be an incompetent witneſs by reaſon of a conviction of *petty larceny*."

Lewis

Lewis *againſt* Maſters.

Caſe 33.

J. S. dies inteſtate in *London*, and *Godſprit* his creditor attaches money in *the garniſhee*'s hand, and it is condemned before any adminiſtration actually granted, it being at that time conteſted before THE ARCHBISHOP.

The *creditor* of an inteſtate cannot, by the cuſtom of *London*, *attach* money in the hands of a *debtor* to the *inteſtate* before letters of adminiſtration granted.

SIR B. SHOWER. I take this manner of proceeding to be good by the *cuſtom of London*. It is true their cuſtoms are different from the laws of the land, and yet are good, for they are confirmed by acts of parliament; ſo general *indebitatus aſſumpſits* are good by the *cuſtom of London*, &c.

* [76]

HOLT, *Chief Juſtice*. It is one thing if a cuſtom be different from the law, and another thing if it be repugnant to it and unreaſonable. I confeſs, the cuſtom of *garniſhment* is reaſonable, for there are two debts diſcharged by it: For if *A.* be indebted to *B.* and *C.* be indebted to *A.* now *C.* ſtanding againſt *B.* in lieu of *A.* by the payment of that debt by *C.* to *B.* both the debts to *A.* and *B.* are diſcharged and ſatisfied. Now in this caſe, *A.* has at the ſame time a remedy to recover againſt *C.* which by the cuſtom is transferred to *B.*; but in our caſe, the creditor *Godſprit* would have remedy againſt *Maſters* the garniſhee *, when the Archbiſhop had none, and would diſcharge *the garniſhee* againſt the Archbiſhop, who had never any claim againſt him; which certainly is abſurd, and wholly differs from the other caſe; for there *A.* had a charge againſt *C.* and by his payment to *B.* *C.* is diſcharged from *A.* But there can be no cuſtom to ſupport this caſe; for cuſtoms that overthrow the principles of law, and which are unreaſonable, are to be rejected.

S. C. Poſt. 92. S. C. Carth. 344. S. C. 1. Ld. Ray. 56. S. C. Skin. 516. S. C. 3. Salk. 49. S. C. Holt, 325. 429. S. C. Comb. 347. Poſt. 160. 440. 1. Roll. Abr. 105. 551. Dyer, 196. Cro. Eliz. 593. Comb. 109. 347. 427. 3. Will. 297. 2. Bl. Rep. 834. 1. Bac. Abr. 691. 4. Term Rep. 312.

DEE. Here the ordinary had the goods in his hands, and had intermeddled; and why ſhould he not be charged? The *cuſtoms of London* are in many caſes different from the common law; ſo an executor is chargeable there, upon an action of debt grounded on ſimple contract, and the judgment in ſuch an action has been allowed to be a good bar here.

HOLT, *Chief Juſtice*. So it is, as was adjudged here in the caſe of *Palmer v. Lawſon* twelve years ago. But here was a trick too, to put in *a caveat* to the granting of adminiſtration till the plaint was finiſhed.

ROKEBY, *Juſtice*. Can you charge any one by this cuſtom that is not a debtor? and here the Archbiſhop is no debtor.

HOLT, *Chief Juſtice*, at another day. We think in this caſe, that the debt was not well attached; for the ordinary had no way to recover the debt, nor had any thing to do with it.

LET the plaintiff have judgment.

Gardner

Caſe 34.

Gardner *againſt* Hobbs.

In *treſpaſs*, if the defendant juſtify the taking for poors rate, and the plaintiff is nonſuited, and the jury do not aſſeſs damages, a *writ of enquiry* ſhall iſſue: ſo in *detinue* and in *replevin*.

THIS was an action of treſpaſs, and the defendant juſtified by virtue of the 43. *Eliz.* c. 2. for the poors rates, &c. The plaintiff was nonſuited, but no damages were found; therefore Counſel moved for a *writ of enquiry*.

HOLT, *Chief Juſtice*. I remember a caſe, where, upon an action of *detinue*, and upon iſſue *non detinet*, the jury did not enquire of the value, and afterwards we granted a writ of enquiry. It is every day's practice, that if the plaintiff in *replevin* be nonſuited *(a)*, the jury ſhall find damages and coſts for the avowant *(b)*.

S. C. Holt, 192. Poſt. 77. 118. 2. Roll. Abr. 722. 11. Co. 6. 10. Co. 119. 3. Leon. 213. Lutw. 211. 1. Salk. 206. Skin. 595. 12. Mod. 85. 5. Com. Dig. "Pleader" (3. K. 30.). 2. Bac. Abr. 13. Sayer Rep. 214. Hullock on Coſts, 233.

(*a*) See the caſe of Freeman *v.* Lady Archer, 2. Bl. Rep. 763.; and Dewell *v.* Marſhall, 2. Bl. Rep. 921. 3. Wilſ. 442.

(*b*) See the caſe of Valentine *v.* Fawcett, Sta. 1021.

* [77]

Caſe 35.

* Harcourt *againſt* Weeks.

The omiſſion of the jury to enquire of damages on a *nonſuit* in *replevin* may be ſupplied by *a writ of enquiry*.

THIS was a caſe of the ſame nature with the former.

HOLT, *Chief Juſtice*. We are of opinion, that the omiſſion of the jury to enquire of the damages on *a nonſuit* in *replevin*, may be ſupplied by *a writ of enquiry* of damages: it is true, the jury might have been charged with the damages, but ſince they were not, there may be a writ of enquiry awarded. In *aſſumpſit (a)*, the parties being at iſſue, a demurrer was joined upon the evidence, and ſo the jury was diſcharged; and after judgment was given for the plaintiff, and a writ of enquiry awarded, and damages found, and judgment thereupon: and damages might have been enquired of by the ſame jury conditionally, but it may be as well enquired of by a writ of enquiry, when the demurrer is determined: and that comes home to this. *Brampſton's Caſe (b)* is the ſame with ours; ſo that it is no new caſe. Indeed, in the caſe of *Burton v. Robinſon (c)*, where in *detinue* the jury omitted to aſſert the value of the goods, the Court did doubt that a writ could not be awarded, for that it would be againſt the whole tenor and reaſon of *Cheney's Caſe (d)*. But, notwithſtanding, I remember a caſe about fourteen years ago, where a writ was awarded in ſuch caſe; ſo that I think *a writ of enquiry* ought to be awarded in this caſe.

S. C. Holt, 192. Poſt. 118. 1. Roll. Rep. 272. 284. 2. Roll. 212. Cro. Car. 357. 446. Hard. 166. 1. Sid. 380. 1. Vent. 40. Raym 170. 124. 1. Lev. 255. 1. Salk. 205. 5. Com. Dig. "Pleader" (3. K. 30.).

(*a*) Darroſe *v.* Newbut, Cro. Car. 143.

(*b*) 1. Roll. Rep. 272.

(*c*) 1. Sid. 246. Raym. 124.

(*d*) 10. Co. 119.

Johnſon *againſt* Adams *and* Others. Caſe 36.

IN *replevin*, for taking live cattle, and ſeveral ſtacks of hay, &c. the defendants plead, "*bene cognoſcunt captionem averiorum et catallorum in loco præd. quia dicunt quòd averia præd. &c.* but ſay nothing as to the *chattels*; but they conclude, and pray judgment *averiorum et catallorum.*

In replevin for *bona, catalla, et averia*, a CONUSANCE of all, and JUSTIFICATION for part, is bad.

CURIA. It is ill: for though they make cognizance of the whole, yet they do not anſwer the whole; ſo that they are ſhort in their juſtification. If the diſtreſs be intire, and it is wrong in part, it is bad for the whole.

* [78]

S. C. Comb. 346. S. C. 12. Mod. 84.

* The matter is, what judgment we ſhall give; Whether to abate the avowry, or that the plaintiff ſhall recover and have judgment final? Certainly it is ill to acknowledge the taking of all, and to juſtify but for part.

We will conſider what judgment to give.

S. C. Holt, 555. Ante, 73. 3. Co. 26. 5. Co. 19. Carth. 346. 4. Mod. 402. 1. Saund. 287.

Cudmore *againſt* Tripe. Caſe 37.

WRIT OF ERROR on a judgment given in the provoſt-court at *Exeter*, where the plaintiff declared in an *indebitatus aſſumpſit*, and alſo in a *quantum meruit*; but in the *quantum meruit* does not ſay, that the cauſe of action was *infra juriſdictionem curiæ.*

ASSUMPSIT in an inferior court omitting to allege that the work was done or the goods delivered *within the juriſdiction* is erroneous.

CARTHEW. If it had been omitted in the firſt promiſe, I confeſs it had been ill; but I conceive, the *infra juriſdictionem* in the *indebitatus aſſumpſit* goes to all.

HOLT, *Chief Juſtice.* Indeed; there wants the *adtunc et ibidem.*

Let JUDGMENT be reverſed *(a)*.

S. C. Comb. 347. S. C. Holt, 554. S. C. 2. Show. 413. 2. Show. 246. Salk. 404. 6. Mod. 223. 1. Saund. 73. 2. Wilſ. 16.

(a) In an inferior court the declaration muſt in every *count* not only allege that the money was *had and received* within the juriſdiction, but that the defendant *promiſed to pay* within it, Trevor *v.* Wall, 1. Term Rep. 15 or the defendant may take advantage of ſuch defect on a writ of error or falſe judgment, Rowland *v.* Veale, Cowp. 20.; but if the cauſe of action do not ariſe within the juriſdiction, the defendant muſt avail himſelf of it by plea in the court below. Cowp. 20.

The Caſe of Kendal and Others. Caſe 38.

THE defendants being brought up by *habeas corpus*, it appeared by the return that they had been committed by *Sir William Trumball*, one of the *ſecretaries of ſtate*, for aſſiſting *Sir James Montgomery*, who was in cuſtody for *high treaſon*, in his eſcape.

A *ſecretary of ſtate*, although he is neither a conſervator nor a juſtice of the peace, by virtue of his office may commit a perſon for aſſiſting another in the cuſtody of A MESSENGER for *high treaſon* to eſcape; but if the particular ſpecies of treaſon for which the priſoner was in cuſtody be not clearly and certainly expreſſed in THE WARRANT, the court of king's bench will admit the party to bail.—S. C. 1. Salk. 347. S. C. Comb. 343. S. C. Holt, 144. S. C. 12. Mod. 82. S. C. Skin. 596. S. C. 1. Ld. Ray. 65. S. C. 4. St. Tr. 854. 1. Leon. 71. 2. Leon. 175. 1. And. 297. 4. Com. Dig. 8vo. 333. 5. Com. Dig. 8vo. 140. 1. Bac. Abr. 224. 378. 2. Hawk. P. C. ch. 15. ſ. 66. ch. 16. ſ. 4. 2. Wilſ. 205. 244. 275. 283. 3. Burr. 1742.

SIR

THE CASE OF KENDAL AND OTHERS.

SIR B. SHOWER moved, that they might be discharged, their commitment not being legal.

FIRST, Because a *secretary of state* is no justice of peace; and as a *secretary of state*, he cannot take a recognizance to prosecute; and therefore it is strange he should have power to commit. It is true, since *Sir Lionel Jenkins's* time, it has been practised by the secretaries of state to take bond. I have looked into *Rushworth's Collections*, and I cannot find one precedent for a secretary of state to commit any one. It cannot be presumed that *Sir William Trumbull* was a justice of peace; for it appears that he was secretary of state, and as such did make the commitment; and truly, I cannot see but he might as well commit for *murder* or *felony* as for *high treason*. It is objected, that any man may arrest another for treason, and that is true; but then he must carry him to a *justice of the peace*, which we say the *secretary of state* is not.

*[79]

SECONDLY, But however, though we were to grant that a *secretary of state* has power to commit, yet, with submission, in this case the defendants ought to be bailed, since they are within the benefit of the *habeas corpus act*; for the commitment appears to be for the assisting the escape of *Sir John Fenwick*, who was committed for *high treason*, but was never outlawed nor indicted. And my LORD CHIEF JUSTICE HALE (*a*) is express, that the gaoler shall not be arraigned for an escape until the prisoner be attainted; for if the prisoner be acquitted, the escape is disparishable. And here the prisoner cannot be attainted, for he is dead; so that they only can be fined and imprisoned.

Gaoler not to be arraigned for an escape till the prisoner be attaint.

Dalt. 331. c. 159. Hawk. P. C. c. 19. s. 26.

THIRDLY, With submission, to assist in the escape of one committed for *high treason*, is not treason, unless the party assisting knew that he was committed for high treason (*b*): and if this offence be but felony, the commitment is illegal, because it would have been too generally set forth (*c*). If a prisoner broke prison, it was felony at common law, be the cause what it might; but by statute 1. *Edw.* 2. *De frangentibus prisonam*, "none shall suffer judgment of life and member, unless the cause "for which he is imprisoned require such judgment (*d*):" and I take it for a rule, that whatever is not felony on the escape of a felon, is not treason upon the escape of a traitor (*e*).

2. Inst. 589. 591. 1. Hale, 234. 590.

See 1. Burr. 460.

FOURTHLY, It is said, that the prisoner was in custody of a MESSENGER; but what that is we know not; there is no book of law that takes notice of any such person.

FIFTHLY, It does not appear what the offence was, nor that any treason was committed.

So that we must throw ourselves upon your Lordship's justice, and hope that for these reasons your Lordship will think fit to discharge us quite, or else to bail us.

(*a*) Hale P. C. 110.
(*b*) Benstead's Case, Cro. Car. 583.
(*c*) 2. Inst. 589. 3. Inst. 70.
(*d*) 2. Hawk. P. C. ch. 18.
(*e*) Staund. P. C. 31. Hale's P. C. 103. 2. Hac. Abr. 638.

TREVOR,

TREVOR, *Attorney General*, anſwered, that theſe commitments by *ſecretaries of ſtate* had always been received to be good, and that their office was more ancient than *the privy council*, and that it was clear *the privy council* could commit; and that though the warrant be not ſo exact, yet it is ſufficient; and it was not like *an indictment*, for the time and place, and the * particular fact need not be expreſſed in the warrant, as they muſt be in indictments.

Commitment by SECRETARY OF STATE.

* [80]

SHOWER. Here the meſſenger being no officer in law, the party in his cuſtody may bring *falſe impriſonment* againſt him; and then to aſſiſt a perſon to eſcape in ſuch a caſe, is no fault at all, for it was to free him from one that had nothing to do with him.

HOLT, *Chief Juſtice*. The law indeed does not take notice of A MESSENGER; but however, if a man reſcue another that is carrying to the gaol by a MESSENGER, or any other perſon, it is criminal. —Then why ſhould not *a ſecretary of ſtate* have power by law to make commitments? Pray what authority has *a juſtice of peace* to commit in caſes of *high treaſon*? It is not given to him by any ſtatute; and truly I cannot tell from whence he derives ſuch an authority, unleſs it be by virtue of the old common law, which does authorize *conſervators of the peace* to commit in ſuch caſes. My LORD COKE ſeems to intimate, as if a man could not be committed till he was *indicted*; but certainly that is a miſtake; for the conſtant practice is otherwiſe *(a)*. But their ſtrongeſt objection ſeems to be, that the nature of the treaſon is not ſet forth; as whether it be for levying of war, or for conſpiring of treaſon, or any other ſpecies of treaſon.

How the law takes notice of A MESSENGER.

1. Hale, 598. 606.

2. Hawk. P. C. c. 21. ſ. 7.

Skin. 596. 599.

Vide 6. Mod. 179.

TREVOR, *Attorney General*. Let the treaſon be what it will, of whatever ſort it is, to aſſiſt ſuch a perſon charged with it to eſcape, is treaſon.

HOLT, *Chief Juſtice*. Suppoſe the treaſon were for coining, &c. would it be treaſon to aſſiſt ſuch a perſon to eſcape?

TREVOR, *Attorney General*. The queſtion is, Whether this man be charged with *high treaſon*, as you have alledged it in the warrant?

ROKEBY, *Juſtice*. Does it appear to us, that this offence is not bailable?

* [81]

HOLT, *Chief Juſtice*. I remember my LORD CHIEF JUSTICE HALE, at *Norwich aſſizes*, was of opinion, that a juſtice of peace might direct a warrant to any perſon to execute it; and in a caſe that came before him there, the warrant was directed to the conſtable of one pariſh to be executed in another pariſh; which was done, and held to be good.

A JUSTICE OF PEACE may direct a warrant to any man to execute.

2. Lev. 275.

At another day this matter was again debated.

HOLT, *Chief Juſtice*. In *Anderſon* it was the opinion of all the Judges, that the *privy council*, or any one of them, might commit *(b)*; and certainly the *ſecretary of ſtate* is one of them.

(a) See 4. Inſt. 176. 2. Hale P. C. 108. 2. Hawk. P. C. ch. 13. ſ. 18. 4. Bl. Com 288.

(b) 1. Anderſon, 297.

SHOWER.

THE CASE OF KENDAL AND OTHERS.

SHOWER. As for that reſolution, it may well be ſuſpected for law; it was not judicial: and there have been inſtances where Judges have given different reſolutions under their hands from thoſe which they have given judicially when they acted under an obligation of an oath; and, with ſubmiſſion, one of the *privy council* cannot commit, for he cannot give an oath: and it ſeems againſt the reaſon of our conſtitution that the ſame officer ſhould have power to commit, and yet cannot adminiſter an oath, which I take to be neceſſary upon every commitment; for my LORD COKE (*a*) ſays, that all commitments muſt be upon oath. Then it is very extraordinary that an officer ſhall have power to commit, and yet he can neither adminiſter an oath, nor take a recognizance to proſecute, nor take bail, though his judgment tells him that the offence is bailable: this ſeems very inconſiſtent. Theſe extraordinary commitments are not favoured in our law; and in the old times ſuch commitments were very ſeldom. Then 25. *Edw.* 3. c. 4. is one of thoſe ſtatutes that vindicates the liberty of the ſubject in reſpect of extrajudicial commitments; for it is ſaid there, "none "ſhall be apprehended upon ſuggeſtion to the king or his council, "unleſs by indictment or preſentment, or by proceſs at the com-"mon law." And in the fourth year of *Charles the Firſt* theſe general commitments *per mandatum domini regis* were thought a great oppreſſion to the ſubject (*b*). My LORD COKE (*c*) ſays, that before commitment there muſt be an oath; which in this caſe could not be. It is true, the whole privy council may examine upon oath; but that one privy councillor may do ſo I do not find any where. In *Prynne (d)* there is a notable record, where the perſon was impeached by the commons in parliament for a riot and aſſault on ſeveral lords of the council; from which I infer, * they would not have any recourſe to the legiſlators, had the privy council themſelves ſuch a power to commit. I confeſs the privy council may cite, and ſo may the eccleſiaſtical court ſummon, but they cannot commit.

Commitment by one of THE PRIVY COUNCIL.

1. Will. 275. 11. St. Tr. 317. 319. 2. Hawk. P. C. ch. 16. ſ. 4. *Habeas.*

[82]

As to my other exception: In 2. *Inſt.* 705. it is ſaid, that a new gaol cannot be erected without an act of parliament; How then can the houſes of theſe meſſengers be as ſo many priſons? I think there are forty-two meſſengers; and if their houſes ſhould be lawful places of confinement, there would be ſo many new gaols or priſons erected without authority of parliament, which ought not to be. 5. *Ed.* 3. *No.* 68. In the 12. *Rep.* 129. indeed, A MESSENGER is mentioned; but nothing can be drawn from thence that he can therefore keep a priſon. So that if *Sir James Montgomery* was not in legal cuſtody, the aſſiſting of him to eſcape is no fault. There are other places of confinement beſides meſſengers houſes that have been queſtioned whether they be priſons or not; ſo it has been doubted, whether THE TOWER of *London* be a priſon, or not, within the *habeas corpus act.*

Skin. 199.

(*a*) 2. Inſt. 51.
(*b*) See 16. *Car.* 1. c. 10. 2. Hawk. P. C. ch. 15. ſ. 71.
(*c*) 2. Inſt. 52.
(*d*) Prynne's Animadverſion on the Fourth Inſtitute, page

HOLT,

HOLT, *Chief Juſtice.* THE TOWER is a priſon without doubt.

SHOWER. My next exception was, That the warrant does not expreſs what the treaſon is; and there may be a treaſon the aſſiſting of which is not treaſon; as the harbouring of jeſuits or counterfeiters of money, it is only a miſpriſion of treaſon. My inference is, that if *Sir James Montgomery* was charged with ſuch a treaſon, the aſſiſting of which would not make me guilty of treaſon, then my aſſiſting him to eſcape is not treaſon (*a*). Then if the intendment be general, it ſhall be taken for the liberty of the ſubject; ſo is *Vaughan*, 136. 157. where it alſo appears, that the return to a *habeas corpus* ought to be certain; and ſo it was reſolved in *Buſhell's Caſe*. So that if it cannot appear to your Lordſhips to be treaſon, with ſubmiſſion, we ought to be bailed within the *habeas corpus act*.

LEVINZ, *Serjeant, on the ſame ſide.* If *Sir James Montgomery* himſelf were here he muſt have been bailed, by reaſon of the uncertainty of the crime expreſſed in the warrant of commitment; and ſhall we be in a worſe caſe than he himſelf would have been? * Returns in all caſes ought to be particular, and certainly expreſs the cauſe (*b*). There are ſeveral caſes of priſoners committed and delivered by *habeas corpus*; and the returns of the officers having cuſtody of them in THE FLEET, THE TOWER, and THE GATEHOUSE, are all certain. The old law is, that all commitments ſhall be to the county gaol (*c*); and the ſtatute of 5. *Hen.* 4. c. 10. that juſtices of peace ſhall commit to the county gaol, is but declaratory of the common law; and a meſſenger's houſe certainly is not the county gaol: indeed, a man may be committed to a meſſenger's cuſtody for twenty-four hours, &c. while the matter is under examination. There is *Howell's Caſe* (*d*), where the power of the *ſecretary of ſtate* is queſtioned, but I am loth to meddle with it; and I think we need not have made all this ſtir about it; we only deſire to be bailed. It is plain, that the warrant muſt be legal. And CHIEF JUSTICE HALE (*e*) is as plain, that the reſcuer ſhall not be arraigned till the principal be attainted. Then if it be true that *Sir James Montgomery* is dead, it is morally impoſſible for theſe perſons ever to be attainted.

[83]

Returns to be particular and certain.

TREVOR, *Attorney General.* In *Howell's Caſe* the writ of *habeas corpus* was directed "to the ſteward and marſhal of the "Marſhalſea," who made return, that the ſaid *Howell* was committed to his cuſtody *per mandatum* FRANCISCI WALSINGHAM, *Militis, principalis ſecretarii, et unius de privato concilio dominæ reginæ*; and that return was by the Court held inſufficient, becauſe the cauſe why he was committed was not ſet down in the return: and there the Court took a difference, where one is committed by

The cauſe of commitment to be ſet down in the return.

Poſt. 85.

(*a*) Dyer, 296. a. 12. Co.
(*b*) Moor, 839.
(*c*) Britton, 19. 92. Capt. Norwood's Caſe. But ſee 6. *Geo.* 1. c. 19. and 2. Hawk. P. C. ch. 16. ſ. 6.
(*d*) 1. Leon. 70.
(*e*) Hale's P. C. 116.

one

THE CASE OF KENDAL AND OTHERS.

one of the privy council, for in such case the cause of the committing ought to be set down in the return; but where the party is committed by the whole council, there no cause need to be alledged.

It is objected, that the treason not being expressed, therefore the aiding and assisting of him cannot be treason; for, say they, this treason might be for harbouring jesuits, counterfeiters of coin, &c.; but the receiving of jesuits, &c. is not an aiding and abetting of them: but, with submission, the assisting any of these persons is treason, though these facts were made treason by act of parliament.

*[84] On trial of the accessary, the attainder of the principal must be produced.

* So I think it is not necessary to insert the overt-act in the warrant of commitment, the species of treason is not usually mentioned there. I do agree, that upon the trial of the accessary, there must be the attainder of the principal produced: but here in treason all are principals; and let them take advantage of that at the trial.

2. Hawk P. C. c. 21. s. 8. c. 29. s. 2. 13.

As for their objection, that no person shall be committed but to the county gaol, this is not so; for then no man could be committed to THE TOWER, THE GATEHOUSE, &c.

HAWLES, *Solicitor General.* These commitments in cases of high treason have varied in all times; sometimes the particular facts have been expressed, and sometimes not; and yet thought good either way.

Commitments without an oath.

As for the objection, that *an oath* is necessary to be made before any commitment, that need not be; there are many cases where persons may be committed without any oath at all: so THE HOUSE OF COMMONS may commit, and yet they cannot administer an oath: so *a constable* may commit without any oath, *Staundf.* 32.

Then as to the objection concerning THE MESSENGER, it is out of the case; for though his house be no gaol, yet the assisting of one to escape from thence is as criminal as if he had assisted to escape from the county gaol. For being with the messenger while he was under examination, he was in the custody of the law, and it is not the breach of the wall that is a breach only of prison; for, as *Bracton* observes, to assist a man to escape that is going to be executed is a breach of prison: so that we conceive the commitment to be lawful, and that they ought not to be bailed.

Palm. 558. 1. Sid. 78. 1. Salk. 347. 2. Hawk. P. C. c. 16.

HOLT, *Chief Justice.* Indeed you might have spared that question about the secretary's power to commit; it seems to have been made more for delight than for necessity: but in *Anderson* it is plainly resolved; and so it is in 1. *Leon.* 71. that he has such power (*a*). But that which always puzzled me is, What authority there was

(*a*) 1. Bl. Com. 338. 1. Bl. Rep. 557.—And see Lord Camden's Exposition of these case, 11. State Trials, 316. 2. Hawk. P. C. ch. 16. s. 4.

to

to commit at common law? and why Juſtices of *gaol delivery* at common law might impanel a jury to enquire, &c.

As to the objection about the commitment to A MESSENGER, ſurely the party may be committed to him during examination. Indeed I do take it, that generally the commitments ought to be to the common gaol, eſpecially ſince the *habeas corpus* * *act*, that the party may better take out a *habeas corpus*; though you will find in my LORD CHIEF JUSTICE HALE's *Pleas of the Crown* (*a*), that the breaking of other priſons is felony. Now conſider this, that if an act of parliament make an offence felony, and there is not one word as to the acceſſaries, yet they ſhall be felons; then why ſhould not theſe perſons that are in the nature of acceſſaries to treaſon be likewiſe guilty of treaſon?

* [85]

But, MR. ATTORNEY, I very much doubt whether you ought not to have ſpecified what ſort of treaſon it was, and that he had committed it; as for the purpoſe, if it had been for the conſpiring the death of the king, or for adhering to his enemies, &c. then the aſſiſting the eſcape of ſuch a traitor comes under the ſame ſpecies of treaſon.

Then it is a great doubt with me, Whether you ſhould not aver that he did actually commit the treaſon?

TREVOR, *Attorney General.* With ſubmiſſion, it would be too much to ſay in *the warrant* of high treaſon, that the party was guilty. Indeed in *the indictment* we muſt alledge it.

HOLT, *Chief Juſtice.* I think it muſt be conſidered of, though I doubt very much as to the not ſpecifying of the treaſon, that the particular ſort ought to have been expreſſed in the warrant.

Commitment for treaſon ſhould ſpecify the particular ſort of treaſon. Ante, 83.

ROKEBY, *Juſtice.* Certainly a *conſervator of the peace* at the common law might have committed, and to adminiſter an oath is incident to his office; ſo that I take it, that *a ſecretary of ſtate* is in nature of a *conſervator of the peace*, and may as well commit now, as the other could at common law (*b*). But indeed it ſeems to me that they are bailable, becauſe it is not expreſſed what ſort of treaſon it was. As to THE MESSENGER, I take him to be only a carrier of the party to priſon, and that he is not in the nature of a gaoler.

2. Hawk. P. C. c. 16. ſ. 16.

EYRE, *Juſtice.* Upon the whole, I think it reaſonable that they ſhould be bailed.

HOLT, *Chief Juſtice.* Then let them be bailed.

(*a*) 1. Hale P. C. 601. 607. 2. Hawk. P. C. c. 21. ſ. 1. 7. ch. 18. ſ. 16.

(*b*) See the opinion of LORD CAMDEN on this paſſage in delivering the judgment of the court of common pleas in the caſe of Entick v. Carrington, 11. State Trials, App. 316.

Caſe 39.

* Young *againſt* Rudd.

Eaſter Term, 7. Will. 3. Roll 78.

To an *indebitatus* and *quantum meruit*, if the defendant plead that he *gave* the plaintiff a hat, which he *accepted* in ſatisfaction of the debt; a REPLICATION *proteſting* that the defendant did not *give* the hat in ſatisfaction, and *traverſing* that he *received* it in ſatisfaction, is good.

S. C. 2. Salk. 627. S.C.Comb.346. S. C. 1. Ld. Ray. 60. S.C.Carth.347. S. C. 12. Mod. 85. Poſt. 136. 9. Co. 80. b. Sty. 263. 239. Winch, 76. Cro. Eliz. 68. 103. Sty. 263. 239. 2. Brownl. 107. 1. Com. Dig. "Accord" (C.). 2. Term Rep. 24.

INDEBITATUS ASSUMPSIT and a *quantum meruit*. The defendant pleaded in bar, that he gave the plaintiff a beaver hat, which he accepted in ſatisfaction of the debt. The plaintiff replied by proteſtation, that the defendant did not give the hat in ſatisfaction; and traverſed, that he accepted it in ſatisfaction: and upon demurrer,

IT WAS OBJECTED *on the behalf of the defendant*, that this was an *immaterial traverſe*, becauſe the giving is the directing matter, which ought to have been traverſed, and not anſwered by proteſtation; like the reſolution in *Pinnell's Caſe* (*a*), which was an action of debt on a bond, of the penalty of ſixteen pounds, for payment of eight pounds ten ſhillings on a certain day; the defendant pleaded, that before that day he, at the requeſt of the plaintiff, paid him five pounds, which he accepted in full ſatisfaction of the debt; but becauſe he pleaded the payment of the five pounds generally, and not in full ſatisfaction of the whole debt, the plaintiff in that caſe had judgment. And there it was held, that the manner of tender and payment ſhall be directed by him who makes it, and not by him who accepts it; ſo that it is not material how the perſon to whom the thing is given accepts it; for if it be accepted, it muſt be as the giver intended it; and therefore the plaintiff ought to have traverſed the giving in ſatisfaction, for that is the moſt material part of the plea, and ought to have been put in iſſue. It is true, if it had been after a verdict, the giving and acceptance might have been taken to be reciprocal acts, *viz.* that the one would not have accepted it unleſs the other had given it in ſatisfaction; but upon a demurrer it is otherwiſe.

E CONTRA *for the plaintiff*. Either the giving or the acceptance of what is given in ſatisfaction may be traverſed. This was the opinion of my LORD ROLLE (*b*), though he held it more proper to take iſſue upon the payment; but if the acceptance in ſatisfaction be traverſed, there will be no occaſion to anſwer the giving. It is a rule in philoſophy, that *Quicquid recipitur eſt ad modum recipientis*; and there are inſtances in law to this purpoſe; as in an action of debt upon a bond (*c*), the defendant pleaded, that whereas the plaintiff was indebted to him for a load of lime, it was agreed between them, that the defendant * ſhould acquit him of the lime, and yet the plaintiff ſhould accept it in ſatisfaction of the bond; and avers that he did accept it in ſatisfaction of the bond; and upon demurrer to this plea it was held ill; not becauſe the defendant had pleaded *the acceptance* only, and not *the giving* in ſatisfaction, but becauſe he ought to have pleaded *the acceptance* in ſatisfaction of the ſum mentioned in the condition of the bond, and not of the bond generally; for that could not be diſcharged without a ſpecialty (*d*).

(*a*) 5. Co. 117. Moor, 677.
(*b*) Stiles, 239.
(*c*) Neale *v.* Sheffield, Yelv. 192. S. C. Cro. Jac. 254. S. C. 1. Brownl. 109. S. C. 1. Bulſt. 66.
(*d*) 5. Co. 117. b. 9. Co. 79. Cro. Eliz. 68. 193.

CURIA

YOUNG *againſt* RUDD.

CURIA. Where a thing is pleaded by way of *concord*, it is iſſuable; but if the concord be not executed by giving and receiving, it cannot be pleaded in bar to the action (*a*): therefore the beſt way of pleading it, is by ſetting forth, that the thing was given and received in the full ſatisfaction, &c. according to the reſolution in *Pinnell's Caſe*. But both are traverſable; as for inſtance: The condition of a bond was (*b*), that if the defendant *compounded* with one *Earle* for his lands, then he ſhould pay the plaintiff thirty pounds; in an action of debt brought on this bond, the defendant pleaded, that he had not made any *compoſition* with *Earle*, *&c.*; the plaintiff replied, that *Earle* did grant a rent-charge in fee to the defendant in ſatisfaction of his title; and ſo he made *a compoſition*; the defendant *proteſtando* that *Earle non conceſſit*, *pro placito dicit* that he did not accept it in ſatisfaction; and it was adjudged a good plea, without traverſing the grant: for as in that caſe there could not be any compoſition without the conſent of the parties, which depended purely upon the acceptance, which the defendant denied to be in ſatisfaction of his title, ſo in this caſe, the denial of the acceptance implies, that the thing was not given in ſatisfaction.

See Heathcoat *v.* Cruikſhanks, 2. Term Rep. 24.

And therefore judgment was given for the plaintiff.

(*a*) 1. Com. Dig. 3d edit. 135. *notis.* (*b*) Hob. 178.

* [88]

Smith *againſt* Crompton.

Caſe 40.

In an action againſt a perſon for negligently keeping his fire, whereby the plaintiff's houſe was burned, if the jury find a verdict for the *defendant*, the Court will not grant a *new trial* on the ground that the evidence was doubtful, and the Judge diſſatisfied with the verdict.

IN AN ACTION ON THE CASE for negligently keeping his fire, whereby the plaintiff's houſe was burnt (*a*), there was a doubtful evidence given at the trial before THE CHIEF JUSTICE at the *niſi prius*, and the jury gave a verdict for the defendant.

* It was moved ſeveral times for *a new trial*, becauſe the evidence was very doubtful upon which the verdict was given againſt the plaintiff; and it was inſiſted on his behalf, that though it is true, that in an information of perjury (*b*) where the defendant was found *guilty*, the Court would not grant a new trial, though it appeared there was no reaſon for ſuch a verdict, unleſs the king's counſel would conſent to it; yet in an action of debt brought by an informer, and a verdict for the defendant, the Court may grant a *new trial*, becauſe the party has an intereſt; and this is the difference taken in the Books. It might be a thing of ill conſequence, if it ſhould not be in the power of the Court to grant new trials in caſes where there are apparent reaſons for ſo doing; as where *exceſſive damages* are given for words (*c*), or where two verdicts

S. C. 2. Salk. 644. Poſt. 181. Carth. 202. 425. Stra. 1105. Cowp. 37. 230. 601. 1. Term Rep. 84. 2. Term Rep. 114. 4. Term Rep. 468. 753. 8. Mod. 220. 264. Carth. 498. Fitzg. 40.

(*a*) See 6. *Anne*, c. 31. ſ. 6. Poſt. 181.

(*b*) 1. Sid. 49, 50.

(*c*) See Clark *v.* Udal, 2. Salk. 649. Redſhaw *v.* Brooks, 2. Wilſ. 405. Wilford *v.* Berkley, 1. Burr. 609. Benſon *v.* Frederick, 3. Burr. 1845. Hayward *v.* Newton, Stra. 940.—But the general rule is, that in perſonal torts the Court will never grant a new trial for *exceſſive damages* unleſs they are ſuch as manifeſtly ſhew the jury to have been actuated by paſſion, partiality, or prejudice. Cowp. 230.

SMITH *againſt* CROMPTON

have been given againſt one defendant, and in many other caſes (*a*).

But *on the other ſide* it was ſaid, that no new trial could be granted in this caſe, though the Court ſhould ſee any reaſon for it: and the caſe of *Sir John Jackſon* (*b*) was chiefly relied on, who was diſcharged of a great debt at the aſſizes in *Cumberland*, by the perjury of *Fenwick* and *Holt*; who being indicted for the ſame crime, *Sir John* procured the witneſſes to be arreſted who could prove the perjury, ſo that they could not come to the aſſizes to give evidence, and thereupon *Fenwick* and *Holt* were acquitted; and though this practice appeared plainly upon ſeveral affidavits, yet the Court would not grant a new trial, but ordered an information againſt *Sir John Jackſon*; upon which he was found guilty, and fined one thouſand marks.

Afterwards *a new trial* was denied in the principal caſe (*c*).

(*a*) See 5. Com. Dig. "Pleader" (R. 17.) the 8vo edition by Mr. Kyd, where all the caſes on this ſubject are collected.

(*b*) 1. Sid. 149. 153.

(*c*) In S. C. 2. Salk. 644. it is ſaid, that THE CHIEF JUSTICE was diſſatisfied with the verdict, but that the reaſon of refuſing *a new trial* was, becauſe it was a hard action.—See alſo Sparks *v.* Spicer, 2. Salk. 648. Dunkley *v.* Wade, 2. Salk. 653.

Caſe 41.

Plummer *againſt* Lea.

If *A.* have judgment in *ſcire facias* and become bankrupt, the aſſignee of the original judgment ſhall have execution without a new *ſcire facias*.

1. Salk. 108, 109. 111. 6. Mod. 103.

ONE *Alexander Holt*, in the ſeventeenth year of *Charles the Second*, recovered a judgment againſt the defendant, and had a *teſtatum ſcire facias* to the *terretenants*. They appeared and pleaded; and there was a verdict againſt them at the aſſizes in *Suffolk*, and judgment thereupon. Afterwards *Holt* became a bankrupt, and the commiſſioners aſſigned the original judgment to *Plummer*, who now moved the Court that it might be entered, to entitle him to the benefit of the judgment upon the *ſcire facias*; which was ruled accordingly, without bringing a new *ſcire facias* (*a*). QUOD NOTA.

2. Jo. 203. 1. Mod. 93. 4. Bac. Abr. 411.

(*a*) See Hewit and Others, Aſſignees of Bibbins, *v.* Mantell, 2. Wilſ. 372.

TRINITY

TRINITY TERM,

The Seventh of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir William Gregory, *Knt.*
Sir Giles Eyre, *Knt.*
Sir Samuel Eyre, *Knt.*
} *Juſtices.*

Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

Caſe 42.

* Dalſton, Bart. *againſt* Janſon.

Precedent of a declaration, in which an action on the *caſe*, on the cuſtom of the realm, and *trover* are joined.

LONDON, } JOHN DALSTON, knight and baronet, complains
to wit, } of *Joſhua Janſon*, a common carrier, in cuſtody of the marſhal of the *Marſhalſea* of the lord the king, being before the king himſelf, for that, to wit, that whereas the aforeſaid *Joſhua*, on the 16th day of *March*, in the year of Our Lord 1693, and long before and always afterwards, hath been, and now is, a common carrier of goods and chattels, and for his profit hath been accuſtomed to carry the goods and chattels of all perſons whatſoever requiring the carriage thereof from *Wakefield*, in the county of *York*, unto *London*, and from *London* aforeſaid unto *Wakefield* aforeſaid, for all the ſaid time, for a reward to be therefore had. And whereas by the law and cuſtom of this kingdom of *England*, every common carrier of goods and chattels, who receives the goods and chattels of any perſon ſo to be carried, is bound to keep and carry the ſame without ſubſtraction and loſs, ſo that by the default of ſuch common carrier, or his ſervants, damage may not in any manner come to paſs. And whereas the ſaid *John*, on the ſame 16th day of *March*, in the year of Our Lord 1693 aboveſaid, at *London* aforeſaid, that is to ſay, in the pariſh of the *Bleſſed Mary of the Arches*, in the ward of *Cheape*, was poſſeſſed of the goods and chattels following, that is to ſay, of one deal box, and one hundred

DALSTON, BART. *against* JANSON.

pieces of gold coin, called guineas, of lawful money of *England*; as of his own proper goods and chattels; and the aforesaid *John* being thereof so possessed, on the same 16th day of *March*, in the year of Our Lord 1693 abovesaid, at *London* aforesaid, to wit, in the parish and ward aforesaid, he the said *John* then and there delivered the box aforesaid, with the said one hundred pieces of gold coin, called guineas, to the aforesaid *Joshua*, to carry the same safely and securely from *London* aforesaid unto *Wakefield* aforesaid for a reward; and the aforesaid *Joshua* then and there had and received the said box, and the said one hundred pieces of gold coin, called guineas, being therein to be carried and delivered in form aforesaid: nevertheless the said *Joshua*, at any time afterwards until now, hath not delivered the box aforesaid, with the said one hundred pieces of gold being therein, to him the said *John*: but the box aforesaid, and the said one hundred pieces of gold coin being therein, afterwards, to wit, on the 17th day of *March*, in the year of Our Lord 1693 abovesaid, at *London* aforesaid, in the parish and ward aforesaid, for default of the good keeping of him the said *Joshua*, were lost. And also whereas, on the 16th day of *March*, in the year of Our Lord 1693 abovesaid, at *London* aforesaid, to wit, in the parish and ward aforesaid, the said *John* was possessed of other goods and chattels following, to wit, of one deal box, and one hundred pieces of gold coin, called guineas, of lawful money of *England*, as of his own proper goods and chattels; and being so possessed thereof, he the said *John* afterwards, to wit, on the same 16th day of *March*, in the year of Our Lord 1693 abovesaid, at *London* aforesaid, in the parish and ward aforesaid, casually lost those goods and chattels out of his hands and possession; which said goods and chattels afterwards, to wit, the same 16th day of *March*, in the year of Our Lord 1693 abovesaid, in the parish and ward aforesaid, came to the hands and possession of the aforesaid *Joshua*, by finding; nevertheless the said *Joshua*, knowing the said goods and chattels last mentioned to be the proper goods and chattels of the aforesaid *John*, and of right to belong and appertain to him the said *John*, yet contriving and fraudulently intending craftily and subtilly to deceive and defraud the aforesaid *John* in this behalf, hath not yet delivered the said goods and chattels last mentioned to him the said *John*, although often requested, &c.; but the goods and chattels last-mentioned afterwards, to wit, on the 17th day of *March*, in the year of Our Lord 1693 abovesaid, at *London* aforesaid, in the parish and ward aforesaid, converted and disposed of to the proper use and benefit of him the said *Joshua*, to the damage of him the said *John* of 150l.; and thereupon he brings suit, &c.

On *not guilty* pleaded, judgment for the plaintiff.

Dalston

Dalſton *againſt* Janſon.

Caſe 43.

An action on *the caſe* againſt a carrier on the cuſtom of the realm and *trover* may be joined in the ſame declaration.

THIS was an action on *the caſe* brought againſt *a common carrier* upon the cuſtom, and alſo *a trover* was laid in the ſame declaration. Upon not guilty pleaded, there was a verdict for the plaintiff.

It was moved in arreſt of judgment, that theſe are different actions, and ought not to be joined in one and the ſame declaration; for one is grounded upon *a contract* in law, to which *non aſſumpſit* is the proper plea, and the other upon *a tort*; and it is for the ſame reaſon that *a trover* and an *indebitatus aſſumpſit* ought not to be joined, nor an * ejectment, and an action on the caſe for ſcandalous words, though the ſame iſſue goes to both. But *not guilty* is not the proper iſſue to this action, for anciently the defendant pleaded ſpecially to the neglect and misfeaſance *(a)*. It cannot be denied but that this action is founded on the *contract*; and for that, the authority of the caſe of *Boſon v. Sandford (b)* is plain. An *ejectment* and an action for an *aſſault and battery* were joined *(c)*, and the plaintiff had a verdict; but the Court was of opinion that this was the firſt precedent, for they ſever in damages, and therefore they adviſed on it; but WINCH, *Juſtice*, was of opinion that it was not good.

S. C. 12. Mod. 73.

* [91]

S. C. 1. Salk. 10.

S. C. Comb. 333.

S. C. 3. Salk. 204.

S. C. 1. Ld. Ray. 58.

S. C. 3. Ld. Ray. 115.

1. Roll. Abr. 6.

1. Vent. 365.

1. Sid. 244.

2. Wilſ. 319.

To which it was anſwered, that it was my *Lord Hobart*'s opinion in that very caſe, that the declaration was good after a verdict; and that of late no action had been brought againſt a common carrier but *trover* was joined with it *(d)*. An action on the caſe for over-riding, and not delivering a horſe according to a contract, and alſo for a converſion to the defendant's uſe, were joined together *(e)*; upon *not guilty* pleaded, the plaintiff had judgment, though he might have demurred to the declaration, it being double; but by pleading the *general iſſue*, and that being found againſt him, it made the declaration good. So treſpaſs for beating his ſervant, *per quod ſervitium amiſit*, and an action on the caſe for keeping a dog accuſtomed to bite ſheep, were joined in one declaration *(f)*, and the plaintiff had judgment; though it may be a queſtion whether treſpaſs will lie for the laſt or not, for it is only a negligence to let the dog looſe, for which treſpaſs will not lie. It is not *the contract* which entitles the plaintiff in this caſe, for it is an action grounded upon *a tort*, and the iſſue and judgment are the ſame in both *(g)*. It is true, there was the like declaration, iſſue, and verdict, in the caſe of *Matthew v. Hopkins (h)*, and the judgment was arreſted; not for the reaſon

(*a*) Winch. 29. See alſo 1. Term Rep. 31

(*b*) 1. Show. 29 3. Mod. 321 3. Lev. 258. 2. Salk. 440.

(*c*) Bird *v.* Snell, Hob. 249 1. Brownl. 235.

(*d*) 2. Lev. 101. 3. Lev. 99.

(*e*) White *v.* Relden, Cro. Car. 20. 1. Lutw. 101.

(*f*) Aſh *v.* Rapier, Eaſter Term, 26. *Car.* 2.

(*g*) See Gilbert's Hiſtory of Common Pleas, 7. Bedford *v.* Alcock, 1. Wilſ. 248. Dickon *v.* Clifton, 2. Wilſ. 319.

(*h*) 1. Sid. 244. 1. Vent. 365. 1. Keb. 870.

DALSTON *againſt* JANSON.

now given, but becauſe the plaintiff had alledged, that the defendant was a carrier on the tenth of *May*, and that he was poſſeſſed of the goods on the ſixth of *May*, on which day he did deliver them, ſo that it did not appear he was a carrier on the day of the delivery. Theſe are not actions of different natures, and therefore they may be joined; and the like has been done in many other caſes; as *debt upon bond*, and *detinue*, were joined (*a*): ſo likewiſe *debt upon a penal ſtatute*, and an *indebitatus aſſumpſit* [92] generally for * tithes (*b*), and *non aſſumpſit* pleaded to both, which was a diſcontinuance to ſo much as related to the penalty; but it was the opinion of TWISDEN, *Juſtice*, that if the iſſue could have been *not guilty*, it might have gone to both (*c*). Agreeable to this is that diſtinction taken in *Packmere's Caſe* (*d*), that in actions real founded upon *a tort*, a man ſhall have but one writ to recover lands to which he had ſeveral titles; but in perſonal actions, ſeveral *torts* may be comprehended in one declaration, becauſe in theſe there is not ſo much regard to forms as in the other. Before the ſtatute *de bonis aſportatis in vitâ teſtatoris*, it was a queſtion, whether an action would lie againſt the executor of a carrier? but now it is not doubted (*e*).

Skin. 66. Comb. 47. 114. Carth. 113. Hob. 17. Hard. 163. Cro. Jac. 262. 330. Palm. 523. Herne's Pl. 76. 1. Sid. 36. 4. Co. 84. Owen, 57. 2. Saund. 380. 2. Mod. 270. Moor, 462. Co. Lit. 89. 3. Mod. 323. Molloy, 209.

CURIA. A plaintiff cannot join two actions which require ſeveral iſſues; ſo that the queſtion now is, Whether actions may be joined where the ſame pleading will anſwer both? In ſuch caſes as this, the defendant in former times pleaded particularly to the neglect; but it has been lately ruled, that *not guilty* is a good plea (*f*). But it ſeems ſtrange, that *debt* and *detinue* ſhould be joined, becauſe theſe actions have different judgments.

Upon the firſt debate of this caſe, they inclined for the plaintiff. But afterwards, when ROKEBY, *Juſtice*, came into the court in *Michaelmas Term* following, they were all of opinion that theſe were diſtinct actions; for an action againſt *a common carrier*, upon THE CUSTOM OF ENGLAND, is not ſo much upon *a tort*, as upon *a contract*; for by receiving the goods, and taking a reward for the carriage, the defendant implicitly undertakes to deliver them ſafely, and therefore the law implies *a contract* to anſwer the value, if robbed. The caſe of *Matthew v. Hopkins* (*g*) the carrier of *Tiverton*, was upon the common cuſtom of the realm, for negligently carrying a bag of wool, in which there was fifty pounds, and in the ſame declaration there was *a*

(*a*) Fitz. Abr. "Brief," pl. 3. Tidd's Digeſt, Bk. 10 ch. 15. § 6.

(*b*) Bro. Abr. "Joinder in Action," pl. 97.

(*c*) Wright *v.* Beale, 1. Sid. 223. 1. Lev. 141.

(*d*) 8. Co. 86.

(*e*) But a plaintiff cannot join in the ſame declaration a cauſe of action, *executor*, with another which accrued in *his own right*, Cockeril *v.* Kryaſton, 4. Term Rep. 277.; nor can a count on a promiſe made by a defendant, *as adminiſtrator*, to pay money received by him, *as jacb*, to the plaintiff's uſe, be joined with other counts on promiſe made by *the inteſtate*, Jennings *v.* Newman, 4. Term Rep. 347.

(*f*) 2. Vent. 77.

(*g*) 1. Sid. 244. 1. Vent. 365.

trover

trover for the said money; and it was held, that these were different actions, and ought not to be joined, which is the case in point.

DALSTON *against* JANSON.

So JUDGMENT was given for the defendant (*a*).

(*a*) But it is now settled, that an action against a common carrier on the custom of the realm and an action of *trover* may be joined in the same declaration, Dickson *v.* Clifton, 2. Wilf. 319. See also 1. Vent. 223.; Bedford *v.* Alcock. 1. Wilf. 252.; Maft *v.* Goodfon, 2. Bl. Rep. 848.; Brown *v.* Dixon, 1. Term Rep. 274.

* [93]

Alice Masters, Administratrix of Charles Masters, *against* Lewes.

Case 44.

INDEBITATUS ASSUMPSIT against *Lewes*; and upon *non assumpsit* pleaded, the cause was tried before HOLT *Chief Justice* of the king's bench in GUILDHALL, *London*; and it was given in evidence,

To an *indebitatus assumpsit* brought by an administrator against the debtor of the intestate, the defendant cannot plead in bar, that *a creditor* of the intestate had entered a plaint in the sheriff's court against *the ordinary*, and that the *debt*, for which the action was brought, was thereby *attached* in his hands at the suit of the *creditor*.

* That *Masters* was indebted to *Gosfright*, and *Lewes* was indebted to *Masters*, who died intestate: That the defendant, after the death of *Masters*, received two hundred and fifty pounds due to the said intestate for wages, as master of a ship; and before any administration was granted to the plaintiff, for that was contested by *Gosfright*, he (*Gosfright*) levied a plaint against the *Archbishop of Canterbury*, as ordinary, for the debt due to him. There was a *nihil* returned in the sheriff's court of *London*, and upon four summons there was a *scire facias* and judgment against him, and the money of the ordinary was attached in the defendant's hands, which was afterwards condemned and received by *Gosfright*: then administration was granted to the plaintiff, who brought this action against *Lewes*, and had judgment to recover. But whether the point in law was a good bar to her action (*a*), it was referred to the opinion of the Court by THE CHIEF JUSTICE himself, to whom it was referred at the trial.

S. C. Ante, 75. S. C. Carth. 344. S. C. 1. Ld. Ray. 56. S. C. Skin. 516. S. C. 3. Salk. 49. S. C. Holt, 325. 429. S. C. Comb. 347. T. Jones, 165. 1. Roll. Abr. 551. Cro. Eliz. 593. Ld. Ray. 347. Dougl. 380.

It was argued, that such an attachment was well warranted by the *custom of London* for above one hundred and fifty years; that there had been no writ of error in all that time brought upon any such judgment, neither was there any precedent to the contrary. The objections against it are,—FIRST, That by this means the administrator will be liable to a *devastavit*.—SECONDLY, That no such action will lie in the sheriff's court against THE ORDINARY. As to THE FIRST OBJECTION, this can be no *devastavit* in the administrator; for if he be sued, he may plead *plene administravit*, which will be good, especially in this case, where no goods came to his possession. Then as to THE SECOND OBJECTION, by the

(*a*) The custom of *foreign attachment*, as in the present case, was always pleaded specially, Skin. 639. Salk. 280. 1. Ld. Ray. 180. but it may now be given in evidence under the general issue, 3. Wilf. 297. 2. Bl. Rep. 834.

statute

ALICE MASTERS, ADMINISTRATRIX OF CHARLES MASTERS, *against* LEWES.

ſtatute *Weſtminſter the Second*, c. 19. THE ORDINARY was liable for any debt ſo long as he had goods in his hands, which act was made in affirmance of the common law. Now until adminiſtration be granted, THE ORDINARY repreſents the perſon of the inteſtate. There are many *cuſtoms in London*, which are allowed there, and in no other place; as arreſting before a debt is due, &c. (*a*) and they are the proper judges of their own uſages; and this Court will preſume that they have acted according to cuſtom, unleſs the contrary appears. So in *London*, an executor ſhall be charged to pay a debt upon a ſimple contract of his teſtator (*b*); and this was held a reaſonable cuſtom.

2. Inſt. 397.

* [94]

* *E contra.* The plaint is entered againſt the archbiſhop, and he is ſummoned, which ought not to be; for the money being in *London*, the *Biſhop of London*, if any body, ought to be ſummoned.

But THE CHIEF QUESTION was, Whether this is a ſuit within the cuſtom of foreign attachments in *London?*

W. 2. c. 19.

And as to that matter, IT WAS ARGUED, that this is not a reaſonable cuſtom; for at common law, before the ſtatute of *Weſtminſter the Second*, tho' THE ORDINARY could not ſue for or releaſe a debt due to the inteſtate, yet he might ſeize ſuch goods which he found to be in the inteſtate's poſſeſſion, and diſpoſe them at his will, or to pious uſes; and it was a queſtion, Whether debt would lie againſt him if he did otherwiſe? for the creditors of the inteſtate could not call him to account, becauſe the law adjudged him the fitteſt perſon to take care of the eſtate. It is true, the common law was a little defective in this matter; but now by that ſtatute, debt will lie againſt him for ſuch goods which ſhall come to his poſſeſſion; and the reaſon which is given in the ſtatute, is the ſame which was before; for if THE ORDINARY will intermeddle with the goods, he ſhall account as an executor ought to do; and this is the very ground of the writ in *Fitzherbert* (*c*): "PRÆCIPE *A. epiſcopo* "*Lincoln. ad cujus manus bona et catalla quæ fuer. B. qui obiit* "*inteſtatus, ut dicitur, devenerunt, &c.*" and for this very reaſon, if THE ORDINARY die, his executor ſhall be liable. Now if he cannot be ſued but where the goods of the inteſtate *devenerunt* to his poſſeſſion, then the plaint brought againſt the archbiſhop is wrong; for he had no goods of the inteſtate in his hands, and is a mere ſtranger to the ſuit and judgment, and therefore is no proper defendant; for which cauſe this *attachment* is not good. Since the ſtatute 31. *Edw.* 3. c. 11. THE ORDINARY is compellable to grant adminiſtration to the *next of kin*, which if he refuſe, the court of king's bench will grant *a mandamus* to compel him. Now here is a plaint brought againſt AN ORDINARY, to whom the right of granting adminiſtration belonged, and who never refuſed to grant it, and who cannot be anſwerable, unleſs he actually intermeddle with the goods; but here he is condemned to anſwer

Carth. 457. Comb. 454. 1. Lev. 187. 1. Salk. 38. 1. Sid. 280. 370. 2. Sid. 114.

(*a*) Ante, 75. Calthorp, 27. Hob. 86. 1. Vent. 29. Rell. Abr. 555. 1. Bac. Abr. 689.

(*b*) Snelling's Caſe, 5. Co. 82. Cro. Eliz. 409.

(*c*) Fitz. N. B. 120.

before

before he knows any thing of the ſuit. The cuſtom is, that if the defendant, who is really the debtor, appear, *the attachment* againſt *the garniſhee* will be diſcharged, and then he muſt put in bail to render his body, or pay the condemnation money; but the archbiſhop cannot be compelled to do either, ſo he is not within this cuſtom. * The authority which comes neareſt to this caſe, is in *Dyer* 244. where one *Toſt* was indebted to *Foxcroft*, and *Wilkinſon* was indebted to *Toſt*, who died inteſtate; THE ORDINARY granted adminiſtration to *Marſhall*; then *Foxcroft* levies a plaint in *London* againſt THE ORDINARY, and upon a *nihil* returned, as in this caſe, the money was attached in the hands of *Wilkinſon*, and recovered and paid to *Foxcroft*, and the adminiſtrator brought an action of debt for it; the defendant pleaded the cuſtom of *foreign attachments* in *London*, and all the matter before mentioned, and upon demurrer to the plea, the plaintiff had judgment. Now though adminiſtration was granted in that caſe before the plaint levied againſt THE ORDINARY, which was not in this caſe, yet the reaſon of that judgment may govern this caſe; becauſe THE ORDINARY can have no action againſt *Wilkinſon* the *garniſhee*, to recover the debt due to the inteſtate; therefore no action ſhould lie againſt him; ſo in this caſe, becauſe THE ORDINARY cannot ſue, it is unreaſonable he ſhould be ſued, and the cuſtom will not extend to make him liable to ſuch ſuit.

ALICE MASTERS, ADMINISTRATRIX OF CHARLES MASTERS, *againſt* LEWES.

* [95]

Dyer, 247. a, pl. 73.

Comb. 347. 427.

CURIA. The reaſon why money is attached in the hands of *the garniſhee*, is to make the debtor appear. Now the defendant *Lewes* was never indebted to THE ORDINARY; therefore he could not be compelled to appear, by entering a plaint againſt the archbiſhop, to whom there was nothing due. There are ſeveral cuſtoms in *London* againſt law, as arreſting the bail without a *ſcire facias* or *capias* againſt the principal, &c. But this cuſtom cannot be ſupported by reaſon; and though their cuſtoms are confirmed by act of parliament, yet ſuch cuſtoms which are contradictory to reaſon, and to the principles of the common law, ſhall not be allowed in the court of king's bench.

Afterwards in *Michaelmas Term* following IT WAS HELD, that no action did lie againſt *the archbiſhop*, and by conſequence the plaintiff, in this caſe, had judgment.

Wilſon *againſt* Guttery. Caſe 45.

THE DEFENDANT was arreſted on *a Sunday*, by a writ out of THE MARSHALSEA. And now the Court was moved to diſcharge him. BUT IT WAS DENIED; and he was directed to bring an action of falſe impriſonment.

Action lies for arreſting on *a Sunday*, contrary to 29. *Car.* 2. c. 7.; but the Court will not diſcharge the priſoner.—S. C. 1. Salk. 78. Poſt. 449. 6. Mod. 96. Fort. 373. 6. Com. Dig. "Temps" (B. 3.). 3. Bac. Abr. 39, 40. 4. Term Rep. 377. 5. Term Rep. 194.

Case 46.

The King *against* Harpur.

An indictment for refusing the office of *constable*, ought to shew that the defendant was chosen by sufficient authority.

A MOTION was made to quash an indictment, which set forth, that the defendant being qualified to be *a constable*, was *debito modo electus* to serve that office at *Islington*; and that he had *notice* of it, but did not take *the oath* to execute that office.

The objection was, that the indictment should set forth, that he was chosen by one who had sufficient authority, and that he was summoned before a justice of peace to take the oath; and therefore it not appearing how he was chosen, and that he had notice, the indictment ought to be quashed *(a)*.

S. C. Comb. 328. 1. Mod. 13. 1. Salk. 175. 380. 2. Keb. 557. 6. Mod. 96. Post. 130. 179. Alleyn, 78. Stra. 920. 1146. Dougl. 534. 3. Bac. Abr. 102. 2. Burr. 726. 4. Com. Dig. "Indictment" (G. 3.). 4. Com. Dig. "Justice of Peace" (M. 8.). 2. Hawk. P. C. ch. 10. s. 46. ch. 25. s. 57. See Rex *v.* Burder, 4. Term Rep. 778.

(*a*) It is said S. C. Comb. 328. that the indictment was quashed.

Case 47.

Anonymous.

Post. 127. 130. 8. Co. 38. b. 11. Co. 43. b. 2. Roll. Rep. 3.

NOTA. A *leet* may set a fine on a constable, but the *sessions* cannot.

1. Salk. 175. Savil, 94. 1. Ld. Ray. 70. 4. Com. Dig. 8vo. 696. 1. Bac. Abr. 440.

Case 48.

Swales *against* Lowther.

If a man dwell on a farm in the parish of *A.* and has a small quantity of land in the parish of *B.* on which he feeds cattle for the purpose of being employed in *husbandry* in the parish of *A* and not in the parish of *B.* the owner shall pay *tithe* for such *agisted cattle* to the parson of the parish of *B.*

A MAN had a house and a great farm of arable land in the parish of *Kippax*, where he dwelt, and he had five acres of plowed land, and forty acres of pasture, in the parish of *Snillington*, upon which pasture he fed his cattle which were employed in husbandry in the parish of *Kippax*. The parson of *Snillington* libelled for tithes, for the *agistment* of cattle there. The defendant thereupon suggests, that by the *custom of England* no tithes ought to be paid for agistment of cattle kept for plough or pail.

And now a motion was made for *a prohibition*, because the plaintiff cannot libel for the agistment of cattle but for such as are fed in the same parish, and not elsewhere; and the pasturage of cattle used for husbandry in the same parish is not titheable, because the parson has tithes for them in another kind.

On the other side it was said, that the parson is to have a profit where the parishioner has any benefit, and that he is an inhabitant wherever he has land.

But THE COURT would not grant a prohibition upon the first motion, but gave the defendant leave to amend his suggestion, by adding, that he had arable land in *Snillington*, and exercised husbandry there; which was amended.

Cro. Eliz. 446. 475. 702. Fitz. N. B. 53. 1. Roll. Abr. 645. 660. Cro. Jac. 576. Show. 560. Mod. 9. 90. Hard. 184. 3. Com. Dig. "Dismes" (H. 5.). Fitzg. 208.

Afterwards

* Afterwards in *Michaelmas Term* it was moved again, and THE COURT were of opinion, that if the cattle depaſtured were not for plowing the land in the ſame pariſh where they are fed, he ſhall pay tithes, though they plow in another pariſh; and if he had more cattle than he employed for the plough in the ſame pariſh, he ought to pay tithes for them. But THE COURT ordered the defendant to make affidavit to aſcertain the fact.

SWALES *againſt* LOWTHER. Carth. 476.

Brockwell *againſt* Lock. Caſe 49.

DEBT by the bailiff of THE PALACE COURT of the *Biſhop of Rocheſter* for fees, upon execution of a judgment in that court, being twelvepence in every pound for any ſum under a hundred pounds, and ſixpence in the pound if above that ſum; and this is by virtue of the ſtatute 29. *Eliz.* c. 4. (*a*), in which there is A PROVISO, "that it ſhall not extend to fees taken or had "within *a city* or *town corporate*." The plaintiff had a verdict.

And upon a motion in arreſt of judgment, becauſe of that clauſe in the ſtatute, it was alledged that this caſe was not within that PROVISO, it being neither *a city* or *town corporate* where the execution was made. Now the reaſon why execution fees are not to be taken in ſuch places is, becauſe the juriſdiction is narrow, the ſheriff is at leſs trouble, and not ſo much in danger of an eſcape; but here the juriſdiction of the biſhop is as large as his dioceſe, and ſo not within the like reaſon. Bailiffs of franchiſes and liberties are named in the ſtatute, and the plaintiff being ſuch, and the place not within the proviſo, he is entitled to this action; and it has been ruled, that where *a bailiff* of *a franchiſe* made execution upon *a ſcire facias*, he ſhould have his fees by virtue of this ſtatute.

CURIA. An officer of *a liberty* ſhall have his fees for executing the proceſs of *this* court; but it was never intended by the ſtatute, that he ſhould have any for executing judgments obtained in *inferior courts*.

Therefore this judgment was ſtayed.

The Bailiff of THE PALACE COURT of the Biſhop of *Rocheſter* is not entitled to *poundage* under the 29. *Eliz.* c. 4. for executing a judgment of *that* court.

S. C. 1 Salk. 331. 2. Jones, 185. 2. Roll. Rep. 59. 3. Leon. 268. Cro. Car. 287. Noy, 76. 1. Mod. 167. 4. Mod. 254. Poph. 173. Latch. 19 52. 6. Com. Dig. "Viſcount" (F. 2.). 2. Bac. Abr. 466. 2. Term Rep. 155.

(*a*) See 3. *Geo.* 1. c. 15.

* [98]

* South *againſt* Allen. Caſe 50.

Trinity Term, 7. *Will.* 3. *Roll*

SURREY, *to wit.* } BE it remembered that heretofore, to wit, in the Term of *Eaſter* in the firſt year of the lord the king that now is, before the ſame lord the now king at *Weſtminſter*, came *William South*, by *Thomas Johnſon*, ſenior, his attorney, and brought here into the court of the ſaid lord the king, then there, his certain bill againſt *Robert Allen* and *John Wilſon*, in the cuſtody of the marſhal, &c. of a plea of treſpaſs and ejectment; and there are pledges of proſecuting, to wit, *John Doe* and *Richard Roe*, which ſaid bill follows in theſe words, to wit, *William South* complains of *Robert Allen* and *John Wilſon*, in the cuſtody

of

SOUTH against ALLEN.

of the marſhal of the *Marſhalſea* of the lord the king, being before the king himſelf, for that, to wit, that whereas one *William Birch* and *Sarah* his wife on the firſt day of *May*, in the firſt year of the reign of the lord *James the Second*, now king of *England*, &c. at *Tooting-Graveney*, in the county aforeſaid, by a certain indenture ſigned with his hand, and ſealed with his ſeal, demiſed, granted, and to farm let, to the ſaid *William South* one meſſuage with the appurtenances, and one barn, and one orchard, and one garden, ſituate, lying, and being in *Tooting Graveney* aforeſaid, in the county aforeſaid, to HAVE AND TO HOLD the tenements aforeſaid, with the appurtenances, to the ſaid *William South* and his aſſigns, from the ſaid firſt day of *May* until the full end and term of five years from thence next enſuing and fully to be completed and ended. By virtue of which ſaid demiſe, the ſaid *William South* entered into the tenements aforeſaid, with the appurtenances, and was poſſeſſed thereof, until the ſaid *John Wilſon* and *Robert* afterwards, to wit, on the ſame firſt day of *May* in the year aboveſaid, with force and arms, into the tenements aforeſaid, with the appurtenances in and upon the poſſeſſion of him the ſaid *William South*, thereupon entered, and him the ſaid *William* from his farm aforeſaid, his term thereof not being ended, ejected, expelled, and removed, and him the ſaid *William* from his poſſeſſion aforeſaid, ſo ejected, expelled, and removed, kept out and yet keeps out thereof, and other wrongs then and there to him did, againſt the peace of the ſaid lord the now king, to the damage of him the ſaid *William South* of one hundred pounds. And thereupon he brings ſuit, &c.

And now here at this day, to wit, *Monday* next after eight days of *Saint Hilary* in this ſame Term, until which day the ſaid *Robert* and *John* had leave to imparl to the ſaid bill, and then to anſwer, &c. before the lord the king at *Weſtminſter*, came as well the ſaid
[99] *William South*, by his attorney, as the aforeſaid *Robert Allen* and *John Wilſon*, by *Edward Shaller*, their attorney: and the ſaid *Robert* and *John* defend the force and injury when, &c. and ſay, that they are not thereof guilty, nor is either of them guilty in the manner and form as the ſaid *William South* above declaring alledges; and of this they put themſelves upon the country, and the aforeſaid *William South* likewiſe, &c. Therefore let a jury thereupon come before the lord the king at *Weſtminſter*, on *Saturday* next after eight days of the Purification of the *Bleſſed Virgin Mary*, and who neither, &c. to recognize, &c. becauſe as well, &c. The ſame day is given to the parties aforeſaid there, &c. Afterwards the proceſs is thereupon continued between the parties aforeſaid of the plea aforeſaid by the jury being thereupon reſpited between them before the lord the king at *Weſtminſter*, until *Wedneſday* next after three weeks of *Eaſter* then next following, unleſs the juſtices of the lord the king aſſigned to take THE ASSIZES in the county aforeſaid ſhall firſt come on *Thurſday* the third day of *March*, at *Southwark*, in the county aforeſaid, by form of the ſtatute, &c. for want of jurors. At which day before the lord the king at *Weſtminſter* cometh

cometh the parties aforeſaid by their attornies, and the ſaid juſtices of the lord the king before whom, &c. have ſent here their record before them had in theſe words, TO WIT, Afterwards on the day and at the place within contained before EDWARD HERBERT, *Knight*, Chief Juſtice of the lord the king, aſſigned to hold pleas before the king himſelf, and THOMAS JENNOUR, *Knight*, one of the barons of the exchequer of the ſaid lord the king, aſſigned to take aſſizes in the county of *Surrey* according to the form of the ſtatute, &c. came as well the within named *William South*, as the within written *Robert Allen* and *John Wilſon*, by their attornies within contained. And the jurors of the jury whereof mention is within made being called likewiſe came; who being choſen, tried, and ſworn to ſpeak the truth concerning the matter within contained, ſay upon their oath, that before the ſaid time of the treſpaſs and ejectment aforeſaid above ſuppoſed to be done, one *John Stone* was ſeiſed in his demeſne as of fee of and in one meſſuage, one barn, one orchard, and one garden, in the declaration aforeſaid mentioned, with the appurtenances, ſituate, lying, and being in *Tooting Graveney* within written in the county aforeſaid; and that the ſaid *John Stone*, being ſo ſeiſed as aforeſaid of and in the tenements aforeſaid with the appurtenances, afterwards, &c. to wit, on the twenty-ninth day of *October*, in the thirty-third year of the reign of the lord *Charles the Second*, late king of *England*, made his laſt will and teſtament in writing, ſigned, ſealed, and delivered by the ſaid *John Stone*, in the preſence of three credible witneſſes, whoſe names to the ſaid laſt will and teſtament, and in the preſence of him the teſtator by the ſame witneſſes ſubſcribed, are in theſe Engliſh words following: *viz.* "The twenty-"ninth of *October* 1681, *John Stone*, of the pariſh of *Allhallows* "*Barking*, *London*, citizen and merchant-taylor of *London*, being "ſick and ill, makes his will as follows: As to my eſtate, I give "and diſpoſe the ſame in manner following: *Item*, I give unto "my ſiſter *Sarah Birch*, wife of *William Birch*, the rents and "profits of all my lands and tenements lying in *Tooting*, in the "county of *Surrey*, during her natural life; and to be paid by "my executors hereafter named, into her own hands, without "the intermeddling of her huſband; and after the deceaſe of my "ſaid ſiſter *Sarah Birch*, I do give and bequeath the ſaid lands "and tenements, with the appurtenances, unto and amongſt *John* "*Birch*, *Malme Birch*, and *Sarah Birch*, children of my ſaid "ſiſter, and to their heirs and aſſigns for ever equally, part and "part alike," as by the ſaid laſt will and teſtament of the ſaid *John Stone*, to the ſaid juſtices and jurors aforeſaid in evidence ſhewn amongſt other things, is more fully manifeſt and appears. And the jurors aforeſaid, upon their oath aforeſaid, further ſay, that the ſaid *John Stone*, afterwards, to wit, on the firſt day of *May*, in the year of Our Lord 1682, at *Tooting Graveney* aforeſaid, in the county of *Surrey* aforeſaid, died ſo thereof ſeiſed of and in the tenements aforeſaid, with the appurtenances. And the jurors aforeſaid, upon their oath aforeſaid, further ſay, that the within named *Sarah*,

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SOUTH against ALLEN.

Sarah, one of the leſſors of the plaintiff, and wife of *William Birch*, the other leſſor of the plaintiff in the declaration aforeſaid mentioned, and *Sarah Birch*, in the laſt will and teſtament of the aforeſaid *John Stone* likewiſe named, is one and the ſame perſon, and not another and a different perſon; and that the tenements in the declaration aforeſaid mentioned, and the lands and tenements in *Tooting*, in the county of *Surrey*, in the ſaid laſt will mentioned, are one and the ſame lands and tenements, &c.; and that the ſame *Sarah Birch in plenâ vitâ modò exiſtit.* And the jurors aforeſaid, upon their oath aforeſaid, further ſay, that the ſaid *William Birch* and *Sarah* his wife, afterwards, and after the death of the ſaid *John Stone*, and before the ſaid time when, &c. to wit, on the thirtieth day of *April*, in the firſt year of the reign of the lord *James the Second*, now king of *England*, &c. in the tenements aforeſaid, with the appurtenances, in the declaration and laſt will aforeſaid mentioned in and upon the poſſeſſion of the aforeſaid *Robert Allen* and *John Wilſon*, entered thereupon, and were thereof ſeiſed as the law requires; and that the aforeſaid *William Birch* and *Sarah* his wife being thereof ſo ſeiſed, afterwards, to wit, on the within written firſt day of *May*, in the firſt year within written, at *Tooting Graveney* aforeſaid, in the county aforeſaid, by his indenture within ſpecified, ſigned with his hand, and ſealed with his ſeal, demiſed to the aforeſaid *William South* the tenements aforeſaid, with the appurtenances, to have and to hold the tenements aforeſaid, with the ſaid appurtenances to the ſaid *William South* and his aſſigns, from the ſaid firſt day of *May*, in the firſt year aboveſaid, until the full end of five years from thence next following and fully completed and ended. By virtue of which ſaid demiſe, the ſame *William South* into the tenements aforeſaid with the appurtenances, entered, and was thereof poſſeſſed, until the aforeſaid *Robert Allen* and *John Wilſon* afterwards, to wit, on the ſecond day of the ſame month of *May*, in the firſt year abovementioned, with force and arms, &c. into the tenements aforeſaid, with the appurtenances, in and upon the poſſeſſion of him the ſaid *William South* thereupon entered, and him from his poſſeſſion ejected. But whether upon the whole matter aforeſaid, by the jurors aforeſaid in form aforeſaid found, the ſaid *Robert Allen* and *John* are guilty of the treſpaſs and ejectment within written in manner and form aforeſaid, as the ſaid *William South* within againſt them complain, or not, the jurors aforeſaid are wholly ignorant, and thereupon pray the advice of the Court here in the premiſes. And if upon the whole matter aforeſaid, by the jurors aforeſaid, in form aforeſaid found, it ſhall ſeem to the juſtices here that the tenements aforeſaid, with the appurtenances, by the aforeſaid laſt will and teſtament of the ſaid *John Stone*, are deviſed to the ſaid *Samuel Birch* for the term of his life, then the jurors aforeſaid upon their oath aforeſaid ſay, that the aforeſaid *Robert Allen* and *John Wilſon* are guilty of the treſpaſs and ejectment within written, in manner and form as the ſaid *William South* within againſt them complains; and then they aſſeſs damages of him the ſaid *William South* by occaſion of that treſpaſs and

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and ejectment; beſides his coſts and charges by him about his ſuit in this behalf laid out, to ſixpence; and for theſe coſts and charges to forty-eight ſhillings. But if upon the whole matter aforeſaid, in form aforeſaid found, the tenements aforeſaid, with the appurtenances by the aforeſaid laſt will and teſtament of the ſaid *John Stone* are not deviſed to the ſaid *Sarah Birch* for the term of her life, then the jurors aforeſaid, upon their oath aforeſaid ſay, that the ſaid *Robert Allen* and *John Wilſon* are *not guilty* of the treſpaſs and ejectment within written, as the ſaid *Robert Allen* and *John Wilſon* within, in pleading, have alledged. And becauſe the aforeſaid juſtices and court here are not yet adviſed what judgment to give of and in the premiſes, a day is thereof given to the parties aforeſaid until *Thurſday* next after fifteen days of *Eaſter*, before the lord the king at *Weſtminſter*, to hear their judgment of and upon the premiſes, for that the aforeſaid juſtices and court here are not yet adviſed thereof, &c.

South *againſt* Allen.

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Caſe 51.

IN EJECTMENT for lands in *Tooting*, upon the demiſe of *William Birch* and *Sarah* his wife; a ſpecial verdict was found, that *John Stone* was ſeiſed in fee of the lands in queſtion; and by his laſt will and teſtament deviſed the *rents and profits* thereof to the ſaid *Sarah* for life, to be paid by his executors into her hands, &c.

The queſtion was, Whether this was a deviſe of the lands to her for life, or to the executors during her life? If it was to her for life, then the ejectment is well brought upon the demiſe of the huſband and wife.

THOSE WHO ARGUED *for the plaintiff* held, that it was a good deviſe of the lands to the wife for life; for a deviſe of "the "rents and profits" is a deviſe of the lands itſelf: and the ſubſequent words, "to be paid by his executors," will make no * alteration of the eſtate; it makes them bailiffs to a particular purpoſe, but gives them no intereſt. As for inſtance: A man had iſſue a ſon and a daughter (*a*), and deviſed that his ſon ſhould have his lands at the age of twenty-four years, and bequeathed forty pounds to his daughter at the age of twenty one years, and appointed who ſhould be his executor, and that he ſhould have "the overſight and doing of all his lands, &c." until the ſeveral ages of his children; and it was adjudged, that the executor had no intereſt in the lands by thoſe words, but only a ſtewardſhip for the benefit of the heir. So in *Trinity Term*, in the forty-firſt year of *Queen Elizabeth*, The teſtator being ſeiſed in fee, deviſed to his ſon in tail, and appointed that the overſeer of his will

A deviſe of "the "*rents and profits* of all my "lands and tenements lying "in *Dale*, to my "ſiſter during "her natural "life, to be paid "by my executors into her "own hands, "without the "intermeddleing of her huſband; and after her deceaſe "the ſaid lands "and tenements "to be equally "divided unto "and amongſt "the children of "my ſaid ſiſter," is not a deviſe of *the lands* to his ſiſter for life, but to his executors in truſt, to receive *the rents and profits* for her uſe during her life.

South *againſt* Allen.

S. C. Ante, 63. S. C. 1. Salk. 228. S. C. Comb. 375. 1. Vern. 104. 256. 2. Vern. 310. 420. 1. Eq. Caſ. Abr. 383. 1. Atk. 581. Caſ. T. T. 164. 2. Vezey, 323. 1. Chan. Caſes, 173. 176. Powel on Dev. 286. 1. Term Rep. 193. 4. Term Rep. 89.

(*a*) Carpenter *v.* Collins, Yelv. 73.

South *against* Allen.

ſhould educate his ſon till twenty-one, " and receive, ſet, and let " for him :" and it was adjudged (*a*), that the overſeer had no intereſt to make a leaſe for years in his own name, but that he might make leaſes at will, and that his receipts were for the uſe of the deviſee. If a man deviſe that his land ſhall deſcend to his ſon; and that his mother ſhall take *the profits* until he is of age; and the mother marry, and die before her ſon come of age; the huſband ſhall not have the profits till that time, becauſe no intereſt was deviſed to the wife, but a confidence for the benefit of the ſon (*b*). There can be but three pretenders to this eſtate; the heir at law; the executors; or the deviſee. The heir at law cannot have it; for a deviſe of *rents and profits* is a deviſe of *the land* itſelf. The executors have no eſtate by this deviſe; for ſince the ſtatute of wills (*c*), the law never conſtrued a freehold to paſs by ſuch words, without neceſſity required it; for nothing is given to them, but that they ſhall pay, &c. and it is no conſequence, becauſe they are to pay, that therefore they muſt have the eſtate in the land (*d*). If a leaſe be made, upon condition that the leſſee ſhall not alien but to his children, and he afterwards deviſe part of the term to his ſon, after the death of his wife, and make his executors, and die; this is no forfeiture (*e*), becauſe the law will not intend it to be a deviſe to the wife by implication, to make a breach of the condition in order to deſtroy an eſtate expreſly deviſed: ſo in this caſe, the rents being expreſly deviſed to the wife though they are to be paid by his executors, the law will conſtrue it to be a deviſe to the wife, becauſe it does not appear that he intended any intereſt to the executors.

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THOSE WHO ARGUED *for the defendant* inſiſted, that it was impoſſible to fulfil the intent of the teſtator, if the eſtate ſhould not be veſted in the executors. his meaning was, that the wife ſhould receive *the rents* for her life, which ſhe may do, if the executors receive *the profits*. An executor *quatenus* ſuch, has nothing to do with the freehold, ſo that his office is not concerned in this caſe, but the perſon is deſcribed who ſhall receive the profits, and therefore ſuch a conſtruction muſt be made of the will, that all the parts of it may ſtand together. Can any reaſon be aſſigned why a deviſe of " *the rents and* " *profits*, &c." ſhould paſs the *land* itſelf, but only to fulfil the intent of the teſtator by implication? For the right which is given to a man to receive *the profits* entitles him to *the land*; but if any thing appear in a will, to ſhew the intention of the teſtator to be otherwiſe, there the law will never make it an eſtate by implication. If an eſtate of freehold ſhould be veſted in *Sarah* the wife, then her huſband would have it during her life; and if he ſhould be outlawed or become a bankrupt, it would then be forfeited for his life, and during that time ſhe could not have *the profits*; which is directly contrary to the will. The law has ap-

Comb. 375. 1. Vern 104. 2. Chan Rep. 117.

(*a*) Pigott *v.* Garniſh, Cro. Eliz. 674. 734.
(*b*) 2. Leon. pl. 380.
(*c*) 32. *Hen.* 8. c. 1. 34. *Hen.* 8. c. 5. 12. *Car.* 2. c. 4.
(*d*) See 3. Com. Dig. "Deviſe" (N. 7.).
(*e*) Horton *v.* Horton, Cro Jac. 74.

pointed

pointed no particular words to diſpoſe a freehold by will; therefore ſuch words which ſhew the intention of the teſtator to deviſe ſuch an eſtate, are ſufficient to make it ſo. Now an executor cannot pay the rents into the hands of the wife, unleſs he has ſome eſtate in the land to ſue for and recover the profits, if the tenants ſhould deny payment. As to the caſe of *Carpenter v. Collins* (*a*), it is not to this purpoſe, for that was only an appointment to the executors to look after the land; they were no more than the overſeers of the will, and had no legal intereſt by that deviſe. SOUTH *againſt* ALLEN.

In *Trinity Term* 1696, JUDGMENT was given for the defendant by the opinion of TWO JUDGES againſt THE CHIEF JUSTICE, who held that the intent of the teſtator would be better fulfilled if theſe words ſhould be conſtrued to give *an intereſt* to the executors during the life of *Sarah*, becauſe the will being penned againſt her huſband, by ſuch a conſtruction he would have nothing to do with *the rents*. But by the penning this will, the executors have no intereſt by theſe words; for if they ſhould, it would contradict the precedent deviſe of "the rents and profits" to the wife; and that would be to make a deviſe by implication to the executors, to * contradict an expreſs deviſe to her for life. [104]

But by the opinion of the other Judges, the defendant had judgment.

(*a*) Cro. Eliz. 74. S. C. Yelv. 73. S. C. Brownl. 88.

Robinſon *againſt* Groſcourt. Caſe 52.

THE CHAMBERLAIN of *London* brought an action of debt againſt the defendant, for a forfeiture upon the breach of a bye-law, which being removed in this court by a *habeas corpus*, the lord mayor, aldermen, and ſheriffs made this return: "THAT "the *City of London* is an ancient city; that there had been a "cuſtom there, time out of mind, for the mayor and aldermen for "the time being, with the conſent of other faithful people, to make "bye-laws for the common good of the citizens, as often as there "ſhould be occaſion; that their cuſtoms were confirmed by act "of parliament; that at a common-council held at GUILDHALL "on the eleventh of *September*, &c. a bye-law was made, "That whereas the maſter, warden, aſſiſtants, and commonalty "of the art and ſcience of muſic, freemen of the ſaid city, had "been an ancient brotherhood, and that no perſon not being a "freeman ought to uſe any art or occupation within the ſaid "city for gain; that many foreigners did take upon them the art "*Muſicians*, on pain of forfeiting ten pounds for every offence," is a *void* bye-law —S. C. Comb. 372. S. C. Holt, 129. 1. Roll. Abr. 363. Poſt. 157. 167. 319. 438. 1. Mod. 10. 164. 6. Mod. 123. 177. Ray. 447. 1 Salk. 341. 352. Comb. 10. 121. 181. Skin. 371. 291. 2. Show. 267. 270. 4. Mod. 27. 1. Burr. 12. 14. 3. Burr. 1324. 1. Bac. Abr. 339. 1. Wilſ. 233. 2. Wilſ. 266. 1. Stra. 675.

A *bye-law* made by the CITY OF LONDON, "that "every perſon "uſing the oc- "cupation of "muſic and "dancing with- "in the city, "and who ſhall "be entitled to "the freedom "by *patrimony* "or *ſervitude*, "ſhall at the "next court, "after notice, "take up his "freedom in the "*Company* of

ROBINSON against BRIDGEWAT.

" of *dancing*, not being free of the ſaid city, nor members of any " fraternity, &c. For remedy whereof it was enacted by the " mayor, aldermen, and commons, that every perſon uſing the " occupation of *muſic* and *dancing* within the ſaid city, who ſhall " have a privilege to be made free by patrimony, ſhall at next " court of aſſiſtants of the *Company of Muſicians*, after notice, " accept and take upon himſelf the freedom of the ſaid company; " and that every perſon who hath ſerved an apprenticeſhip to the " myſtery of *muſic* and *dancing*, and not made free, and ſhall yet " exerciſe his trade, ſhall forfeit ten pounds for every offence, to " be recovered by action of debt or plaint, in the name of THE " CHAMBERLAIN, in the mayor's court, one moiety after con- " viction to be paid to THE CHAMBER OF LONDON, the other " moiety to the maſter, wardens, and aſſiſtants of the ſaid com- " pany, for the uſe of the poor thereof."

IT WAS ARGUED *for the defendant*, that bye-laws are good or bad, in reſpect to the end for which they are made; as againſt frauds by *Blackwell-Hall factors*; againſt reſtraining the number of carts and coaches; but where the public is not concerned, a man ſhall not be reſtrained of his liberty by any law whatſoever.

* [105] * Therefore this bye-law is void:

FIRST, For the matter, becauſe it is trivial. There are ſeveral trades ſo mean, that they are not within the intention of the ſtatutes of bankruptcy, though thoſe ſtatutes ſpeak generally of " all perſons uſing the trade of merchandize, by way of bargain- " ing, exchange, &c. or otherwiſe in groſs or retail, or ſeeking " a living by buying and ſelling, &c." All cuſtoms or laws which reſtrain trade, are to be taken very ſtrictly, becauſe at common law any man might uſe what trade he thought fit; which is now reſtrained by the ſtatute 5. *Eliz.* c. 4. to an apprenticeſhip; but that being performed, he may ſet up his trade where he can moſt conveniently. A bye-law, without a cuſtom of the place to ſupport it, will not bind (*a*). Now the cuſtom of this place is, " That no perſon not being a freeman, ought to uſe any art " or occupation within the city of *London* for gain, not being " free of the city, nor member of any fraternity;" ſo that this cuſtom does not bind a man to be free of any particular company; and then the bye-law exceeds the cuſtom, becauſe though the perſon is free, yet if he do not take his freedom of THE COMPANY OF MUSICIANS, it is not good. This bye-law tends to deprive perſons of their freedom though they are entitled to it by birth or ſervice, and to take away the intereſt which they have, and which is veſted in them by cuſtom; for there may be a cuſtom to appropriate particular privileges to a corporation, excluſive to all other perſons; but a bye-law without a cuſtom will not do it, becauſe it is againſt the liberties of the people in general.

(*a*) 1. Salk. 192. 4. Mod. 27.

SECONDLY,

Robinson against Groscourt.

SECONDLY, The penalty is exorbitant, in making the forfeiture to be ten pounds for every offence: and this has often been adjudged in cases of lords of manors, who have set arbitrary fines on their tenants, that notwithstanding they had power to impose fines, yet it must be according to justice and reason (*a*). The case which most resembles this is that of *Paine v. Haughton* (*b*), where the king by letters patents granted a power to the mayor and commonalty of this very city to make bye-laws, and this was confirmed by act of parliament; afterwards they made a bye-law, "That no carman should use a cart in the city without a licence "from the wardens of such an hospital, under the penalty of "fifteen shillings," and it was adjudged void, because it was in nature of a monopoly, and made only for the private benefit of such wardens, without any respect to the public good.

Comb. 43. Skin. 247.

* THIRDLY, The penalty is to be recovered by action of debt, or plaint, in the name of THE CHAMBERLAIN in the mayor's court, and one moiety after convict on to be paid to THE CHAMBER OF LONDON. Now for this reason the bye-law is void, because it is to make them judges in their own cause; which is so contrary to the rules of law, that it has been held (*c*), that if a judge take the caption of a fine where he is a party, the cognizance is void.

* [106]

FOURTHLY, This custom is not applied to those who are free of the city, but it is laid at large to be in the mayor and aldermen for the time being, with the *consent of other faithful people*, to make bye-laws, &c. which may be people of any other place; and therefore it is naught, not being bound up to the freemen of the city, for so was the return in *Wagoner's Case* (*d*), VIZ. *de assensu communitatis ejusdem civitatis.*

FIFTHLY, Here is an arbitrary power given to the *Company of Musicians*, who by admitting a man into their fraternity, may take what fine they please, and if they refuse to admit him, there is no penalty given by this law to the person thus refused to compel an admittance, which is to put a certain number of men under the final jurisdiction and power of others, and that is contrary to a fundamental rule in the law Therefore a bye-law made by *the Merchant Adventurers* (*e*), "That no man should buy or sell "at four fairs within such a prince's dominions, without first "compounding with them, and paying a fine," was held to be void, because it was an infringement of the liberties of all others not being free of that company.

SIXTHLY, But admitting this bye-law to be good, they ought to have returned, that the defendant had *notice* of it, and the rather because he is not one of their company; and it is a rule in all cases, where penalties are imposed by way of forfeiture, that the party ought to have notice of the law.

(*a*) See Halton *v.* Hiffell, Stra. 1042. Evelyn *v.* Chichester, 3 Burr. 1717. Grant *v.* Astle, Dougl. 724. *contr.*

(*b*) 1. Roll Abr. 364.

(*c*) Co. Lit. 14.

(*d*) 8. Co 122.

(*e*) 1. Roll. Abr. 363

ROBINSON *against* GRASCOURT.

THOSE WHO ARGUED *on the other ſide* anſwered ſome of the objections, *viz.*

As to that objection, that the bye-law was void becauſe a moiety of the penalty was to be for the uſe of the city; admitting it to be void for that reaſon, yet that will not make the whole bye-law ſo, becauſe it may be good in part, and void in part. The ſame objection was taken in the caſe of *Player v. Archer (a)* where a moiety of the fine was appointed for the maintenance of CHRIST'S HOSPITAL, and the other moiety to the mayor and aldermen, &c. and there it was inſiſted, that the court of aldermen would be both judges and parties; yet a *procedendo* was not allowed.

[107] * Neither is this bye-law contrary to a cuſtom, or excluding thoſe who have right by birth to be freemen, becauſe it is neceſſary that even in ſuch caſes the party ought to be free of ſome company, otherwiſe he cannot be free of the city; and if it be neceſſary that the defendant ſhould be free of a company, why not of the *Company of Muſicians*, which is the moſt agreeable to the art of *dancing*? And if he refuſe, why may not the court of aldermen have power to impoſe him upon that company?

AS TO THE FIRST OBJECTION, that this bye law is void becauſe it is made about a trivial matter; the queſtion is not about the meanneſs of the thing, but whether the ſubject-matter be within the juriſdiction of the court of aldermen; and if ſo, then whether they have not done what is reaſonable?

And as to that, it cannot be denied but that *muſicians* are an ancient brotherhood in *London*, and have been always under the care and government of the city; and the law now in queſtion carries a conveniency in the very nature of it, for it is to keep good order in the city, that the youth ſhould not be taught but by ſuch who are approved maſters in this art; and it is not the meanneſs of trades which exclude the people who exerciſe ſuch trades from the care of the civil magiſtrate; for then inn-keepers, comb-makers, patten-makers, and many other trades, would be under no government, which is moſt neceſſary in ſuch mean employments; ſuch people are ſubject to bye-laws, not in reſpect of their occupations, but by reaſon of the diſtrict where they inhabit, that they may be kept in due conformity and order.

It is admitted by thoſe who argued *on the other ſide*, that a cuſtom may be good to exclude particular perſons from certain privileges, but that a bye-law cannot do it. Now it will not be denied, but that there is a cuſtom in *London*, which enables them to make bye-laws, and that their cuſtoms differ from others: now if a bye-law be founded on ſuch a general cuſtom, and made in purſuance thereof, it is as good as if there were an expreſs cuſtom for this very purpoſe.

(a) 1. Sid. 105.

As

As to the penalty being exceſſive, the Court are the proper judges thereof: there are many bye-laws where the like penalty is inflicted, and thoſe which had the leaſt during all the reigns of *Edward the Sixth* and *Queen Elizabeth* have forty ſhillings and ſome of them five pounds, ſo that this is but a reaſonable fine.

CURIA. Though the cuſtom is, that whoever is free of the city muſt be free of ſome company, yet that cuſtom does not oblige * a man to be of any particular company; for if it ſhould, then though the defendant is entitled by birth to be free of ſuch company, yet he muſt alſo be free of this, otherwiſe he cannot exerciſe this art, which is unreaſonable. They may make him take his freedom (*a*), but cannot direct in what company; for if they had ordered the defendant to be admitted of the *Blackſmiths Company*, it had not been good. It may be a queſtion, Whether the city has a power to enforce men of no trades to be free of thoſe companies which are ſuitable to their profeſſions? as *dancing* is no trade, but it may be called a profeſſion. It is true, *muſic* is ſuitable to it; but it is not abſolutely neceſſary that *a dancing-maſter* ſhould be free of the *Muſicians Company*: there is no fellowſhip of *refiners*; but the court of aldermen cannot order them to be free of the *Goldſmiths Company*, which is the moſt ſuitable to them. So that this cannot be a good bye-law, becauſe the defendant cannot be compelled to be of that particular company, and it is ſufficient if he is of any other, which he may be for any thing that appears on this return: it is in nature of a monopoly to the *Company of Muſicians*, who cannot be compelled to make him free of that company in caſe they had refuſed.

* [108]

1. Salk. 143.

So in *Trinity Term*, in the eighth year of *William the Third*, judgment was given accordingly.

(*a*) See the caſe of Wannel *v.* The City of London, that a bye-law to oblige a joiner, in *London*, to be free of the Joiners Company, is good, 1. Stra. 675. S. C. 8. Mod. 269. See alſo Harriſon *v.* Goodman, 1. Burr. 12.; Pierce *v.* Bartrum, Cowp. 270.; The King *v.* Marſhall, 2. Term Rep. 2.

MICHAELMAS TERM,

The Seventh of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir William Gregory, *Knt.*
Sir Thomas Rokeby, *Knt.* } *Juſtices.*
Sir Samuel Eyre, *Knt.*
Sir Thomas Trevor, *Knt. Attorney General.*
Sir John Hawles, *Knt. Solicitor General.*

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* Britten *againſt* Cole.

Caſe 53.

Trinity Term, 7. Will. 3. Roll 187.

GLOUCESTER, *to wit.* } JOHN BRITTEN complains of *Thomas Cole* in the cuſtody of the marſhal of the *Marſhalſea* of the lord the king, being before the king himſelf, for that he on the twentieth day of *March*, in the ſeventh year of the reign of the lord *William the Third*, now king of *England*, *&c.* at *Hannam*, in the pariſh of *Bitton* in the county aforeſaid, with force and arms the cattle, that is to ſay, forty-three ſheep and two lambs of him the ſaid *John Britten* of the price of ſixteen pounds took and drove away, and other wrongs to him did, againſt the peace of the ſaid lord the now king, to the damage of him the ſaid *John* of forty pounds, and thereupon he brings ſuit, &c. Treſpaſs.

And now here at this day, to wit, *Friday* next after three weeks of the *Holy Trinity* in this ſame Term, until which day the ſaid *Thomas* had leave to imparl to the bill aforeſaid, and then to anſwer, &c. before the lord the king at *Weſtminſter* come as well the ſaid *John* by his ſaid attorney as the ſaid *Thomas* by *Philip Hodges* his attorney, and the ſaid *Thomas* defends the force and injury when, &c. and as to the coming with force and arms, and whatſoever is againſt the peace of the ſaid lord the now king, ſaith that Special juſtification under a *levari facias* grounded on an outlawry certified into the court of exchequer.

BRITTEN *againſt* COLE.

that he is *not guilty*; and of this he puts himſelf upon the country, and the ſaid *John Britten* likewiſe: and as to the reſidue of the treſpaſs aforeſaid above ſuppoſed to be done, he the ſaid *Thomas Cole* ſaith, that the ſaid *John Britten* ought not to have or maintain his ſaid action thereof againſt him, becauſe he ſaith, that before the ſaid time when the treſpaſs aforeſaid is above ſuppoſed to be done, to wit, on the twelfth day of *February*, in the ſixth year of the reign of the ſaid lord the now king, a certain writ of the ſaid lord the now king of *levari facias* iſſued out of the court of exchequer of him the ſaid lord the king at *Weſtminſter*, then being in the county of *Middleſex*, directed to the ſheriff of *Glouceſterſhire*; by which ſaid writ, the ſaid lord the king reciting, that whereas *Sir Richard Cocks*, Bart. then late ſheriff of *Glouceſterſhire* aforeſaid, by virtue of the writ of him the ſaid lord the king of *capias utlagatum*, iſſuing out of the court of the ſaid lord the king of common bench, at *Weſtminſter*, againſt *Francis Creſwick*, of *Hannam's Court*, [110] within the pariſh of *Litton*, in the county aforeſaid, Eſq. * outlawed in the county of *Somerſet*, on the twelfth day of *June*, in the fifth year of the reign of the lord the king and of the lady *Mary* late queen of *England*, *&c.* at the ſuit of *Thomas Cole* the now defendant, and *Mary* his wife, of a plea of debt, to the aforeſaid late ſheriff directed, on the twenty-eighth day of *September*, in the fifth year aboveſaid, took and ſeized into the hands of the ſaid lord the king and lady the queen, one capital meſſuage or tenement called *Hannam's Court*, with all the barns, ſtables, outhouſes, edifices, gardens, orchards and appurtenances to the ſame belonging; one cloſe of paſture commonly called *Hill-houſe*, containing by eſtimation fourteen acres; one other cloſe of paſture called the *New Encloſure*, containing by eſtimation eight acres, and ſeveral other grounds; all and ſingular which premiſes aforeſaid, with the appurtenances, were of the clear yearly value of fifty four pounds, in all their iſſues beyond repriſes, of the lands and chattels of the ſaid *Francis Creſwick*, as by the tranſcript of the ſaid writ of *capias utlagatum*, and the return thereof, and of a certain inquiſition thereupon taken, certified into the exchequer of the ſaid lord the now king, and there in the cuſtody of the ſaid lord the king remaining, more fully appears: the aforeſaid lord the king willing to be anſwered and ſatisfied of the rents, iſſues and premiſes aforeſaid, as is right, commanded the ſaid ſheriff of *Glouceſterſhire* by the ſaid writ of *levari facias*, that he ſhould not omit, becauſe of any liberty, but that he ſhould enter into the ſame, and ſhould cauſe to be made, collected and levied, all and ſingular the rents, iſſues, and profits of the premiſes aforeſaid, with the appurtenances, and of every parcel thereof forthcoming, from the ſaid time of taking thereof into the hands of the ſaid lord the king, until the feaſt of the Annunciation of the *Bleſſed Virgin Mary* then next to come (which was not thereof anſwered to the ſaid lord the king), for the proportion of time, and according to the rate and yearly value above mentioned, ſo that when he ſhould have levied that money, he ſhould have the ſame before the barons

of

of the exchequer of the ſaid lord the king at *Weſtminſter*, from *Eaſter-day* in one month then next to come in the court of the lord the king then there, to be paid to the uſe of him the ſaid lord the king, and that he ſhould have there then that writ: by virtue of which ſaid writ of *levari facias*, *Nathaniel Rider*, *Eſq.* then and yet being ſheriff of *Glouceſterſhire* aforeſaid, after the iſſuing of the ſame writ, to wit, on the ſeventh day of *March*, in the ſeventh year of the reign of the ſaid lord the now king, at *Bitton* aforeſaid, made his warrant in writing under the ſeal of the office of him the ſaid ſheriff, directed to all the bailiffs, tythingmen, * and other officers of the ſame county, and alſo to *Anthony Powell*, *John Cooke*, *John Okes*, and *Joſeph Powell* his bailiffs; by which the ſaid ſheriff commanded the ſaid bailiffs and other officers aforeſaid, that they ſhould cauſe to be made, collected and levied, all and ſingular the rents, iſſues, and profits of the premiſes aforeſaid, in the writ aforeſaid abovementioned, with the appurtenances, and of every parcel thereof forthcoming, from the ſaid time of taking thereof into the hands of the ſaid lord the now king, until the feaſt of the Annunciation of the *Bleſſed Virgin Mary* then next to come, for the proportion of time, and according to the rate and yearly value abovementioned, ſo that the ſaid *Nathaniel Rider* the ſaid ſheriff might have the ſame before the barons of the exchequer of the ſaid lord the king at *Weſtminſter*, from *Eaſter-day* in one month then next to come in the court of the ſaid lord the king then there, to be paid to the uſe of him the ſaid lord the king, according to the command of the writ aforeſaid. And the ſaid *Thomas Cole* further ſaith, that the ſaid capital meſſuage or tenement called *Hannam's Court*, the ſaid ſeveral cloſes and parcels of paſture, and the reſt of the premiſes in the writ of *levari facias* aforeſaid mentioned, at the time of the iſſuing out of the ſame writ at the ſeveral times of pronouncing the ſaid outlawry, and of iſſuing out the ſaid writ of *capias utlagatum* recited in the ſaid writ of *levari facias*, were and yet are lying and being in *Hannam* aforeſaid, within the ſaid pariſh of *Bitton*, in the county of *Glouceſter* aforeſaid; and becauſe the ſaid forty-three ſheep and two lambs, after the iſſuing out of the ſaid writ of *levari facias*, and the making of the ſaid warrant, and before the ſaid feaſt of the Annunciation of the *Bleſſed Virgin Mary*, to wit, at the ſaid time when, &c. were in the ſaid cloſe of paſture called *Hill-houſe*, in *Hannam*, in the pariſh of *Bitton* aforeſaid, being parcel of the premiſes aforeſaid, in the ſaid writ of *levari facias* before mentioned, there feeding *levant et couchant*, he the ſaid *Thomas Cole* then and there requeſted the ſaid *Anthony Powell* and *John Powell* to take and drive away the ſaid forty-three ſheep and two lambs, to make of the iſſues and profits aforeſaid, according to the command of the ſaid writ of *levari facias* to the ſaid ſheriff directed, and the warrant aforeſaid made by the ſheriff; whereupon the ſaid *Anthony Powell* and *John Powell* the ſheep and lambs aforeſaid at the ſaid time when, &c. at *Hannam*, in the pariſh of *Bitton* aforeſaid, took and drove away, which are the ſame reſidue

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[111]

Nota, The warrant was not directed to *John*, but to *Anthony*, therefore upon a motion to amend it, this was granted; for *per Curiam*, it is amendable within the ſtatute 8. *Hen.* 6.

of

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of the treſpaſs aforeſaid, whereof the ſaid *John Britten* above complains againſt him the ſaid *Thomas Cole*. and this he is ready to verify. Wherefore he prays judgment if the ſaid *John Britten* ought to have or maintain his ſaid action thereof againſt him, &c.

Demurrer and joinder in demurrer.

* [112]

Caſe 54.

* Britten *againſt* Cole.

In treſpaſs, A PLEA in juſtification, ſtating that a *levari facias* was directed to *the ſheriff* on a *cap. utlag.* againſt *A* at the ſuit of the *defendant*, that thereupon *the ſheriff* made a warrant to his bailiffs to levy the debt due to *the defendant*, and that *he* (the defendant) *required* the bailiff to take the cattle of *A. ſuper quo* the bailiffs did take them, is bad, for the *treſpaſs* is *confeſſed*, but not *avoided*.

S. C. 1. Salk 395. 408.
S C Comb 434 469
S.C.Carth 441.
S.C.Skin 617.
S. C 12. Mod. 175.
S. C. Holt, 421.
S. C 1. Ld. Ray. 305
S. C. 3 Ld. Ray. 145.
S C. Comy 51.
Cro Elz 594.
1. Saund 21.
2. Lev. 175
2. Bac. Abr 352.

IN treſpaſs for taking his cattle, the defendant pleaded *not-guilty* as to the force, and made a ſpecial juſtification as to the reſidue, *viz.* that a *levari facias* iſſued out of THE EXCHEQUER, directed to the *Sheriff of Gloueſter*, reciting, that by virtue of a *capias utlagatum* againſt *Francis Creſwick*, at the ſuit of the defendant *Cole*, the ſaid ſheriff had ſeized into the king's hands one meſſuage, and ſeveral lands of the ſaid *Creſwick's*, being of the yearly value of fifty-four pounds beyond all charges and reprizes, by which writ of *levari* the ſheriff was commanded to levy the debt due to the defendant *Cole* out of all and ſingular the rents, iſſues, and profits of the ſaid lands, that thereupon the ſheriff made a warrant to ſeveral bailiffs to levy the profits of the ſaid lands, &c. and the ſheep and lambs being *levat et ceperunt* upon parcel of the lands ſo ſeized into the king's hands, the defendant *required* the bailiff to take and carry them away, *ſuper quo* the bailiffs did take them, which is the reſidue of the treſpaſs.

To this plea the plaintiff demurred, and the defendant joined in demurrer.

The queſtion was, Whether the defendant *Cole* has well entitled himſelf to *command* the bailiffs to execute this writ? for he cannot juſtify under it himſelf, becauſe it is not alledged that it was proſecuted at his ſuit, or that the bailiffs had the warrant, or that they took the cattle *virtute warranti*, and he cannot juſtify it *in auxilium* of the bailiffs, becauſe he was not preſent. If therefore he has not ſhewed a ſufficient juſtification, the plaintiff ought to have judgment.

FIRST, Therefore it was ſaid that he ought to have made himſelf one of the bailiffs, or alledged that he acted *in aid* of them, but he has ſet forth, that becauſe a warrant was directed to *them*, therefore *he* came, without their conſent, or as aſſiſting them, and commanded them to take the plaintiff's ſheep; ſo that though there was a good warrant to the bailiffs, yet the defendant, who in this caſe is a ſtranger, had no authority to require them to take the goods of another. The writ and warrant cannot give power to any perſon but to him to whom it is directed, or to the party called in aid by the proper officer. As for inſtance, in an action of falſe impriſonment (*a*), the defendant juſtified by virtue of a warrant from the ſheriff, directed to the bailiff who arreſted the

(*a*) Cro Car. 445.

plaintiff,

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plaintiff, and * required the defendant to aſſiſt him to keep the other in ſafe cuſtody; but here the defendant is a mere ſtranger to the writ, neither named in it, nor called to the aſſiſtance of that perſon to whom it was directed; and yet he required the bailiff to carry the cattle away.

A juſtification under a writ directed to *Anthony*, SUPER QUO *John* took the cattle, is bad.

1. Saund. 18. Co. Entr. 42. 106. 667.

SECONDLY, The defendant does not *confeſs and avoid* as he ought to do, for he juſtifies the treſpaſs without acknowledging the taking: he ſhould have pleaded, that the writ was delivered to the officers *in formâ juris exequend.* and that they took the cattle *virtute warranti*; but here he has pleaded the executing before the delivery of the writ, and ſets forth, *ſuper quo* JOHN POWELL took the ſheep, when the warrant was not directed to him, but to *Anthony Powell*, ſo that *John* could have no authority to take them.

In treſpaſs, a juſtification under a *levari facias*, is bad, if it do not ſhew the judgment.

1 Sid. 125.

THIRDLY, He could not plead a writ of execution out of ſuch a court, without ſhewing a judgment to warrant it, which he ought to have averred, and therefore he ſhould have pleaded, that he ſued out an original, &c. and the outlawry thereon, and then ſet forth the *levari facias*; for though the writ without the judgment will juſtify the officer in the execution of it, yet it will not juſtify a ſtranger to require him to do it *(a)*.

A juſtification under a *levari facias* is good, without ſtating they had the warrant at the time.

FOURTHLY, The moſt material exception was, *viz.* It is ſaid, that the ſheriff made a warrant directed to the bailiffs, and that the defendant required them to ſeize the cattle, *ſuper quo* they did take and drive them away, but does not ſay, that they had a warrant at that time, or that they took them *virtute warranti*. Now theſe words, *ſuper quo*, &c. can have no reference to the writ and warrant, but only to the requeſt, VIZ. *ſuper quo rogatu* he took them *(b)*.

The cattle of a ſtranger *levant et couchant* on lands extended on an outlawry, may be taken for THE KING upon a *levari facias*, as the *iſſues and profits* of the land.

8. Mod. 358. Carth. 442. 3. Bl. Abr. 757. 4. Fac. Abr. 460.

FIFTHLY, Then as to the matter in law, the queſtion was, Whether the cattle of a ſtranger *levant et couchant* upon the lands of an outlawed perſon, may be taken and ſold by virtue of the writ *levari facias*?

And as to that, it is neceſſary to conſider the ſtatute of *Weſtminſter the Second (c)*, which directs the ſheriff what ſhall be accounted iſſues, *viz.* "rents, corn in the grange, and all moveables except horſe-harneſs and houſhold-ſtuff;" and my LORD COKE *(d)*, in his comment upon this branch of that ſtatute, explains it to be not only the rents and revenues of the land, but

(a) It is ſaid S. C. 1. Ld. Ray. 309. that HOLT, *Chief Juſtice*, pronounced the opinion of the Court, that this was a good exception.

(b) This exception is ſaid not to have been allowed; for PER CURIAM, though it be the practice to ſay ſo, yet it being a plea in BAR, it ſhall be good to a *common intent*, and if the cattle were taken before the delivery of the writ, the plaintiff ſhould have ſhewn it by *replication*; for no ſpecial matter ſhall be ſuppoſed to intervene to make a man a treſpaſſer, S. C. 1. Ld. Ray. 310.

(c) C. 39.

(d) 2 Inſt. 453.

corn

Britten *againſt* Cole.

corn in the barn, and all other moveable or perſonal goods whatſoever. * But this ſtatute does not affect this caſe: It takes notice of ſeveral inconveniences at common law, *viz.* that the ſheriffs did not return their writs, or if they did, it was *tardè*, or they made falſe returns in making mandates to feigned liberties; or if a bailiff of a liberty had really the return of writs, yet he would do nothing, and that the ſheriffs would frequently return too ſmall iſſues, and no averment could be made againſt ſuch returns. Now this ſtatute provided a remedy againſt all theſe inconveniences, ſo that the whole extent of it ſeems to be only to proceſs upon *originals*, and the returning of iſſues is only to make the party appear, and it is never carried farther than the goods of him whoſe appearance is required. And this ſeems plain by ancient authorities, for as often as any queſtion has been made upon this ſtatute, what are the iſſues which ſheriffs muſt return, not only rents, but all the goods which the defendant had at the time of the writ purchaſed, have been allowed to be iſſues; which ſhews that he, and not another, muſt be proprietor of ſuch goods. But let the iſſues be what they will, the beaſts of a ſtranger cannot be ſo accounted in this caſe, becauſe nothing is forfeited by the outlawry, but only the profits of his land who is outlawed; and the *levari facias* is only to make the ſheriff accountable for the profits as they ariſe, which are rents and corn, &c. And therefore the king is not to have the occupation, and the profits of the land in ſuch caſe, for if the law was ſo, then he might plow and ſow, and cut down timber, for that is part of the profits; but this he cannot do upon ſuch a forfeiture *(a)*; therefore he is only entitled to the profits as they ariſe upon the land, which is all that is forfeited to him upon an outlawry in a perſonal action, and ſuch outlawry, and the inquiſition taken upon it, is to aſcertain him what is forfeited; if it be a rent, then he is to have the rent; if a manor, he is to have it; but he muſt not plow and ſow the demeſne, for the land is not the debtor *(b)*. Neither does the ſheriff's return make any debt to the king, for he is to make the beſt of the land, and account for it, but cannot be charged with iſſues, as he will be where iſſues are returned.

Then as to the finding the value, that is not concluſive to any perſon, neither does it make the man debtor. If the cattle of a ſtranger had been on the king's land, which he had in the right of his crown as forfeited by outlawry for felony, he could not
[115] have ſeized them for a debt due to himſelf *(c)*, * and therefore not in this caſe where the land is not forfeited at all, it being only an outlawry in a perſonal action, where he has only the pernancy of the profits to ſuch a value, but has no title to the land. And where the king takes the profits of the land upon an outlawry in treſpaſs, yet if the tenant or owner make a feoffment thereof to another,

Comb. 469. Carth. 442.

(*a*) Plowd. 541 Bro. Abr. "Iſſue."
(*b*) Bro. Abr. "Return" pl. 9. 2. Roll. Abr. 808.
(*c*) Year Book 9. *Hen.* 6. pl. 10. abridged by Brook, title "Patents" pl. 5. and title "Outlawry" pl. 36.

another, the profits as to the king ſhall from thenceforth ceaſe *(a)*. If it ſhould be objected, that a diſtreſs may be taken of a ſtranger's cattle for a debt due to the king, if they are *levant et couchant* on the land *(b)*, that will not affect this caſe; for no authority can be found, that even in ſuch caſe the goods ſo diſtrained might be ſold, though the law is otherwiſe now by a late act of parliament. In trover, the defendant juſtified the taking the goods as bailiff to the king of his manor of *Dunſtable*, upon a plaint there affirmed, and proceſs was thereupon directed to the defendant, in that caſe, as bailiff, &c. by virtue whereof he diſtrained and ſold the cattle; and it was adjudged upon a demurrer, that they could not be ſold upon *a diſtringas* in a court-baron *(c)*. It is true, it has been ruled in TROVER *(d)*, upon not-guilty pleaded, where the evidence was, that the goods were taken and ſold by virtue of a commiſſion of ſewers, that ſuch diſtreſs and ſale was good; but it is not mentioned any where, that the cattle of a ſtranger might be taken and ſold for the debt or default of another. And therefore, where a cuſtom was alledged *(e)* for a lord of a manor to have the beſt beaſt which the tenant had at the time of his deceaſe, and if ſuch beaſt was claimed, then to have the like of any other man whoſe beaſts ſhould be *levant et couchant* upon the heriotable land; this was held a void cuſtom, becauſe it made the goods of a ſtranger forfeitable for a heriot of another. But THE YEAR BOOK of *Henry the Seventh (f)* has this caſe in point: The king had the profits of a man's land by outlawry in a perſonal action, and the cattle of a ſtranger committed treſpaſs on that land; and it was held, that though he had a ſufficient intereſt to maintain an action of treſpaſs, yet he could not ſeize the cattle. If the law ſhould be otherwiſe, theſe inconveniences would follow:—FIRST, Upon ſuch a ſeizure the ſubject muſt loſe his cattle without a trial, to which he cannot be admitted againſt the king.—* SECONDLY, If a tenant's cattle come upon the land where the king is thus entitled to the profits, for want of mending the fences; this tenant muſt both anſwer the rent to his landlord, and forfeit his cattle to the king, which is unreaſonable. But common experience ſhews that the law is otherwiſe; for whenever this writ is iſſued, the tenant is never altered or put out of poſſeſſion; for it is no more than a charge upon the ſheriff to levy ſo much money for the king, who can have no more forfeited to him than the outlawed perſon could forfeit, and that was no more than what he had in his own right; ſo that if the cattle of a ſtranger came thither wrongfully, he might have an action of treſpaſs, but cannot have an execution at the firſt inſtance.

Bettiſ againſt Cove.

2. *Will & Mary*, c. 5.

* [116]

THOSE WHO ARGUED *on the other ſide* anſwered the exceptions taken to the pleading.

(*a*) Year Book 21. *Hen.* 7. pl. 7.
(*b*) 2. Roll. Abr. 159. Cro. Eliz. 431.
(*c*) Cro. Jac. 255. S. C. Yelv. 194.
(*d*) Allen, 92. Stiles, 12.
(*e*) Dyer, 199. Bendlowes, 39. Co. Ent. 666.
(*f*) 25. *Hen.* 7. pl. 2. abridged by Brooke, title "Prerogative" pl. 29.

FIRST,

Britton against Cole.

FIRST, That this being in the caſe of the king, and to levy a ſum certain out of the rents and iſſues of the land, it is lawful for any perſon to aſſiſt the officer in the performance of his duty; and therefore it has been held a good juſtification, that the defendant came *in auxilium* of the officer, without ſaying *per mandatum (a)*; for the ſubſtance of the plea is the writ to the ſheriff, and the warrant to the officer.

SECONDLY, It is pleaded, that a warrant was directed to the officers, and the defendant required them to take the cattle, *ſuper quo* they did take them, which is as well pleaded, as if he had ſet forth that the warrant was delivered to them: and though it was directed to *Anthony* and *Joſeph Powell*, and they were required to take the ſheep, &c. and it appeared they were taken by *Joſeph* and *John*, who was neither named in the writ, or required to take them, it may be good enough, becauſe the taking by *John* is void, and then there will be ſufficient matter for *Joſeph* to juſtify.

THIRDLY, As to the matter of law, it was never yet diſputed, therefore it muſt be preſumed, that the king has a right to have the cattle; for if the ſheriff ſhould not have liberty to take a ſtranger's goods *levant et couchant* on the lands of an outlawed perſon, the *levari facias* would be of very little uſe. * There is no greater hardſhip in this caſe, than for a common perſon to ſeize the cattle of any perſon whatſoever *levant et couchant* on the land charged with rent; and it cannot be denied but ſuch cattle are diſtrainable. It is true, the king ſhall be allowed no more than the extended value; and if more be made of it, the owner ſhall have it *(b)*. This writ is to levy the iſſues of the land, and not of the perſon outlawed; and the profits being taken by the cattle of a ſtranger, it is reaſonable the king ſhould ſeize them: and this has been the courſe of the exchequer time out of mind. There can be no doubt of what is meant by the word "iſſues;" my LORD COKE *(c)*, in his comment upon the ſtatute of *Weſtminſter the Second*, does not reſtrain them to the goods which the defendant had at the time of the writ purchaſed, but declares them to be all moveable and perſonal goods whatſoever.

*[117]

Comb. 469. Carth. 442.

CURIA. If the king have a rent iſſuing out of land, a ſtranger's cattle may be diſtrained and ſold for ſuch rent in arrear. So likewiſe, where he has the pernancy of the profits returned upon an outlawry, it is a charge upon the land itſelf ariſing *de exitibus*; and what thoſe iſſues are has been ſufficiently deſcribed by the ſtatute of *Weſtminſter the Second*; the very being on the land makes the cattle *iſſues* (*d*). Now the land being charged with an annual value to the king, where ſhall he have any remedy for that value, if a ſtranger's cattle eat the profits, and are not liable to a

Comb. 437. 470. Skin. 617.

(*a*) Skin. 619.
(*b*) Hardres, 106.
(*c*) 2. Inſt. 453. See Finch L. 352.
(*d*) Tidd's Practice, 19. And ſee 10. *Geo.* 3. c. 50.

ſeizure?

seizure? And it is no new thing in the law, to punish one for the fault of another; as if there be tenant for life, remainder in fee, and the tenant for life forfeit issues and die, they shall be levied upon him in remainder, for they are to arise *de exitibus terræ*. This writ itself imports that the charge is upon the land; for in other executions, the sheriff is commanded to levy the debt *de bonis et catallis*, but in this it is to levy so much *de exitibus terræ*; and therefore it seems unreasonable that the king should be put to an action of trespass against the owner of such cattle which are *levant et couchant* on the lands of the outlawed person. It is true, if he had made a lease of such lands before the *exigent* returned, then the cattle could not be seized by virtue of this writ, but even in such case, he must plead that the lease was made before the outlawry, but here the outlawed * person still continues in possession, and having no cattle of his own, takes in several men's cattle to agist. The king has not the lands forfeited upon an outlawry, but the profits only, and when they are found by an inquisition to be of such a yearly value, then the lands remain a debtor to the value till the debt itself is satisfied, but he can only agist or mow those lands, therefore if he could not seize the cattle of a stranger which eat up the profits, he would have but little benefit of an outlawry. Besides, the law is, that if issues are forfeited for not appearing of jurors, the cattle of a stranger may be taken on their lands for such forfeitures, which cannot be distinguished from this case. There can be no inconveniency nor danger that the sheriff should sell the cattle thus seized, because he is to return the contract or agreement for depasturing them, and then the owners are to stand charged to pay the money to the king, but it would be inconvenient for him to punish such owners in an action of trespass, for that is a remedy which was never yet taken *(a)*.

Britton, *against* Cole.

* [118].

(a) The Court was unanimously of opinion, as to the matter of law, with the defendant, S. C. Comb. 41. S. C. Carth. 441., but ruled the plea to be bad, because it stated that the warrant was made to *Anthony Powell* and *Joseph Powell*, upon which *John Powell* and *Joseph Powell* took the cattle, and so the *trespass* though not confessed is justified, for it is not a taking pursuant to the command and request. S. C. 1 Ld Ray 310. *Sed vide* S. C. Skin. 619. And for this defect in the pleading, judgment was entered for the plaintiff — S. C. Carth. 443.

Herbert *against* Waters.

Case 55.

REPLEVIN.—The defendant, as overseer of the poor, justified the taking, by virtue of the statute 43. *Eliz.* c. 2. for poor's tax, by which statute it is enacted, "That if, after issue joined for the defendant, or nonsuit of the plaintiff after appearance, and the plaintiff is nonsuited, the jury may assess the damages; or if they omit so to do, the Court will grant a writ of inquiry.—S. C. 1 Salk. 205. S. C. Comb. 344. S. C. Skin. 386. S. C. Mod. 83. S. C. Carth. 362. S. C. Holt, 191. S. C. 1 Ld. Ray. 59. Ante 36, 37. 2 Sid. 380. 10 Co. 114. Comb. 11. Skin. 595.

In replevin, if the defendant justify as overseer of the poor under the 43

HERBERT *against* WATERS.

"ance, the defendant ſhall recover treble damages, to be aſſeſſed "by the ſame jury, or a writ to enquire of the damages, as the "ſame ſhall require, &c."

The plaintiff was nonſuited, and the jury had not aſſeſſed the damages.

And now the Court was moved to award *a writ of enquiry* to ſupply that defect upon theſe authorities. The defendant juſtified under this very ſtatute, in an action of treſpaſs *(a)* brought againſt him; and the plaintiff being nonſuit, a writ of enquiry was awarded for the treble damages. In *replevin* (*b*), the like juſtification was made as in this caſe, and the plaintiff was nonſuited; and upon a writ of enquiry awarded, judgment was given for the avowant, and a writ of error brought, becauſe the enquiry was erroneouſly awarded, ſince the ſtatute expreſsly requires, that the [119] firſt jury ſhall enquire of the damages: but that exception * was over-ruled; for though the firſt jury might have enquired, yet it was only an *inqueſt of office*, and no part of the iſſue (*c*), nor was it a thing for which an attaint would lie againſt them; and therefore it is within the rule taken in *Cheyney's Caſe* (*d*), that where the Court *ex officio* ought to enquire of a matter upon which no *attaint* lies, the omiſſion of it may be ſupplied by a writ of enquiry. Beſides theſe authorities in point, there are other caſes adjudged in law which come near this, *viz.* Where *a demurrer* is joined upon the evidence, the jury are as much diſcharged from trying *the iſſue*, as they are upon *a nonſuit*; for *the fact* being agreed by both parties, the judgment of the Court is then demanded, Whether the matter given in evidence be ſufficient to find a verdict for the plaintiff upon the iſſue joined (*e*)? Now though the jury are diſcharged of the iſſue, yet they ought to aſſeſs damages conditionally, *viz.* "*Si lex eſt cum querente quod* "*præd. defend. eſt culpabilis quodq. præd.* (the plaintiff) *occaſione* "*premiſſorum juſtinuit damna, &c.*" yet if this ſhall be omitted (*f*), it may as well be done upon a writ of enquiry of damages after judgment is given upon a demurrer (*g*).

And for theſe reaſons *a writ of enquiry* was granted in this caſe (*b*).

(*a*) Brampton's Caſe, 1. Roll. Rep. 2[illegible].

(*b*) Anonymous, 2. Roll. Rep. 112.

(*c*) 1. Sid. 380.

(*d*) 10. Co. 119.

(*e*)

(*f*) See Mallory *v.* Jennings, that the omiſſion of a writ of enquiry is aided by the ſtatute of Jeofails, Stra. 878.

(*g*) Cro. Car. 143.

(*b*) So alſo where an action is brought againſt an overſeer of the poor, for any thing done in the execution of his office, and *a verdict* is found for him, he ſhall have a writ of enquiry for the treble damages given to him by 43. *Eliz.* c. 2. Valantine *v.* Hawcett, 2. Stra. 1021. S. C. Cafes T. H. 138.; for although the 43. *Eliz.* c. 2. ſ. 19. directs that the damages for the wrongful vexation ſhall be aſſeſſed by *the ſame jury*, yet, by LORD HARDWICKE, *Chief Juſtice*, in every caſe, where the Court are not tied up by the ſtatute 17. *Car.* 2. c. 7. which reſpects only *rent arrear*, a writ of enquiry may be granted to do complete juſtice. Dewell *v.* Marſhall, 2. Bl. Rep. 921. S. C. 3. Wilſ. 442. See alſo Freeman *v.* Lady Archer, 2. Bl. Rep. 763. Hullock on Coſts, 233.

Redſhaw

Redſhaw *againſt* Heſter.

Caſe 56.

Trinity Term, 7. Will. 3. Roll 178.

LONDON, *to wit.* BE it remembered, that heretofore, to wit, in *Eaſter Term*, in the ſeventh year of the reign of the lord *William the Third*, &c. to wit: *Chriſtopher Redſhaw* and *Ann Redſhaw*, executors of the teſtament and laſt will of *George Redſhaw*, late of *Wapping* in the county of *Middleſex*, mariner, deceaſed, complains of *William Heſter*, ſon and heir of *William Heſter* deceaſed, lately called *William Heſter*, citizen and ſoap-maker of *London*, in the cuſtody of the marſhal of the *Marſhalſea* of the lord the king, being before the king himſelf, of a plea that he render to them a thouſand pounds of the lawful monies of *England*, which from them he unjuſtly detains, for that, to wit, that whereas the aforeſaid *William Heſter* the father, whoſe heir the aforeſaid *William Heſter* the ſon now is, in his life-time, to wit, on the eighth day of *March*, in the third year of the reign of the lord *James the Second* late *King of England*, &c. at *London*, to wit, in the pariſh of *Saint Mary-le-Bow*, in the ward of *Cheap*, by his certain writing obligatory, ſealed with the ſeal of the ſaid *William Heſter* the father, and to the court of the ſaid lord the now king here ſhewn, the date whereof is the ſame day and year, acknowledged himſelf to be held and firmly bound to the ſaid *George Redſhaw* in his life-time in the aforeſaid thouſand pounds, to be paid to the ſame *George Redſhaw*, * his executors or adminiſtrators, when he ſhould be thereunto after required, and well and truly to make the ſame payment the ſaid *William Heſter* the father in his life-time bound himſelf and his heirs by the ſame writing. Nevertheleſs the ſaid *William Heſter* the father in his life-time, nor the ſaid *William Heſter* the ſon and heir of the ſaid *William Heſter* the father, after the death of the ſaid *William Heſter*, although often required, &c. the ſaid *thouſand pounds* to the ſaid *George Redſhaw* in his life-time, or unto the aforeſaid *Chriſtopher* and *Ann*, or either of them, hath not yet paid, nor hath either of them paid, but to pay the ſame to the ſaid *George* in his life-time, or to the ſaid *Chriſtopher* and *Ann* ſince the death of the ſaid *George*, hath hitherto altogether refuſed; and the ſaid *William Heſter* the ſon doth yet refuſe to pay the ſame to the ſaid *Chriſtopher* and *Ann*, and unjuſtly detains, to the damage of them the ſaid *Chriſtopher* and *Ann* of an hundred pounds, and therefore they produce ſuit, &c. And the ſaid *Chriſtopher* and *Ann* produce here in court the letters teſtamentary of the ſaid *George*; by which it ſufficiently appears to the court of the ſaid lord the now king here, that the ſaid *Chriſtopher* and *Ann* are executors of the ſaid teſtament of the aforeſaid *George*, and thereof have the adminiſtration, &c.

A declaration in debt on bond, by executors of the obligee againſt the heir of the obligor.

* [120]

And now on this day, to wit, on *Friday* next after the morrow of the *Holy Trinity*, in the ſame Term, until which day the ſaid *William Heſter* the ſon had leave to imparl to the ſaid bill, and then to anſwer, &c. comes as well the ſaid *Chriſtopher* and *Ann* by their attorney

Imparlance.

REDSHAW *againſt* HESTER.

aforeſaid, as the ſaid *William Heſter* the ſon by *William Turbil* his attorney. And the ſame *William Heſter* the ſon defends the force and injury when, &c. and ſays, that he ought not to be charged with the debt aforeſaid, as ſon and heir of the ſaid *William Heſter* his father, becauſe he, *proteſting* that the ſaid writing obligatory is not the deed of him the ſaid *William Heſter* his father, for plea ſays, that he had not any lands or tenements by hereditary deſcent from the ſaid *William Heſter* his father in fee-ſimple, nor had on the ſaid day of the exhibiting of the bill aforeſaid, nor ever after: and this he is ready to verify. Wherefore he prays judgment if he the ſaid *William Heſter* the ſon ought to be charged with the debt aforeſaid, by virtue of the ſaid writing obligatory, as ſon and heir of the ſaid *William Heſter* his father, &c.

Plea of *non eſt factum*, and no lands by diſcent.

Replication in lands by diſcent.

And the ſaid *Chriſtopher* and *Ann* ſay, that by any thing by the ſaid *William Heſter* the ſon above in pleading alledged, they from their action aforeſaid thereupon againſt him had ought not to be debarred; becauſe they ſay that the ſaid *William Heſter* the father, after the twenty-fifth day of *March* in the year of Our Lord one thouſand ſix hundred and ninety-two, to wit, on the twenty-ſeventh day of *November* in the fifth year of the reign of the lord *William the Third*, now king of *England*, at *London* aforeſaid, in the pariſh and ward aforeſaid, died; and that the ſaid *William Heſter* the ſon, after the death of the ſaid *William Heſter* the father, and before the exhibiting of the bill aforeſaid, * to wit, on the twenty-eighth day of *November*, in the fourth year of the reign of the lord *William the Third*, now *King of England*, &c. had divers lands and tenements by hereditary deſcent from the ſaid *William Heſter* his father in fee-ſimple wherewith he might have ſatisfied the debt aforeſaid to the ſaid *George Redſhaw* in his life-time, and the ſaid *Chriſtopher* and *Ann* ſince the death of the ſaid *George*, to wit, at *London* aforeſaid, in the pariſh and ward aforeſaid: and this they are ready to verify. Wherefore they pray judgment, and the ſaid debt, together with their damages by occaſion of the detention of that debt, to be adjudged to them, &c.

[121]

Rejoinder, monies paid to the value of the lands.

And the ſaid *William Heſter* the ſon ſays, that he of the debt aforeſaid, as ſon and heir of the aforeſaid *William* his father deceaſed, ought not to be bound, becauſe he ſays that he the aforeſaid *William*, before the exhibiting the bill aforeſaid, to wit, the day and place in the plea of them the ſaid *Chriſtopher* and *Ann* above in replying pleaded, had not lands or tenements by hereditary deſcent from his father aforeſaid in fee-ſimple whereof the aforeſaid *George Redſhaw* in his life-time, or the ſaid *Chriſtopher* and *Ann* after the death of the ſaid *George*, of the ſaid debt might be ſatisfied. Becauſe he ſays that well and true it is, that after the twenty-fifth day of *March*, in the year of Our Lord one thouſand ſix hundred and ninety-two, to wit, on the twenty-ſeventh day of *November*, in the fourth year of the lord *William the Third*, the now *King* of *England*, &c. at *London* aforeſaid, in the pariſh and ward aforeſaid, the aforeſaid *William Heſter* his father died; and

and that he the aforesaid *William*, after the death of the said *William* his father, and before the exhibiting the bill aforesaid, to wit, the same twenty-seventh day of *November*, the year and place abovesaid, had lands and tenements by hereditary descent from the aforesaid *William* his father in fee-simple to the value of *eighty pounds* and no more. But the aforesaid *William* farther says, that the aforesaid *William* his father at the time of his death, to wit, on the twenty-seventh day of *November*, the year and place abovementioned, by divers writings obligatory by which he bound himself and his heirs, was indebted for true and just debts to divers other persons than the aforesaid *George Redshaw*, to wit, to *John Lethieullier*, *Knight*, *John Nichols*, *Esq.* *Peter Baldwin*, and *Ann Peachey*, in divers sums of money amounting in the whole to eight hundred pounds of the lawful monies of *England*; and that he the aforesaid *William*, as son and heir of the said *William* his father as before-mentioned deceased, afterwards, to wit, the same twenty-seventh day of *November*, the year and place abovesaid, the aforesaid eight hundred pounds to the said several persons aforesaid, other than the aforesaid *George Redshaw*, in discharge of their several debts aforesaid, and to the full value of all the lands and tenements which at any time before the exhibiting of the bill aforesaid by the aforesaid *William* had by hereditary descent in fee-simple from his father aforesaid, paid and caused to be paid: and this he is ready to verify. Wherefore he prays judgment if he the said *William Hester* the son, of the debt aforesaid, by virtue of the said writing obligatory, as son and heir of the aforesaid *William* his father, ought to be charged, &c.

* [122]

Demurrer.

And the said *Christopher* and *Ann* say, that the plea of him the said *William Hester* the son, in manner and form as aforesaid, above in pleading rejoined, and the matter in the same contained, are not sufficient in law to bar them the said *Christopher* and *Ann* from having their said action thereof against him the said *William Hester* the son, and that they the same *Christopher* and *Ann* have no necessity, nor are they bound by the law of the land in any other manner to answer: and this they are ready to verify. Wherefore for defect of sufficient rejoinder in this behalf the said *Christopher* and *Ann*, as before, pray judgment, and their said debt, together with their damages by the occasion of the detention of that debt, to be adjudged to them, &c. And for causes of demurrer in law upon the plea aforesaid above in pleading rejoined, the said *Christopher* and *Ann*, according to the form of the statute in such cases thereof lately made and provided, shew and demonstrate to the Court here the causes following, to wit, because the aforesaid *William Hester* the son, in the aforesaid rejoinder, has not shewn or demonstrated what tenements or lands he had by hereditary descent from the aforesaid *William* his father in fee-simple; and for that because the plea aforesaid above in pleading rejoined is uncertain, repugnant, and wants form, &c.

Causes of demurrer.

Joinder in demurrer.

Case 57.

Redſhaw *againſt* Heſter.

In debt on bond against *an heir*, if the defendant plead "*riens per* "*diſcent*;" A REPLICATION that he had lands and tenements by diſcent before the exhibiting of the bill, *unde debito præd. ſatisfeciſſe potuit*, &c. concluding with a *verification*, is good within the ſtatute 3. & 4. *Will. & Mary*, c. 14.

DEBT UPON BOND againſt *an heir*, who pleaded "*riens per* "*diſcent.*"

The plaintiff replied, that he had lands and tenements by *deſcent* before the exhibiting the bill, *unde præd.* (the plaintiff) *de debito præd. ſatisfeciſſe potuit*; and then puts himſelf upon the judgment of *the Court.*

And upon demurrer, exception was taken to this replication,

FIRST, becauſe it was *double*, for he ought to have concluded to *the country.*

SECONDLY, The replication is neither good at common law, or by the new ſtatute 3. & 4 *Will. & Mary*, c. 14.—It is not good at *common law*, for the plaintiff does not ſhew that the defendant had lands by *deſcent* at the time of the bill filed. The value of the land was not material before this ſtatute; for if an heir was ſued for a thouſand pounds, and pleaded *riens per diſcent*, and it was found that but one acre came to him by deſcent, the judgment muſt be, "that the aforeſaid * plaintiff recover his debt "aforeſaid;" ſo that he ſhould be charged to pay the whole debt, though nothing ſhould be put in execution but that ſingle acre. But now the ſtatute 3. & 4. *Will. & Mary*, c. 14. has made the *quantum* of the land material; for it provides, "that the heir may "plead *riens per diſcent* at the time of the bill filed, and that the "plaintiff may reply, that he had lands and tenements from his "father before the original writ brought; and if upon iſſue "joined it be found for the plaintiff, the jury ſhall enquire of the "value of the land deſcended; and if ſold before the action brought, "execution ſhall be taken out againſt the heir to the value of "the land ſo ſold by him, as if it had been his proper debt." Now this replication is not agreeable to the ſtatute, becauſe the plaintiff has made the value of the land part of his plea; for he ſays, that the defendant has ſuch lands, *unde debitum præd. ſatisfeciſſe potuit*; and puts himſelf upon the judgment of *the Court.* But the replication directed by the ſtatute is, that the defendant had lands and tenements by deſcent before the original writ brought; which ſhould have been tried by *a jury*, who upon finding the land deſcended, are *ex officio* to enquire into the value. The plaintiff has alledged, that the lands thus deſcended were to the value of the debt; now if the jury ſhould find that they were not half of that value, this would falſify his plea; and yet if ſuch pleading ſhould be allowed, he would recover even upon a plea that was falſe, for the new ſtatute provides, that he ſhall recover to the value of the land ſold.

E contra. The inconveniences which were at common law, and which are now remedied by this ſtatute, are as follow:— FIRST, In *point of time*; for if the heir had aliened before proceſs iſſued againſt him, this plea of "*riens per diſcent*" had been good, and the plaintiff could not have recovered his debt. But this is now

* [123]

S. C. Comb. 344.
S. C. Carth. 353.
S. C. 3. Salk. 279.
1. Sid. 248. 342.
1. Lev. 130. 424.
5. Com. Dig. "Pleader" (2. E. 4.).
3. Bac. Abr. 28.

now prevented; for if the heir ſell any lands which by law were liable to the debt of his anceſtors before any action brought againſt him, yet he ſhall be anſwerable to the value of the land ſo ſold.—SECONDLY, If before the action brought he had ſold all the lands deſcended to him except one acre, and upon *riens per diſcent* * pleaded, it had been found that ſuch acre deſcended, though the judgment was *quod recuperet debitum*, yet, at common law, he could only extend that acre; but now he ſhall have execution to the value of the land ſold; ſo that though his plea may be falſified by the finding of *the jury*, yet the plaintiff ſhall now recover *pro tanto*; and ſo the replication is good, both by the *common law* and the *ſtatute (a)*.

REDSHAW *againſt* HESTER.

* [124]

(a) THE COURT, upon debate, held that the *replication* was good, and as it ought to be; and that if the *unde debito præcedito ſatisfeciſſe potuit* had been left out, it might have been a good cauſe of objection; for the ſtatute does not give occaſion to alter any more of the form of the replication common in ſuch caſes, but only as to the time concerning the aſſets by deſcent; and that the *concluſion*, which before the ſtatute was to *the country*, muſt now be with *an averment*, becauſe the defendants may have an opportunity to anſwer the new matter alledged in the replication, S. C. Carth. 354. And thereupon judgment was given for the plaintiff, S. C. Comb. 345.; for though a jury may find, that what deſcended to the heir is not ſufficient to ſatisfy the debt, and ſo falſify the value alledged in the replication, yet THE PLAINTIFF ſhall recover to the value of the land ſold, be it what it will. S. C. 3. Salk. 180.

Fletcher *againſt* Ingram.

Caſe 58.

Michaelmas Term, 7. *Will.* 3. *Roll* 107.

STAFFORDSHIRE, *to wit.* } JOSEPH INGRAM and *John Hale* were ſummoned to anſwer to *James Fletcher* of a plea, wherefore they took one mare of him the ſaid *James*, and unjuſtly detained her, againſt gages and pledges, &c. And whereupon the ſaid *James* by *John Lilly* his attorney complains, that the aforeſaid *Joſeph* and *John* on the twentieth day of *February* in the ſeventh year of the reign of the lord *William the Third*, now *King of England*, &c. at *Shewſton* in the county aforeſaid, in a certain place there called *the Lane*, took the mare aforeſaid of him the ſaid *James*, and unjuſtly detained her, againſt gages and pledges until, &c. and whereupon the ſaid *James* ſaith that he is injured, and hath damage to the value of twenty pounds, and thereupon he brings ſuit, &c.

Replevin.

And the aforeſaid *Joſeph* and *John Hale* by *Thomas Callow* their attorney come and defend the force and injury when, &c. and as bailiffs of *Rowland Fryth*, *Gent.* well acknowledge the taking of the mare aforeſaid, in the place in which, &c. and juſtly, &c. becauſe they ſay, that the ſame place in which the taking of the mare aforeſaid is ſuppoſed to be done, containeth, and at the ſaid time when the ſame taking of the mare is ſuppoſed to be done, did contain in itſelf one acre of land with the appurtenances, in *Shewſton* aforeſaid; which ſaid town of *Shewſton* is, and from the

Defendants make conſtgnizance as bailiffs of the lord of the manor.

FLETCHER *against* INGRAM.

said time when, &c. and alſo from time whereof the memory of man is not to the contrary, was within the manor of *Shewſton*, with the appurtenances, in the county of *Stafford* aforeſaid, of which ſaid manor, with the appurtenances, the aforeſaid *Rowland* is, and at the ſaid time when, &c. and long before, was ſeiſed in his demeſne as of fee; and the ſaid *Rowland*, and all thoſe whoſe eſtate he hath in the ſame manor, with the appurtenances, from time whereof the memory of man is not to the contrary, have had, and been accuſtomed to have, a court-leet or view of frankpledge of the ſame manor, and whatſoever belongeth to the view of frankpledge, of all the inhabitants and reſiants within that manor, before his ſteward of the ſame court for the time being, in every year within the month next after the feaſt of *Saint Michael the Archangel*, to be holden at that manor yearly, as to the ſaid manor, with the appurtenances belonging: and they the ſaid *Joſeph* and *John* further ſay, that within the manor aforeſaid there is had, and from time whereof the memory of man is not to the contrary there hath been had a certain cuſtom, that the jurors charged and ſworn to enquire of and preſent thoſe things which belong to the court-leet and view of frankpledge aforeſaid, at the court of view of frankpledge of the manor aforeſaid, holden at that manor within the month next after the feaſt of *Saint Michael the Archangel* yearly, have choſen, and for all the time abovеſaid have been accuſtomed to chooſe one fit man of the inhabitants within the manor aforeſaid, to be conſtable of the conſtablewick of *Shewſton* aforeſaid, to ſerve in that office for one year, which ſaid man ſo choſen took upon himſelf that office, and for all the time aforeſaid was uſed and accuſtomed to take it, and hath taken and been accuſtomed to take an oath for the due execution of that office, under a reaſonable pain, for the time aforeſaid, by the jurors aforeſaid at ſuch court-leet and view of frankpledge in that behalf impoſed. And the ſaid *Joſeph* and *John* further ſay, that the aforeſaid *Rowland* being lord of the manor aforeſaid, with the appurtenances, and being ſeiſed of the ſame in form aforeſaid, at the court-leet or view of frankpledge of that manor holden at the ſaid manor within the month next after the feaſt of *Saint Michael the Archangel*, to wit, on the ninth day of *October* in the fifth year of the reign of the lord *William the Third* the now king, and of the lady *Mary*, late queen of *England*, &c. before *Henry Eyth*, *Gent.* then ſteward of that court of him the ſaid *Rowland*, the aforeſaid *James Fletcher* then and long before being an inhabitant within the manor aforeſaid, to wit, at *Shewſton* aforeſaid, and being a fit man to be conſtable of the aforeſaid conſtablewick of *Shewſton* aforeſaid, by *Edward Thorneton*, *Thomas Grace*, *John Cooke*, *Joſeph Alſop*, *James Standley*, *William Milner*, *William Rudkin*, *Richard Wiat*, *Thomas Salt*, *James Milner*, *John Sawyer*, *John Alcock* and *John Dickeſon*, honeſt and lawful men and inhabitants within the manor aforeſaid, and then and there in the ſame court ſworn and charged to inquire and preſent thoſe things which to the court-leet and view of frankpledge did belong,

Preſcription to hold a court-leet.

Preſcription for the homage to chooſe a conſtable,

who is to take the office and an oath for the due execution of it, under a penalty to be impoſed by the homage.

That the plaintiff was choſen conſtable by the homage.

in

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in due manner and according to the cuſtom aforeſaid, was choſen to be conſtable of the conſtablewick of *Shewſton* aforeſaid, to ſerve in that office for one year then next following: and the ſaid jurors then and there in the ſame court did order that the ſaid *James* ſhould make his oath for the due execution of his office aforeſaid, under the pain of forfeiting forty ſhillings, whereof the aforeſaid *James Fletcher* immediately afterward, to wit, the ſame day and year had notice, yet the ſaid *James* hath not made his oath for the due execution of the office of conſtable aforeſaid, nor hath executed or taken upon himſelf that office, but he to do thoſe things then, and often afterwards, there, abſolutely refuſed, by which afterwards and before the time when, &c. to wit, at the court-leet, or view of frankpledge of the manor aforeſaid of the ſaid *Rowland* at that manor, within the month next after the feaſt of Saint *Michael the Archangel*, to wit, on the eleventh day of *October* in the ſixth year of the reign of the ſaid lord the king and lady *Mary*, late queen of *England*, holden before the ſaid *Henry Frith*, then ſteward of him the ſaid *Rowland* of that court, by *Edward Thorneton*, &c. honeſt and lawful men, then inhabitants within the manor aforeſaid, then and there in the ſame court ſworn and charged to inquire and preſent thoſe things which to the court-leet or view of frankpledge aforeſaid did belong, it was preſented, that the aforeſaid *James Fletcher*, for that he was duly choſen conſtable of the conſtablewick of *Shewſton* aforeſaid, at the laſt leet holden for the manor aforeſaid, and under the pain of forty ſhillings upon him impoſed, he was ordered to take upon himſelf and execute that office, and to make his oath in form aforeſaid, for the due execution of the ſaid office, which things, or any thing thereof, he hath not done, therefore he hath forfeited to the lord of the manor aforeſaid the ſaid forty ſhillings, for the pain aforeſaid, then to be paid to the lord of the manor aforeſaid, as by the record thereof in the power of the ſaid ſteward of the court of the manor of him the ſaid *Rowland* aforeſaid at that manor remaining, more fully appears: and becauſe the ſaid forty ſhillings for the pain aforeſaid to him the ſaid *Rowland*, being lord of the manor aforeſaid, as before is ſet forth, at the ſaid time when, &c. was in arrear, and not paid, they the ſaid *Joſeph* and *John*, as bailiffs of him the ſaid *Rowland*, well acknowledge the taking of the mare aforeſaid in the ſaid place in which, &c. and juſtly, &c. for the ſaid forty ſhillings, for the pain or amercement aforeſaid ſo being in arrear, and not paid to the ſaid *Rowland*, and within the manor aforeſaid, &c.

That the plaintiff hath refuſed to take on him the office, and the oath.

Plaintiff is fined forty ſhillings.

For payment of which defendants took the mare.

And the aforeſaid *James* ſaith, that by any thing by the aforeſaid *Joſeph* and *John* above in the cognizance aforeſaid in pleading alledged, they the ſaid *Joſeph* and *John* ought not to acknowledge the taking of the mare aforeſaid in the ſaid place, &c. to be juſt; becauſe he ſaith, that the plea aforeſaid by them the ſaid *Joſeph* and *John* in manner and form aforeſaid above pleaded, and the matter in the ſame contained, are not ſufficient in law for the acknowledging the taking of the mare aforeſaid in the ſaid place in which,

Demurrer to the cognizance.

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which, &c. to be juſt, and that he, to that cognizance in manner and form above made and pleaded, hath no neceſſity, nor is he bound by the law of the land to anſwer; and this he is ready to verify: wherefore, for want of a ſufficient plea in this behalf, he the ſaid *James* prays judgment, and his damages by occaſion of the taking and unjuſtly detaining of the mare aforeſaid, to be adjudged to him, &c.

Joinder in demurrer.

And the aforeſaid *Joſeph* and *John* ſay, that the plea aforeſaid by them the ſaid *Joſeph* and *John* in manner and form aforeſaid above pleaded, and the matter in the ſame contained, are good and ſufficient in law for them the ſaid *Joſeph* and *John* to acknowledge the taking of the ſaid mare in the ſaid place in which, &c. to be juſt; which ſaid plea, and the matter in the ſame contained, they the ſaid *Joſeph* and *John* are ready to verify and prove, as the Court, &c. And becauſe the ſaid *James* to that cognizance hath not pleaded or anſwered, nor the ſame hath hitherto in any manner denied, they the ſaid *Joſeph* and *John* pray judgment, and a return of the mare aforeſaid, together with their damages, coſts, and charges, according to the form of the ſtatute in ſuch caſe made and provided, to be adjudged to them, &c. And becauſe the court of the ſaid lord the king now here is not yet adviſed of the giving of their judgment of and upon the premiſes, day is thereupon given to the parties aforeſaid, before the lord the king, from the day of ———— wherefoever, &c. to hear their judgment of and upon the premiſes aforeſaid, for that the court of the ſaid lord the king now here are not yet adviſed, &c.

Curia adviſare vult.

Caſe 59.

Fletcher *againſt* Ingram.

Qu. Whether the lord of a leet can, without ſtating a *preſcription*, diſtrain for an *amerciament*.

S. C. 1. Salk. 175.
S. C. Comb. 350.
S. C. Holt, 187.
S. C. Skin. 635.
S. C. 12. Mod. 87.
S. C. Lilly Ent. 369.
S. C. 1. Ld. Ray. 69.
S. C. 3. Ld. Ray. 117.
1. Salk. 186.
380.
Ante, 96.
1. Roll Rep. 3. pl. 15. f. 27.

IN REPLEVIN for taking a mare at *Shewſton*, in a certain place called *the Lane*. The defendants made cognizance as bailiffs of one *Rowland Fryth*, lord of the manor of *Shewſton*, whereof he was ſeiſed in fee, &c.: then they alledge *a preſcription* to hold A COURT-LEET there within a month after *Michaelmas* every year; and they ſet forth *a cuſtom* within the ſaid manor, to elect A CONSTABLE at the ſaid leet out of the inhabitants there; which perſon ſo elected has uſed to take upon him that office, under a reaſonable penalty in that behalf, to be impoſed by the jury; that the plaintiff at a court-leet held for the ſaid manor, was elected CONSTABLE by the jury; that he was ordered to take upon him the execution of that office, under the penalty of forty ſhillings, which he neglected to do; that this neglect was preſented at the next court, by which the plaintiff had forfeited forty ſhillings to the lord of the ſaid manor; for which the diſtreſs was taken, &c. The plaintiff demurred to the cognizance, and the defendants joined in demurrer.

The exceptions taken to the cognizance were,

8. Co. 38. b. 4. Com. Dig. 656. 1. Bac. Abr. 439. 2. Hawk. P. C. FIRST,

FIRST, That the defendants have not preſcribed to any right in the lord of the leet to diſtrain for *an amerciament*, being a private benefit to him, and which he cannot have without a preſcription to the diſtreſs *(a)*.

FLETCHER *againſt* INGRAM.

* TO THIS OBJECTION it was anſwered, It is true, this is an *amerciament*, which differs from *a fine*, the firſt being always impoſed by *the jury*, and the other by *the Court*; and though it is a thing of leſs nature than a fine, yet a diſtreſs may be taken for it, without a cuſtom alledged ſo to do: and this is the reſolution in *Grieſly's Caſe*.

* [128]

SECONDLY, The jury ordered him to take his oath generally, to execute the office of conſtable; but do not ſay that he was *ſummoned* to appear before a juſtice of peace for that purpoſe; or before *whom* or *where* he ſhould come to take his oath.

AS TO THIS SECOND OBJECTION it was ſaid, that the defendants have alledged a cuſtom every year to chooſe a fit perſon at the court-leet to be conſtable for that year, and that the plaintiff was elected conſtable, which is a ſufficient obligation for him, under a pain, to come and take upon him the office; and it is alſo alledged that he had notice, ſo that the cuſtom of the place operates upon him, which he is bound to obey. Now the adminiſtering the oath is ſubſequent to the cuſtom, and he is thereby bound to do all reaſonable acts to qualify himſelf to take the ſaid office upon him; though uſually the ſteward certifies under his hand who perſon is choſen, which certificate is carried to a juſtice of the peace; and if the party refuſe to take upon him the office, the juſtice uſually ſends his warrant to compel him.

If a leet jury orders a conſtable elect to take the oath of office, he muſt be *ſummoned*, and directed *where* and *when* to take the oath. 8. Co. 38. b. 41. 11. Co. 43, 44. Cart. 28. Pal. 7. Cro. Eliz. 241. 581. 1. Roll. Rep. 201. 2. Roll. Rep. 3. Cro. Jac. 382. Fitzg. 46. 108. 192. 8. Mod. 300. 1. Salk. 175. 4. Com. Dig. "Leet" (M. 8.).

THIRDLY, They do not ſay that the *forty ſhillings* impoſed on him for not taking upon him the office, was a reaſonable pain.

AS TO THE THIRD OBJECTION, The law ought to judge, whether the penalty impoſed on him be reaſonable or not; and the averring it to be reaſonable, will be of little uſe if the Court ſhould be of another opinion.

Under a cuſtom to impoſe a reaſonable fine, if the party impoſes *forty ſhillings* it. Co. Lit. 208.

Quære, If a juſtification is good without averring that that ſum was reaſonable.

In *Hilary Term* following, this caſe was argued again.

AND IT WAS OBJECTED, that it was an unreaſonable cuſtom, and therefore void.

FIRST, For the uncertainty of the time when the year ſhall begin, in which the plaintiff is to take upon him this office; and ſo like the caſe where the condition of a feoffment in fee is for payment of a ſum of money, and no time limited for the payment, there the obligor hath time during his life to do it; and this being a cuſtom againſt common law, it muſt be taken ſtrictly.

(*a*) 11. Co. 44. Cro. Eliz. 673.

To

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Skin. 248. Comb. 43. 118.

* To which it was answered, that the time was certain enough, for the plaintiff was to hold the office *pro uno anno integro prox. sequent.* that day whereon the Court was held. But it is as certain, as where a custom hath been alledged for a copyholder to pay a year's value of the land upon an admittance; and yet such a custom hath been held good, because the value may be reduced to a certainty *(a)*. So where a custom was, that the surrenderee shall come and be admitted after three proclamations, otherwise that the copyhold should be forfeited, and the surrenderee died, and his heir within age refused to be admitted; it was held, that the lord might seize *quousque* the infant came of age, which is as uncertain as this, for the heir may die before that time *(b)*. So where a man is beyond sea, it is uncertain when he may return, and yet his right is saved by that means *(c)*.

An avowry for an *amerciament* for not taking the oath of constable, must shew before whom *the oath* was ordered to be taken, and the *court leet* was held.

SECONDLY, It is said, that the homage ordered him to take an oath duly to execute the office, but does not appoint *before whom* he should take it, or from whom he should accept it; and so not like *Grieſly's Caſe (d)*, for there the custom was laid to choose a constable within a month after *Michaelmas*, to hold the office for one year next following, and that if the person was present in court, that he ought to be sworn by the steward; so that not only the time, but the person before whom the oath should be taken is ascertained, which is wholly omitted in this case.

1. Brownl. 198.

This objection was thus answered, *viz.* That it is true, where a man is obliged to do an act, it must appear to the Court that it is possible for him to do it, but that the Court will take notice without setting it forth; that a steward of a leet during the time he held the court may give an oath to a constable, as well as a justice of peace after the court is adjourned.

An avowry for an *amerciament* in a COURT-LEET, for not accepting the office of *constable*, must shew that the party had *special notice* of his election to the office.

THIRDLY, It does not appear that the plaintiff was *summoned* to THE LEET, or that he had any *special notice* that he was chosen constable; but only generally, that *notitiam habuit*, which is not sufficient; and for this reason an indictment was quashed in this court *(e)*, which set forth, that the defendant was fit to be a constable; that he was *debito modo electus*; and that he had notice of it, but did not take the oath, &c. and because it was not said that he was summoned before a justice of peace for that purpose, the indictment was quashed.

*[130] S. C. Salk. 175. Hob. 129. Cro. Eliz 885. 3. Leon. 8. 1. Show. 61. 1. Salk. 107.

* To which it was answered, that by alledging *notitiam habuit*, it must be intended due and legal notice, because the law requires him to take the oath before the steward of the leet, or a justice of the peace. In *Pragg's Caſe (f)*, who was indicted, for that he being chosen headborough, refused to take the oath to execute

Fitzg. 108. Stra. 647. 3. Bac. Abr. 100. 2. Hawk. P. C. ch. 10. ſ. 46.

(a) Perkins v. Titus, 3. Mod. 132. S. C. 3. Lev. 255. S. C. 2. Show. 507.

(b) Rex v. Dilliſton, 3. Mod. 221. And ſee 5. Geo. 1. c. 27. ſ. 5.

(c) Cro. Jac. 226.

(d) 8. Co. 38.

(e) Rex v. Harper, Trinity Term, 7. Will. 3.

(f) Allen, 73.

that

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that office, there is no mention of *notice* or *ſummons* before whom to appear for that purpoſe; but a writ was granted by the court of king's bench, directed to him, commanding him to go before a juſtice of the peace to take it. Beſides, it is alledged in this cognizance, that the plaintiff *ſtatim poſtea ibidem notitiam habuit*; which word *ibidem* is a relative, as well in a legal as grammatical conſtruction, and muſt refer to the Court, being the place where he was choſen conſtable.

FOURTHLY, It was objected, that there was not a cuſtom alledged to make any diſtreſs for this penalty; and though it may be true that a man may diſtrain for *an amerciament*, and for *a fine* in a leet, without alledging a cuſtom, yet for ſuch an extraordinary thing as this, there muſt be a cuſtom expreſſly laid to diſtrain, &c.

Qu. Whether a juſtification for diſtraining for an amerciament be good, without *a cuſtom* to make ſuch diſtreſs.

Thus where a cuſtom *(a)* was alledged to ſwear twelve men to enquire into the articles given in charge at a court-leet, and that the men ſo ſworn had uſed, *inter alia*, to preſent themſelves to pay to the lord of the leet ten ſhillings *pro certa letæ*, for which the avowant diſtrained; but it was held unlawful, becauſe it being for the particular benefit of the lord, and againſt common right, he cannot juſtify the taking a diſtreſs without a preſcription, as he may for a fine or amerciament.

2 Inſt. 118. 8. Co. 41. Cro. Jac. 382. Kit. 43. Cro. Eliz. 698. 3. Mod. 138.

This objection was anſwered by the Counſel, that *a diſtreſs* is incident, as well for *a penalty*, as for *a fine* or *an amerciament*.

CURIA. The ſteward may impoſe a fine upon a perſon who is elected by the homage, if he be preſent at the leet, and refuſe to be ſworn to execute the office; but if the perſon be not preſent, the ſteward cannot fine him, but he may be amerced *(b)*, which muſt be preſented at the next court, and affeered; and after the court is over, the juſtices of peace may adminiſter the oath of conſtable by the power which they have as conſervators of the peace, which power they had at common law, and is now veſted in them, and the rather becauſe a conſtable is but a ſubordinate officer to them for the preſervation of the peace. * But the party ought to be *ſummoned*, and *a time* and *place* ought to be appointed under a penalty *when* and *where* he ſhall come, and before whom to take the oath; and therefore *notitiam habuit* generally is not enough, for though he be an inhabitant, yet he may be eſſoined.

If a conſtable refuſe the oath, being, *preſent*, he may be fined for contempt; if *abſent*, preſented by the homage at the next court, and amerced.

8. Co. 39.

11. Co. 43. 1. Roll Rep. 73. Savil, 94. 1. Bac. Abr. 440. 2 Bac. Abr. 505. 2. Hawk. P. C. ch. 10. ſ. 35. 4. Com. Dig. "Leet" (M. 8). Winch. Ent. 987.

And therefore for want of alledging *ſpecial notice*, judgment was given for the plaintiff.

(a) Godfrey's Caſe, 11. Co. 43.
(b) 1. Roll. Rep. 73. 8. Co. 39. 11. Co. 43. Moor, 89. Cro. Eliz. 841. Kitchen, 43. a. 1. Bac. Abr. 440. 2. Bac. Abr. 505. 518. Stra. 847. Fitzg. 109. 1. Wilſ. 248. Andrews, 47.

Leaves

Case 60.

Leaves *against* Bernard.

Trinity Term, 7. Will. 3. Roll 41.

A plea, which, though *informal*, is in *substance* a DEMURRER, is good.

S. C. Post. 144. S. C. 12. Mod. 233. Ante, 4, 5. 7. Post. 146. 175. Post. 334. 4. Bac. Abr. 130. 1. Com. Dig. 90.

THE plaintiff declared, that in consideration he had paid to the defendant sixteen guineas, he promised to pay the plaintiff a hundred pounds, if no town in *Flanders* garrisoned with two thousand men should be taken or surrendered to THE FRENCH KING before the first day of *September* 1695; and lays an *indebitatus assumpsit* for the hundred pounds upon *a wager*, and another *indebitatus* for the hundred pounds received by the defendant for the use of the plaintiff.

To which the defendant pleads thus: "*Et modo ad hunc diem scilicet diem Veneris prox. post cras. Sanctæ Trinitatis isto eodem termino usque quem diem præd.* ISAACUS BERNARD *(salvis sibi omnibus et omnimodis exception. quoad billam præd.) habuit licentiam ad billam interloquendi et tunc ad respondend. &c. coram dom. rege apud Westm. ven. tam præd.* JOHANNES LEAVES, *per attorn. suum præd. quam præd.* ISAACUS *per* JOHANNEM BERNARD *attorn. suum et idem* ISAACUS *defen. vim et injur. quando, &c. et petit judicium de narratione præd. quia quoad primam promissionem et assumption. superius in narratione illa mentionat. idem* ISAACUS *dicit quod præd.* JOHANNES LEAVES *valorem præd. sexdecim peciarum auri cuneat. per ipsum* JOHANNEM LEAVES *eidem* ISAACO *ut præfertur solv. suppositi. in narratione sua præd. in certo monstrare et allegare per legem terræ tenetur et debuisset unde ex quo præd.* JOHANNES LEAVES *verum valorem sexdecim peciarum auri cuneat. illius superius non monstravit seu allegavit idem* ISAACUS *petit judicium de narratione præd. quoad primam promissionem et assumption. præd. et quod narratio illa in ea parte cassetur, &c. Et quoad secundum promissionem et assumptionem præd. superius in narratione ipsius* JOHANNIS LEAVES *mentionat. idem* ISAACUS *similiter petit judicium de narratione illa quia præd.* JOHANNES LEAVES *in narratione sua præd. non ostendit de vel pro quibus pignoribus in eadem promissione et assumption. superius express. fact. fuisset inter eosdem* JOHANNEM LEAVES *aut* ISAACUM, *aut qualiter vel in quo modo præd.* JOHANNES LEAVES *pignus ill. de eodem* ISAACO * [132] "* *lucrasset prout per legem terræ ostendere debuisset ita quod curia dom. regis hic appareat utrum pignus præd. licitum seu illicitum fuisset unde ex quo præd.* JOHANNES LEAVES *ill. curiæ dom. regis hic non ostendit seu demonstravit idem* ISAACUS *petit judicium de narratione præd. quoad præd. secundum promission. et assumption. et quod narratio ill. in ea parte cassetur, &c. Et quoad tertiam promissionem et assumptionem præd. superius in narratione ipsius* JOHANNIS LEAVES *mentionat. idem* ISAACUS *similiter petit judicium de narratione præd. quia dicit quod centum libræ in eadem tertia promissione et assumptione superius express. sunt eædem centum libræ in secunda promissione et assumptione præd. superius in narratione ipsius* JOHANNIS LEAVES *similiter mentionat.*

" *tionat. et expreſſ. et non al. neque diverſæ et hoc parat. eſt ve-*
" *rificare unde ex quo præd.* JOHANNES LEAVES *un. et eandem*
" *denariorum ſummam in una et eadem actione bis petiit idem*
" ISAACUS *ſimiliter petit judicium de narratione præd. quoad ter-*
" *tiam promiſſion. et aſſumption. et quod narr. in ea parte ſimiliter*
" *caſſetur, &c.*

LEAVES *againſt* BERNARD.

IT WAS OBJECTED againſt this form of pleading, that it is neither *a demurrer* nor *a plea in bar*; and therefore it muſt be a plea *in abatement*, and ſo no judgment final could be given, but a *reſpondeas ouſter.*

Concluſion of the plea. *Vide* Poſt. 146. 6. Mod. 102. 1. Lut. 42.

FIRST, It cannot be *a demurrer*, for that is where the party will go no farther, becauſe the other has not ſhewed ſufficient matter againſt him; and therefore he ſays, that *narratio minus eſt ſufficien. in lege* to make him give any anſwer thereunto, whereupon he prays the judgment of the Court if he ſhall be compelled to anſwer: all which form is wanting in this plea.

SECONDLY, It cannot be a plea in bar to the action, for then he ſhould have pleaded, that the plaintiff *actionem ſuam* againſt the defendant *habere non debet*; and concluded his plea thus, " *Unde* " *petit judicium ſi præd.* (the plaintiff) *actionem ſuam præd. inde* " *verſus* (the defendant) *habere ſeu manutenere debeat, &c.*"

1. Com. Dig. " Abatement" (I. 12).

THIRDLY, Therefore it muſt be in *abatement*, and that is either to the writ or count: if the action is brought by original, then the plea is *petit judicium de brevi*, and it muſt conclude in the ſame words; if it is to the declaration, then it muſt be *petit judicium de billa et narratione*, for *billa* and *narratio* are the ſame, and in this form the defendant has now pleaded. * The firſt time that ſuch incertainty of pleading was introduced, was in the twenty-ſecond year of *Charles the Second*, where the defendant began his plea in bar, " *actio non, &c.*" and concluded in abatement, " *Unde pro* " *defectu ſufficientis narrationis, &c. petit judicium.*" But all the other entries are otherwiſe.

4. Bac. Abr. 50. 10. Mod. 112.

* [133]

2. Saund. 128.

But THE COURT was of opinion, that the ſubſtantial part of a demurrer was in this plea, and therefore the defendant had judgment.

Smith *againſt* Sharp. Caſe 61.

WRIT OF ERROR upon a judgment by default in an action of covenant upon articles, &c. wherein the defendant covenanted, that he or his heirs would convey ſix acres of land, &c. to the plaintiff or his *aſſigns*; and farther covenanted, that he would offer to the plaintiff a good conveyance for the aſſuring the ſaid ſix acres to him or his *aſſigns.*

On a covenant that the defendant or his heirs ſhall convey an acre *to* the plaintiff *or to his aſſigns*; A BREACH that he had not conveyed it to the plaintiff, is good, without adding *or to his aſſigns.*—S. C. 1. Salk. 139. S. C. 12. Mod. 86. Poſt. 352. 1. Vent. 114. 1. Mod. 67. 223. 1. Stra. 199. 8. Mod. 238. 2. Bac. Abr. 547. 2. H. Bl. Rep. Trinity Term, 1793.

The

SMITH *Againſt* SHARP.

The breach aſſigned was, that he had not executed a conveyance to the plaintiff himſelf, and takes no notice of his *aſſigns*.

It was for this reaſon objected, that the breach was not well aſſigned, for if it had been conveyed to his *aſſigns*, the covenant had been performed. As for inſtance; A covenant was made by the plaintiff, that he, his executors, *or* aſſigns, would repair, &c. (*a*); the breach was, that neither he, his executors *and* aſſigns, had repaired; and upon demurrer it was held to be ill, becauſe he ought to have aſſigned the breach in the *disjunctive* according to the covenant.

In the principal caſe, the declaration was held good, for there is a difference where a thing is to be done *by* a perſon, or his aſſigns, and *to* a perſon or his aſſigns: for in the firſt caſe the breach muſt be aſſigned, that it was not done "either by the one or the "other"; but in the laſt caſe it will be intended *prima facie*, to be done *to* the perſon himſelf; but if he aſſign his intereſt, then it may be done to the aſſignee.

Whereupon judgment was given for the plaintiff.

(*a*) Colt *v.* How, Cro. Eliz. 348.

Caſe 62.

Tayler *againſt* Baker.

STAFF. ſſ. } *MEMORAN. quod alias ſcilicet termino Paſ. ult. præterit. coram dom. rege apud Weſtm. venit* HENRICUS TAYLER *per* NATHAN. HICKMAN. *attorn. ſuum et protulit hic in curia dict. dom. regis tunc ibidem quandam billam ſuam verſus* JOHANNEM BAKER *in cuſtod. mar. &c. de placito tranſgreſſionis ſuper caſum: et ſunt pleg. de proſ. ſcilicet* JOHANNES DOE *et* RICHARDUS ROE *quæ quidem billa ſequitur in hæc verba.*

* [134]

STAFF. ſſ. HENRICUS TAYLER *queritur de* JOHANNE BAKER *in cuſtod. mar. Mareſc. domini regis coram ipſo rege exiſtent. pro eo videlicet quod cum præd.* HENRICUS 21 *die Maii anno regni dom. Willi. tertii nunc regis et dom. Mariæ nuper reginæ Angliæ ſexto, apud* SWINFORD REGIS *in conſid. quod idem* HENRICUS *ſervus ipſius* JOHANNIS *fuiſſet et ipſe in labore aurigæ ac in laboribus et operibus agriculturæ et agricolæ pro ſpatio octodecim menſium ante idem tempus bene et fideliter ſerviſſet ipſe idem* JOHANNES *ſuper ſe aſſumpſit et eidem* HENRICO *adtunc et ibidem fideliter promiſit quod ipſe idem* JOHANNES *tant. denariorum ſummas quant. idem* HENRICUS *pro laboribus et ſervitiis ſuis tempore perform. eorundem habere mereretur eidem* HENRICO *cum inde poſtea requiſit. eſſet bene et fideliter ſolvere et contentare vellet et idem* HENRICUS *in facto dicit quod ipſe pro laboribus et ſervitio ſuis ſicut præfertur per ipſum pro eodem* JOHANNE *factis habere meruit ſex libras legalis monetæ Angliæ unde idem* JOHANNES *poſtea apud* SWINFORD REGIS *præd. notitiam habuit, cumque etiam præd.* JOHANNES *viceſimo octavo die Maii anno ſexto ſupradicto apud* SWINFORD REGIS *præd. infimul*

Tayler against Baker.

mul computaſſet cum præfat. HENRICO *de diverſis aliis denar. ſummis eidem* HENRICO *per præfat.* JOHANNEM *ante idem tempus debit, et adtunc in aretro, et inſolut. exiſten. pro diverſis aliis operibus et negotiis per ipſum* HENRICUM *pro eodem* JOHANNE *ante tempus illud performat. et ſuper compo. ill. præd.* JOHANNES *invent. fuit in arreragiis erga eundem* HENRICUM *in al. ſumma quinque librarum bonæ et legalis monetæ Angliæ, et præd.* JOHANNES *in conſideratione inde ſuper ſe aſſumpſit; et eidem* HENRICO, *adtunc et ibidem, fideliter promiſit, quod ipſe idem* JOHANNES *præd. quinque libras eidem* HENRICO *cum inde poſtea requiſit. eſſet bene et fideliter ſolvere et contentare vellet; quæ quidem ſummæ in toto ſe attingunt ad undecim libras præd. tamen* JOHANNES *ſeparal. promiſſio. et aſſumptiones ſuas præd. minime curan. ſed machinan. et fraudulenter intenden. eundem* HENRICUM *in hac parte callide et ſubdole decipere et defraudare præd. ſeparal. denar. ſummas ſeu aliquem inde denar. eidem* HENRICO *non ſolvit, nec aliqualiter pro eiſdem contentavit, licet ad hoc faciend. præd.* JOHANNES *poſtea, ſcilicet, primo die Februarii anno ſexto ſupradicto, apud* SWINFORD REGIS *præd. in com. præd. et ſæpius poſtea requiſit. fuit; ſed ill. ei hucuſque ſolvere ſeu aliqualiter pro eiſdem contentare omnino recuſavit, et adhuc recuſat, ad damnum ipſius* HENRICI *viginti librarum et de producit ſectam, &c.*

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Et modo ad hunc diem, ſcilicet diem Veneris prox. poſt craſtinum Sanctæ Trinitatis iſto eodem Termino, uſque quem diem præd. JOHANNES *habuit licentiam ad billam præd. interloquen. et tunc ad reſpondend. &c. coram dom. rege apud Weſtm. ven. tam præd.* HENRICUS *per attorn. ſuum præd. quam præd.* JOHANNES *per* RICHARDUM LONGFORD *attorn. ſuum; et idem* JOHANNES *defen. vim et injuriam quando, &c. et dicit, quod præd.* HENRICUS *actionem ſuam præd. inde verſus eum habere ſeu manutenere non debet, quia dicit, quod poſt confectionem præd. ſeparal. promiſſion. et aſſumption. in narr. præd. mentionat. ſcilicet eodem 21 die Maii anno regni dictorum dom. regis et dom. reginæ ſexto, apud* SWINFORD REGIS *præd. concordat. fuit inter præd.* HENRICUM *et eundem* JOHAN. *quod præd.* HENRICUS *acceptaret et dict.* JOHANNES *daret eidem* HENRICO *quandam billam ſub manu ſua ipſius* JOHANNIS *pro ſolutione ſummæ quinque librarum eidem* HENRICO, *ad feſtum Sancti Mich. Archang. tunc prox. ſequen. in plena ſatisfactione et exoneratione omnium denariorum ſummarum eidem* HENRICO *à præfat.* JOHANNE *debit. et ſuperinde ipſe præd.* JOHANNES, *adtunc et ibidem, dedit eidem* HENRICO *quandam billam ſub manu ipſius* JOHANNIS, *et per eadem billam cognovit ſe debere et ſtare indebitat. eidem* HENRICO *ſummam 5l. ſolven. eidem* HENRICO *ad feſtum Sancti Mich. Archang. tunc prox. ſequen. ad quam quidem ſolutionem bene et fideliter faciend. idem* JOHANNES *obligavit ſe, et hæredes ſuos, per eandem billam; quam quidem billam ipſe præd.* HENRICUS *adtunc et ibidem cepit et acceptavit, in plena ſatisfactione et exoneratione præd. ſeparal. promiſſion. et aſſumption. ipſius* JOHANNIS *in narratione præd. mentionat. et hoc parat. eſt verificare: unde petit judicium ſi præd.* HENRICUS

TAYLER *againſt* BAKER.

actionem ſuam præd. inde verſus eum habere ſeu manutenere debeat, &c.

Et præd. HENRICUS *dicit, quod ipſe per aliqua per præd.* JOHANNEM *ſuperius placitan. allegat. ab actione ſua præd. inde verſus eum haben. præcludi non debet, quia, proteſtando quod non concordat. fuit inter præd.* HENRICUM *et* JOHANNEM *quod præd.* HENRICUS *acceptaret et diſt.* JOHANNES *daret eidem* HENRICO *billam in placito præd. mentionat. ſub manu ipſius* JOHANNIS *pro ſolutione ſummæ quinq. librarum eidem* HENRICO *ad feſtum in eodem placito ſpecificat. in plena ſatisfactione et exoneratione omnium denariorum ſum. eidem* HENRICO *à præfat.* JOHANNE *debit.*; *proteſtando etiam, ſimiliter quod præd.* HENRICUS *non cepit et acceptavit billam præd. in plena ſatisfactione ſeparal. promiſſion. et aſſumption ipſius* JOHANNIS *in placito præd. ſimiliter mentionat. prout præd.* JOHANNES *ſuperius inde placitando allegavit, pro placito*

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eidem HENRICUS *dicit, quod præd.* JOHANNES * *non dedit præfat.* HENRICO *aliquam billam ſub manu et ſigillo ipſius* JOHANNIS *pro ſolutione denariorum in placito præd. mentionat. Et hoc paratus eſt verificare: unde petit judicium, et damna ſua, occaſione non perform. promiſſion. et aſſumption. præd. ſibi adjudicari, &c.*

Demurrer, and joinder in demurrer.

Caſe 63. Tayler *againſt* Baker.

To *aſſumpſit*, if the defendant plead an agreement to take a *bill* in ſatisfaction; ARREPTICATION *proteſting* that there was no ſuch agreement made, or bill given, and pleading that it was not under SEAL, is good.

QUANTUM MERUIT for work and labour, and *inſimul computaſſet* for five pounds, to pay *cum inde requiſit. eſſet.*

The defendant pleaded, that it was agreed between him and the plaintiff, that the defendant ſhould give, and the plaintiff ſhould accept a bill of five pounds, in ſatisfaction of what was due to him, and that he did accept ſuch a bill according to the ſaid agreement.

The plaintiff replied, *proteſtando* that he made no ſuch agreement; *proteſtando etiam*, that there was no ſuch bill given; *pro placito dicit*, that it was under ſeal (*a*).

And upon demurrer to this replication, it was held good.

Ante, 86. Co. Lit. 124. Plowd. 276. Cowp. 128.

(*a*) See 5. Com. "Pleader" (N) (2. G. 10).

Caſe 64. Bowers and his Wife *againſt* Cook, Executrix, &c.

Indebitatus againſt the defendant, as *executor a plea* that the obligee died inteſtate, and that *adminiſtration* was committed to the defendant, &c. is good, without traverſing his having intermeddled as executor.—S. C. Poſt. 145. S. C. 1. Salk. 298. S. C. Carth. 363. S. C. 12. Mod. 83. S. C. Holt, 307. 556. Cro. Eliz. 108 565. 810. 3. Leon. 197. 8. Mod. 301. Carth. 99. Chan. Caſes, 33. 1. Sid. 76. 5. Co. 30.

DEBT againſt the defendant as executrix, &c. She pleaded, that her huſband died inteſtate, and that the *Archbiſhop of Canterbury* committed adminiſtration to her; *cujus prætextu* the

ſaid

Powrs and his Wife *against* Cook, Executrix, &c

ſaid defendant adminiſtered to the goods and chattels of *John Cook* her huſband; *unde petit judicium, &c.* (*a*). And upon demurrer to this plea,

The queſtion was, Whether ſhe ſhould not have *traverſed*, that ſhe was executrix, or ever adminiſtered as executrix?

If the plaintiff in this caſe had replied, that ſhe adminiſtered *de ſon tort*, and the defendant had demurred, judgment ſhould be given againſt him, becauſe by the demurrer, it is confeſſed that ſhe was a wrongful adminiſtrator, and therefore by her intermeddling with the goods, an advantage is given to the creditor to ſue her, either as *executrix* or *adminiſtratrix*, though in truth ſhe was neither at that time; but adminiſtration was committed to her afterwards. Now a wrongful adminiſtration ſhall never be intended, unleſs the party acknowledge the intermeddling with the eſtate. * It is true, in the caſe of *Bradbury v. Reynell* (*b*), the defendant's plea went a little farther: That was an action of debt brought againſt *an executor*; he confeſſed, that ſome of the inteſtate's goods came to his hands, and that afterwards adminiſtration was committed to another, to whom he delivered the ſaid goods; now in caſe he may be ſued as EXECUTOR *de ſon tort*, becauſe he had once charged himſelf to the plaintiff's action, and therefore ſhall not be diſcharged by matter *ex poſt facto* (*c*). The like exception was taken to the like plea in the common pleas (*d*), and judgment was given for the plaintiff; not becauſe the plea was ill, nor for the reaſon now alledged, but becauſe it was a plea *in abatement*, and concluded *in bar*.

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Vide 1. Cro. 89. 3. Cro. 102. 406. 565. Moor, 419. 1. Mod. 212, 213.

Afterwards IT WAS ADJUDGED in the principal caſe, that the plea was good, and that the defendant need not traverſe that ſhe was executrix, or ever adminiſtered as executrix.

(*a*) Moor, 30. 1. Bac. Abr. 15. Rep. 37.; Edwards *v.* Hurben, 2.
(*b*) Cro. Car. 565. Godd. 95. 100. Latch. Rep. 57.
(*c*) See Paget *v.* Prieſt, 2. Term (*d*) 1. Mod. 213.

The King *againſt* Stocker. Caſe 65.

THE defendant was indicted for forging *a bill of lading*; and upon demurrer to the indictment,

An indictment in the *diſjunctive* for "making and forging, or cauſing to be made and forged," a bill of lading, &c. bad, for uncertainty.

The exception was, *viz.* It ſet forth, that the defendant *ſcienter et ſubtiliter, nequiter et falſo, fecit et fabricavit, vel fieri et fabricari cauſavit, quandam chartam*, VIDELICET, *quandam billam exonerationis, cujus tenor ſequitur, &c.* which is too incertain, for this being an indictment at common law, it ought to have more certainty; and though the defendant has demurred, yet nothing is thereby confeſſed but what is well pleaded: beſides, theſe are diſtinct offences, and require ſeveral judgments.

S. C. 1. Salk. 342. 371. 8. Mod. 329.

Poſt. 414. Ld. Ray. 737. Stra. 747. 900. 3. Bac. Abr. 101. B. R. H. 370. 1. Hawk. P. C. ch. 70. ſ. 11. 2. Hawk. P. C. ch. 25. ſ. 58. ſ. 74. Fitz. 56. 2. Hale, 349.

THE KING *against* STOCKER.

To which it was answered, that the word "*vel*" is only an explanation of what goes before, and makes it signify the same thing. As for instance: the statute 5. *Eliz.* c. 4. enacts, "That it shall "not be lawful to exercise a trade except he shall be apprentice "seven years, under the penalty of forty shillings *per* month;" and a man was indicted on this statute, for that he did exercise *artem* SIVE *mysterium*, &c. and this was held good.

CURIA. An indictment setting forth, that the defendant *murdravit, vel . . . i causavit*, is not good; for those are distinct * crimes, *viz.* one is the proper act of the party, and the other is not. So in this case, the defendant might be absent when the forgery was committed; and if so, it requires a distinct consideration in respect of the fine. It is true, in a strict sense, he who causes a forgery to be done, is a forger himself; but then it ought to be so laid in the indictment. If in an action of battery the plaintiff should declare, that the defendant *verberavit vel verberari causavit*, the causing him to be beaten will not make him guilty of the battery, for it is no more than a trespass. In an indictment, or information, the fact is never laid in the *disjunctive* (*a*); and therefore an indictment on the statute 8. *Hen.* 6. c. 9. for a forcible entry into "two closes of meadow, *or* pasture," was held void (*b*) for the incertainty (*c*).

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1 Hawk. P. C. c. 64. s. 37

(*a*) Co. Ent. 278.
(*b*) 2. Roll. Abr. 81.
(*c*) The Court thought the indictment not good, being in the disjunctive; S. C. 1 Salk. 371.; and therefore it was quashed. S. C. 1 Salk. 342.

Case 66.

The King *against* Gately.

Record of an order of Sessions on the statute 5. *Eliz.* c. 4. discharging an apprentice from his master, because he had not taught him the trade of a surgeon, pursuant to the covenant in the indenture.

MIDDLESEX, } BE it remembered, that at the general ses-
to wit. } sions of the peace of the lord the king holden for the county of *Middlesex* by adjournment at *Hicks's Hall*, in *St. John's Street*, in the county aforesaid, on *Friday*, to wit, the eleventh day of *October*, in the seventh year of the reign of our sovereign lord *William the Third*, by the grace of God now king of *England*, &c. before *Gorman Ireland*, *Esq.* *Jacob Munday*, *Esq.* *William Underhill*, *Esq.* *William Withers*, *Esq.* and others their fellows, justices of the said lord the king, assigned to keep the peace, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed in the same county, it was ordered, by the court aforesaid, as follows, that is to say, "WHEREAS *James Cardrow*, *Esq.* one of his majesty's justices "of the peace for this county of *Middlesex*, upon complaint made "by *Edward Green*, apprentice to *Roger Gately*, now of the "parish of *St. James Clerkenwell*, in the said county, and late of "*London*, surgeon, by indenture of apprenticeship, bearing date "on or about the twenty-second day of *November*, in the year of "Our Lord 1690, for the term of seven years, from the date of
* [139] "the said indenture, to learn the said art; that the said *Gately*
"had not taught and instructed * him the said *Green* in the art,
"mystery, or profession of a *surgeon*, according to the covenants

"in

" in the ſaid indenture of apprenticeſhip, but had altogether com-
" pelled him the ſaid *Green* to be *a rope-dancer*, *tumbler*, and
" *jack-pudding*; and the ſaid *James Cardrow*, upon examination of
" the ſaid matter, for want of good conformity in the ſaid maſter,
" could not compound and agree the ſame; and therefore by re-
" cognizance taken before him the ninth day of *September* laſt,
" did bind the ſaid *Gately* with ſureties to appear at this preſent
" quarter-ſeſſions to anſwer the ſaid complaint: now upon exa-
" mination of the ſaid apprentice, upon oath, and other proof, it
" appears to this Court, that the ſaid *Roger Gately* has not taught
" and inſtructed the ſaid *Green*, or cauſed him to be taught and
" inſtructed in the art, myſtery, or profeſſion of *a ſurgeon* during
" the time of his apprenticeſhip, but inſtead thereof has altoge-
" ther compelled him to practiſe the art and employment of *rope-*
" *dancing*, *tumbling*, and acting as *a jack-pudding*, on a moun-
" tebank's ſtage, and in booths, in fairs and markets; and that
" the ſaid *Gately* alſo had at ſeveral times immoderately beat and
" miſuſed his ſaid apprentice: and for that it could not be made
" appear to this Court, that the ſaid *Gately* did either underſtand,
" practiſe, or exerciſe the ſaid art, myſtery, or profeſſion of a
" *ſurgeon*, and upon a full hearing of what was inſiſted on by
" Counſel on either ſide, this Court, upon conſideration of the ſaid
" matter, doth think fit, and order, that the ſaid *Edward Green*
" ſhall be, and he is hereby diſcharged from his ſaid indenture of
" apprenticeſhip to the ſaid *Roger Gately*; and the juſtices of the
" peace for this county, whoſe hands and ſeals are hereunto ſet
" (*quorum unus*, &c.) have declared, and do declare, that for the
" reaſons aforeſaid, they have diſcharged, and do diſcharge the ſaid
" *Edward Green* from his ſaid indenture of apprenticeſhip to the
" ſaid *Roger Gately* accordingly."

The King *againſt* Gately. Caſe 67.

THE order above-mentioned being removed into the court of king's bench by *a certiorari*, ſeveral exceptions were taken to quaſh it.

An order of ſeſſion to diſcharge an *apprentice* from his *maſter*, virtually diſcharges the maſter from the covenants of the indenture.

FIRST, The order is, that the ſervant ſhall be diſcharged from his maſter; but the maſter is not diſcharged from his covenants to the ſervant; therefore the order, being not mutual, is void,

* To which it was anſwered, that it is not neceſſary it ſhould be mutual, for when the ſervant is diſcharged, the other is no longer a maſter.

* [140]

S. C. 2. Salk. 471.

S. C. Comb. 353. S. C. Carth. 198. 366. S. C. Sett. & Rem. 131. 1. Mod. 287. 3. Bac. Abr. 550.

SECONDLY, The ſtatute 5. *Eliz.* c. 4. never intended to give the juſtices in ſeſſions a general power to meddle with maſters in all trades, but only in ſuch which were then uſed in *England*, and

The ſeſſion under the 5. *Eliz.* c. 4. cannot diſcharge an *apprentice* from his *maſter*, if not bound to one of the *trades* mentioned in the ſtatute.—S. C. Salk. 471. 1. Mod. 2. 286. 1. Vent. 175. 1. Saund. 315. Comb. 353. *Sed Quære*, and ſee note (*a*) page 141.

THE KING *against* GATELY.

therein particularly mentioned; and it provides, "That if such "master," which must be in one of those trades, "shall misuse "his apprentice, then the justices may interpose:" but *a surgeon* is not named in that act; and it being a penal law, it shall not be extended according to equity to comprehend any other trade but what is expressly named in the act.

This objection was thus answered, *viz.* that *a surgeon* is a trade within the statute, for it is a manual occupation, and that is particularly mentioned in the act. But it has been held, that this statute extends to more trades than those mentioned in it; for the apprentice of *a merchant* has been discharged from his master by an order of sessions, and yet *a merchant* is not named in that act. Besides, it is not a penal but a remedial law, to regulate masters and apprentices (*a*).

The justices of the peace may discharge an *apprentice* but not an *articled servant*.

1. Salk 67, 68. 2. Ld. Raym. 471. 490. 491. Carth. 156.

THIRDLY, The justices of peace have no authority to discharge an apprentice, but where he was compelled by them to serve; and in such case it is reasonable, that the contracts which were made by their authority should be dissolved by the same power; but they cannot discharge any voluntary agreements made between the parties. If they make an order for the payment of servants wages, it is good, because they have power to compel the service (*b*); but for the wages of *a coachman*, or the like, they have no power to make an order, because they cannot compel a man to serve in that capacity (*c*). One *Reycroft*, a justice of peace in *Middlesex*, made an order for the payment of *a seaman's wages*, and upon an action brought against him, the plaintiff recovered thirty pounds damages (*d*).

Qu. Whether in an order of justices, discharging an apprentice, it must appear that they were present at the sessions.

FOURTHLY, But if the justices of peace had any power, they have not pursued it, for it does not appear, that they who set their hands and seals to the discharge were present in sessions; and at the examination of the matter, it being only set forth in the order, "That the justices of the peace of the county, whose * hands "and seals are thereunto set, &c." and those may be justices acting out of sessions.

* [141]

2. Keble, 822. Skin. 98. Carth. 198. 366.

Afterwards it being moved again, this order was quashed for the *second* and *third* exceptions taken to it.

(*a*) See Rex *v.* Collingburne, Mich. Term, 12 *Geo.* 1. where on an order of session to discharge an apprentice from the trade of *a glazier*, it was contended that the session had no authority, because this is a trade not mentioned in the act; but the Court said, that although it was doubted whether the statute 5 *Eliz.* c. 4. extended to all trades, it had of late been settled and agreed that it does. 1. Stra. 663 S. C. 2 Ld Ray. 1420.

(*b*) Rex *v.* Pope, Post. 419.

(*c*) 2. Jones 47. Comb. 3. 6. Mod. 91. 204. 3. Salk. 261.

(*d*) 22. Viner Abr 408. pl. 15.

Stedman *againſt* Page. Caſe 68.

REPLEVIN. The plaintiff declared for taking bricks, &c. The defendant made cognizance as bailiff of one *John Bennet*, and *Grace* his wife; ſetting forth, that one *Simon Bennet* was ſeiſed in fee of the lands *in quo*, &c. and, being ſo ſeiſed, made a leaſe thereof to *Griffith* for forty-four years, rendering rent; that *Simon Bennet* died, and the lands deſcended to his daughters and coheireſſes, one whereof married the ſaid *John Bennet*, and the other was the preſent *Counteſs of Salisbury*, and ſo made cognizance for a moiety of the rent.

Co-parceners muſt avow jointly.

S. C. 1. Salk. 390. S. C. Comb. 347. S. C. 12. Mod. 86. S. C. 1. Ld. Ray. 64.

And upon demurrer, JUDGMENT was given for the plaintiff, becauſe one coparcener cannot make ſuch an avowry for a moiety of the rent before partition, though they have ſeveral inheritances.

Carth. 364. 1. Salk. 187. Ld. Ray. 726. 422.

Co. Lit. 164. 169. 196. 180. 1. Vac. Abr. 444. Cowp. 219.

The King *againſt* Hill. * Caſe 69.

SHOWER. Though the ſtatute of recuſancy 3. *Jac.* c. 4. ſ. 17. ſays, "That an *outlawry* for recuſancy ſhall not be reverſed "for want of form," yet in *Serjeant Winder's Wife's Caſe* (*a*), you adjudged in this court that it ſhould, that the ſtatute may be made ſenſe: an *indictment* or *information* for recuſancy ſhall not be quaſhed for form; but on traverſe of the fact, and bail given, the outlawry ſhall be reverſed for form.

Outlawry for recuſancy may be reverſed for want of *form*.

S. C. 1. Salk. 371. Cro. Car. 604. 1. Show. 379. 3. Keb. 592. Skin. 114.

Quod Curia conc ſit.

1. Hawk. P. C. ch. 10. ſ. 29.

(*a*) 1. *Hale* & *Mary*,

Anonymous. Caſe 70.

HOLT, *Chief Juſtice*. On the reverſal of an outlawry, in an information for ſending children beyond ſea to be bred papiſts, the defendants muſt plead *inſtanter*, *et jic per* ASTRY.

Pleading in outlawry on the 1. *Jac.* 1. c. 4. ſ. 6.

* The King *againſt* Betterton and Others. * [142] Caſe 71.

A PROHIBITION writ (*a*) was iſſued out to the new players, *Betterton* and others, who had erected A PLAY-HOUSE in *Little-Lincoln's-Inn-Fields*. The writ recited, that it was *a nuiſance* to the neighbourhood, and therefore prohibited them to continue it; but the players not obeying this writ, there was a rule made for an attachment, *niſi*, &c.

If a licenſed playhouſe, from the great concourſe of perſons reſorting to it, become a public nuiſance, *Quære*, Whether the Court of King's Bench can grant *a prohibitory writ* to ſuppreſs it, or it muſt be left to the common mode of proſecution by *indictment*. S. C. Skin. 625 S. C. Holt. 424. 2. Ruſh. Coll. 220. 247. 1. Roll. Rep. 190. 1. Mod. 76. 2. Keb. 846. 3. Keb. 464. 3. Bac. Abr. 684. 1. Hawk. P. C. c. 73 ſ. 7.

(*a*) See the writ verbatim, Skin. 626.

THE KING *against* BETTERTON AND OTHERS.

SHOWER came and ſhewed, that no ſuch writ could be granted by the Court, for that the parties had no way to defend themſelves, unleſs it were to come in and be examined upon interrogatories upon oath, and they would ſwear it was no nuiſance, as appeared by ſeveral affidavits (which he then ſhewed); but he ſaid, that the moſt proper method would be to proceed by *indictment*; and then THE GRAND JURY, *viz.* the whole county, would conſider whether it were a *nuiſance* or not.

HOLT, *Chief Juſtice.* You are not concluded by this writ, as to the right; but you may come in and plead to this *attachment* the *general iſſue*, and if the thing be no nuiſance, it is no fault or contempt to continue it. It is like the caſe of A PROHIBITION to the eccleſiaſtical court; you make *a ſuggeſtion* that the defendant proceeded there *contra prohibitionem regiam*, upon which, if there goes *an attachment*, the defendant may come and take iſſue, that he did not proceed after the prohibition granted. There was a caſe in this court of *Jacob Hall* (*a*), where the Court ſent ſuch a writ as this is here, and made him pull down his ſtage. But indeed, that of *a rope-dancer* is a nuiſance *in ſe*, but here it is only ſo in conſequence; for the acting of plays, you ſay, is only a nuiſance, as it draws the people, and coaches, and ſharpers thither.

SHOWER. The law will not determine a man's right but by a jury. The writ *de leproſo amovendo* (*b*) is a writ of an extraordinary nature, and I think has not been granted theſe hundred years; but even in that writ, the ſheriff is commanded to enquire
* [143] by the oath of twelve men. But beſides, in this particular caſe, the proſecution is carried on by the patentees of the old play-houſe, and not by the inhabitants; which ſhews that they do not think it a nuiſance, if it be one: and in truth, the queſtion at laſt will be, Whether thoſe letters patents, to have the ſole liberty of ſetting up a play-houſe be not merely a licence and authority which determined by the king's death, and ſo does not bind his ſucceſſor? and the new players are licenſed by his preſent majeſty.

HOLT, *Chief Juſtice.* It is a caſe of conſequence, and therefore we will take time to conſider of it.

EYRE, *Juſtice.* I think the moſt proper way is to proceed by indictment.

Adjournatur.

(*a*) 1. Mod. 76. (*b*) Fitz. N. B. 8th edit. p. 534.

Caſe 72.

Davis *againſt* Speed.

The *original* in a writ of *annuity* the ſame as in *debt*, and therefore in a bill, *in placita debiti*, the plaintiff may declare on a deed for an annuity.—S. C. Carth. 262 354 Poſt. 335. Cro Eliz. 3. 268. Yelv. 208. 9. Mod. 243. Cro. Car. 171. Skin. 66. 1. Com. Dig. "Annuity" (E.). Fitz. 85.

ANNER. This is *debt* on a deed for an annuity, and the action is laid in the county palatine of *Cheſter*. To which the defendant demurs.

FIRST,

DAVIS *againſt* SPEED.

FIRST, Becauſe this Court has not juriſdiction.

SECONDLY, The bill is for *debt*, and the declaration is for *an annuity*, which is a material variance, for they ſhall receive different judgments. In the caſe of *Lucas v. Fullwood (a)*, the plaintiff entered his ſuit *in placito debiti*, and declared that the defendant *reddat ei* 50*l. de annuali reddita quas ei debet et injuſte detinet*; and, on *nil debet*, the plaintiff had a verdict, but it was adjudged, *quer. nil capiat per billam*; for by his declaration he demands *an annuity*, which is contrary to the entry of his plaint *in placito debiti*. If the declaration be, *per quod ſubſtraxit annualem redditum*, he ſhall, in *a writ of annuity*, have a ſeveral and diſtinct judgment; for in *a writ of annuity* he ſhall have judgment of the arrears hanging the writ; but in *debt* he ſhall only have judgment for the ſum demanded.

THIRDLY, No action of debt lies for an annuity for life.

HOLT, *Chief Juſtice*. No; nor on an annuity for years *(b)*.

CHESHIRE, *è contra*. But this is all annuity; the bill and declaration are the ſame in annuity.

* HOLT, *Chief Juſtice*. They are ſo. * [144]

Then as to the juriſdiction; I do not know what became of *Jennings* and *Hawkins' Caſe*; there was a plea to the juriſdiction, in which there was another point adjudged, that when the defendant pleads to the juriſdiction, he muſt alſo plead that he lives in the county palatine, or that he has lands there whereby he may be ſummoned, though the cauſe of action be laid in the county palatine, and it is not well pleaded without it, becauſe proceſs cannot iſſue againſt the defendant in the county palatine. So that though the cauſe of action here ariſes in the county palatine, yet ſince that is not pleadable to our juriſdiction, that is not material. Vide 2. H. 7. 16, 17.

Then annuity lies, though the annuity continues, to recover the annuity and arrears; but for the future there muſt be *a ſcire facias* on the judgment.

JUDGMENT for the plaintiff.

(*a*) Yelv. 108.
(*b*) See Lucas *v.* Fulwood, 1. Bulſt. 151., and Brown *v.* Pendlebury, Cro. Eliz. 268. Brandlop *v.* Philips, Cro. Eliz. 895. *contra*. But ſee the caſe of Acherley *v.* Vernon, Fortes. 188.

Churchy *againſt* Roſſe. Caſe 73.

A bond and judgment given by a *debtor* to a *third perſon*, to ſecure him from

HOLT, *Chief Juſtice*. If a defendant be arreſted, and in execution, and one become bound for him to the *plaintiff*, and the defendant give the perſon who becomes bound judgment for his *counter-ſecurity*, it is good, though no *attorney* were preſent: and *his* bond to *the creditor*, is good, though no *attorney* was preſent.—S. C. Holt, 398. 2. Lilly, 47. 434. 1. Mod. 1. 6. Mod. 85. 163. 1. Salk. 402. Cowp. 141. 281. 5. Com. Dig. "Pleader" (Y. 2.). Stra. 530, 902, 1245. 3. Burr. 1792. 1. Bac. Abr. 188. Cowp. 141. 281. 4. Term Rep. 433.

it

CHURCHY *and* ROSSE. it is not within the common rule of the court, becauſe it was not given to the plaintiff himſelf (in which caſe there muſt be an attorney preſent), but not when given to a third perſon.

Caſe 74.

Lee *againſt* Barnes.

Where a man may plead in abatement of the declaration, or not.

S. C. Holt, 3. Fitz. 256.

HOLT, *Chief Juſtice.* You may plead in abatement of a declaration where the action is by *original*, for the pleas there are different; but if the action is by *bill*, you cannot plead in abatement of *the declaration*, but only of *the bill*, for they are the ſame thing, and therefore the entry in ſuch caſe is *petit judicium de billâ.*

*[145]

Caſe 75.

Bowyer *againſt* Cook.

The ſeveral ways of *modern pleading*, where one is ſued *as executor* and where as *adminiſtrator.*

S. C. Ante, 136. S. C. 1. Salk. 298. S. C. Carth. 63. S. C. 12. Mod. 83. S. C. Holt, 507. 556.

HOLT, *Chief Juſtice.* In an action againſt an executor, the old way was to plead, *ne unque executor ne unque adminiſtrator* as executors. But this is a dangerous way, and it is the better way to plead, as this caſe was, "he is not executor, but that the "biſhop has granted adminiſtration to him," and that proves him not to be executor. In the caſe of *Lathbury v. Humfrey* (*a*) it is ſaid, there ſhould be *a traverſe*; but all the precedents and the reaſon of the thing is to the contrary. If the defendant be ſued as *adminiſtrator*, and he plead that there is *a will*, and that he is made executor, there ought to be a traverſe, ABSQUE HOC that the teſtator died inteſtate: but where he is ſued as *executor*, and he pleads that he died inteſtate, there needs no traverſe.

Hob. 79. Lutw. 30. 890. 2. Vent. 150. 5. Com. Dig. "Pleader" (2. D. 4.).

In debt againſt the defendant as *executrix*, A PLEA that ſhe is *adminiſtratrix*, concluding *quod reſpondere non debet ad billam*, is bad.

S. C. Carth. 566.

SHOWER. When the concluſion, *quod reſpondere non debet ad billam*, is good, becauſe the plaintiff names us *executrix*, and not *adminiſtratrix*, and either this *or quod raſſetur billa* is good, 3. *Bulſt.* 250. Debt by executor, and *a profert*, &c. the defendant pleaded, that the party which was dead, died inteſtate, and that letters of adminiſtration were granted to him, ABSQUE HOC that the plaintiff is executor, and by the Court the traverſe is not good, and day was given to put him to a peremptory plea.

2. Saund. 97. 190. 337. N. Lutw. 144. 4. Bac. Abr. 55.

S. C. Ante, 136. S. C. 1. Salk. 308. Fitz. 37. Show. 56.

HOLT, *Chief Juſtice.* You ſhould have begun the plea, *petit judicium de billâ* (*b*). But if there had been a traverſe, the plea had been naught; as if he had ſaid, ABSQUE HOC that he made her executrix.

DYER. But my exception is, that he ought to have traverſed, that he had not adminiſtered as executor before adminiſtration granted, for we have liberty to charge him as EXECUTOR *de ſon*

(*a*) Lathbury and his Wife, Adminiſtratrix of William Bridges, *v.* Humfry, Yelv. 115.

(*b*) Ante, 132. 144. Moor, 30. 1. Com. Dig. "Abatement" (I. 12.). 1. Bac. Abr. "Abatement" (M.). Pickering *v.* Symonds, Poſt. 334.

tort

tort as a rightful one. The case of *Justice v. Whyte* (*a*) is express on the point: In debt against the defendant, as executor of *J. Whyte*, the defendant pleads, *J. Whyte* made a will, but made not him executor, &c. and concluded in bar; and this was held a plea in abatement only.

BOWYER *against* COOK.

At another day this case was again debated.

SHOWER. No traverse is necessary here, for a wrongful administrator shall not be intended, but it is to come on their side in their replication. We have shewn, that the plaintiff has mislaid his action by charging us as executor, and also we have shewed * him how to mend it, that we are not *executor*, but *administrator*, which are the only two things requisite in pleas of abatement, and must be done: so if the defendant plead to the jurisdiction of the court, it will be bad, unless he shew some other court where the plaintiff may sue him. Then the *respondere debet* is only form, and you are to give judgment according to the nature of the case, and we have shewed it abateable, and therefore you will abate it.

S. C. Ante, 136. S. C. 1. Salk. 298. Firz. 37. Skin. 86. * [146]

HOLT, *Chief Justice*. No; every plea must have its proper conclusion: you should have pleaded in abatement, but *respondere non debet* is proper to the jurisdiction, which, it is true, is in consequence in abatement; but they are two distinct things, and you must begin and conclude the plea properly, and put it to the judgment of the Court. When a man pleads to the jurisdiction of the Court, *respondere non debet* is a good plea; sometimes it is *si Curia cognoscere velit, &c.*

Every plea must have its proper conclusion.

Ante, 132, 133. 1 Saund. 283. 2. Saund. 97. 189, 190. 339. N. Lutw. 44. Show. 4. 1. Lutw. 303. 306. Cowp. 575. 2. Term Rep. 439.

But as to the other exception, there ought not to be *a traverse*, and the plea is much better without it; for he allows that he is chargeable as to the right, but that it is in another manner than you have charged him, and shews that it is as administrator, which is enough, and is a full answer to the declaration: and it is a foreign intendment that he administered wrongfully. Why should he traverse ABSQUE HOC that he administered as EXECUTOR *de son tort?* That is a special matter not charged against him: he need not traverse administration as executor before, when you only charge him generally in the declaration; but you ought to reply, and shew what act of administration he had done: at common law an administrator was only suable as executor: we cannot suppose *a tort*, unless it is alledged. But I think the defendant ought to *answer over* for the other fault.

Traverse.

Ante, 136.

Skin. 274.

Respondeat ouster.

(*a*) 1. Mod. 239.

HILARY

HILARY TERM,

The Seventh of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir William Gregory, *Knt.*
Sir Thomas Rokeby, *Knt.*
Sir Samuel Eyre, *Knt.*
} *Juſtices.*

Sir Thomas Trevor, *Knt. Attorney General.*

John Hawles, *Eſq. Solicitor General.*

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* Sir William Wentworth *againſt* Lord Strafford.

Caſe 76.

THE late *Earl of Straffford*, in the year 1676, gave a warrant of attorney to confeſs a judgment at the ſuit of the plaintiff, and this was given to one *Symſon*, an attorney in the country, and ſent to one *Wall*, who was his entering clerk, and the judgment was entered accordingly, *quod recuperet debitum et damna ſua*, and *a blank* left to inſert what the ſum ſhould be for the damages. *Wall* died ſoon afterwards, and the warrant of attorney and his papers were all loſt; but *Symſon*, who was ſtill living, made affidavit of the fact.

Qu. Whether, if judgment be entered on a warrant of attorney, and a *blank* left to inſert the *quantum* of *damages*, the Court, after a lapſe of nineteen years, will ſuffer the judgment to be amended.
S. C. 1. Ld. Ray. 68.
1. Salk. 52.
Ray. 39. 398.
1. Sid. 70.
2. Mod. 316.
3. Mod. 112.
5. Mod. 148.
6. Mod. 263.
2. Lev. 22.
2. Saund. 289.
Stra. 1110.
Burr. 1986.
2730.

A motion was now made for leave to put in a ſum certain for the damages and coſts, which was oppoſed for theſe reaſons:

FIRST, Becauſe there was nothing appeared to direct what the amendment ſhould be, as a declaration, which may be amended by a writ, or one roll by another, &c.

SECONDLY, If any ſuch thing had appeared in this caſe, yet this could not be amended, becauſe it was of another Term, this judgment being now nineteen years old; and though this ſhould be admitted to be the act of the Court, and ſo amendable if in the ſame Term wherein the judgment was entered, yet, being now ſo many years paſt, it cannot be done.

THIRDLY,

SIR WILLIAM WENTWORTH *againſt* LORD STRAFFORD.

3. Lev. 430. 6. Mod 164. 269. 1. Saund. 249. Skin. 591.

THIRDLY, Neither can it be amended *if* it ſhould be taken to be the miſpriſion of the clerk; for at common law ſuch a miſpriſion in proceſs was not amendable in another Term; and it is * not warranted by the ſtatute 8. *Hen.* 6. c. 12. which extends to records as well as to proceſs, and likewiſe to pleas, warrants of attorney, original and judicial writs, panels and returns, in all which the negligence of the clerk is to be examined, reformed, and amended, in affirmance of the judgment.

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Comb. 433. Skin. 253.

THOSE WHO ARGUED *for the amendment* inſiſted, that the Court might put in any ſum to make the judgment perfect, though it was uncertain what ſum they ſhould allow for coſts, becauſe it does not appear what was confeſſed, ſince the warrant of attorney was loſt; and this may be done eſpecially ſince it appears to be the neglect of the clerk to enter the judgment before the coſts were taxed.

Comb. 71. Carth. 520.

The words omitted are the act of the Court, who had power, at common law, to amend their own judgments before any ſtatute of amendments was made, though in another Term; as for inſtance, in *the Year Book* (*a*), a *præcipe quod reddat* was brought, and the defendants were eſſoined to *tres Mich.* which was adjourned to *craſtino Purificationis*, when it ſhould have been to *octab. Pur.*; but it was amended: now the alteration of *the eſſoin* in that caſe was more than in this. So where a writ of error was brought in the court of king's bench (*b*), upon a judgment in replevin for the defendants, and an error aſſigned in the entry of the judgment, in which theſe words were omitted, that the plaintiff "*nil capiat* "*per breve ſuum, ſed ſit in miſericordiâ pro falſo clamore*," and that the defendants "*eant inde ſine die*;" but it was amended, and all theſe words were inſerted in another Term. So where a judgment general was given againſt an executor, and it was not entered *de bonis teſtatoris in manibus* of the defendant adminiſtered, and yet that was amended in my LORD HALE's time (*c*); and even in the very laſt Term in the common pleas ſeveral *continuances* were omitted, and upon great debate it was amended (*d*).

2. Mod. 316, 317. Yelv. 130. Rav. 38, 39. 398. 2. Mod. 112. 2. Lev. 22. 2. Saund. 289. 1. Sid. 70. Comb. 86. 265.

Comb. 393.

CURIA. This is amendable, if the Court had any thing to amend it by. It is the act of the Court, and yet judgment is not given by them as to the damages. It might have been amended in the ſame Term; for though it is entered on THE ROLL, yet the Court has power to amend any fault in a record during that Term wherein it was entered (*e*).

(*a*) 4. *Edw.* 3. pl. 9. b.
(*b*) 2. Mod. 316.
(*c*) 2. Lev. 22. Carth. 167.
(*d*) See 1. Salk. 177. Stiles, 339. Strange, 62. 1. Com. Dig "Amendment" (I.).
(*e*) HOLT, *Chief Juſtice*, was of opinion, that it could not be amended, becauſe it would be making a new judgment, and becauſe the motion came too late; but ROKEBY, *Juſtice*, thought it might be amended, becauſe it was for a juſt debt: but it was adjourned. S. C. Ld. Raym. 68.

* The King *againſt* Clough and Others.

Caſe 77.

THE DEFENDANTS were indicted at *the ſeſſions* upon the ſtatute 1. & 2. *Philip and Mary*, c. 7. by which it is enacted, "That no perſon dwelling in the country out of a corporation or "market-town ſhall ſell, or cauſe to be ſold, by retail, any woollen "cloth, linen cloth, haberdaſher wares, or mercery wares, in "any corporation or market-town, or the liberties thereof, "except in open fairs, under the penalty of ſix ſhillings and "eight pence for every offence, and the forfeiture of the wares "ſold, or offered to be ſold; one moiety to the queen, the other "to the ſeizer or proſecutor, &c."

The indictment ſet forth, that the defendants had ſold earthenware in *London*, *contra formam ſtatuti*.

But it was quaſhed upon a motion, becauſe the ſtatute does not give juſtices of peace any juriſdiction to proceed in this matter at their *ſeſſions*, for they are not ſo much as named in the act.

The ſeſſions cannot take an *indictment* on a ſtatute creating a *new offence* not againſt *the peace*, unleſs ſo authoriſed by expreſs words.

4. Mod. 51. 379. Cro. Eliz. 87. 9. Co. 118. 2. Salk. 406. 475. 680. Fitzg. 83, 84. Stra. 1256. 4. Com. Dig. 8vo. 528.

The King *againſt* the Inhabitants of Wootton-Rivers.

Caſe 78.

TWO juſtices of peace made an order for the removal of a poor woman from one pariſh to another.

The order recited, "that upon complaint made to them," but did not ſay, "by the churchwardens or overſeers of the "poor, &c."

Exception being taken to the order, it was inſiſted at the bar,

FIRST, As to the order itſelf, that it is not neceſſary to ſet forth, that the complaint was made "by the churchwardens, &c." but where it is expreſsly alledged in the order, that the perſon to be removed "did endeavour to ſettle himſelf in a tenement under the "yearly rent of ten pounds (*a*)," which was not mentioned in this order, but only that he was "likely to be chargeable, &c.:" and if ſo, then any of the pariſhioners may complain.

To which it was anſwered, and RESOLVED BY THE COURT, that the complaint muſt be made by the *public officers of the pariſh*, to whom the care of the poor is entruſted by law, and without ſuch complaint the juſtices of peace have no power to remove the perſon (*b*); for the reſt of the pariſh may be willing to keep him,

The juſtices have no authority, on 13. & 14. *Car.* 2. c. 12. to remove paupers, except on complaint of the pariſh-officers; and therefore an order made "*on* "*complaint*," omitting "*of* "*the church-* "*wardens*, &c." is bad. S. C. Holt, 510. S. C. 2. Salk. 492. S. C. Carth. 365. S. C. 3. Salk. 254. S. C. Sett. & Rem. 18. 165. S. C. 12. Mod. 89. S. C. Foley, 72. Carth. 222. Foley, 267. 1. Burr. S. C. 24. Andrews, 361. 2. Stra. 1158. 2. Burr. S. C. 163.

(*a*) Rex *v.* Graffham, Sett. & Rem. 16. 2. Bott P. L. 764. pl. 688.—See alſo Rex *v.* South Marſton, Stra. 189.

(*b*) Rex *v.* Hareby, Andr. 361. But ſee Rex *v.* Forreſt, 3. Term Rep. 38.

or

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or may take ſecurity of another pariſh to * indemnify them in particular from any charge which may ariſe by his poverty, and ſo they will have no reaſon to complain.

An order of removal omitting to ſtate that it was made on complaint of the *pariſh officers*, cannot be made good by the return of the *certiorari*.

SECONDLY, it was inſiſted, that if it be a fault, yet it is helped by the return of the order; for there the juſtices certify, that it was "upon complaint made to them by the churchwardens, &c.;" ſo that if it be defective for this omiſſion, it is helped by the return.

But THE COURT reſolved, that as to the return, it is not material to ſupport this defect; for the order itſelf is THE RECORD, and not the return of the *certiorari*, which cannot make a void order good, becauſe the juſtices of peace have executed their authority by aſſigning the order, and therefore ſhall not ſupport this defect by any ſubſequent matter.

An order of removal good, though not alledged that the pauper "*came to ſettle in a tenement under 10l. a year.*"

NOTA, There was another exception to this order, *viz.* that it was not alledged that the perſon came to ſettle in a tenement under the yearly value of ten pounds.

But THE COURT held the order to be good notwithſtanding that exception, for of late years it is ſeldom expreſſed in orders; and becauſe the practice had been ſo, they thought fit to continue it.

Comb. 339. Stra. 142. 189. 393. 698.

So it was quaſhed upon the firſt exception.

Caſe 79.

Pullen *againſt* Palmer.

Trinity Term, 6. Will. 3. Roll 179.

In replevin, if the defendant avow the taking for rent, it is ſufficient to ſay, that he was *ſeiſed* generally, without ſtating of what eſtate.

IN REPLEVIN, the defendant *avowed* in his own right, ſetting forth, that the *locus in quo* was parcel of a tenement whereof ſuch a perſon was *ſeiſed*, who by bargain and ſale granted it to thirteen perſons and their heirs; that they being ſeiſed thereof granted the premiſes to thirteen more. Then he ſhewed, that four of theſe thirteen were dead, and that nine were living, of whom he was one; that there was rent in arrear, *per quod idem* (the defendant) *in jure ſuo proprio bene advocat captionem, &c.*

S. C. 3. Salk. 207. S.C Carth. 328. S. C 2. Lutw. 1211. 2. Salk. 562. 629. 3. Sid. 298. 3. L.v. 190. 3. Salk. 210. 3. Sid. 10, 11.

The plaintiff replied, that one of the nine ſurviving grantees releaſed the ſaid rent.

To this replication the defendant demurred, and the plaintiff joined in demurrer.

The exceptions to the avowry were:

FIRST, The defendant ſets forth, that he was ſeiſed generally, and does not ſay of what eſtate, either in fee or for life (*a*).

(*a*) But now by 11. *Geo.* 2. c. 19. "All defendants in replevin may avow "or make conuſance generally, that the "plaintiff in replevin, or other tenant "of the lands and tenements whereon "the diſtreſs was made, enjoyed this "ſame under a grant in demiſe, &c. "without ſetting forth the grant, the "nure, demiſe, or title, &c. &c."

SECONDLY,

SECONDLY, That the eſtate was conveyed by *bargain and ſale*; and it may be a queſtion, Whether this is a ſufficient conveyance to raiſe an uſe?

Bargain and ſale will raiſe

1. Mod. 262.
2 Mod. 254.
Truſts, 409.

1. Co. 87. 8. Co. 94. Co. Lit. 271. 1. Burr. 95. Sanders on Uſes and

THIRDLY, and laſtly (which was chiefly relied on), That he did not ſever in the *avowry*; for he ought to have *avowed* in his own right, and to have made *cognizance* as bailiff to the reſt; but having avowed generally, and made no cognizance as bailiff to the other *jointenants*, the avowry cannot be good; for though he may diſtrain for himſelf, yet he muſt do it as the law directs; for his fellows jointenants muſt join in an avowry for *damage feaſant*, and much more for a rent: all the entries are ſo (*a*).

If *joint-tenants* diſtrain, and the goods be replevied, they muſt ſever in avowry, or the avowant muſt *avow* in his own right, and make *cognizance* as bailiff to the reſt.

S. C. Ante, 71.

To which it was anſwered, that this is but form, for the defendant had avowed for a rent, and had ſhewed the ſpecial matter; and therefore his avowry is good: for if one jointenant make a *diſtreſs* for the whole rent in arrear, and levy the whole, the taking is good, for he is accountable to the reſt (*b*); and in this caſe the defendant has ſpecially ſhewed, that ſuch a rent was due to him, and to them, who being jointenants were ſeiſed, and ſo it is well enough. A rent-charge was granted to the father and his heirs during his life, and the lives of his wife and two daughters; one of them married the defendant, who avowed for the rent arrear before marriage due to him and his wife; which being aſſigned for error, it was held (*c*) to be no more than *form*, becauſe the avowry being for rent arrear, to ſay that it was due to him and his wife is but ſurpluſage (*d*); and that avowry was held good in ſubſtance.

Co. Lit. 145. Cuith. 364. Comb. 329. 347. 474. Cro. Eliz. 530. 4. Bac. Abr. 662. Eſpinaſſ. Dig. 374. 2. Lutw. 1211. 3. Bac. Abr. 216. 5. Term Rep. 247.

Adjournatur (*e*).

(*a*) Thompſon's Entries, 264.
(*b*) See Tooker's Caſe, 2. Co. 67. *contra*.
(*c*) Bowles *v.* Poore, Cro. Jac. 282. Wiſe *v.* Bellent, Cro. Jac. 442.
(*d*) 1. Roll. Abr. 218.
(*e*) See S. C. ante, 71. to 73.

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Caſe 80.

JUSTICIAR. *dom. regis ad placita coram ipſo rege tenen. ego* JACOBUS FELL, *cuſtos gaolæ dicti dom. regis de* NEWGATE *humillime certifico quod civitas* LONDON *modo eſt, et a toto tempore cujus contrarii memoria hominum non exiſtit fuit, antiqua civitas; quodque cives et liberi homines civitat. il. a toto tempore ſupradicto cujus contrarii memoria hominum non exiſtit. fuerunt incorporat.* (*a*)

The return to a writ of *habeas corpus* made by the keeper of *Newgate* on a commitment by the *court of mayor and aldermen* of the ſaid city,

man of a *freeman* for refuſing to take upon himſelf the office of *liveryman*

(*a*) The gaoler has laid a preſcription in THE VINTNERS to be *a Company* when they were incorporated but in the reign of *Edward the Sixth*.—NOTE *to the former Editions*.

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tam per nomen majoris communitat. ac civium civitat. LONDON, *quam per nomen major. communitatis civitatis* LONDON.; *ac quod de. præd. civibus a toto tempore ſupradicto fuer. et adhuc ſunt ſeperal. ſocietat guild. et fraternitat. infra eandem civitatem unde ſocietas myſterii Vintarum in præd. civitat.* LONDON *a toto tempore præd. incorporat. per nomen magiſtri cuſtod. ac. liberorum hominum ac colitat. myſterii Vintarum civitat.* LONDON *fuit et eſt un. quodque tam de et in præd. ſocietate Vintarum quam de et in omnibus aliis ſocietatibus, guildis ſive fraternitatibus infra eandem civitatem ſunt et a toto tempore ſupradicto fuerunt quidem homines exiſten. cives civitat. præd. ac liberi homines earundem ſocietat. guild. ſive fraternitat. reſpectivè,* VOCAT. livery-men, *qui de tempore in tempus et a toto tempore ſupradicto electi fuerunt et eligi* * *conſuever. per ſocietatem, guild. ſive fraternitat. unde hujuſmodi homines liberi extiterunt et quilibet liber extitit reſpectivè in liberatur.* ANGLICE the livery, *ejuſdem ſocietat. guild. ſive fraternitat. unde ipſe reſpectivè ſic ut præfertur liberi homines, extiter. qua quidem homines et quilibet eorum reſpective ſo electi. exiſten. idonei et non habentes ſeu habens aliquam rationabilem cauſam ſive excuſation. in contrarium inde officium ſive locum unius liberatur.* ANGLICE of a liveryman, *ejuſdem ſocietat. guild. ſive fraternitat. reſpective in quo quilibet hujuſmodi liber homo electi fuer. fore de liberatur. unde a toto tempore ſupradict. in ſe ſuſceperunt et ſuſcipere totaliter fuerunt ac debuerunt et debent ac officium il. ac omnia officii ſui. hoc illius onera et expenſa et denariorum ſummas ergo ſupportationem et in et pro bono publico et pro meliori regimin. ejuſdem ſocietat. a toto tempore ſupradicto ſolverunt et ſolvere ſolit. facere et debuerunt. Et ulterius certifico quod infra civitat. præd. habetur et a toto tempore ſupradicto cujus contrarium memoria hominum non exiſtit habebatur quædam curia dom. regis nunc et progenitor. ſuor. regum et reginarum Angliæ de record. tent. ſeptimana poſt diem Martis et quolibet die Veneris coram majore et aldermannis civitat. præd. pro tempore exiſten. in* GUILDHALL *ejuſdem civitatis ſituat. in parochia* SANCTI MICHAELIS BASSISHAW *in warda de* BASSISHAW *in qua quid. curia major. et aldermannor. civitat. præd. pro tempore exiſten. a toto tempore ſupradicto tractare conſuever. et ordinaverunt et tractare regulare et ordinare uſi fuerunt et conſueverunt omnia ad præd. ſeparal. ſocietat. guild. et fraternitat. civitat. præd. pro tempore exiſten. tangen. et ſpectan. vel quomodolibet concernen. quæ coram eis dilat. fuerunt pro bono regimine et gubernatione inde in ſupportation. honoris et dignitatis ejuſdem civitatis; quodque liberi homines exiſten. cives civitat.* LONDON *præd. qualibet ſocietate guild. ſive fraternitate civitat.* LONDON *præd. et cor. quilibet toto tempore ſupradicto fuerunt et fore conſueverunt et adhuc exiſtunt ſub regimine gubernatione correctione et punitione præfat. major. et aldermannor. civitat. præd. pro tempore exiſten. in curia præd. in forma tent. pro omnibus et ſingulis materiis per aliquem hujuſmodi liberum hominem ſocietat. præd. inde fact. ſive fieri omiſſ. contra ſive in præjudicium boni regiminis et gubernationis præd. ſocietatis guild. ſive fraternitat. civitat. præd. Et ulterius certifico quod infra civitat. præd. habetur et a toto*

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a toto tempore ſupradicto habebatur quædam al. conſuetudo infra civitat. præd. a toto tempore ſupradict. uſitat. et approbat. quod ſi aliqua querimonia, ANGLICE complaint, facti, fuit in ſcriptis vel ore tenus præfat. major. et aldermannis civitat. præd. pro tempore exiſten. in * curia præd. ſic ut præfertur coram eis ſecundum conſuetudinem præd. tent. per magiſtrum et cuſtod. alicujus ſocietatis civitat. præd. infra eandem civitatem ſive per membra principalia alicujus ſocietat. civitatis præd. infra eandem civitatem in qua non fuerunt magiſtri ſive cuſtod. ſeu eorum aliquis oſtenden. quod aliqua perſona exiſtens civis civitat. præd. ac membrum ejuſdem ſocietatis electus et idoneus pro officio illo fuit per ſocietat. ill. liberatur. ejuſdem ſocietatis unde ipſe membrum extitit. ac requiſit. fuit ad officium ſive locum unius de liberatur. ejuſdem ſocietatis ſuſcipien. ac ad onus officii ſive loci illius ſubeun. et ſuſtinen. quo quidem hujuſmodi civis liber homo ac membrum hujuſmodi ſocietat. abſque rationabili cauſa ſive excuſatione in contrar. inde fore de liberatur. hujuſmodi ſocietatis officium ſive locum il. ſuſcipere ac onus officii ſive loci illius ſubire et ſuſtinere recuſavit ac inde petiens remedium auxilium et juſtitiam ejuſdem curiæ coram majore et ald. ejuſdem civitat. pro tempore exiſten. ſic ut præfertur ſecundum conſuetudinem præd. tent. in premiſſis verſus talem perſonam ſic recuſantem ac ſuperinde talis perſona verſus quam hujuſmodi querimonia fact. fuit exiſten. civis liber homo ac membrum hujuſmodi ſocietatis coram præfat. major et ald. civitat. præd. pro tempore exiſten. in curia præd. convent. exiſten. coram iiſdem majore et ald. in eadem curia premiſſa convenit vel non debuit ſed monitus per eandem curiam ad ſuſcipiendum conformari in ea parte ad officium ſive locum il. ſuſcipere ac onus officii ſive loci illius ſubire et ſuſtinere aperte voluntarie oſtinatè et contemptuoſè abſque aliqua cauſa ſive excuſatione quia dicit ſi ut præfertur membrum exiſten. vel onus officii ſive loci illius ſubire et ſuſtinere in eadem curia recuſaverit; unde idem major et ald. civitat. LONDON pro tempore exiſten. in eadem curia tent. ſe ſaepius imprisonand. per totum tempus præd. uſitat. et approbat. hujuſmodi perſonam ſic recuſantem in priſonam ſub cuſtodia vic. civit. d. LONDON pro tempore exiſten. aut al. officiar. ibidem mandaver. et commiſerunt ibidem ſub cuſtodia remanſur. et fore detent. quouſque eadem perſona quæ ſic in priſona commiſſa fuit concederet et declarat quod ipſe officium ſive locum præd. inde ſuſciperet ac onus officii ſive loci ſubiret et ſuſtineret vel aliter hujuſmodi perſona extra priſonam et cuſtodiam præfat. vicecomitis vel alii officiar. civitat. præd. per delitum legis curſum deliberaretur et exoneraret.; quæ quidem ſeparal. conſuetudines ſupra mentionat. necnon omnia alia conſuetudines et libera uſuagia, ANGLICE frank uſages, civitat. præd. infra præd. civitat. uſitat. autoritate parliamenti DOM. RICHARDI nuper regis Angliæ poſt Conqueſtum ſecundi * tent. apud WESTM. in com. MID. anno regni ſui ſeptimo tunc majori et communitat. civitat. præd. ratificat. et confirmat. fuerunt. Et ulterius certifico quod ante adventum dicti brevis de habeas corpus mihi in hac parte direct. ſcilicet quarto die Junii anno regni dom. regis nunc ſeptimo, ISAAC CLERKE in brevi huic ſchedulæ annex. nominat. qui adtunc et diu antea et continuè poſtea hucuſque fuit

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fuit et adhuc existit. civis civitat. præd. ac liber homo et membrum præd. societatis VINTARUM *in civitat.* LONDON *prædict. per societatem illam debito modo electus fuit in liberatura ejusdem societatis adtunc et adhuc existen. idoneus homo pro officio illo ac ad officium sive locum unius liberatur.* ANGLICE of a livery-man, *ejusdem societatis in se susscipien. ac ad onus officii sive loci illius subeund. et sustinen. secundum consuetudinem civitatis præd. a toto tempore supradicto usitat. et approbat. in eadem; unde idem* ISAAC CLERKE *adtunc notitiam habuit et ad officium illud super se susscipien. requisit. fuit quod facere præd.* ISAAC CLERKE *adhuc penitus recusavit. Super quo postea et ante adventum præd. brevis de habeas corpus mihi in hac parte direct. scilicet die Martis tertio die Decembris anno regni dicti dom. regis nunc septimo quædam querimonia,* ANGLICE a complaint, *fact. fuit ore tenus* JOHANNI HOUBLON *mil. adtunc et adhuc majori et tunc ald. civitat. præd. in curia præd. tunc tent. coram præfat. majore et ald. civitat. præd. per quendam* THOMAM COLLETT *adtunc magistrum et quosdam* LUDOVICUM WILSON, THOMAM FEILDER *et* JOHANNEM KNAPP, *adtunc custod. societatis* VINTARUM *in civitate* LONDON *præd. ostenden. quod præd.* ISAAC CLERKE *existen. civis et liber homo civitatis præd. ac membrum societat.* VINTARUM *præd. in civitate* LONDON *præd. et idoneus homo pro officio præd. existen. electus fuit per societatem illam in liberatura ejusdem societatis et adtunc et diu antea idoneus homo existen. tam ad officium quam ad onus ejusdem officii subeun. requisitus fuit ad officium sive locum unius de liberatura ejusdem societatis in se susscipien. ac ad onus officii sive loci illius subeun. et sustinen. idem tamen* ISAAC CLERKE *civis et liber homo civitat. præd. ac membrum ejusdem societatis absque aliqua rationabili causa sive excusatione in contrarium inde fore de liberatura ejusdem societatis et officium sive locum illum in se susscipere ac onus officii sive loci illius subire seu sustinere penitus recusavit; ac proinde magistri et custodes per querimoniam illam remedium auxilium et justitiam curiæ præd. coram majore et ald. præd. secundum consuetudinem præd. tent. in præmissis præd. versus præfat.* ISAAC CLERKE *petierunt. Ac superinde præd.* ISAAC CLERKE *coram præfato majore et ald. civit. præd. in curia præd. adtunc et ibid. secundum consuetudinem præd. coram majore et ald. civitat. præd. tent. convent.*

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majore et aldermannis civitatis præd. in aperta curia prædict. coram prædict. majore et ald. die et loco ultimo ſupradicto tent. Super quo præd. ISAAC CLERKE *adtunc et ibidem in eadem curia per præfat. majorem et aldermannos civitat. præd. ad ſe ipſum conforman. in ea parte ac ad officium ſive locum illum in ſe ſuſcipien. ac ad onus officii ſive loci illius ſubeun. et ſuſtinen. ſæpius in eadem curia ibidem monitus fuit; præd. tamen* ISAAC CLERKE *non habens nec allegans aliquam cauſam ſive excuſation. quamcunque in contrarium inde poſt hujuſmodi monitionem ſibi in forma præd. fact. fore de liberatura ejuſdem ſocietatis ac officium ſive locum illum in ſe ſuſcipere ac onus officii ſive loci illius ſubire ſeu ſuſtinere in eadem curia ibidem adtunc aperte voluntarie obſtinate et contemptuoſe abſque aliqua cauſa ſive excuſatione quacunque in contrarium inde officium illud ſuſcipere ſuper ſe et onus inde ſubire adtunc et ibidem renuit et expreſſe recuſavit, per quod præfat. major et aldermanni civitatis* LONDON *præd. adtunc et ibidem in eadem curia ante adventum præd. brevis de habeas corpus præfat.* ISAACUM CLERKE *ſic recuſantem per quoddam warrantum in ſcriptis ſecundum cuſt. præd. in priſona ſub cuſtodia mea mandaver. et commiſer. ibidem remanſur. et fore detent. quouſque idem* ISAAC CLERKE *conceſſiſſet et declararet quod ipſe officium ſive locum præd. in ſe ſuſcipere ac onus officii ſive loci illius ſubiret et ſuſtineret vel aliter per debitum legis curſum deliberat. et exonerat. foret. Et ulterius certifico quod præd.* ISAAC CLERKE *ad aliquod tempus hucuſque non conſentivit ſeu declaravit quod ipſe idem* ISAAC CLERKE *officium ſive locum præd. in ſe ſuſcipere ſeu onus officii ſive loci illius ſubire et ſuſtinere voluit nec officium et locum il. in ſe ſuſcepit nec onus officii ſive loci illius ſubivit ſeu ſuſtinuit; et hæc eſt cauſa captionis et detentionis præd.* ISAAC CLERKE *in* * *priſona mea, quam una cum corpore præfat.* ISAAC CLERKE *coram præd.* JOHANNE HOLT *mil. capital. juſticiar. præd. dicti dom. regis nunc ad placita coram ipſo rege tenen. aſſign. ad tempus et locum in brevi huic ſchedulæ annex. detent. parat. habeo una cum dicto brevi prout mihi per idem breve præcipitur.*

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UPON an *habeas corpus* directed to the keeper of NEWGATE he returned, That THE CITY OF LONDON is an ancient city, and that the citizens and freemen thereof have, time out of mind, been incorporated by the name of "mayor, commonalty, "and citizens, &c." that there are ſeveral companies, guilds, and brotherhoods amongſt the ſaid citizens, of whom THE COMPANY OF VINTNERS is one; which company was incorporated by the name of "maſter, warden, freemen, and commonalty of the

It is a good cuſtom of *London* that ſome of the *freemen* of each of the ſaid ſhould be of the *livery* of the company, and that the court of

and aldermen, on complaint, by a company, of a *freeman*, ſo choſen on *the livery*, refuſing, after being admoniſhed, to accept the office, may commit the perſon ſo refuſing to the cuſtody of the ſheriff or other officers of the city, until he ſhall conſent to take upon him the ſaid office.—S. C. Poſt. S. C. 1. Salk. 349. S. C. Holt, 430. S. C. Comb. 411. S. C. 3. Salk. 92. S. C. 12. Mod. S. C. Com. 24. 1. Mod. 10. 164. 4. Mod. 27, 28. 6. Mod. 123. 277. Ray. 447. 1. 341. 352. Ante, 104. Poſt. 438, 439. 2. Lev. 200. 2. Keb. 555. 1. Bac. Abr. Term Rep. 2.

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"mystery of vintners;" and that some *freemen* of that company were always of *the livery*, and chosen by that company, who being so chosen and fit persons for the said office, did usually hold the same, without some reasonable excuse to the contrary; that there was a court of record held in the said city before the lord mayor and aldermen at *Guildhall* twice in every week, where rules and orders were made in all things relating to the several companies for the better government of the city, and that the said companies were under the correction of that court: that there is a custom in the said city, that if any complaint be made to the mayor and aldermen of the said court, by the master and wardens of any company, of *a livery man* chosen, and refusing to take the office, being admonished by that court to accept it; that then the mayor and aldermen have used to commit the person so refusing to the custody of THE SHERIFFS OF LONDON, or any other officer, there to be detained until he should consent and declare that he would take upon him the said office. Then he sets forth, that these customs were confirmed by act of parliament; and that before the issuing forth of the said writ, one *Isaac Clerke*, being a citizen of *London*, and *a freeman* of THE COMPANY OF VINTNERS, was chosen of *the livery*, and required to take upon him the said office, which he refused, thereupon complaint being made to the mayor, &c. by the master and wardens of that company, the said *Clerke* was *summoned* to appear, &c. which he did, and refused to take upon him the said * office, and, being admonished by the court to conform, did still refuse: that the mayor, &c. by *a warrant* in writing, did commit him to custody, there to remain *until* "*he shall consent and declare that he will accept the said office*;" and that this was the cause of his taking and imprisonment.

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THOSE WHO ARGUED *against this return*, said, that it consisted of several facts, of which this court could not take any notice; but that none of these facts were contained in the warrant of commitment, and that no matter ought to be put in *the return* which *the warrant* itself does not lead unto.

A commitment by the court of mayor and aldermen of *London* of a freeman of that city, for refusing to take his *livery*, "*until he shall consent and declare that he will accept the office*," is

FIRST, That the return is void, both in *substance* and *form*; and it is void *in form* for these reasons: Because it is laid specially, that the mayor and aldermen have a custom to commit, till the offender shall *consent* and *declare* his willingness to take upon him the office; but he did not set forth *to whom* he should signify such consent: it being therefore uncertain to whom such a declaration should be made, it is void for that reason, especially in this case, where the liberty of the subject is concerned, which is so much favoured by the law.

TO THIS FIRST EXCEPTION it was answered, that if the party declare his *consent* to any person that he will accept the office, it is sufficient; for, upon such a declaration of his mind, he may be brought before the court and discharged from his imprisonment.

CURIA.

CURIA. A commitment, "till he shall *declare* his consent to "accept the office," is more than if he had been committed "till he "should actually *consent*;" therefore, though the court of aldermen might commit him "until he shall *consent*," yet they may have no power to imprison him "till he should *declare it*."

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SECOND EXCEPTION, It is a void and impertinent custom to commit a man to prison until he shall consent and declare to "hold an office." The mayor and aldermen may have a power to summon men before them by virtue of some ancient custom, in order to reform or punish offenders; but the commitment in this case is not a punishment for the refusal to take the office, but because the defendant would not declare he would do it; and when such a declaration is made, then he is at large again, and may break his word by refusing to be of the livery, &c. They might have imposed a penalty to be levied by distress, but ought not to commit the offender; and thus it was adjudged in *Clerke's Case (a)*: the Town of *St. Albans* was incorporated by *Edward the Sixth*, and had power to make bye-laws; and THE TERM being held there, the mayor, by the consent of *Clerke* who was one of the burgesses of the town, &c. made an order for assessing every inhabitant to the charge of erecting courts for the judges and suitors, and those who refused to pay, to be imprisoned; *Clerke* refused; but it was adjudged, that the mayor could not justify his commitment by virtue of that order, because he ought to have inflicted a pecuniary punishment, or he might have brought an action of debt upon the bye-law, made for the forfeiture of a particular sum *(b)*. * A custom for the court of aldermen to commit until the offender should take the oath of alderman, was held good *(c)*, because it is a public office for the administration of justice, and for the government of the city, which are things of necessity; but it does not appear, that the office of *a liveryman* is of any public concernment. There are but few authorities in the Books relating to this objection; some there are; as for instance: In an action of false imprisonment *(d)*, the defendant justified under a *custom in London*, to commit a man for disturbing the election of a warden of a company, and to continue him in custody "until he would promise not to disturb such elections;" and upon a demurrer to this plea, the plaintiff had judgment. So upon the return of a *habeas corpus (e)*, the cause of imprisonment appeared to be, for that he being chosen of *the livery* refused to serve, and it was not until he should make an insignificant declaration of his consent to hold the office; and yet, in that case, the imprisonment was adjudged to be illegal; for they might have fined the offender, and have brought an action of debt for the fine; but they could not commit for such a refusal.

Quære. Whether *a custom* in a corporation to commit a *freeman* until he shall consent and declare his willingness to take up his *livery*, be good.

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(*a*) 5. Co. 64. a. 1. Jones, 182. Moor, 411. 580. 8. Co. 127.
(*b*) Winch. Ent. 252.
(*c*) March, 179.
(*d*) Stiles, 78. 84.
(*e*) 1. Mod. 10.

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AS TO THE SECOND EXCEPTION, The illegality of the cuſtom itſelf, to commit for refuſing to take upon him the office of livery-man, it was argued, that the *cuſtoms of London* are confirmed by act of parliament, to which all people virtually give their conſent; therefore a commitment by virtue of *a cuſtom* thus confirmed, in order to enforce an obedience to it, is juſtifiable by the law of the land. The City of *London* have many cuſtoms more unreaſonable than this is, and which likewiſe tend to reſtrain men of their liberty, and yet they are allowed, becauſe they co-operate with an act of parliament: as for inſtance: there is a cuſtom for a creditor to arreſt a debtor before the day of payment, in order to compel him to give better ſecurity for the debt. There is another cuſtom for a conſtable, upon ſuſpicion only of any immorality, to break open an houſe, and to commit the offenders, which is expreſly contrary to law; and yet ſuch cuſtoms, being the particular uſages of the city, are become *leges loci*, and, being confirmed by act of parliament, are binding to the inhabitants. Then a commitment *quouſque* may be good according as the fact is, unleſs it be in execution; and ſo was the commitment in *Alderman Langham's Caſe* (*a*), until he ſhould take the oath of alderman, &c. Beſides, the court of aldermen is a court of record; the judges ſend prohibitions to them (*b*). Now it appears upon the return, that the defendant *voluntariè, obſtinatè, et contemptuoſè*, refuſed to take upon him *the livery* of his company, and it is incident to a court of record to commit for a contempt.

If the court of aldermen commit *a freeman*, by warrant in writing, for refuſing to take up his *livery*, the gaoler, in making a return to a *habeas corpus*, muſt ſet forth *the warrant* at large.

AS TO THE THIRD EXCEPTION, The gaoler has not ſet forth his WARRANT *in hæc verba*, but only that *per quoddam warrantum in ſcriptis ſecundem conſuetudinem*, &c. the defendant was committed; and this is introduced with a long ſtory, not pertinent to the commitment itſelf, of which he has not ſet forth any cauſe. Now by the ſtatute 31. *Car.* 2. c. 2. commonly called THE HABEAS CORPUS ACT, the Judges of either court in *Weſtminſter* may, upon application made to them by the priſoner, and upon view of the copy of the warrant of commitment, or upon oath made that it was denied, grant a *habeas corpus* in vacation-time, returnable *immediatè*; which ſtatute would be eluded if the warrant itſelf ſhould not be returned; for if the officer ſhould return any cauſe different from the warrant of commitment, and ſuch for which a *habeas corpus* is not allowed by that act, then the perſon muſt ſtill be kept in cuſtody, though he be really bailable by law, and he has no remedy but to bring an action againſt the gaoler for a falſe return: therefore it ſeems neceſſary, that he ſhould return the whole tenour of THE WARRANT, that the Court may make a proper judgment of it; for otherwiſe by a return of the commitment generally the gaoler makes himſelf a judge of the cauſe. * Neither does it lie in the power of the officer to mend the warrant of commitment, but he is to return it as it is, that the Court may judge of it; it is his own excuſe for keeping the priſoner in cuſtody; and if the return

3. C. Salk. 349. 2. Vent. 25. Carth. 75. 2. Com. Dig. "Habeas Corpus" (E. 3). 1. Sid. Rep. 806.

(*a*) March, (*b*) 8. Co. 119.

and

and the warrant do not agree, he may keep him in custody longer than the law allows. The whole warrant was returned in *Bethell's Case* (*a*); and this is agreeable to law in other proceedings; for if a man be bound to make a sufficient release to another, it is not enough for him to say generally, that he executed a release, but he must set it forth at large, that the Court may judge whether it is sufficient or not. The HABEAS CORPUS ACT takes care, that a person who is bailed shall not be recommitted for the same offence, under the penalty of five hundred pounds to the party grieved, "any colourable pretence or variation in the warrant of commitment notwithstanding." From which it may reasonably be inferred, that the makers of that law did intend the THE WARRANT should be returned; otherwise if the party should be recommitted, how can it appear to be for the same cause for which he was in custody before? Now it does not appear upon this return, but that THE WARRANT may be illegal, and the commitment not to be justified by law: therefore it ought to be set forth at large, that the Court may judge of the legality of it. It is always so in the common cases of *orders* made by justices of peace; for it may not appear in the order itself, that those who signed it were justices of peace at that time; and though it should appear so upon the return of the *certiorari* to remove such order, yet this Court would quash it (*b*).

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As to THIS THIRD EXCEPTION, *viz.* That the warrant is not returned *in hæc verba*; it was said, that it is not necessary; for though the law favours liberty, yet it favours likewise magistracy and proceedings in courts of justice. If the commitment had been by *mesne process*, then it might be necessary to set out THE WARRANT at large; but when it is in a judicial way by a court of justice, it is not usual to do it: as if a commitment be made by the court of king's bench and a *habeas corpus* be directed to THE MARSHAL, he never returns the warrant itself. Therefore this is not within THE HABEAS CORPUS ACT, for it is a commitment in execution by a court of record for *a contempt* of their authority, and in such case the warrant itself is never returned. It is sufficient to say, that the person was committed *per mandatum domini cancellarii vel dominorum in concilio*; and it is likewise sufficient, as in this case, to set forth, that it was *per warrantum in scriptis secundum consuetudinem civitatis, &c.* At common law it was sufficient to set forth the substance, and not the thing itself, which must be understood where the officer did not take upon him to disclose the whole fact; but here he has returned the whole matter; which if not true, it is at the peril of him who made the return, and the party grieved may have a remedy by action.

Quære, For it concludes thus, "till he shall "be discharged "by due course "of law;" which is not a commitment in execution.

Raym. 446. Brownl. Rep. 385.

CURIA. The warrant is always set forth at large in *a return* made upon an extrajudicial commitment; but when a man is committed by a court of record, there is no warrant at all; therefore the court of aldermen in this case cannot be intended to proceed

(*a*) Ante, 19.
(*b*) See the case of the King *v.* Inhabitants of Wootton Rivers, ante, page 150.

judicially,

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judicially, becauſe the commitment is *per warrantum in ſcripto*. They are the proper judges of an excuſe made by the defendant why he will not take upon him *the livery*; and if they adjudge it inſufficient, and appoint him to accept it, and he refuſe, it is a *contempt* of their authority, for which they may commit him.

On a cuſtom in a corporation to commit "to the Sheriffs of London, or other officer," a commitment to "The Keeper of Newgate" is bad; for the Court will not intend that the Keeper of Newgate is an officer of the city of London.

THE FOURTH EXCEPTION, and the moſt inſiſted on, was, that in the return *a cuſtom* was laid for the mayor, &c. *to commit* the offender "to the cuſtody of THE SHERIFFS of *London*, or other "*officer*;" and the gaoler had returned, that he was committed *cuſtodiæ meæ*, when it does not appear that he was either SHERIFF or *officer* at that time; ſo that more is put in the judgment than that is warranted by the cuſtom. It is likewiſe ſaid, that he was commited to priſon, but does not ſay where. If he had returned, that the priſoner was committed to *Newgate*, it might have been better; yet that would have been inſufficient; for though *Newgate* is the king's gaol, and admitting that the perſon to whom the defendant was committed was their keeper thereof, yet that does not make him appear to be an officer of the city at that time.

Co. Ent. 346.

AS TO THE FOURTH EXCEPTION *viz.* That it is not returned, that THE KEEPER OF NEWGATE was an officer of the city; it was anſwered, that the return begins thus, "*Ego* JACOBUS FELL, "*cuſtos gaolæ domini regis de* NEWGATE, &c." and when he comes to the warrant, he ſets forth, that the defendant was committed to priſon "*in cuſtodiâ meâ*;" which can be intended of no other perſon than he who was at that time keeper of *Newgate*, who is well known to be an officer of the ſheriffs of *London*, for the Judges deliver that gaol every month.

CURIA. He is committed to THE KEEPER OF NEWGATE, who may be an officer of the city, but not one attending the court of aldermen; ſo that it does not appear that he is a proper officer of that court to receive him, and therefore not like a commitment by the court of king's bench to THE MARSHALL, who is a proper officer always attending that court; and ſo is the ſheriff, where the commitment is made by a Judge of *oyer* and *terminer*: neither does it appear that NEWGATE is in *London*; but if it did, he ought to be committed to THE SHERIFFS, and not to THE KEEPER OF NEWGATE, though they might have taken him as their officer; but this Court cannot take notice that he is an officer to the ſheriffs, no more than they can what boroughs ſend burgeſſes to parliament. As for inſtance; by the ſtatute 17. *Car.* 2. c. 2. ſ. 3. thoſe who preach in *conventicles* ſhall not come, or be within five miles of a borough which ſends burgeſſes to parliament: a man was indicted upon this ſtatute for living in ſuch a borough; but it was quaſhed in this court, becauſe it was not averred, that the borough wherein the defendant lived did ſend burgeſſes to parliament. Now certainly it is as well known to this Court, what boroughs ſend burgeſſes to parliament, as that THE KEEPER OF NEWGATE is an officer of THE SHERIFFS of *London*.

FIFTH

FIFTH EXCEPTION. It is ſaid, he was committed *quouſque concetiret*, which is void and inſenſible, there being no ſuch word. A commitment *quouſque concetiret* is inſenſible and void.

Then as to THIS SIXTH EXCEPTION, *viz.* That the word "*concetiret*" being inſenſible, it is therefore void; it was ſaid, that the following word "*declararet*" hath a certain ſignification, and is more comprehenſive than "*conſentiret*" if it had been right, becauſe a man may *conſent* to a thing, and never *declare* his conſent openly; but when he makes a declaration thereof, he does both.

And for the fourth exception the return was held inſufficient, and the defendant was diſcharged.

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* The King *againſt* Hill.

Caſe 82.

If an order of removal be *quaſhed* at ſeſſions, but *confirmed* on *certiorari* to king's bench, the juſtices may commit the pauper for returning to the place from whence he was removed, altho' the order was quaſhed.

AN ORDER was made by two juſtices of peace, to remove a poor man from *Redburne* to the pariſh of *St. Michael* in *St. Albans*; and upon an appeal to the quarter ſeſſions, the order of the two juſtices was quaſhed. Afterwards upon *a certiorari* brought, the ſeſſions order was quaſhed, and the firſt order was confirmed, ſo that the poor man was now ſettled at *St. Albans*. But of his own accord he returned to *Redburne*, and the juſtices conceived that they had not any power to ſend him to the houſe of correction for returning as aforeſaid, becauſe they were of opinion that the firſt order was not before them, being removed by *certiorari*.

Therefore a motion was made, that the Court would grant a rule to enforce the execution of the former rule made in this caſe, by which the ſeſſions order was quaſhed, and the order of the two juſtices confirmed.

But THE COURT directed, that the juſtices ſhould have the former rule of Court ſhewed to them, and the order of the two juſtices, and if they refuſed to puniſh the perſon afterwards, then to move the Court upon an affidavit of the matter *(a)*.

Poſt. 209. 394. 416. Comb. 374. 2. Salk. 481. Fitzg. 254. B. R. H. 124. 1. Burr. Rep. 595. 2. Bott, 795. 2. Term Rep. 709.

(*a*) See 13. & 14. *Car.* 2. c. 12. ſ. 3.; and 17. *Geo.* 2. c. 5. Mr. Conſt's Edit. of Bott's Poor Laws, 2d vol. 792.

The King *againſt* Paine.

Caſe 83.

The depoſitions of witneſſes taken *ex parte* before a magiſtrate in an examination concerning a *miſdemeanor*, cannot be read in evidence on the trial of the party for ſuch *miſdemeanor* after the death of the deponents; for the defendant, not being preſent before the magiſtrate when they were taken, had no opportunity to *croſs-examine* them.—S. C. 1. Salk. 281. S. C. Comb. 356. S. C. Carth. 405. S. C. 1. Ld. Ray. 729. S. C. Holt, 294. 9. Co. 59. Moor, 814. 2. Sid. 270. 2. Salk. 417. 3. Bac. Abr. 496. Ld. Ray. 414. 2. Salk. 419. 12. Mod. 239. Gilb. C. E. 139. Cowp. 594.

INFORMATION tried at THE BAR by a *Briſtol Jury*, againſt one *Samuel Paine*, a miniſter there, ſetting forth, that the defendant was the compoſer, author, and publiſher, of a moſt malicious and wicked libel againſt the late QUEEN MARY, which was ſtyled "Her Epitaph."

Upon

THE KING against PAINE.

Upon not guilty pleaded, the case, upon the evidence, appeared to be thus:

Paine wrote the libel, it being dictated to him by another. He afterwards put it into his study, and, by mistake, delivered it to one *Brereton* instead of another paper, who transmitted a copy thereof, through several hands, to the *Mayor of Bristol*, which occasioned the mayor to send for *Brereton* to examine him, which he did upon oath, but not in the presence of *Paine*. The defendant *Paine* was afterwards examined by *the mayor*, and confessed, that he wrote the
[164] libel, but that he did neither * compose or publish it, but only delivered it, instead of another paper, to *Brereton*; but it was proved, by his servant, that he sent him to his study for a writing, and that he not bringing the paper sent for, the said *Paine* fetched it himself, and being in a room only with *Dr. Hoyle* the libel was repeated, but he could not tell by whom; but he remembered the first verse. *Brereton* was now dead.

The question was, Whether his depositions taken before the mayor should be given in evidence at this trial?

THE COUNSEL *for the defendant* insisted, that it could not be done by law, because *Brereton* being dead the defendant had lost all opportunity of cross-examining him; that this case was not like an information before a coroner, or an examination by justices of peace of persons accused, and afterwards committed for *felony*, because they have power by a particular statute to take such examinations both of the fact and circumstances, and to put it in writing and certify it at the next general gaol delivery *(a)*. But depositions of this nature are never allowed to be read as evidence in *a civil cause*, and much less in *a criminal case (b)*. Before the making those statutes no single justice had power to take the
2. Hawk. P. C. ch. 46. s. 36. information of witnesses against criminals, neither could *the conservators* at common law take such depositions; they might remove or secure the disturbers of *the peace*, and the justices of peace now may prepare business for THE SESSIONS; but they have no jurisdiction before the indictment found: but if at any time before the statute they had taken such examinations, they were never given in evidence against the party.

To which it was answered, that the statute makes no difference in this case, for the power of a justice of peace to take examinations is not grounded upon it; for he might examine a criminal by virtue of his office, and the statute only enforces the execution of his office by commanding him to take such examinations; so that if he had committed it to writing, and transmitted it to the gaol delivery, it would have been given in evidence to convict the party; and the reason why such an examination shall be read is not by virtue of any

(a) The statutes 1. & 2. *Phil. & Mary*, c. 13 and the 2, & 3. *Phil. & Mary*, c. 10.

(b) There is no difference between *civil actions* and *criminal prosecutions* as to the evidence of papers. Attorney General *v.* Le Merchant, 2. Term Rep. 201, *note*.

statute-

THE KING *against* PAINE.

statute-law, but by the authority of the perſon before whom the oath is taken; and if ſuch oath ſhould be falſe, the party might be indicted for perjury.

* THE COURT thereupon ſent the *puiſne Judge* to confer with the Juſtices of the Common Pleas; who returning, THE CHIEF JUSTICE declared, that it was the opinion of both Courts that theſe depoſitions ſhould not be given in evidence, the defendant not being preſent when they were taken before the mayor, and ſo had loſt the benefit of a croſs-examination. * [165]

Then the queſtions ariſing upon the evidence to prove the defendant guilty were theſe:

FIRST, Whether he was the author and compoſer of the libel?

SECONDLY, Whether he was guilty of the publiſhing it?

AS to THE FIRST POINT, there was no proof that he was the compoſer of it, or that he wrote it, but by his own confeſſion before the mayor. Now if ſuch confeſſion ſhall be taken as evidence to convict him, it is but juſtice and reaſon, and ſo allowed in the civil law, that his whole confeſſion ſhall be evidence as well for as againſt him *(a)*, and then there will be no proof of a malicious and ſeditious publication of this paper; for he confeſſed that it was delivered by miſtake.

If one perſon dictate, and another write down, a libel, both are equally the makers of it: but *qu.* Whether a perſon who has a libellous writing in his poſſeſſion, and reads it to a private friend in his own houſe, is thereby guilty of *publiſhing* it.

Moor, 813. 4. Com. Dig. 8vo. 716. 3. Bac. Abr. 497. 1 Hawk. P. C. c. 73. ſ. 1.

SECONDLY, As to his publiſhing it; if the evidence had come up to prove that he read it, that will not be a publication, and the writing without the publiſhing is no crime. It is true, my LORD COKE ſays *(c)*, that where it is maliciouſly repeated, or where a copy of it is delivered to another, this will be a publication; but here is no proof that the defendant repeated it in the preſence of *Dr. Hoyle*; for *non conſtat* but that *the doctor* might read it to *the parſon*.

THE JURY, upon conſideration of the whole matter, found a ſpecial verdict, *viz.* that a certain perſon to them unknown did pronounce, dictate, and repeat, the words contained in the libel, which the defendant did write; and if that will make him guilty of compoſing and making the libel, then they find him guilty, and as to the publication thereof they find him not guilty.

This verdict was afterwards argued, that there was ſufficient matter found to make the defendant guilty; for it is eſſential that a libel ſhould be in writing. Words may make a malicious ſpeech, but it is writing which makes a libel; and this agrees with my LORD COKE's definition of a libel, that it is *ſcriptura defamatoria (c)*. * This is the firſt time that it became a writing, and therefore it differs from tranſcribing, for that muſt be of ſomething in being before; but in this caſe, when the defendant heard the words repeated he knew they were defamatory, and he could have * [166]

(*a*) 2. Hawk. P. C. ch. 46. ſ. 5. (*b*) 5. Co 125 (*c*) 5. Co. 125.

THE KING *against* PAINE.

no other purpose in writing it but to perpetuate its memory; and so he made it a libel which was not so before.

IT WAS ARGUED *for the defendant*, That there are three things to be considered in this verdict, *viz.* the writing, the making, and the publication. The defendant is acquitted of the last; so that if the writing do not amount to the making and composing, then he must be acquitted of the whole. Now it cannot be said, that writing is either a making or composing what is written; for if that should be true, then a man cannot write any thing but he must be the author of it. The writing may be some evidence to a jury that he did it with an intention to publish it *(a)*, but he is acquitted of that; so that to make the defendant guilty of this information he must be found to be a contriver, or a procurer of contriving it, which can never be by writing a copy. How far the bare act of transcribing a libel is criminal, is a matter of another consideration; it is certainly an offence, and by consequence punishable, to transcribe it; but it has been a question, Whether the writing and delivering it to the party himself is punishable by an action on the case? And it is generally held, that such an action did not lie at common law, because it is no publication to deliver a libel to the party defamed *(b)*, which is essential to make a man guilty of it; but because it is an offence against the king, and tends to the breach of the peace, it is punishable in the court of king's bench by information at the suit of THE ATTORNEY GENERAL. Now the reason given in the Books *(c)*, why an action will not lie in such a case is, because the party intended to be defamed receives no injury, for he cannot be defamed where there is no publication of the libel; and the reason is the same in this case, because there was no publication; and it is the same offence to write and not to publish as to write and immediately to burn the libel.

Hob. 215. Pop. 159. *Idem.* 3. Inst. 174.

On an *information* for a libel, the jury must find *quo animo* it was written or published.

LASTLY, If writing or transcribing a libel is a crime, yet, as it is laid in this information, and found by the verdict, the Court cannot give judgment on it; for the jury have found it generally, that if writing is making and composing, then they find him guilty, but do not say *modo et formâ*, as laid in the information; they should have found *quo animo* he did write it *(d)*.

(*a*) Lamb's Case, 9 Co. 60.

(*b*) Dr. Wooton's Case, 13 Co.

(*c*) Cro. Car. 125, 1 Vent. 31.

(*d*) It has been frequently determined, that the only questions, on the trial of an indictment or information for a libel, for the consideration of a jury are, the fact of publishing and the truth of the *innuendoes*, and that whether the matter be or be not a libel is a question of law for the consideration of the Court, Rex *v.* Withers, 3 Term Rep. 428. But doubts having arisen whether it was not competent for the jury on *not guilty* pleaded to give their verdict on the whole matter in issue, it is enacted by the 32. *Geo.* 3. c. 60. "That "on every trial of an indictment or "information for the making or publish-"ing any libel, the jury may give a gene-"ral verdict of *guilty* or *not guilty* upon "the whole matter put in issue, and shall "not be required or directed by the "Judge to find the defendant guilty, "merely on the proof of *publication*, and "of the sense ascribed to the words of the "libel: but it is provided, that the "Judge shall, in his discretion, give his "opinion and direction to the jury "on the matter in issue, in like "manner as in other criminal cases."

CURIA.

THE KING *against* PAINE.

* CURIA. The making a libel is an offence, though never published; and if one dictate, and another write, both are guilty of making it. To what purpose should any one write, or copy after another, but to shew his approbation of the contents of the libel, and the better to enable him to keep it in his memory, that he may repeat it to others. Now though the bare reading a libel may not be a crime, because a man may be surprised, and not understand what he is about to read, yet when one takes it from another, and hears it spoken before he writes it, this cannot be by surprize, because he has time to exercise his thoughts before he writes what he hears read; so that it is not a libel by repeating, but by writing it. It does not appear upon the evidence, that this libel was ever written before; so that the defendant must be guilty of the making it, by first reducing it into writing, though probably he might not compose it. It is true, the delivering it by mistake is no publication; and if there was no other evidence against him but his own confession, the whole must be taken, and not so much of it as would serve to convict him. But when he sent his servant to his study for a paper, when he did not approve of the paper he brought by the servant, but fetched another, it is not material whether it was read by *Dr. Hoyle* or not; for if that was the libel, and read by either, it is a publication. If one repeat and another write a libel, and a third approve what is wrote, they are all makers of it; for all persons who concur, and shew their assent or approbation to do an unlawful act, are guilty: so that murdering a man's reputation by a scandalous libel may be compared to murdering his person; for if several are assisting and encouraging a man in the act, though the stroke was given by one, yet all are guilty of homicide.

1. Salk. 417. 646. 1. Sid. 270. 414. 1. Mod. 58. Hard. 470. 12. Co. 35. 134. Moor, 813. Carth. 407. 2 Bl. Rep. 1037. 4. Com. Dig. "Libel" (B. 1.). 1 Hawk. P. C. ch. 73. f 10. Fitzg. 47.

1 Hale P. C. 424. 1 Hawk. ch. 26. f. 2.

Sed adjournatur.

* [168]

King *against* Sharp and Another.

Case 84.

SCIRE FACIAS AGAINST THE BAIL: to which the defendants pleaded in bar, that the principal died before the day of the return of the *capias ad satisfaciendum* against him; which might be the *alias capias*, for he does not say, "*ante retorn. alicujus brevis* "*de capias, &c.*"

To a *scire facias* against bail, A PLEA that the principal died before the return of THE *ca. sa.* instead of ANY *ca. sa.* is bad.

And upon a *special demurrer* to this plea, and this * matter being shewn for cause, for he may die before the return of the *alias capias ad satisfaciendum*, whereas the condition was broken by the return of the first *capias*;

S. C. 3. Salk. 57. Jones, 29. 1. Salk. 8. 1 Mod. 5, 6. 1. Vent. 253. 6. Mod. 142. 8. Mod. 31.

The plaintiff had judgment, although it was insisted that this plea being *in bar* was good to a *common intent*. But THE COURT was of opinion, that the word "*alicujus*" was necessary; which being omitted the plea was ill.

Haines

Case 85.

Haines *againſt* Jeſcott.

A man cannot marry his ſiſter's daughter, although ſuch daughter be *illegitimate*.

3 C. Comb. 356. 3. C. 1. Ld. Ray. 68. 3. C. Com. 2. Poſt. 448. 3. Inſt. 683. 2. Lev. 254. 2. Vent. 9. Vaugh. 206. 214. 302. 315. Carth. 271. Skin. 37. 1. Com. Dig. "Baron and Feme" (B. 4.). 3. Bac. Abr. 573. 2. Burn E. L. 415. Gibſon, 413. Swinb. 95. 2. Stra. 1162.

PROHIBITION to the eccleſiaſtical court on a ſuit there againſt a man for marrying his ſiſter's baſtard daughter.

The reaſons offered were theſe: This marriage is not prohibited by any law; it is not within any of the *Levitical degrees*, and ſuch only are under the cognizance of the ſpiritual court; for if a marriage be not under ſome of thoſe prohibitions, it is not to be impeached by any court, becauſe it is enacted by the 32. *Hen.* 8. c. 38. "that all marriages contracted by lawful perſons ſhall not be "diſſolved," and ſuch are all thoſe who are not prohibited by God's law. Now this marriage is not prohibited by God's law, which muſt be intended the *Levitical law* given to THE HEBREWS, under the Moſaick diſpenſation; in which law there are ſix degrees of *conſanguinity*, and ſeven of *affinity*, expreſſly forbidden.

IN CONSANGUINITY, *A man muſt not marry,*	IN AFFINITY, *A man muſt not marry,*
1. His father's ſiſter.	1. His uncle's wife.
2. His mother.	2. His father's wife.
3. His mother's ſiſter.	3. His father's wife's daughter.
4. His ſiſter.	4. His brother's wife.
5. His own daughter.	5. His wife's ſiſter.
6. The daughter of his ſon or daughter.	6. His ſon's wife, or his wife's daughter.
	7. The daughter of his wife's ſon or daughter.

* [169] * But a ſiſter's baſtard is not mentioned amongſt any of theſe degrees. It is true, the *Levitical law* forbids a man to approach to any near of kin to uncover their nakedneſs; but that can never be intended of *a baſtard*, becauſe he is of kin to no perſon whatſoever; he is not eſteemed as *a child* in our law, neither is he of ſufficient conſideration to raiſe an uſe as one of the kindred of the grantor; he is *quaſi nullius filius*: and therefore it is not a principal challenge to him being returned of a jury, that he is of kin to either party, becauſe he cannot be of kin to any: ſo in pleading, either in a real or perſonal action, he cannot alledge any kindred; and nothing can be conferred upon him, but it muſt be by ſuch a name which is common, and may be aſſumed by any other perſon (*a*). It is alſo true by the eighteenth canon of THE APOSTLES, that a man who married his ſiſter's daughter *clericus non poteſt eſſe*, which is all the puniſhment that THE CHURCH in thoſe days could inflict on the perſon ſo married. They had no juriſdiction or power of divorce, even in caſes of inceſtuous marriages, and therefore could not enter into any examination of the cauſe. But when the parties were ſeparated, it was by the authority of the laws to which they were locally ſubject; and therefore it may be a queſtion,

(*a*) 6. Co. 65.

What

What power the ſpiritual court has to proceed in this matter? But it being a juriſdiction which has often been allowed, it was not diſputed now, only a prohibition was prayed upon the whole matter.

E contra. The plaintiff comes too late for a prohibition, for he has anſwered all the allegations in the eccleſiaſtical court, where it appeared upon proof, that the very parſon who baptized the baſtard married her to the plaintiff, and did not aggravate the offence to him before marriage; but he perſiſted in his reſolution.—Now as to the *Levitical law*, it expreſſly prohibits that *ad proximum ſanguinis ſui non accedat*; and at the time when this law was eſtabliſhed there was no difference amongſt THE ISRAELITES between a child born in adultery and in lawful marriage; and therefore a baſtard was *proximus ſanguinis* amongſt theſe people, who were the beſt expoſitors of that law to whom it was firſt promulged; and all the commentators upon this law do allow the unlawful iſſue to be incapable of inheriting. But though the marriage of the uncle with the niece is not forbidden by *the Levitical law* (*a*), yet that of the nephew with the aunt, either by the father or mother's ſide, is prohibited; and * ſo by conſequence * [170] the other muſt be ſo too, becauſe it falls under the ſame degree of kindred with that which is forbidden by name. It is prohibited by the *Levitical law* for a man to marry his ſiſter's daughter; and it is no objection to ſay, that a baſtard is not a daughter; for though ſhe is deprived of ſeveral privileges by particular laws, yet if there be any morality in that law (which cannot be denied), it is morally as unlawful to marry a baſtard as one born in lawful wedlock: and it is ſo alſo in nature, for the *Levitical law* was grounded upon a natural as well as a politick reaſon, to enlarge their kindred and unite their families, for there are natural as well as legal kindred; and if this ſhall not be expounded to fall under the prohibition that a man *ad proximum ſanguinis non accedat*, then a mother may marry her baſtard ſon.

THE COURT inclined not to grant a probibition;

Sed adjournatur.

(*a*) 2. Inſt. 683.

Huſſey *againſt* Jacob. Caſe 85.

LONDON, *to wit.* } WILLIAM HUSSEY complains of *Alexander Jacob*, in cuſtody of the marſhal of the *Marſhalſea* of the lord the king, being before the king himſelf, for that, to wit, that whereas the city of *London* in this kingdom of *England* is, and from time whereof the memory of man is not to the contrary hath been, an ancient city; and alſo whereas the town of *Hereford* in this kingdom of *England* is, and for all the time aboveſaid hath been, an ancient town; and alſo whereas there is had and exiſteth,

Declaration on a bill of exchange againſt the acceptor on the cuſtom of merchants.

S. C. 1. Salk. 344. S. C. Ray. Ent. 93.

Hussey against Jacob.

and for all the time aforesaid there was had and hath been, a certain ancient and laudable custom used and approved amongst merchants, and other persons using commerce, residing in *Hereford* aforesaid, and merchants and other persons using commerce dwelling in *London* aforesaid, that is to say, that if any merchant or other person residing in *Hereford* aforesaid should make any bill of exchange according to the custom of merchants, and direct the same bill of exchange to another person using commerce dwelling in *London* aforesaid, and by the same bill request the same merchant or other person using commerce residing in *London* aforesaid, in such bill of exchange named, to whom the same bill of exchange should be so directed, to pay any sum of money in such bill of exchange mentioned to any other merchant or other person in the same bill of exchange at any time in such bill of exchange specified, and that if such merchant or other person dwelling at *London* aforesaid, to whom any such bill of exchange hath been so directed, hath
* [171] accepted such bill of exchange to him so directed as aforesaid, according to the custom of merchants, ... well such merchant, or other person to whom such bill of exchange hath been so directed, hath been chargeable by such acceptance, and for all the time aforesaid hath been accustomed to be chargeable to pay such sum of money in such bill of exchange mentioned, to such merchant or other person in such bill of exchange named, at the day or time in such bill of exchange appointed for the payment thereof, according to the tenor and effect of such bill of exchange. And whereas the right honourable the *Lord Chandois*, on the 21st day of *October*, in the year of Our Lord 1693, being at *Hereford* aforesaid, and using commerce, that is to say, at *London* aforesaid, in the parish of the *Blessed Mary of the Arches*, in the ward of *Cheape*, made his first bill of exchange bearing date the same day and year, and directed the same bill of exchange to the aforesaid *Alexander Jacob*, then residing and dwelling and using commerce at *London* aforesaid, in the parish and ward aforesaid; and by the same bill of exchange the aforesaid *Lord Chandois* requested the aforesaid *Alexander Jacob* to pay within a month after sight of his first bill of exchange the sum of one hundred and twenty pieces of gold, called guineas, to the aforesaid *William Hussey*, by the name of *Captain Hussey*, the aforesaid *Lord Chandois* and *William Hussey*, then and there using commerce; and the said *William* afterwards, on the 28th day of the same month of *October*, in the year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, did shew the said bill of exchange to him the said *Alexander*, and then and there requested the said *Alexander* to accept the said bill of exchange, and to pay to him the said *William* the said one hundred and twenty pieces of gold, called guineas, according to the tenor of the bill aforesaid, and thereupon the said *Alexander* then and there upon sight thereof accepted the said bill of exchange, according to the custom of merchants aforesaid, by reason of which said acceptance of the said bill of exchange, and by reason of the premises, he, the the said *Alexander*, according to the custom aforesaid so used and approved

approved as aforesaid, became chargeable to pay to the aforesaid *William* the said one hundred and twenty pieces of gold in the said bill of exchange mentioned, according to the form and effect of the said bill; and the aforesaid *Alexander* afterwards, to wit, the day and year last mentioned, at *London* aforesaid, at the parish and ward aforesaid, in consideration of the premises aforesaid assumed upon himself, and to the said *William* then and there faithfully promised, that he the said *Alexander* the said one hundred and twenty pieces of gold, called guineas, in the said bill of exchange mentioned, would well and faithfully pay and satisfy to the said *William*, according to the form and effect of the said bill of exchange. And also whereas the aforesaid *Alexander* afterwards, on the first day of *December*, in the year of Our Lord 1693, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *William* in other one hundred and twenty pieces of gold, called guineas, of the value of one hundred and thirty-two pounds of lawful money of *England*, for so much money by him the said *William* for the said *Alexander*, at the special instance and request of him the said *Alexander*, before that time paid, laid out, and disbursed; and being thereof so indebted, the aforesaid *Alexander*, in consideration thereof, assumed upon himself, and to the said *William* then and there faithfully promised, that he the said *Alexander* would well and faithfully pay and satisfy to him the said *William* the said one hundred and twenty pieces of gold, called guineas, of the value of the one hundred and thirty-two pounds last mentioned, when he should thereunto requested. And also whereas the said *Alexander* afterwards, to wit, on the said first day of *December*, in the year last abovesaid, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *William* in other one hundred and thirty-two pounds of lawful money of *England*, for so much money by the said *William* to the said *Alexander*, at the special instance and request of him the said *Alexander*, before that time lent and advanced; and being so indebted, the said *Alexander*, in consideration thereof, assumed upon himself, and to the said *William* then and there faithfully promised that he the said *Alexander* would well and faithfully pay and satisfy to the said *William* the said one hundred and thirty-two pounds last mentioned, when he should thereunto be required. And also whereas the said *Alexander* afterwards, to wit, on the said first day of *December*, in the year last abovesaid, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *William* in other one hundred and twenty pieces of gold, called guineas, of the value of one hundred and thirty-two pounds of like lawful money of *England*, for the like sum of money by the said *Alexander* for the said *William*, and to the use of him the said *William* before that time had and received; and being thereof so indebted, the said *Alexander*, in consideration thereof, assumed upon himself, and to the said *William* then and there faithfully promised that he the said *Alexander* would well and faithfully pay and satisfy to the said *William* the said one hundred and twenty pieces of gold, called guineas, last mentioned, when he should be thereto requested:

Hussey against Jacob.

* [172]

Idem versus eosdem for money by him laid out.

The like for money lent.

The like for money had and received to the plaintiff's use.

Hussey against Jacob.

nevertheless the said *Alexander* not at all regarding his said several promises and undertakings in form aforesaid made, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said *William* in this behalf, hath not paid to the said *William* the said one hundred and twenty pieces of gold, called guineas, in the said first promise abovementioned, at a month after sight of the said bill of exchange abovementioned, or the said several sums of money in the said second, third, and fourth promises, although to pay the said several sums of money in the said second, third, and fourth promises abovementioned, to him the said *William*, the said *Alexander* afterwards, to wit, on the tenth day of *April*, in the year of Our Lord 1694, and often afterwards, at *London* aforesaid, in the parish and ward aforesaid, was requested by the said *William*, but hath hitherto wholly refused, and yet doth refuse, to pay the same to him, whereupon the said *William* saith that he is injured, and hath damage to the value of four hundred pounds, and thereupon he brings suit, &c. And now here at this day, to wit, *Friday* next after the morrow of the *Holy Trinity*, in this same Term, until which day the said *Alexander* had leave to impark to the said bill, and then to answer before the lord the king at *Westminster*, come as well the said *William* by his said attorney as the said *Alexander* by *Vincent Stynes* his attorney; and the said *Alexander* defends the force and injury when, &c. and as to the second, third, and fourth promises and undertakings in the said declaration abovementioned, the said *Alexander* saith, that he did not assume upon himself in manner and form as the said *William* above complains against him; and of this he puts himself upon the country, and the said *William* thereof likewise: and as to the said first promise and undertaking, in the said declaration abovementioned, the said *Alexander* saith, that he by virtue of the said bill of exchange in the first promise and undertaking abovementioned by him as aforesaid made, ought not to be charged, because protesting that the said *Lord Chandois* at the said time of making the said bill of exchange, or at any time afterwards, was not a person using commerce, protesting also, that the said *William*, at the said time of making the said bill of exchange, was not a person using commerce, as the said *William* by his said declaration above supposes, nevertheless the said *Alexander* for plea saith, that after the twenty-ninth day of *September*, in the year of Our Lord 1664, and before the making the said bill of exchange, to wit, on the twenty-first day of *October*, in the year of Our Lord 1693 aforesaid, at *London* aforesaid, in the parish and ward aforesaid, the said *Lord Chandois* and *William* played between themselves with dice at a certain game called hazard, and that the said *Lord Chandois* then and there at that game, at one time and at one meeting, lost to the said *William* the abovementioned sum of one hundred and twenty pieces of gold, called guineas, and that for securing the payment of the said one hundred and twenty pieces of gold lost by him the said *Lord Chandois* to the said *William* as aforesaid, he the said *Lord Chandois* afterwards, to wit, on the said twenty-

Breach of the first promise

And of the other three promises

* [173]

Imparlance.

General issue to the second, third, and fourth counts.

Plea as to the first count

Protestando that *Lord Chandois* was not a merchant;

and that the plaintiff was not a merchant.

The statute 14 *Car.* 2. against gaming, pleaded, that the bill was given for money lost at hazard by *Lord Chandois* to the plaintiff.

twenty-first day of *October*, in the year of Our Lord 1693 aforesaid, at the parish and ward aforesaid, directed his first bill of exchange to the said *Alexander*, and by the first bill of exchange the said *Lord Chandois* requested him the said *Alexander* to pay at a month after sight of the said bill of exchange the said sum of one hundred and twenty pieces of gold, called guineas, to the said *William*; and afterwards, to wit, on the said twenty-eighth day of *October*, in the year last aforesaid, upon sight of the said first bill of exchange, he, the said *Alexander*, at *London* aforesaid, in the parish and ward aforesaid, accepted the said bill of exchange for the payment of the said one hundred and twenty pieces of gold, and assumed upon himself, as the said *William* by the declaration aforesaid above hath supposed; by reason of which premises, and by force of the statute in that case made and provided, the said first bill of exchange by him the said *Alexander* as aforesaid accepted, and the acceptance thereof, and the promise and undertaking of him the said *Alexander*, by him the said *Alexander* as aforesaid made, became and were, and now are, void and of no force in law; and this he is ready to verify: wherefore he prays judgment, if he by virtue of the said bill of exchange aforesaid by the aforesaid *Lord Chandois*, against the form of the statute aforesaid as aforesaid given and made, and by him the said *Alexander* in form aforesaid accepted, ought to be charged, &c. And the said *William* saith, that he, by anything by the said *Alexander* above in pleading alledged, as to the first promise and undertaking aforesaid, ought not to be barred from having his said action thereof against him the said *Alexander*, because he saith, that the plea aforesaid, by the said *Alexander* in manner and form aforesaid above pleaded, and the matter in the same contained, are not sufficient in law to preclude him the said *William* from having his said action thereof against the said *Alexander*, to which said plea the said *William* hath no necessity, nor is he bound by the law of the land in any manner to answer; and this he is ready to verify: wherefore for want of a sufficient answer in this behalf, he the said *William* prays judgment and his damages, by occasion of the non-performance of the said first promise and undertaking, to be adjudged to him, &c. And for cause of demurrer in law in this behalf, according to the form of the statute in that case made and provided, he the said *William* sheweth, and to the court here demonstrates, the causes following, that is to say, that the plea aforesaid amounts only to the general issue, and also is double, prolixed, uncertain, and wants form, and also is no answer to the declaration aforesaid. And the said *Alexander* saith, that the plea aforesaid by him the said *Alexander*, as to the first promise and undertaking in manner and form aforesaid above pleaded, and the matter in the same contained, are good and sufficient in law to bar him the said *William* from having his said action thereof against him the said *Alexander*; which said plea, and the matter in the same contained, he the said *Alexander* is ready to verify and prove, as the court, &c. And because the said *William* hath not answered to that plea, nor hitherto in any manner denied it, he the said *Alexander*, as before, prays judgment, and

Demurrer, &c. [174]

Demurrer.

Joinder in demurrer.

HUSSEY *against* JACOB.

and that the said *William* may be barred from having his said action thereof against him the said *Alexander*, as to the said first promise and undertaking, &c. But because the court of the said lord the king now here is not yet advised of their judgment to be given of and upon the premises, day thereupon is given to the parties aforesaid before the lord the king at *Westminster*, until ——— next after ———, to hear their judgment of and concerning the premises, for that the court of the said lord the king is *not* yet, &c. And as well to try the issue aforesaid, between the parties aforesaid, above joined by the country to be tried, as to inquire what damages the said *William Hussey* hath sustained by occasion of the premises aforesaid, whereupon the parties aforesaid have put themselves upon the judgment of the court, if judgment thereupon shall happen to be given for the said *William* against the said *Alexander Jacob*, let a jury thereupon come before the lord the king at *Westminster* at the said day, and who neither, &c. to take cognizance, &c. because as well, &c. The same day is given to the parties aforesaid there, &c.

Venire awarded as well to try the issue as to enquire of damages if judgment be for plaintiff on the demurrer.

* [175]

Case 86. Hussey *against* Jacob.

To an action brought by *the payee* against *the acceptor* of a bill of exchange for 120l. A PLEA that the *drawer* and the *plaintiff* played at HAZARD; that *the drawer* lost at one time and meeting the said 120l.; and that the bill was drawn and accepted as *a security* for the money so lost; and that by 16. *Car.* 2. c. 7. all securities whatsoever for monies above 100l. lost at one time upon tick, are *void*, is good, for such plea does not amount to the *general issue*; and the defendant has election to give it in evidence under that issue, or to plead it specially.—See Stra. 1155. S. C. 1. Salk. 344. S. C. Carth. 356. S. C. Holt, 328. S. C. 12 Mod. 96. S. C. Com. 4. S. C. 1. Ld. Ray. 87. S. C. 3. Ld. Ray. 136. Ante, 4. Post. 351. 2. Med. 54. 4 Mod. 409. 1. Lutw. 484. Stra. 1155. 1249. 4. Com. Dig. "Justice of Peace" (B. 42). 4. Bac. Abr. 65. 2. Burn. 1080. 1. Bl. Rep. 245. 2. Ter. Rep. 439.

THIS was an action on the case brought upon *a bill of exchange* against the acceptor, wherein the plaintiff sets forth, that the bill was drawn by my *Lord Chandois* upon the defendant, for the payment of one hundred and twenty guineas to the plaintiff. Then he sets forth the *custom of merchants*, and that both the *drawer*, the *plaintiff*, and the *acceptor*, were persons using trade and merchandizing, and that the defendant had not paid the money, &c.

The defendant, by PROTESTATION, says, that neither my *Lord Chandois* or the plaintiff were persons using merchandize at the time when the bill of exchange was drawn, or at any time afterwards. Then he pleads, that after the making the statute 16. *Car.* 2. c. 7. of Gaming, and before the said bill was given, my *Lord Chandois* and the plaintiff did play at *dice*, at a game called HAZARD; and that *my lord* at one time and meeting did lose one hundred and twenty guineas to the plaintiff; and that, for securing the payment thereof, he did draw the bill of exchange upon the defendant, who accepted the same; and that, by virtue of the said statute 16. *Car.* 2, c. 7. the acceptance was void in law.

The plaintiff demurred specially, and shewed for cause, that this plea amounts to the *general issue*, and no more.

The defendant joined in demurrer.

For the better understanding this case it may be necessary to state, that some part of the statute 16. *Car.* 2. c. 7. enacts, "That if any

" person

" perſon ſhall play other than for ready money, and ſhall loſe above
" one hundred pounds at one time upon ticket or credit, the loſer
" ſhall not be bound to pay it; but the contract for the ſame,
" and all judgments, &c. and other acts and deeds, and ſecurities
" whatſoever for ſuch money, ſhall be void."

Those who argued againſt this plea ſaid,

FIRST, That the ſtatute of Gaming cannot be pleaded to this action, becauſe it is no anſwer to the *cuſtom of merchants*; ſo that the declaration is true notwithſtanding this plea.

* SECONDLY, It is not alledged that the money was loſt upon ticket or credit, or that it was not paid down at that time when it was loſt; for in ſuch caſes only the contracts are void. Now by this way of pleading the defendant has not ſo much as brought himſelf within the purview of the ſtatute, which was made *againſt* deceitful, diſorderly, and exceſſive gamings, and therefore ſhall not have the benefit of the conſequential part of the law, which is the avoidance of the contract. But this ſtatute does not hinder the plaintiff from his action, becauſe he being a third perſon, and not concerned in the gaming, may promiſe the payment of the money upon a good conſideration. As if a man loſe above a hundred pounds at one ſitting, and give judgment for the payment, and a third perſon promiſes the winner, in conſideration he will not take out execution within a year, that he will pay the money, this is a good promiſe, and will find him, becauſe it may have a reaſonable beginning; for probably the loſer would not plead to the *ſcire facias*, or take any advantage of the ſtatute. So if *A.* win above one hundred pounds of *B.* and at the ſame time is indebted to *C.* in the like ſum, and then both *A.* and *B.* become bound to *C.* for the payment of the money, it is a good bond, and not to be avoided by the ſtatute. Thus alſo being brought againſt the acceptor, he muſt now anſwer upon a diſtinct contract of his own, and not upon a promiſe with another; for every indorſer undertakes ſeverally for himſelf and the defendant in this caſe has undertaken to pay the ſum in demand upon a ſubſequent contract made by himſelf. Poſſibly my *Lord Chandois* might have taken advantage of the ſtatute, but the defendant cannot; for his undertaking being ſubſequent to the gaming, is neither within the intent or letter of the law.

* [176]

Carth. 269. 1 Sid. 424. Cro. Jac. 45, 324. Cro. Car. 452. Skin. 235. 343. 415.

THIRDLY, It is not averred in the plea, that the plaintiff *Huſſey* did accept the bill for ſecuring the payment of the money loſt at play; and without ſuch averment it is not within the meaning of the ſtatute.

* *Contra.* FIRST, To the cuſtom of merchants, it need not be anſwered, as it is ſet forth in the declaration; for there is ſpecial matter enough, which alters the cuſtom. It is true, there is a bill ſet forth, which is alledged to be drawn according to the cuſtom of merchants, but with this impediment, that it was drawn as a ſecurity for the payment of money won at play, which bill ought not to

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HUSSEY *againſt* JACOB.

be taken by law; ſo that though the cuſtom is admitted, it is avoided by an act of parliament.

As to THE SECOND OBJECTION, the plea is, that *Jacob* did accept the bill for the ſum for which it was drawn, which was for money won at play; it is *a contract* for the payment of ſuch money, which is void by the ſtatute.

As to THE THIRD OBJECTION, If this ſhould not be within the ſtatute, becauſe it is a new undertaking, then it would be eaſily eluded by getting one to be bound for the money loſt at play, which is a new undertaking for the payment; and ſo the ſtatute would be of very little uſe.

2. Show. Dixon v. Thompſon.

FOURTHLY, As to the exception, that it is a plea which amounts to the general iſſue; a man in many caſes may plead *ſpecial matter* to avoid the plaintiff's action, though he might give it in evidence upon the *general iſſue*; as in debt upon a bond againſt a *feme covert*, ſhe may plead *coverture*, or give it in evidence upon *non eſt factum*. The law here pleaded is conſiſtent with the action brought againſt the defendant, which he has confeſſed, but has alſo ſhewed *ſpecial matter* to avoid it. It cannot be denied, but that if the action had been brought againſt my *Lord Chandois*, the drawer, upon the refuſal of *Jacob* to pay it, *my lord* might have taken advantage of the ſtatute, which is an argument that the defendant ſhall alſo take the ſame advantage, becauſe his new contract ſtands upon the former conſideration, and it is but a farther ſecurity for the ſame money loſt at play; and his acceptance of the bill is an expreſs promiſe to pay it. Now this gaming muſt be either upon tick or for ready money; but it is plain it could not be for ready money, for then the loſer would not have drawn this bill for the payment of it.

1. Bac. Abr. 62.

Carth. 356.

Whereupon judgment was given for the defendant (*a*).

(*a*) See now the 9. *Ann.* c. 14.

Caſe 87. Wilſon *againſt* Howard.

A declaration in treſpaſs for taking four loads of wheat, with a *continuando*.

HERTFORD, to wit, } EDWARDUS WILSON *nuper de villa* SANCTI ALBANI *in com. præd. innholder, attach. fuit ad reſponden.* JOHANNI HOWARD *de placito quare vi et armis, &c. domum ipſius* * JOHANNIS HOWARD *apud villam* SANCTI ALBANI *præd. fregit et intravit et bona et catalla ſua ad valentiam decem librarum adtunc et ibidem nuper invent. cepit et aſportavit et alia enormia ei intulit ad grave damnum ipſius* JOHANNIS HOWARD *et contra pacem domini regis nunc, &c. Et unde idem* JOHANNES *per* JOHANNEM LEIGH *attorn. ſuum queritur quod* EDWARDUS WILSON *vicesimo ſeptimo die Octobris anno regni domini regis nunc, &c. vi et armis, &c. domum ipſius* JOHANNIS HOWARD *apud villam* SANCTI ALBANI *præd. fregit et intravit et bona et catalla ſua* VIDELICET *viginti modios,*

* [178]

ANGLICE

ANGLICE "four loads," *tritici ipsius* JOHANNIS WILSON *al valentiam, &c. adtunc et ibidem super ipsum invent. cepit et asportavit totam transgressionem præd. a præfato vicesimo septimo die Octobris anno regni dicti domini regis septimo supradicto usque decimum septimum diem Novembris tunc prox. sequen. diversis diebus et vicibus* CONTINUANDO *et alia enormia ei intulit ad grave dampnum ipsius* JOHANNIS HOWARD *et contra pacem, &c. unde dicit quod deteriorat. est et dampnum habet ad valentiam viginti librarum et inde producit sectam, &c.*

WILSON against HOWARD.

Wilson *against* Howard. Case 88.

In treſpaſs for *viginti modios tritici*, ANGLICE *four loads of* wheat, the *Anglicè* ſhall be rejected.

TRESPASS for taking four loads of wheat, with a *continuando* for a whole month. There was judgment in the common pleas by *nil dicit*, and a writ of error brought: and the errors aſſigned were,

Cro. Jac 129.
2 Roll. Abr 254.
1. Sid. 185.
3. Lev. 336.
Skin. 42. 641.

FIRST, That the words "*viginti modios tritici*, ANGLICE "four loads of wheat," are inſenſible, for *modius* ſignifies *a buſhel*, and it is not poſſible to make four loads of twenty buſhels.

To which it was anſwered,

FIRST, The ANGLICE is void, and then the *viginti modios tritici* may be well underſtood.

SECONDLY, It was objected, that the treſpaſs is for breaking the plaintiff's houſe, with a *continuando totam transgressionem* for a month; which cannot be, for a man muſt have ſome time to reſt.

Vide 1. Sid. 319.
1 Lev. 210.
6. Mod. 38.
2. Salk. 638.

To which it was anſwered, that the *continuando* ſhews the taking was not all at the ſame time, like the caſe in THE YEAR-BOOK *(a)*, where treſpaſs was brought for taking his goods, *viz.* two loads of wheat, with a *continuando diversis diebus et vicibus*, from ſuch a day to ſuch a day; and held good: for a treſpaſs may be done in taking ſuch a quantity of goods which cannot be removed in one day, and therefore the *continuando* is to ſhew how it was done *(b)*. Beſides, where a *continuando* is not well laid, and entire damages given, it ſhall be intended for that only which can have a continuance *(c)*.

Treſpaſs for breaking the plaintiff's houſe and taking his corn, with a "*continuando totam transgressorem* for a "month," is good.

* [179]

2. Roll Abr. 545. 549.
1. Sid. 319. 253. 224.
1. Vent. 264.
Salk. 639.
Comb. 193. 377. 427.
3. Mod. 110.
8 Mod. 40.
1. Lev. 210.

And ſo was the opinion of THE COURT in this caſe; for the taking the corn is laid to be on ſuch a day *continuando transgressionem præd.* from that day to ſuch a day, which is intermediate, and ſo damages could not be given for that; and a *continuando* may be laid *quoad fractionem domus* as well as *pedibus ambulando*. But of that it was doubted; for if it had been *continuando transgressionem præd.* generally, it had been well enough; but it is *totam transgressionem*, which cannot be for breaking a houſe.

5. Com. Dig. "Pleader" (3. M. 10.). 1. Sid. 31. 1. Vent. 363. 224. 249. Raym. 396.

(a) Year Book 21. *Hen.* 6. pl. 43. a. 2. Roll. Abr. 549.
(b) 2. Mod. 253. 6. Mod. 38. 2. Salk 638.
(c) Yelv. 126.

There

Trespass for taking goods "then "and there *lately* "found," is not erroneous.

There was ANOTHER OBJECTION, *viz.* that the defendant *bona et catalla adtunc et ibidem nuper invent: cepit, &c.* which cannot be at one and the same time.

To which it was answered, that the word *nuper* relates only to the time of declaring, but the time is not material, for he can give in evidence but one taking.

THE JUDGMENT was affirmed.

Case 89.

The King *against* Cummings and Another.

An indictment lies against *overseers* for *refusing to account* within the time limited by 43. *Eliz.* c. 2. *Sed quære.*

S. C. 3. Salk. 187.
S. C. Comb. 374.
Ante, 96.
2. Salk. 175. 380.
2. Salk. 525. 531.
6. Mod. 86 96
4. Com. Dig "Indictment" (E.).
2. Const's Bott, 294.
4. Ter. Rep. 246.

BY 43. *Eliz.* c. 2. s. 2. "The churchwardens and overseers, or "such of them as shall not be let by sickness or other just "excuse, to be allowed by two justices of the peace, shall, within "four days after the end of their year, and after other overseers "nominated, make and yield up to two justices of the peace "true and perfect accounts of all sums of money by them received, "or rated and assessed and not received, &c. upon pain that every "one of them shall forfeit twenty shillings; which may be levied "by distress by warrant of two justices; and in defect of such "distress two justices may commit him or them to the common "gaol of the County, there to remain without bail or mainprize "until payment of the said sum and arrearages."—And by the fourth section it is enacted, "That two justices shall and may "commit to the said prison every one of the said churchwardens and "overseers which shall refuse to account, there to remain without "bail or mainprize until he have made a true account, and satisfied and paid so much as upon the said account shall be remaining in his hands (*a*)."

THE DEFENDANTS were indicted at the sessions, for that they being chosen overseers of the poor of the parish of *Lynn* for the year 1693, and having taken upon them that office, they, *et uterque eorum*, did collect and receive several sums of money for the relief of the poor, and did refuse to account within four days after the end of the said year, and, after other overseers were nominated, to give an account to two justices of the peace of the sums by them received, and to deliver over the same to the new overseers, but converted it to their own use, and did use *other fraudulent practices* to deceive the poor, &c. *contra formam statuti, &c.*

This indictment was removed into the court of king's bench by *certiorari*; and the exceptions to it were,

FIRST, That an indictment will not lie for this offence; for it is grounded on an act of parliament, which appoints the overseers to account, and provides a punishment for refusing, *viz.* to be committed by two justices of the peace "till they account,

(*a*) By 17. *Geo* 2. c. 7. "The overseers shall, within fourteen days after other overseers are appointed, deliver in their accounts to said overseers, and pay the balance, which accounts shall be verified on oath; and if they do not account as the act directs, two justices may commit them to the common gaol until they shall account and pay the balance."

"and

" * and pay what remains in their hands, there to remain without " bail." So that this being an offence made by a particular ſtatute, which was not ſo at common law, and directing how the offenders ſhall be puniſhed, that muſt be the remedy, and no other can be purſued.

THE KING *againſt* COMMINGS AND ANOTHER.

THE COURT. The overſeers are required by the 43. *Eliz.* c. 2. ſ. 2. to account, and their refuſal is a contempt of the law, for which they may be indicted: and as to that, there is no difference when a thing is *enjoined* and when it is *prohibited* by a ſtatute; for when it is prohibited, the party ſhall not only have his action for the injury done, but the offender ſhall be puniſhed at the king's ſuit for the contempt of his law. It is true, two juſtices of peace have power to commit the overſeers refuſing to account, which is a proper means to come at the right; but it does not ſatisfy the king for the contempt *(a)*.

SECONDLY, If an indictment will not lie for this offence as ſet forth, it will not for the *other fraudulent practices* mentioned in it, becauſe it is too general *(b)*. And ſo it has been adjudged in like caſes, *viz.* Where a man was indicted for being *a common miſdoer (c)*, it was held void without laying ſome particular offence.

An indictment for *fraudulent practices* is too general.

THIRDLY, It is ſaid, that " being overſeers of the pariſh of " *Lynn* they did collect ſeveral ſums, &c.;" but they have laid no *venue* where the money was collected, neither is it mentioned what ſums were received.

Indictment againſt overſeers for not accounting, need not ſtate how much money was collected.

Carth. 256.

AS TO THE OBJECTION, that the indictment does not ſet forth what ſums were collected, it is not material, for the offence is for not accounting.

FOURTHLY, Two are indicted; and it is ſaid, " that they " *et uterque eorum* did receive money, which they had not brought " to account." This is likewiſe void for the uncertainty, becauſe the act of one is not the act of the other; as where four were indicted for uſing a trade *contra formam ſtatuti (d)*, ſetting forth, " that they *et uterque eorum*" did uſe the trade, it was quaſhed for this reaſon, for the uſing of one cannot be the uſing of the other *(e)*.

An indictment againſt OVERSEERS, charging that THEY and *each of them* received money without bringing it to account, is good.

* [181]

* THE COURT. Though it be true, that two cannot be indicted for refuſing to become *apprentices*, becauſe the ſervice of one cannot be the ſervice of the other, yet two may be indicted for *a cheat (f)*, and for ſeveral other offences.

2. Roll. Ab. 81. 2 Hawk. P. C. ch. 25. ſ. 89. Fitzg. 56.

Adjournatur.

(a) The Court debated upon this point of the caſe, S. C. 3. Salk. 187.; but ſaid, that an indictment at ſeſſions ſeems to be within the ſtatute, 8 C. Comb. 373. And the Court has refuſed on *motion* to *quaſh* an indictment againſt overſeers for not paying over money to their ſucceſſors. Rex *v.* King, 2. Stra. 1268.

(b) See Rex *v.* Maſon, 2. Term Rep. 581.

(c) 2. Roll. Abr. 79

(d) 2. Roll. Abr. 81.

(e) Salk. 382. 2 Seſſ. Caſes, 221. Stra. 623. 2. Ld. Ray. 1248.

(f) See Benfield *v.* Saunders, 7 Burr. 980.; Rex *v.* Young, 3. Term Rep. 98.

Littleton

Caſe 90.

Littleton *againſt* Cole.

A declaration for negligently keeping a fire, by which the plaintiff's houſe was burned, viz. *in parietibus, partitionibus, ornamentis, &c.* is good. Ante, 87. Poſt. 324. 5. Co. 13. Cro. Eliz 777. 784. Show 310. 4. Mod. 9. Skin. 142. Comb. 306. 5. Com. Dig. "Pleader" (2. P. 3.).

AN ACTION ON THE CASE was brought for negligently keeping his fire, by reaſon whereof the plaintiff's houſe was burned, viz. *in parietibus, in partitionibus feneſtris, in operibus ferrariis, et ornamentis ejuſdem domûs.*

And upon demurrer this exception was taken to the declaration: That it was too general and uncertain, for damages could not be given for the walls and ornaments of the houſe; as where treſpaſs was brought for taking *diverſa genera apparatuum (a)*, or trover for goods *cum aliis implementis et neceſſariis (b)*, not ſhewing what they are, and was held ill after a verdict, for the Court cannot give judgment for ſuch uncertain parcels *(c)*.

It was argued *for the plaintiff*, that the action had been well brought without the *videlicet*, for the enumerating the particulars was but matter of aggravation and inference; and this being an action wherein damages are to be recovered, they may be divided, and the plaintiff ought to recover for that which is well laid in the declaration, and that is, for negligently keeping his fire *(d)*.

The plaintiff had judgment.

(*a*) Allen, 9.
(*b*) Cro. Eliz. 817.
(*c*) Saliſbury *v.* Proctor, Poſt 324
(*d*) By 6. *Ann.* c. 31. ſ. 6 "No action, "ſuit, or proceſs whatſoever ſhall be "had, maintained, or proſecuted againſt "any perſon in whoſe houſe or chamber "any fire ſhall *accidentally* begin, or any "recompence be made by ſuch perſon "for any damage ſuffered or occaſioned "thereby."

EASTER TERM,

The Eighth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.*
Sir Samuel Eyre, *Knt.*
} *Juſtices.*

Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

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* Chamberline *againſt* Harvey.

Caſe 91.

Michaelmas Term, 7. *Will.* 3. *Roll.* 123.

LONDON, *to wit.* BE it remembered, that on *Wedneſday* next after three weeks of *Saint Michael* in this ſame Term, before the lord the king at *Weſtminſter* came *Willoughby Chamberline*, *Eſq.* by *Godfrey Woodward* his attorney, and brought here into the court of the ſaid lord the king then there his certain bill againſt *Robert Harvey*, *Eſq.* in cuſtody of the marſhal, &c. of a plea of treſpaſs; and there are pledges of proſecuting, to wit, *John Doe* and *Richard Roe*; which ſaid bill follows in theſe words, to wit, *London*, to wit, *Willoughby Chamberline*, *Eſq.* complains of *Robert Harvey*, *Eſq.* in cuſtody of the marſhal of the *Marſhalſea* of the lord the king, being before the king himſelf, for that the ſaid *Robert*, on the firſt day of *September*, in the year of Our Lord 1695, with force and arms, one negro of him the ſaid *William*, of the price of one hundred pounds of lawful money of *England*, at *London*, aforeſaid, to wit, in the pariſh of the *bleſſed Mary of the Arches* in the ward of *Cheape*, took and led away from him, and then and there detained and kept poſſeſſion of the negro aforeſaid from the ſaid firſt day of *September* until the exhibiting of this bill, ſo that he the ſaid *Willoughby* totally was without,

Count in treſpaſs for a negro ſlave.

S. C. 3. Ld. Ray. 129.

CHAMBERLINE *againſt* HARVEY.

without, and loſt the uſe and benefit of the ſaid negro for the whole time aforeſaid, and other wrongs to the ſaid *Willoughby* then and there did, againſt the peace of the ſaid lord the now king, to the damage of him the ſaid *Willoughby*, of one hundred and fifty pounds, and thereupon he brings ſuit, &c.

Not guilty.

And the ſaid *Robert*, by *Robert Stone* his attorney, comes and defends the force and injury when, &c. and ſaith, that he is not thereof guilty in manner and form as the ſaid *Willoughby* above complains againſt him; and of this he puts himſelf upon the country, and the ſaid *Willoughby* thereupon likewiſe: therefore let a jury thereupon come before the lord the king at *Weſtminſter* on *Thurſday* next after the morrow of *All Souls*; and who neither, &c. to recognize, &c. becauſe as well, &c. The ſame day is given to the parties aforeſaid there, &c. Afterwards the proceſs thereupon is continued between the parties aforeſaid in the plea aforeſaid, by the jury being reſpited thereupon between them,

Niſi prius.

before the lord the king at *Weſtminſter* until *Thurſday* next after fifteen days of *Saint Martin*, unleſs the lord the king's truſty and well-beloved *John Holt*, *Knight*, *Chief Juſtice* of the lord the king, aſſigned to hold pleas in the court of the ſaid lord the king himſelf, ſhall before come on *Wedneſday* next after fifteen days of *Saint Martin* at *Guildhall*, *London*, by form of the ſtatute, for want of jurors, &c. At which day, before the lord the king at *Weſtminſter*, cometh the ſaid *Willoughby* by his ſaid attorney, and the ſaid *Chief Juſtice* before whom, &c. hath ſent here his record

Poſtea.

before him had in theſe words: Afterward, on the day and at the place within contained, before *John Holt*, *Knight*, *Chief Juſtice* of the lord the king, aſſigned to hold pleas in the court of the ſaid lord the king before the king himſelf, come as well the within-named *Willoughby Chamberline*, *Eſq.* as the within-written *Robert Harvey*, *Eſq.* by their attornies within contained; and the jurors of the jury, whereof mention is within made, being called, certain of them, to wit, *Thomas Sericole*, *Richard Martin*, *Samuel Stone*, *Benjamin Hodgſon*, *Jeremiah Barratt*, and *Nathaniel Spinlow*, came, and are ſworn upon that jury; and becauſe the

Tales de circumſtantibus.

reſt of the jurors of the ſame jury did not appear, therefore others of the by-ſtanders, by the ſheriffs of *London* aforeſaid, being choſen to this, at the requeſt of the ſaid *Willoughby Chamberline*, and by the command of the chief juſtice aforeſaid newly appointed, whoſe names are affiled in the panel within written, according to the form of the ſtatute in ſuch caſe made and provided; and the jurors ſo newly appointed, to wit, *Thomas Pool*, *Richard Martin*, *Thomas Ward*, *John Watſon*, *Philip Brewſter*, and *Richard Chauncey*, being called likewiſe come, who being choſen, tried, and ſworn to ſpeak the truth concerning the matter therein contained, together with the other jurors aforeſaid before impanelled and ſworn, ſay upon their oath, that one *Edward Chamberline*, long

Special verdict.

before the within-written time when, &c. was ſeiſed of a certain plantation in the iſland of *Barbadoes* in the *Weſt Indies*, in parts beyond

CHAMBER-LINE *againſt* HARVEY.

beyond the ſeas in his demeſne as of fee, and of certain negro ſlaves, being ſlaves belonging and appertaining to the ſame plantation; and the aforeſaid negro ſlave, long before the within-written time when, &c. was born within the iſland aforeſaid of negro parents, ſlaves belonging and appertaining to the ſame plantation; and that long before the within-written time when, &c. to wit, on the twenty-ninth day of *April*, in the year of our Lord 1668, by one *William Willoughby*, deputy governor, council and aſſembly, being the repreſentatives of that iſland in that behalf lawfully authorized and commiſſioned at the iſland aforeſaid, it was enacted in theſe *Engliſh* words following, *Barbadoes*, An act declaring the negro ſlaves of this iſland to be real eſtates Whereas a very conſiderable part of the wealth of this iſland conſiſts in our negro ſlaves, without whoſe labour and ſervice we ſhall be utterly unable to manage our plantations here, thereby relieving our wants, and bringing that conſiderable increaſe of revenue which this place affords to his majeſty's coffers, as well here as in *England*; and whereas ſome law-ſuits have riſen, and other great inconveniencies have followed, where divers perſons dying inteſtate have left their right and intereſt of their negro ſlaves to be by law diſputed between their heirs, executors, and adminiſtrators, wherein the various judgments and affections of ſeveral courts or jurors have ſometimes found for one, and at other times for the other; for a full remedy of theſe inconveniencies, and to the intent that the heirs and widow who claim dower may not have bare lands without negroes to manure the ſame, and alſo that the condition, right, and intereſt of negroes to all other ends and purpoſes may be fully known and determined, the deputy governors, council, and aſſembly, being willing that all ambiguities herein ſhould be removed, and the law in this caſe be declared and put in a certainty, have ordained and enacted by the deputy governor, council, and aſſembly, and by the authority of the ſame, that from and after publication hereof, all negro ſlaves, in all courts of judicature and other places within this iſland, ſhall be held, taken, and adjudged, to be eſtates real, and not chattels, and ſhall deſcend unto the heir or widow of any perſon dying, according to the manner and cuſtom of lands of inheritance held in fee-ſimple; provided always, that no perſon ſelling or alienating any of his or her negroes, is hereby held or obliged to cauſe ſuch ſale or alienation to be inrolled, as is accuſtomed to be done and required by the laws of this iſland, as in all other real eſtates; any uſage, cuſtom, or law, to the contrary notwithſtanding. Provided this act, or any-thing therein contained, ſhall not be taken and deemed to extend unto any merchant, factor, or agent, bringing negro ſlaves to this iſland, and having the conſignments of any ſlaves under them, but that in all reſpects they, their executors, adminiſtrators, or aſſigns, may hold, poſſeſs, and enjoy, ſuch ſlaves or negroes in ſuch condition as they might have done before the making of this act, until ſale of ſuch ſlave or ſlaves hath been made in the iſland, as by that act more fully appears. And that the ſaid

Edward

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Edward Chamberline, long before the ſaid time when, &c. at the iſland aforeſaid died ſeiſed of his like eſtate, of and in the plantation and negro ſlaves aforeſaid thereunto belonging; by and after whoſe death, one third part of the plantation and negro ſlaves aforeſaid, whereof the negro in the declaration aforeſaid mentioned was one, deſcended to *Mary*, the widow and relict of the ſaid *Edward Chamberline*, in the name of her dower, by the laws of the iſland aforeſaid; and the reverſion of the ſaid third part deſcended to the ſaid *William Chamberline*, as the ſon and heir of the ſaid *Edward*; and being ſo ſeiſed, the ſaid *Mary* afterwards, and long before the time when, &c. took for her huſband one *John Witham*, *Knt.* by which the ſaid *John Witham* was ſeiſed in right of his ſaid wife of one third part of the plantation and negro ſlaves for the term of the life of his ſaid wife; and the ſaid *John Witham* being ſo ſeiſed, the within-named negro, a true native, long before the within-written time when, &c. to wit, in the thirty-ſixth year of the reign of *Charles* the Second, late king of *England*, brought within this kingdom of *England*, and afterwards, the ſaid negro ſlave above-mentioned remained in the ſervice of him the ſaid *John* within this kingdom of *England* for the ſpace of divers years, from that time and before the ſaid time when, &c. according to the rites of the church of *England*, but without the knowledge or conſent of the ſaid *Willoughby Chamberline*, there was baptized; and that the ſaid *John Witham* afterwards, and after the death of his ſaid wife, but long before the ſaid time when, &c. within this kingdom of *England* abſolutely put the ſaid negro ſlave out of his ſervice; and alſo afterwards, and before the ſaid time when, &c. the ſaid negro ſlave ſerved other ſubjects of this kingdom of *England*, and at the within-written time when, &c. within this kingdom of *England*, was retained in the actual ſervice of the ſaid *Robert Harvey*, to take of the ſaid *Robert Harvey* according to the rate of ſix pounds by the year for his wages in that behalf: but whether upon the whole matter aforeſaid, by the jury aforeſaid in form aforeſaid found, the ſaid *Robert Harvey* be guilty of the treſpaſs within ſpecified or not, the jurors aforeſaid are wholly ignorant, and pray the advice of the Court here concerning the premiſes; and if upon the whole matter aforeſaid, by the jury aforeſaid in form aforeſaid found, it ſhall ſeem to the Juſtices and the Court here that the ſaid *Robert Harvey* be guilty of that treſpaſs, then the ſaid jurors ſay upon their oath, that the ſaid *Robert Harvey* is guilty of the treſpaſs aforeſaid, as the ſaid *Willoughby Chamberline* within complains againſt him; and they aſſeſs the damages of him the ſaid *Willoughby*, by occaſion of the treſpaſs aforeſaid, beſides his coſts and charges, to fifty pounds; and for his coſts and charges three ſhillings and four-pence; and if upon the whole matter aforeſaid, by the jury aforeſaid in form aforeſaid found, it ſhall ſeem to the ſame Juſtices here that the ſaid *Robert Harvey* be not guilty of the treſpaſs aforeſaid, then they the ſaid jurors ſay upon their oath, that the ſaid *Robert Harvey* is not guilty of the treſpaſs aforeſaid, as he the ſaid *Robert*

hath

hath within in pleading alledged: and because the Judges here are not yet advised, &c.

Chamberline *against* Harvey. Case 92.

TRESPASS for taking a NEGRO SLAVE of the value of one hundred pounds: upon *not guilty* pleaded, the jury found a special verdict at *the Guildhall in London*:

That before the trespass committed, one *Edward Chamberline* was seised in fee of a plantation in *Barbadoes*, and of certain *negro slaves* thereunto belonging; that *the negro* now taken was born within the said island of negro parents, being *slaves* belonging to the said plantation; that an ordinance was made by the deputy governor, council, and assembly of the representatives in the said island, that *the negro slaves* there shall be *real estates*, and shall descend to the heir or widow in lieu of inheritance, &c.; that *Edward Chamberline* died seised, &c. of whose death one third part of the plantation and *negro slaves* (whereof this *negro* was one) came to *Mary* his widow and relict, as her dowry, and the reversion of the said third, and the two other thirds descended to the plaintiff, as heir and *Edward Chamberline*; that the said *Mary* afterwards married *Sir John Witham*, who thereupon was seised, in her right for her life, of one third part of the plantation and slaves; and being so seised, he did, in the thirty sixth year of king *Charles the Second*, bring this very *negro* into *England*, where he continued in the service of the said *Sir John Witham* several years; that he was baptized here, but without the privity or consent of the plaintiff, that after the death of the said *Mary*, *Sir John Witham* turned this *negro* out of his service, who afterwards lived several other masters there, and at the time when the trespass was supposed to be committed, was in the service of the defendant, and had of his Wages for pounds by the year. But whether, upon the whole matter, the defendant be guilty of the trespass, they refer to the Court.

A case like this never happened before.

* Three questions were made upon this verdict:

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FIRST, Whether, upon this finding, there was any legal property vested in the plaintiff?

SECONDLY, If any such property be vested in him, then whether the bringing this NEGRO into *England* be not *a manumission*, and the property thereby divested?

THIRDLY, Whether an action of *trespass* will lie for taking *a man* of the price of one hundred pounds?

Trover will not lie for "taking "and carrying "away one *negro slave* of "the price of, "&c. so that the "plaintiff was "totally with- "out, and lost "the use and "benefit of, the "said negro, "&c." for by the laws of England one man cannot have an *absolute property* in the person of another man; but, as under certain circumstances a man may have a *qualified property* in another, in the character of *servant*, *apprentice*, or relation or taking away, with, &c. *Lutw.* 396. 1 Ld. Ray. 3 Ld. Ray. 1 Vent. 175. 3 Lev. 3, 6, 337. 3 Keb. 765. Ray 16 2 Salk 666. Cro. Car. 10. 301. 545. Cro. Eliz. 126. 545 Cro. Jac. 262. 463 2 Ld. Ray. 1274.

1. El. Com. 323. Comp. 54. 2 Bott's P. L. 330. See Mr. Hargrave's case of Somerset.

CHAMBER-LINE *againſt* HARVEY.

Vide March 12. Hob. 283. Ray. 16. 2. Lev. 201. 3. Lev. 336. 2. Salk. 667. &c. ante. Vide 2. Salk. 411, 412.

As to THE FIRST, Though the word "*ſlave*" has but a very harſh ſound in a free and chriſtian country, yet perfect bondage has been allowed in ſuch places. The power which naturally ariſes to the lord over ſuch bondmen or ſlaves, is by reaſon of his ſupplying them with food and raiment during their lives, as a recompence for their labour: ſuch is the uſage of the iſland of *Barbadoes*. The jury have found a law there, which makes theſe ſlaves part of the real eſtate, and this negro was born of negro parents there. Now the children of ſuch parents are ſlaves as well as they. So it was amongſt THE ROMANS; where both parents were aliens, the children were ſo too. This ordinance made in *Barbadoes*, being ſubject to the crown of *England*, has the ſame force there as an act of parliament has here. Now if this had been the caſe of *a villein* here, the jury have found enough to make him *regardant to a manor*; in which, by the law of this land, the lord had ſo abſolute a property, that if he were taken away, the party detaining him gained no property in him; for then the writ *de nativo habendo* muſt be brought againſt him, but it is only directed to the ſheriff to take him wherever he may be found, &c. An action of *trover* will not lie, except where the plaintiff has a property in the thing demanded. Now it cannot be denied but that *trover* will lie for *a negro*; for ſo was the caſe *Butts v. Penny*. It is true, there is no judgment entered in that caſe; that may be the fault of the attorney in not bringing in THE POSTEA (*a*).

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SECONDLY, Nothing here found amounts to a manumiſſion or enfranchiſement. * Manumiſſion is defined by *Littleton* (*b*) to be, when the lord makes a deed to his *villein* to enfranchiſe him, this is one kind of manumiſſion; the other is, when the lord does ſome act which, in judgment of law, amounts to make his *villein* free, as by making a feoffment in fee to him, and delivering ſeiſin accordingly, &c. It is true, he may have ſeveral temporary privileges whereby he may be exempted from the ſeiſin of the lord, as entering into religion, &c. but can in no caſe be enfranchiſed but where the lord is an actor; and even in ſuch caſe, if the lord himſelf had enfranchiſed him by deed, *cum totâ ſequelâ ſuâ procreatâ et procreandâ*, this was not a ſufficient manumiſſion of ſuch children which he had before the execution of the deed without ſpecial words, becauſe they were *villeins* in poſſeſſion at that time (*c*). But here is nothing of the lord's conſent found in this verdict; but the contrary. Then the bringing of him into *England* by *Sir John Witham* will not make him free, becauſe he was a treſpaſſer in ſo doing; for he ought not to have removed him from the plantation to which he was *regardant*. If, therefore, taking him from the plantation was *tortious*, then the finding that he continued in his ſervice, and that he was afterwards turned away,

(*a*) Trinity Term, 9. *Car.* 2. 2. Lev. 201. 3. Keb. 785.

(*b*) Lit. ſect. 204.

(*c*) Co. Lit. 137. Year Book, 5. *Hen.* 7. pl. 14. a. Bro. Abr. "Villenage," pl. 26.

will

will not amount to a manumission. The chief question then is, Whether *baptism* without the privity of the lord will amount to a manumission? Now if a bare consent, without any other act of the lord, will not be sufficient to make his villein free, so as to divest himself of that property which he had in him, then *à fortiori*, what the *villein* does without the consent of the lord, cannot acquire a manumission. That a bare consent alone is not sufficient, appears by my *Lord Coke*'s Commentary on *Littleton* (*a*), and the authorities there cited in the margin, that if a *nief regardant* to a manor marry a freeman without the license of the lord, who afterwards makes a feoffment of the manor, and then her husband dies, the lord shall still have *the nief*, and not the feoffee. If baptism should be accounted a manumission, it would very much endanger the trade of the plantations, which cannot be carried on without the help and labour of those slaves; for the parsons are bound to baptize them as soon as they can give a reasonable account of the christian faith; and if that would make them free, then few would be slaves.

CHAMBERLINE *against* HARVEY.

* IT WAS ARGUED *on the other side*, That it is against the law of nature for one man to be a slave to another. It is true, that a man may lose his liberty by a particular law of his country, or by being taken in war, for there he owes his life to those who preserve him; or where a man voluntarily sells himself for sustenance, or alimony; but no such thing is found in this verdict, and nothing shall be presumed but what is in favour of liberty. It is by the *constitution of nations*, and not by the *law of nature*, that the freedom of mankind has been turned into slavery: thus says BRACTON (*b*), *Fiunt etiam per civilem bonitatis captivitate de jure gentium.* But our laws are called *Libertates Angliæ*, because they make men free; and therefore even in the time of *villenage* here, the lord had not such an absolute property over his slave, but that in some cases that very slave might have an action against his lord; as an appeal for the death of his father: so where the lord was indebted to the testator of his *villein*, he might bring an action against him as executor; so might *the nief* have had an appeal of rape, being ravished by her lord (*c*). If slavery in *Barbadoes* and *villenage* here were the same sort of servitude, the plaintiff may be seised of this negro as a *villein in gross*, or as *regardant* to the plantation; for there were but two sorts of *villeins* here, either *in gross*, or *regardant* to particular manors. Now this cannot be a *villein regardant* to the plantation, for then the plaintiff and his ancestors must be seised of this *negro* and his ancestors time out of the memory of man, which could not be, because *Barbadoes* was acquired to THE ENGLISH within time of memory; and he cannot be a *villein in gross*, because it is found that he was born of parents belonging to the plantation (*d*). But if the plaintiff have

* [189]

(*a*) Co. Lit 136. b.
(*b*) Bract bk. 1. cap. 6.
(*c*) Littleton's Tenures, sect. 189, 190.
(*d*) Littleton's Tenures, 181, 182.

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any property in this *negro*, he muſt either have an abſolute or a qualified property in him at the time of the treſpaſs ſuppoſed to be committed. He could not have an abſolute or general property, becauſe by MAGNA CHARTA, and THE LAWS OF ENGLAND, no man can have ſuch a property over another. And if he had only a qualified property, then an action of treſpaſs will not lie, but an action *per quod ſervitium amiſit.*

[190] * But if the plaintiff had any right to the ſervitude of this *negro*, that right is now diveſted by his coming into *England*; for the ordinance made in *Barbadoes* ſhall not make him ſo *regardant* to the plantation there, as to go to the heir, becauſe that is only *lex loci*, and adapted to that particular place (as the law of *Stannaries* in *Cornwall*), and extends only to that country, ſo long as he is occupied in ſervice on that plantation; and if he be brought into another country where that law has no effect, that amounts to a manumiſſion, ſo that the bringing him into *England* diſcharges him of all ſervitude or bondage, eſpecially being turned out of the ſervice of his maſter, and not allowed ſuſtenance by him; for food and cloathing are the only recompence for ſervitude. But being baptized according to the rite of THE CHURCH, he is thereby made a chriſtian, and chriſtianity is inconſiſtent with ſlavery. And this was allowed even in the time when the popiſh religion was eſtabliſhed, appears by *Littleton* (*a*), for in thoſe days, if a *villein* had entered into religion, and was profeſſed, as they called it, the lord could not ſeize him; and the reaſon there given is, becauſe he was dead in law, and if the lord might take him out of his cloiſter, then he could not live according to his religion. The like reaſon may now be given for baptiſm being incorporated into the laws of the land; if the duties which ariſe thereby cannot be performed in a ſtate of ſervitude, the baptiſm muſt be a manumiſſion. That ſuch duties cannot be performed is plain, for the perſons baptized are to be confirmed by the diocеſan when they can give an account of their faith, and are enjoined by ſeveral acts of parliament to come to church: and it cannot be an objection of any weight to ſay, that though he was baptized, yet it was not by the conſent of the lord, becauſe he is enjoined by the law. But if the lord have ſtill an abſolute property over him, then he might ſend him far enough from the performance of thoſe duties, *viz.* into *Turkey*, or any other country of infidels, where they neither can or will be ſuffered to exerciſe the chriſtian religion. The law is ſo careful of the liberties of men under its protection, that the king himſelf, who has ſo great a right to the duty and ſervice of his ſubjects, cannot ſend any-one out of *England* againſt his will to ſerve in any other place, even in his own dominions, for this, my LORD COKE ſays, would be *perdere patriam* (*b*): and therefore the lord could not ſend a [191] *villein* * *in groſs* out of the kingdom, becauſe the king had a right

(*a*) Sect. 202. 2. Hawk. P. C. c. 33.
(*b*) 2. Inſt. 46. 1. Bl. Com 137.

in

in him. Thus it is alſo in the caſe of *apprentices*, who, though they voluntarily ſubmit themſelves to ſerve their maſters for a certain number of years, yet they cannot be ſent out of the kingdom, though it be to their own [illegible] and in his ſervice, unleſs it be the agreement, or the nature of the apprenticeſhip is ſuch (*a*). Captives taken in war are under the moſt ſlaviſh degree of ſervitude, and thoſe to whom they are ſubjected have thereby the higheſt right in them, becauſe it is lawful not only to diſpoſe of them at their pleaſure, but even to kill them. But it is obſerved amongſt *the Turks*, that they do not make ſlaves of thoſe of their own religion, though taken in war; and if a chriſtian be ſo taken, yet if he renounce chriſtianity, and turn *Mahometan*, he thereby obtains his freedom (*b*). And if this be a cuſtom allowed amongſt infidels, then how much more in a chriſtian nation, as this is, ſhould be an immediate enfranchiſement to them, and they ſhould thereby acquire the privileges and immunities enjoyed by thoſe of the ſame religion, and be intitled to THE LAWS OF ENGLAND.

CHAMBERLINE *againſt* HARVEY.

THIRDLY, This action will not lie for taking a man *pretii centum librarum*.—FIRST, Becauſe it is not found that either the widow or the heir was in poſſeſſion of this plantation and negro ſlaves at the time of the action brought; for if this negro be part of the real eſtate, then *Sir John Witham* was a diſſeiſor by bringing him into *England*, and a diſſeiſee cannot have an action of treſpaſs before a re-entry, becauſe the freehold is in the diſſeiſor (*c*). SECONDLY, The vagrancy of a *villein*, or *a neife*, is the fault of the lord; and therefore, in the ſeventh year of *Richard the Second*, it was held, that if a ſtranger marry ſuch *neife*, not knowing to what lord ſhe belonged, he is not a treſpaſſer (*d*), which is this very caſe in point.

Adjournatur.

Afterwards, in *Hilary Term*, judgment was given for the defendant, that the bill ſhall abate; for THE COURT were of opinion, that no action of treſpaſs would lie for the taking away a man generally, but that there might be a ſpecial action of treſpaſs for taking his ſervant, *per quod ſervitium amiſit*. Carth. 396.

(*a*) Coventry *v.* Woodall, Hob. 134. 1. Brownl. pl 67.
(*b*) Molloy de Jure Maritimo, 355.
(*c*) 2 Roll Abr. 552.
(*d*) Fitz. Abr. "Bar." pl 240.

Roberts *againſt* Withered. Caſe 93.

MIDDLESEX, *to wit.* } FRANCIS ROBERTS, who ſues as well for the lord the king as for himſelf in this behalf, complains of *Thomas Withered*, being in the cuſtody of the marſhal of the *Marſhalſea* of the ſaid lord the king, before the 1. Sal. 233.

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king himſelf, of a plea that he render to the ſaid lord the king, and to him the ſaid *Francis*, thirty ſix barrels of olive oils, containing in the whole thirteen tuns of olive oils aforeſaid, of the value of ſeventy pounds, and alſo ſixty-nine pipes of wine, containing in the whole thirty-five tuns of wine aforeſaid, of the value of one thouſand and forty pounds, which from the ſaid lord the king and the aforeſaid *Francis* he unjuſtly detains; for that, to wit, that whereas after the firſt day of *April*, in the year of Our Lord one thouſand ſix hundred and ſixty-ſeven, to wit, between the nineteenth day of *September*, in the year of Our Lord one thouſand ſix hundred and ninety-four, and the day of exhibiting this bill, to wit, on the tenth day of *April* aforeſaid, goods were imported by the aforeſaid *Thomas Withered*, and by him had and poſſeſſed, and to his own proper uſe converted, and depoſited in a certain ſhip or veſſel called THE STELLA, at *Genoa*, in parts beyond the ſeas, in this realm of *England*, to wit, at *Ratcliffe*, in the county of *Middleſex* aforeſaid, within the port of *London*, the ſame ſhip or veſſel called STELLA not being, at the time of importing the goods aforeſaid, a ſhip or veſſel truly and without fraud belonging to the people of *England*, *Ireland*, *Wales*, or the town of *Berwick upon Tweed*, or either of them, as the owner and proprietor thereof, and whereof the maſter and three-fourths of the mariners at leaſt were *Engliſh*; and the aforeſaid ſhip or veſſel not being a foreign ſhip or veſſel of the built of *Genoa*, a place of which the ſaid goods were the growth, production, or manufacture, or of ſuch port where the ſaid goods could only be, or were moſt uſually firſt ſhipped for tranſportation, and whereof the maſter and three-fourths of the mariners at leaſt were of the ſame country or place; againſt the form of the ſtatute in ſuch caſe made and provided: by reaſon whereof, and alſo by force of the ſtatute aforeſaid, the goods aforeſaid, and every parcel thereof, have become, and are forfeited; and thereupon an action hath accrued to the ſaid lord the king, and to him the ſaid *Francis*, who ſues as well, &c. to require and have of the ſaid *Thomas*, for the ſaid lord the king and himſelf, the aforeſaid goods in form aforeſaid forfeited. Nevertheleſs, the aforeſaid *Thomas*, although often requeſted, &c. the aforeſaid goods in form aforeſaid forfeited to the ſaid lord the king and the ſaid *Francis*, who ſues as well, &c. hath not yet delivered, but the aforeſaid goods to the ſaid lord the king and the ſaid *Francis*, who ſues as well, &c. hath hitherto refuſed to deliver, and ſtill refuſes to deliver, and unjuſtly detains. By reaſon whereof the ſaid *Francis*, who ſues as well, &c. ſays, that he has received injury, and is damnified to the value of two thouſand pounds; and therefore he brings ſuit, &c.

Roberts

* Roberts *againſt* Withered.

Caſe 94.

AN action of *detinue* was brought for goods forfeited by virtue of the ſtatute 12. *Car.* 2. c. 18. intituled, "An act for encouraging and increaſing of ſhipping and navigation," in the eighth paragraph whereof it is enacted, amongſt other things, "That no *olive-oil*, or *wines*, ſhall, from and after the firſt day "of *April*, in the year 1667, be imported into *England*, *Ireland*, "*Wales*, or town of *Berwick upon Tweed*, in any ſhip or ſhips, "veſſel or veſſels whatſoever, but in ſuch as do truly, and without "fraud, belong to the people thereof, or of ſome of them, as the "true owners and proprietors thereof, and whereof the maſter and "three-fourths of the marin rs at leaſt are *Engliſh*, except only "ſuch foreign ſhips and veſſels as are of the built of that country "or place of which the ſaid goods are the growth, production, or "manufacture reſpectively, or of ſuch port where the ſaid goods "can only be, or moſt uſually are, firſt ſhipped for tranſportation, "and whereof the maſter and three-fourths of the mariners at "leaſt are of the ſaid country or place, under the penalty and for-"feiture of ſhip and goods; one moiety to his majeſty, and the "other moiety to him or them that ſhall inform, ſeize, or ſue for "the ſame in any court of record."

If a ſtatute, *viz.* the *Navigation Act* 12. *Car.* 2. c. 18 ordain, that no goods ſhall be imported but in Engliſh-built ſhips, &c. "under the pe-"nalty and for-"feiture of ſhip "and goods, "one moiety to "the king, the "other to him "that ſhall in-"form, ſeize, or "ſue for the "ſame," without ſaying by what mode of proceeding; an *action of detinue* will lie before ſeizure for a ſhip and goods ſo forfeited; for the property is *veſted* out of the owner by the forfeiture, and *veſted* in the perſon who ſues, by the commencement of the action.

Upon *non detinet* pleaded, there was a verdict for the plaintiff.

And now it was moved in arreſt of judgment, that an action of *detinue* will not lie except where the defendant comes by the goods either by *delivering* or by *finding*, and where the plaintiff has an *antecedent right*, neither of which is this caſe; and it is not enough to ſay, that the ſtatute veſts a property in him who firſt ſues for the forfeiture, becauſe, by the expreſs words thereof, the right is not attached but by ſeizure or information. Moſt of the ſtatutes which give penalties of forfeiture direct how they ſhall be recovered, *ſcilicet*, "by action of debt, bill, plaint, &c." but where a law gives a property "by information or ſeizure" of the goods, an action of *detinue* will not lie till that be done, becauſe it cannot be a wrongful detainer of that to which the party had no right.

S.C. 1. Salk 223. S.C. Comb. 361. S.C. 12. Mod. 92. 11. Co. 89. 1. Rol Rep. 118. 161. 2 Rol. Rep. 275. 296. Hard. 353. Noy, 12. Cro. Jac. 39. Cro. Eliz. 457. 2. Danv. 510. 2. Bac. Abr. 47.

SECONDLY, If *Genoa* be the place of the growth of the goods, then the ſhipping them there is not an offence within the act; and they do not ſay, that the goods are not of the growth, production, or manufacture of *Genoa*, or that it was not the place *where they were uſually ſhipped at the time of the making of the act. The proceedings upon ſuch popular ſtatutes have uſually been by way of information: ſo was the caſe of *Pitcher v. Jones* (*a*); it was an *information* for importing two bags of ſpices from *Holland*, being of the growth of *Aſia*, *Africa*, or *America*, that not being the place where ſuch goods were firſt moſt uſually ſhipped for tranſportation, *contra formam ſtatuti*; there was a judgment for the plaintiff; but it was arreſted, becauſe it was not

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(*a*) Mich. Term 13. *Car.* 2. in the exchequer, Hardres, 217.

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alledged, that the goods were not of the growth of *Holland*; though the information did ſet forth, that they were of the growth of *Aſia*, &c. Now it is not material where ſuch goods were uſually ſhipped, either before or ſince the making the act; for they ought to aver, that *Genoa* was not the uſual place of ſhipping them at the time when the act was made; like the caſe where the king granted to a biſhop (*a*), that the manor and lands belonging to his biſhoprick ſhould be free for ever from ſuch a foreſt; the biſhop could not claim any freedom for any other lands, but ſuch which he had at the time of the making the grant.

BUT THOSE WHO ARGUED *for the plaintiff*, ſaid, that nothing remained to be anſwered, upon reading the act and the declaration, but THE FIRST QUESTION, which was, Whether an action of
Comb. 361. *detinue* would lie or not in this caſe? And it was inſiſted, that it would; for as the act had given only the penalty of one hundred pounds, one moiety to the king, the other to him who ſhall ſue for the ſame, and had not ſaid in what action, it will not be denied but that *debt* would have been the proper action in ſuch caſe for the informer to recover his moiety. There was no difference between *debt* and *detinue* for ſuch a forfeiture; for the informer had an antecedent property in neither. But in this caſe there is a forfeiture immediately veſted in the king and party, and if one may have an action, the other may alſo ſue for his moiety. Now it is no argument to ſay, becauſe the perſons have choſe to proceed by way of *information* upon forfeitures on penal ſtatutes, therefore an action of *detinue* will not lie for ſuch a forfeiture.

* [195] * To prove that a forfeiture was *veſted*, this caſe was compared by THE COURT to a *replevin*, which ſuppoſes an antecedent property, as much as an action of *detinue*; for it is a rule, that the plaintiff muſt have the property of the goods in him at the time when they were taken; but yet the lord ſhall have *a replevin* of the cattle of his *villein* being diſtrained, though he had no property in them at the time of the diſtreſs made: for my LORD COKE (*b*) was of opinion, that the bringing *a replevin* is a claim in law, and that the property is veſted thereby in the plaintiff. So by navigating contrary to the act, the property is diveſted out of the former owners; and by this action now brought, it is veſted in the plaintiff, and therefore he may bring *detinue* for it.

So judgment was given for the plaintiff by THE WHOLE COURT without any farther argument (*c*).

(*a*) The caſe of the Biſhop of Coventry. 2. Roll. Abr. 202.

(*b*) Co Lit. 145 b. Fitz. N. B. 69 b.

(*c*) See the caſe of Wilkins and others v. Deſpard, Hilary 33 *Geo.* 3 in which it is determined on the authority of the above caſe, that if a ſhip be *ſeized* or forfeited under the Navigation Act 12. *Car.* 2 c. 18 by a governor of a foreign country belonging to *Great Britain*, the owner cannot maintain *trover* againſt the party ſeizing, although the latter do not proceed to condemnation; for by the forfeiture the property is diveſted out of the owner. 5. Term Rep. 312.

Wolfe

Wolfe *against* Davison. Case 95.

THE TOWN OF NEWCASTLE UPON TYNE, *to wit.* } BE it remembered, that heretofore, to wit, in *Easter Term* last past, before the lord the king at *Westminster*, came *Henry Wolfe*, by *Thomas Mathews* his attorney, and brought into the court of the said lord the king then there, his certain bill against *Benjamin Davison* merchant, late sheriff of the town aforesaid, in the custody of the marshal, &c. of a plea of debt; and there are pledges of prosecuting, to wit, *John Doe* and *Richard Roe*; which said bill follows in these words, to wit: TOWN OF NEWCASTLE UPON TYNE. *Henry Wolfe* complains of *Benjamin Davison* merchant, late sheriff of the town aforesaid, in the custody of the marshal of the *Marshalsea* of the said lord the king, before the king himself, of a plea that he render to him one hundred and eight pounds of lawful monies of *England*, which he owes to and unjustly detains from him; for that whereas the said *Henry* heretofore, to wit, in the Term of *Saint Michael*, in the second year of the reign of the lord *William* now king, and the lady *Mary* late queen of *England*, in the court of the said lord the king and lady the late queen, before HENRY POLLEXFEN, *Knight*, and his companions, then justices of the lord the king and lady the late queen, of the bench at *Westminster*, in the county of *Middlesex*, by the consideration of the same Court, recovered against one *George Dale*, gentleman, by the name of *George Dale*, late of *Gateshead* in the county of *Durham*, gentleman, as well a certain debt of one hundred and six pounds, as forty shillings, which to the same *Henry Wolfe*, in the same court, were adjudged for the damages which he had sustained by occasion of the detaining of that debt whereof the said *George* was convicted, as by the record and proceedings thereof in the said court of the lord the king of the bench aforesaid here, to wit, at *Westminster* aforesaid, remaining, manifestly appears: Therefore * the aforesaid *George*, for that he came not before the * [196] said justices of the lord the now king and lady the late queen of the bench, at *Westminster* aforesaid, to satisfy the said *Henry* of the debt and damages in form aforesaid recovered, whereupon he was as aforesaid convicted, was put in the *exigent*, and was outlawed in *London* by occasion thereof afterwards, to wit, on *Monday* next after the feast of *St. Agatha*, virgin, in the second year above said, at THE HUSTINGS of the Common Pleas, then held in THE GUILDHALL of the city of *London*, at the suit of the same *Henry*, was outlawed, as by the record and proceedings of the same outlawry, in the aforesaid court of the said lord the now king of the bench remaining more fully and manifestly appears: upon which certain OUTLAWRY against the aforesaid *George*, in form aforesaid promulgated, the same *Henry Wolfe* afterwards, to wit, on the thirteenth day of *April*, in the fourth year of the said lord the king and lady the late queen, for the better obtaining of the debt and damages aforesaid, sued out of the aforesaid court of the said lord the king and lady the late

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late queen of the bench, a certain writ of the ſaid lord the king and lady the late queen, of *capias utlagatum* againſt the aforeſaid *George* to the then ſheriff of the aforeſaid town of *Newcaſtle upon Tyne* directed, by which writ the ſaid lord the king and lady the late queen commanded the ſame ſheriff of the town of *Newcaſtle* aforeſaid, upon *Tyne* aforeſaid, that he ſhould take the aforeſaid *George*, at the ſuit of the ſame *Henry*, as before-mentioned, outlawed, whereſoever, in the bailiwick of the ſame ſheriff, as well within liberties as without, he might be found, and him ſafely keep, ſo that he might have his body before the juſtices of the ſaid lord the king and lady the late queen, at *Weſtminſter*, on the morrow of the Aſcenſion of Our Lord then next following, to do and receive what the ſame Court of the ſaid lord the king and lady the late queen ſhall conſider in that behalf, and that he have there that writ; which writ the ſame *Henry Wolfe* afterwards, and before the return of the ſame writ, to wit, on the fourth day of *May*, in the above-mentioned fourth year of the ſaid lord the king and lady the late queen, at the town of *Newcaſtle upon Tyne* aforeſaid, in the county of the ſame town, delivered to one *Joſeph Atkinſon*, then being ſheriff of the town aforeſaid, to execute in due form of law: by virtue of which certain writ, the aforeſaid *Joſeph Atkinſon* afterwards, and before the return of the ſame writ, to wit, on the ſeventh day of *May*, in the fourth year above-mentioned, then being ſheriff of the town aforeſaid, at the ſame time, in the ſame county town, took and arreſted the ſaid *George*, and him in his cuſtody, for the debt and damages aforeſaid, then and there had, and him, in the priſon of the ſaid lord the king and lady the late queen, then detained and kept in cuſtody until the going out of him the ſaid *Joſeph* from his office of ſheriff of the town aforeſaid. And the aforeſaid *George* ſo in the cuſtody of the aforeſaid *Joſeph Atkinſon*, in execution for the debt and damages aforeſaid, in form aforeſaid being, the ſame *Joſeph Atkinſon* afterwards, to wit, on the thirteenth * day of *October*, in the fourth year above-mentioned, from his office of ſheriff of the town aforeſaid, at the ſaid town of *Newcaſtle upon Tyne*, was in due manner removed; and afterwards, to wit, on the ſame thirteenth day of *October*, in the fourth year above-mentioned, the aforeſaid *Benjamin*, into the office of ſheriff of the ſame town, at the town of *Newcaſtle upon Tyne* aforeſaid, was duly elected and appointed. And the aforeſaid *Joſeph Atkinſon*, in his ſaid exit from his office of ſheriff of the town aforeſaid, in due manner delivered to the ſaid *Benjamin Davidſon*, and into his cuſtody, the aforeſaid *George* in priſon aforeſaid, ſo as before-mentioned detained in execution for the debt and damages aforeſaid, in form aforeſaid, that is to ſay, at the town of *Newcaſtle upon Tyne* aforeſaid; and the ſame *Benjamin*, as ſheriff of the town aforeſaid, the aforeſaid *George*, in priſon aforeſaid, under his cuſtody, then and there in execution for the debt and damages aforeſaid, received, had, and detained. And the ſaid *George*, ſo in cuſtody of him the ſaid *Benjamin*, ſheriff of the town aforeſaid, as before-mentioned, being in execution for the

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the debt and damages aforeſaid, in form aforeſaid being detained; the ſame *Benjamin*, afterwards, to wit, on the twentieth day of *Auguſt*, in the fifth year of the reign of the ſaid lord the king and lady the late queen, at the town of *Newcaſtle upon Tyne* aforeſaid (the ſame *Benjamin* then being ſheriff of the town aforeſaid), the aforeſaid *George*, from the priſon aforeſaid, out of the cuſtody of him the ſaid *Benjamin*, permitted to go at large and eſcape where he would, without the conſent and againſt the will of the ſame *Henry*, and the ſame *Henry Wolfe* of the debt and damages aforeſaid, or any part thereof being unſatisfied, whereby an action hath accrued to the ſame *Henry Wolfe*, to have of the aforeſaid *Benjamin* the aforeſaid one hundred and eight pounds; yet the ſaid *Benjamin*, though often required, &c. the aforeſaid one hundred and eight pounds to the ſame *Henry Wolfe* has not paid, but to pay the ſame to him hath hitherto wholly refuſed, and doth ſtill refuſe, to the damage of the ſaid *Henry Wolfe* of thirty pounds; and thereupon he brings ſuit, &c. Wolfe *againſt* Davison.

And now at this day, to wit, on *Friday* next after the morrow of the *Holy Trinity*, in this ſame Term, until which day the ſaid *Benjamin* had leave to imparl to the bill aforeſaid, and then to anſwer, &c. before the lord the king at *Weſtminſter* cometh as well the ſaid *Henry*, by his attorney aforeſaid, as the ſaid *Benjamin*, by *Nicholas Hardinge* his attorney. And the ſaid *Benjamin* defends the force and injury when, &c. and ſaith, that he doth not owe the ſaid *Henry* the ſaid one hundred and eight pounds, nor any part thereof, in manner and form as the ſaid *Henry* above thereof againſt him has declared: and of this he puts himſelf upon the country: and the ſaid *Henry* thereupon likewiſe, &c. THEREFORE let a jury thereof come before the lord the king at *Weſtminſter* on *Wedneſday* next after three weeks of the *Holy Trinity*, and who neither, &c. to take cognizance, &c. becauſe as well, &c. The ſame day is given to the parties aforeſaid there, &c. AFTERWARDS, the proceſs between the parties aforeſaid is thereupon of the * plea aforeſaid continued, by reſpiting the jury thereof between them, before the lord the king at *Weſtminſter*, until *Wedneſday* next after three weeks of *St. Michael* thence next following, unleſs the juſtices of the lord the king aſſigned to take the aſſizes in the county of the city of *Newcaſtle upon Tyne* ſhall before come on *Monday* the twenty-ſecond day of *July*, at the *Guildhall* of the city of *Newcaſtle upon Tyne*, in the county of the ſaid city, by form of the ſtatute, &c. for want of jurors, &c. At which day, before the lord the king at *Weſtminſter*, came the parties aforeſaid by their ſaid attornies, and the ſaid juſtices of the ſaid lord the king, before whom, &c. ſent here their record before them had in theſe words, to wit: AFTERWARDS, on the day and at the place within contained, before EDWARD NEVIL, *Knight*, one of the juſtices of the lord the king of his bench, and JOHN TURTON, *Knight*, one of the barons of the exchequer of the ſaid lord the king, juſtices of the ſaid lord the king aſſigned to take aſſizes

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Poſtea.

in

WOLFE *againſt* DAVISON.

in and for the county of the city of *Newcaſtle upon Tyne*, by form of the ſtatute, &c. comes as well the within-named *Henry Wolfe* as the within-written *Benjamin Davidſon*, by their attornies within contained. And the jurors of the jury, whereof mention is within made, being likewiſe called, come, who ſay upon their oath, that the aforeſaid *Henry* recovered againſt the within-named *George Dale*, the debt and damages in the declaration of him the ſaid *Henry*, as within written mentioned, in manner and form as by the ſaid declaration is ſuppoſed. And that the ſaid *George* thereupon, at the ſuit and proſecution of the ſaid *Henry*, was OUTLAWED in manner and form as in his declaration is ſpecified; and that the ſaid *Henry* thereupon was proſecuted by the writ of *capias utlagatum*, in the ſaid declaration mentioned, and the ſame to the within-named *Joſeph Atkinſon*, ſheriff of the city of *Newcaſtle upon Tyne* within-written delivered, who took and arreſted the ſaid *George*, by virtue of the ſaid writ, in manner and form as in the ſaid declaration is contained. And that the ſaid ſheriff of the aforeſaid city, the ſaid *George* in his cuſtody for and upon that writ had, and him in the gaol of the lord the king and late lady the queen there detained and kept in cuſtody, as by law required; and on his quitting his office of ſheriff of that town, in due manner delivered him to the aforeſaid *Benjamin* (he being ſheriff of the ſaid town, as in the ſaid declaration is contained), and in his cuſtody the aforeſaid *George*, in priſon aforeſaid, ſo as aforeſaid detained, by the cauſe aforeſaid; and alſo the ſaid *Benjamin*, as ſheriff of the town aforeſaid, the aforeſaid *George*, in the priſon aforeſaid, under his cuſtody, then and there received, had, and detained, as by law required. And the ſaid *George*, being ſo in priſon, under the cuſtody of the ſaid *Benjamin*, in form aforeſaid detained, the ſaid *Benjamin*, being ſheriff of the town as aforeſaid, the ſaid *George*, from the priſon aforeſaid, out of the cuſtody of the ſaid *Benjamin*, permitted to go at large where he would, and voluntarily permitted to eſcape, without the command of the ſaid *Henry*, he the ſaid *Henry* not being ſatisfied of the debt and damages, or any part thereof, as the ſaid *Henry*, in his declaration *aforeſaid, has ſet forth. But the jurors aforeſaid, upon their oath aforeſaid, further ſay, that the aforeſaid *Henry* made no petition other than in the ſaid declaration of him the ſaid *Henry*, to charge the aforeſaid *George* in execution for the debt and damages aforeſaid, by the ſaid *Henry* againſt the aforeſaid *George* in form aforeſaid recovered. And whether the aforeſaid *George*, ſo as aforeſaid to the proſecution of the ſaid *Henry*, by virtue of the writ of *capias utlagatum* aforeſaid, of and upon the judgment aforeſaid, ſo as aforeſaid taken and arreſted, beyond the year and a day after that judgment given, was or might be lawfully in execution at the ſuit of *Henry* for the damages aforeſaid, without any expreſs petition by him the ſaid *Henry*, to charge the ſaid *George* in execution in ſuch behalf, or not, the ſaid jurors are wholly ignorant, and therefore pray the advice of the Court here, &c. And if it ſhall ſeem to the Court here, that the aforeſaid *George*, ſo from proſecuting the aforeſaid *Henry*,

Quære.

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Henry, by virtue of the writ of *capias utlagatum* as aforeſaid, was legally taken and arreſted after the year and a day after judgment aforeſaid, was lawfully rendered, or might be in execution at the ſuit of him the ſaid *Henry*, for his debt and damages aforeſaid, without any expreſs petition by him the ſaid *Henry*, to charge the ſaid *George* in execution in that behalf made; then the jurors aforeſaid ſay, upon their oath aforeſaid, that the aforeſaid *Benjamin* owes the aforeſaid *Henry* the within-written one hundred and eight pounds, in form as the ſaid *Henry* within thereof hath declared: and then they aſſeſs the damages of him the ſaid *Henry* by occaſion of the detention of his debt, beſides his coſts and charges by him laid out about his ſuit in this behalf, to ſix pence, and for thoſe coſts and charges to forty ſhillings. But if it ſhall ſeem to the Court here, that the aforeſaid *George*, ſo by proſecuting the aforeſaid *Henry*, by virtue of the writ of *capias utlagatum* aforeſaid, ſo as aforeſaid taken and arreſted beyond the year and a day after judgment aforeſaid given, was not lawfully nor might be in execution at the ſuit of him the ſaid *Henry*, for his debt and damages aforeſaid, without expreſs petition by him the ſaid *Henry* to charge the ſaid *George* in execution in that behalf made; then the jurors aforeſaid, upon their oath aforeſaid, ſay, that the aforeſaid *Benjamin* does not owe the aforeſaid *Henry* the ſaid one hundred and eight pounds, nor any part thereof, as he the ſaid *Benjamin* within, in pleading thereupon, hath alledged. And becauſe the Court of the ſaid lord the king here is not yet adviſed what judgment to give of and upon the premiſſes, a day is thereof given to the parties aforeſaid until —— day next after ————, to hear their judgment of and upon the premiſes, for that the Court of the lord the king here is not yet adviſed thereof, &c.

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* Wolfe *againſt* Daviſon.

Caſe 96.

DEBT againſt the ſheriff for an eſcape, wherein the plaintiff ſets forth, that he had obtained a judgment in the court of common pleas againſt one *Dale* for one hundred and ſixty pounds and coſts, and the ſaid *Dale* not appearing to ſatisfy the ſaid judgment, was outlawed at the ſuit of the plaintiff, who thereupon ſued forth a *capias utlagatum* againſt him, directed to the then SHERIFF OF NEWCASTLE; and that the plaintiff, before the return of the ſaid writ, delivered it to one *Joſeph Atkinſon*, then ſheriff of the ſaid vill, who by virtue thereof arreſted the ſaid *Dale*, and detained him in priſon for the ſaid debt and damages till the ſaid *Atkinſon* was diſcharged from his office of ſheriff; that the defendant was afterwards under-ſheriff, and the ſaid *Dale* was delivered to him in cuſtody and in execution for the ſaid debt and damages; and that afterwards he ſuffered him to eſcape, the ſaid debt not being paid.

An action of debt lies againſt a ſheriff for ſuffering the voluntary eſcape of a priſoner in his cuſtody on a *capias utlagatum*, although he was not taken thereon until a *year and a day* after the judgment recovered, and there was no *expreſs prayer* to the Court to charge him in cuſtody.

S. C. Comb. 373. S. C. 1. Salk. 319. 5. Co 88, 89. Cro. Eliz. 706, 707. Cro. Jac. 361. 1. Rol. 810. 895. 1. Leon. 263. 1. Sid. 380. Poſt. 413. 416. Moor, 641. Fitzg. 265. 2. Stra. 901. 3. Com. Dig. "Eſcape," (B. 1.) (c.) 2. Bac. Abr. 235. 3. Bac. Abr. 761.

THE

WOLFE *againſt* DAVISON.

THE JURY, upon *nil debet* pleaded, find a ſpecial verdict, that the plaintiff had obtained a judgment againſt the ſaid *Dale* for the ſaid debt and damages: they find *the outlawry* and the *capias utlagatum*, and the arreſt upon it; and that the ſaid *Dale* was in the cuſtody of the defendant, then SHERIFF OF NEWCASTLE; and that he *voluntarily* ſuffered him to eſcape, the ſaid debt not being paid: Then they make a ſpecial concluſion, that if *Dale*, ſo taken a year and a day after the ſaid judgment recovered againſt him, could be in execution for the ſaid debt and damages, without any expreſs prayer to charge him in cuſtody, then they find for the plaintiff, &c.

IT WAS ARGUED *for the plaintiff*, that when a man is outlawed after judgment, the *capias utlagatum* is the proper proceſs, and then the plaintiff is at the end of his ſuit (*a*); and therefore there can be no default in him for not continuing his proceſs ſo as to have the priſoner brought into court, and then upon prayer of the defendant to be committed in execution at his ſuit. But admitting there were any laches in the plaintiff, or diſcontinuing the proceſs, yet if the party be in execution upon a *capias utlagatum* after judgment, he is in execution at the ſuit of the plaintiff, if he pleaſe (*b*); for though the outlawry be in the king's name, yet it is at the ſuit of the party and for his benefit: and the ſheriff
[201] muſt take notice of the * law, that he has him in cuſtody for that purpoſe "*unde convictus eſt*", for theſe are the words in the writ. If the defendant promiſe to pay a debt in conſideration of forbearance to proſecute a *capias utlagatum*, this is good in law (*c*), which proves that an outlawry is at the ſuit of the party; for ſuch a promiſe would be void to ſtay any proceſs at the ſuit of the king. In the *Fifth Report* (*d*) there is a caſe in point: *Layton* brought an action of debt againſt *Walwyn* and had judgment, and then he was outlawed, and taken upon the *capias utlagatum*, and eſcaped; whereupon the action was brought againſt *Garnon* the ſheriff; and it was reſolved (*e*), that at common law, if there be an outlawry after judgment in debt, and the party is taken upon the *capias*, there is an end of the plaintiff's ſuit, and if no laches be in him in continuing his proceſs, he ſhall be in execution at his ſuit if he will; for it is but reaſonable, that if the king ſhall have a benefit at the ſuit of the party, that the party ſhall have a benefit at a ſuit of the king. This caſe was adjudged in *Michaelmas Term*, in the fortieth year of the queen: and three years afterwards, in the ſame Term, POPHAM and FENNER, *Juſtices*, ſeemed to be of another opinion in an action of debt brought againſt an adminiſtrator upon a judgment had againſt the inteſtate (*f*), where the defendant pleaded, that the inteſtate was outlawed after the judg-

(*a*) Poſt. 202.

(*b*) 1. Sid. 280. Yelv. 19. Cro. Eliz. 632. 700. 850. Bridg. 7. Moor, 567. Hob. 57. 115.

(*c*) Jennings v. Harley, Cro. El. 909.

(*d*) 5. Co.

(*e*) Garnon's Caſe, 6. Co. 88. Cro. Eliz. 707. 1. Roll. Abr. 810. 895. Moor, 556.

(*f*) Shaw v. Cutteris, Cro. Eliz. 850. Moor, pl. 817.

ment,

ment, and taken upon the *capias*, and died in priſon; and upon demurrer to the plea thoſe TWO JUDGES held, that he was not in execution at the ſuit of the plaintiff without his expreſs prayer, and the Court award it: but GAWDY, *Juſtice*, was of a contrary opinion in that caſe. And according to his opinion and the reſolution in *Garnon's Caſe* there have been ſubſequent judgments in this very point, that when the party is taken upon the *capias utlagatum* he ſhall be in execution for the plaintiff if he will, although his body was never brought into court (*a*). This caſe came in queſtion again in this court in *Michaelmas Term*, in the twentieth year of *King Charles the Second*. It was debt upon an eſcape (*b*), wherein the plaintiff declared, that he recovered a judgment in the thirteenth year of that king, that the party was outlawed the fifteenth, and taken upon the *capias* the eighteenth year of the ſame king, and eſcaped; but he had not declared that he was in cuſtody, and prayed to be ſo at his ſuit, without which his impriſonment upon the *capias* did not make him in execution at his ſuit; for it may be he was not * contented with that, but intended to have another execution than his body. But the judgment in this caſe is not reported; only the opinion of POPHAM and FENNER, *Juſtices*, is there cited, that he ſhall be in execution at the ſuit of the party until he diſclaim it. If the party be taken upon a *capias pro fine*, he ſhall not be in execution after a year and a day at the ſuit of the party without prayer (*c*). But there is a difference between that and this caſe (*d*); for here it appears by verdict that the plaintiff ſued out the *capias* for the recovery of his debt, and it appears plainly that he intended to have the body of the party in cuſtody.

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THOSE WHO ARGUED *on the other ſide*, admitted, that if the eſcape had been within the year after he was taken by the *capias*, the plaintiff ſhould have an action of debt againſt the ſheriff for an eſcape; and the reaſon is, becauſe within the year the plaintiff might have brought a *capias ad ſatisfaciendum* againſt him, and charged him in cuſtody, but after the year he hath lapſed his time, and is driven to a *ſcire facias*, and therefore he ſhall not be then in execution at his ſuit without continuing the proceſs; he is in at the ſuit of the king to anſwer the contempt of his laws (*e*), and ſo it would have appeared if the ſheriff had returned a *cepi corpus* upon the *capias utlagatum*; therefore ſomething muſt appear upon record, to make him in execution at the ſuit of the party. When the defendant is taken upon the *capias utlagatum*, there is an end of the party's ſuit as to any other proceſs to be ſued by him (*f*), for he cannot have a *ſcire facias* or any other proceſs upon that judgment: and ſo it was at common law, if there had been any ſtay of proceſs after the year and day; therefore it ought to be

(*a*) Moor v. Reynell, Bridg. 6. Cro. Jac. 619. Latch. 200.
(*b*) Buckland v. Kelland, 1. Sid. 380.
(*c*) Bridgman, 7.
(*d*) Cro. Jac. 545. 620. 657.
(*e*) Dalton, 214.
(*f*) Ante, 201.

Continued.

WOLFE *againſt* DAVISON.

continued. It is affirmed, that he is in execution of the party *nolens volens*. It is true the ſheriff is bound to keep his priſoners in cuſtody, but not under equal penalties; for in ſome caſes an action on the caſe only will lie againſt him for an eſcape, and ſometimes an action of debt, where the plaintiff will recover both his debt and damages: but here an action on the caſe only will lie againſt the ſheriff. The reſolution in *Garnon's Caſe* will not come up to this; for the words are, If the defendant be taken upon the *capias utlagatum* at the king's ſuit, no laches being in the plaintiff in continuing his proceſs, he ſhould be in execution for the * plaintiff if he would; it is not ſaid with prayer or without prayer, neither is the year and day mentioned there. Neither is the caſe in *Bridgman* (*a*) an authority for the plaintiff; for that was an action of the caſe brought againſt the ſheriff for an eſcape of the party taken upon a *capias utlagatum*, which is an argument that they took the law to be otherwiſe at that time; for if the priſoner had been in execution at the ſuit of the party and eſcaped, they would have brought an action of debt, and not an action on the caſe. The like action on the caſe was brought againſt the ſheriff of *London* for an eſcape by *Froſt* (*b*), where the defendant was in cuſtody upon a *capias utlagatum* ſued after a year; and there it was agreed, that he could not be in execution at the ſuit of the party without prayer: but becauſe he was diſcharged from his impriſonment, without finding ſureties to ſatisfy the plaintiff according to the ſtatute (*c*), the plaintiff was prejudiced thereby, and therefore an action on the caſe would lie againſt the ſheriff.

Fitz. 265.

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But THE COURT were of opinion, that it was in vain for the plaintiff to ſue out an outlawry if he had no benefit thereby when the party was taken upon the *capias* without continuing the proceſs (*d*); for to what purpoſe ſhould he take out a *ſcire facias* after judgment, when the party cannot be found and nothing can be done upon it?

Therefore JUDGMENT was given for the plaintiff.

(*a*) Bridg. 6. 7. (*c*) 5. *Edw.* 3 c. 12.
(*b*) Froſt's Caſe, 5. Co. 89. 1 Leon. 263. (*d*) Cro. Eliz. 706 Gilb. C. P. 17.

Caſe 97.

The King *againſt* Cranfeild.

Qu. If an indictment at a *borough ſeſſions* need ſtate the authority by which the ſeſſions are held.

THE defendant was indicted at the ſeſſions held for the borough of *Hatfield* for ſpeaking theſe words, "The mayor and alder-"men of *Hatfield* are a pack of as great villains as any who rob "upon the highway, and we will take away their charter." He was found *guilty* of ſpeaking the words.

It was moved in arreſt of judgment, and ſeveral exceptions taken:

Comb. 13. 46. 65. 414. Carth. 14.

FIRST, This being tried at a ſeſſions of a particular borough, they ſhould have ſhewed what authority they had to hold the ſeſſions,

ſions, being in a private place, either by preſcription or charter, which was omitted.

THE KING *againſt* CRANFIELD.

To ſay of a corporation that "the "mayor and al- "dermen are "villains," is not indictable, unleſs applied to them in the execution of their offices.

SECONDLY, The words are not indictable, for they are of heat and paſſion, for which the defendant ought to be bound to his good behaviour, but not indicted. * In *Eaſter Term*, in the twenty-firſt year of *King Charles the Second* (*a*), one *Burford* was indicted in this court for theſe words ſpoken by him of the juſtices of the peace: "None of the juſtices of the peace underſtand the ſtatutes "of exciſe, except ſuch a one" [naming him], "and truly he "does neither well underſtand them, nor moſt of the parliament-"men who made them:" and this indictment was quaſhed.

Hob. 202. Moor, 819. 2. Keb. 494. 594. 1. Mod. 35. 2. Vent. 16. 2. Salk. 698. 6. Mod. 124. 1. Hawk. P. C. c. 21. ſ 13. 2. Term Rep. 199.

S. C. 12 Mod. 98.

THIRDLY, It is ſaid, *juratores pro domino rege præſentant*, it ſhould have been *pro domino rege et burgo prædict. præſentant* (*b*).

Indictment.

(*a*) Vent. 16. 2. Keb. 494.

(*b*) It is ſaid, S. C. 12. Mod. 98. that the defendant having ſlipped *the time* of moving in arreſt of judgment, prayed that he might ſubmit to a ſmall fine; and that the Court, not being ſatisfied that the words were indictable, becauſe no contempt of *Government*, they fined the defendant ſixpence. See alſo Rex *v.* Burford, 1. Vent. 16. Anonymous, 1. Vent. 10. Wrightſon's Caſe, 1. Salk. 698. Reg. *v.* Soley, 1. Salk. 698. Reg. *v.* Langley, 6. Mod. 124. Rex *v.* Legarley, 1. Hawk. P. C. ch. 21. ſ. 13.; but Rex *v.* Baker, 1. Mod. 35. ſeems *contra*. And NOTE, that now a motion may be made in arreſt of judgment on an indictment at any time before judgment pronounced.

The King *againſt* The Inhabitants of Liſley. Caſe 98.

If the pariſh of *A.* procure a female pariſhioner to be delivered of a baſtard child in the pariſh of *B.* an order of removal muſt ſtate that ſhe was a pariſhioner of the pariſh of *A.* at the time ſhe was delivered; but the Court will not quaſh an order for this defect *nine years* after it was made.

Ante, 150. 2. Bulſt. 345. 538. Blackerby's Caſes, p. 32. Carth. 397. 1. Bac. Abr. 329.

AN ORDER of ſettlement was made by two juſtices of peace to remove one *Elizabeth Sinkwell*, late of *Liſley*, ſingle-woman, and *William* her ſon, to the pariſh of *Morton-Hampſtead*; in which order the cauſe aſſigned was, becauſe that, by fraud and colluſion of the pariſh of *Liſley*, ſhe was delivered of the ſaid baſtard child in the pariſh of *Morton*.

FIRST, It was objected againſt this order to quaſh it, becauſe it did not appear that the mother was laſt legally ſettled in the pariſh of *Liſley*, or that ſhe was a pariſhioner there at the time ſhe was delivered at *Morton*: they only ſaid, "*Elizabeth Sinkwell*, late "of *Liſley*, ſingle-woman;" which is but a deſcription of the perſon and an addition of the place, and not a ſufficient allegation that ſhe was an inhabitant there, or that the child was ſettled there. Now it appears by the order, that the child was born at *Morton*, and the birth *primâ facie* makes a ſettlement in that place, nothing appearing in the order to make him an inhabitant elſewhere; and they cannot ſend him back to a place where he never was.

AS TO THIS OBJECTION, it was anſwered, that the order recites her to be "late of the pariſh of *Liſley*, ſingle-woman;" which is a ſufficient taking notice that ſhe was an inhabitant of that pariſh.

Salk. 121. Comb. 285.

THE KING against THE INHABITANTS OF LISLEY.

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SECONDLY, The reason of the removal is too general, *viz.* that she was delivered at *Morton* by fraud and collusion of the parish of *Lisley*.

AS TO THIS OBJECTION, it was said, that the justices are not bound to shew a reason why they make such an order to * remove her; and therefore if they assign a cause uncertainly, that shall not quash an order.

THE COURT inclined, that she ought to be alledged to be a "legal inhabitant in the parish of *Lisley*;" but would not quash the order, because it was nine years since it was made, *viz.* ever since *October* 1691.

Case 99.

Stanford *against* Chamberlaine.

Judgment in the court of king's bench cannot be signed until *four days* after the return of THE POSTEA.

S.C. 3. Salk. 25. Stiles, 442. 1. Sid. 36. 1. Lut. 11. 1. Salk. 77. 5. Com. Dig. "Pleader," (S. 47) 4. Burr. 2130.

EJECTMENT tried at the assizes, and a verdict for the plaintiff; the judgment ought not to be signed till the rules are out, which will be in *four days* after THE POSTEA returned, which happened, in this case, to be the sixth of *May*.

The plaintiff got his judgment signed on the very day, but it was not executed till after the sixth day; so that the defendant had time enough to bring a writ of error, or move any thing in arrest of judgment.

Yet THE COURT held, that the signing the judgment was irregular, it being before the day allowed by the rules of the court; and though it was taken out afterwards, that was not material.

Therefore the judgment was set aside, and the party had restitution (*a*).

(*a*) See 2. Lilly P. R. 423. Turner *v.* Barnesby, 1. Salk. 259. Doe *v.* Copeland, 2. Term Rep. 776.

Case 100.

Stephens *against* Squire.

If a person promise to pay a sum of money on a matter in which *he* and another are interested, the promise is good, although it be not reduced into writing.

2. Comb. 362. Comb. 2. 1. Salk. 28. Fitzg. 202. 2. Will. 94.

AN ACTION was brought against *Squire*, an attorney, and *two others*, for appearing for the plaintiff without a warrant. The cause was carried down to be tried at *the assizes*; and the defendant promised, that in consideration the plaintiff would not prosecute the action, that he would pay ten pounds and costs of suit.

And now an action was brought against the defendant upon this promise.

The question was, Whether this was a void promise by the statute 29. *Car.* 2. c. 3. of Frauds, being made in behalf of another, and not in writing? which statute enacts, "that no action "shall be brought to charge the defendant upon any special pro-

Bull. N. P. 281. 3. Burr. 1888. Esspinasse, 100. 2. Term Rep. 80.

"mise

" mile to anſwer for the debt, default, or miſcarriage of another " perſon, unleſs it be in writing."

Statute against Frauds.

But THE COURT were of opinion, that this cannot be ſaid to be a promiſe for another perſon, but for his own debt, and therefore not within this ſtatute (*a*).

(*a*) See Read *v.* Naſh, 1. Wilſ. 305. Fiſh *v.* Hutchinſon, 2. Wilſ. 94. Williams *v.* Leaper, 3 Burr. 1886.

* Richards *againſt* Hill.

Caſe 101.

A preſcription for a water-courſe running to a mill of which the plaintiff was ſeiſed "according to "*the cuſtom* of "the deanery of "ſuch a place," is good.

1. Sid. 298.
1. Lev. 190.
3. Lev. 133.
Carth 8.
1. Vent. 116.
N. Lutw. 29.
2. Sal. 562.
3. Mod. 48.
1. Show. 64.

AN ACTION ON THE CASE for diverting a water-courſe, in which the plaintiff declared, that he was *ſeiſed* of A WATER-MILL to him and his heirs, *ſecundum conſuetudinem decanatûs de Wolverhampton*, and ſo preſcribed for a water-courſe, &c. and that the defendant, intending to deprive him of the profit of the ſaid mill, did divert the water *ab antiquo curſu ſuo, per quod* he could not *molare* ſo faſt. There was a verdict for the plaintiff.

It was moved in arreſt of judgment, for that a copyholder cannot preſcribe in *a que eſtate*, and the Court could not take notice of any other eſtate the plaintiff had by this declaration: he ſhould have left out *ſecundum conſuetudinem decanatûs*; for, How can he be ſo ſeiſed without ſhewing what that cuſtom was?

This objection was over-ruled by THE COURT; for if the plaintiff was ſeiſed of an eſtate in *Borough Engliſh*, that had been a cuſtomary eſtate, becauſe he has it by the cuſtom of the manor, and in ſuch he may preſcribe.

On a declaration for diverting a water-courſe, it is ſurpluſage.

SECONDLY, He does not ſay, that he diverted the water from the mill, but "from its ancient courſe, *per quod, &c.*"

from a mill, an inſenſible *per quod* may be rejected; for as the action implies *a tort*, S. C. 1. Ld. Ray. 102. Lord Ray. 274. 293. 2. Wilſ. 313.

THIRDLY, The matter of his damages is laid inſenſibly; for the *git* of the action is, that he had a mill, out of which he had profit by grinding: now the word *molare* is inſenſible, and there is a proper word for grinding.

IT WAS HELD, as to the Third Objection, that the word "*molare*" being inſenſible, no damages could be given for it; and that the declaration had been good, if that part of it had been left out.

So the plaintiff had his judgment.

The King *againſt* Cowper.

Caſe 102.

To hire a boat for the purpoſe and intention of aſſiſting the king's enemies, is indictable at common law, as *miſpriſion of treaſon*.

INDICTMENT againſt the defendant, ſetting forth, that there was a war with LEWIS the *French King*: that during the continuance of that war the defendant hired a boat for twenty guineas,

THE KING against COOPER.

falso, malitioſe, et proditorie to aſſiſt the king's * enemies; that the boat ſo hired was brought to the ſhore in order to embark him and others, where he was taken. This matter was all found by verdict.

IT WAS MOVED *in arreſt of judgment*, that this was not an offence at common law; for then any act which ſhews an *intention* to do an unlawful thing will be a fault, as if a man hire a houſe with an intention to ſet up an unlawful trade (*a*). If the fact itſelf do not import any malicious deſign, then the finding of the jury will not alter the nature of it (*b*). If then there is nothing in this indictment which favours of an offence at common law, there is nothing prohibited by any ſtatute; for an intention to do an unlawful act is no crime by either law. In this caſe it is not ſo much as ſaid that the defendant endeavoured to go beyond ſea without the king's licence.

TO WHICH *it was anſwered*, that it is a crime to hire a boat to aſſiſt the king's enemies with an open and manifeſt attempt, by viſible acts, ſo to do (*c*). As if a man prepare a plate of the breadth of the broad ſeal, and by ſome plain act it ſhould appear that he deſigned to have counterfeited it, and is taken before his deſign was brought to perfection, although this do not amount to *high treaſon*, yet it is *a miſdemeanor*. It is an innocent act to lie in a hedge; but if it be with an intention to attempt the *queen conſort*, and that appear, it is a high crime. An intention to fight *a duel* is a miſdemeanor, and puniſhable by fine and impriſonment; and therefore if a challenge be ſent to another, though the parties never fight, yet both he who ſent and he who carried the challenge are puniſhable (*d*); according to the rule which is mentioned by my LORD COKE (*e*), "*Quando aliquid prohibetur, pro-*"*hibetur et omne per quod devenitur ad illud.*" The knowledge and concealment of treaſon is *miſpriſion* thereof, which is puniſhed by impriſonment during life, and forfeiting of the goods and profits of lands during life (*f*): now ſince the law inflicts ſo high a puniſhment upon the concealing a treaſon, it cannot be a queſtion but the bare intention to commit ſo high a crime is puniſhable likewiſe at common law. * It is no argument to ſay, that becauſe the defendant is not guilty of the higheſt offence, therefore he is guilty of none, for there are gradations in law which vary the offences of men, and proportion their puniſhments to their crimes.

1. Hale P. C. 371.
2. Hawk. P. C. c. 20. ſ. 59.
2. Hawk. P. C. c. 25. ſ. 145.
* [208]

CURIA. The very intention to commit treaſon is regarded in law; and any preparation to aſſiſt the king's enemies is a prejudice to the public, and therefore an offence at common law. Our actions

(*a*)
(*b*) 2. Show. 2.
(*c*) See Lord Preſton's Caſe, 4. State Trials, 406. Foſter's Crown Law, 196
(*d*) See the Caſe of Darcy *v.* Robinſon, 1. Keble, 694. and Darcy *v.* Collins, 2. Sid. 186.
(*e*) 3. Inſt. 138.
(*f*) 1. Hale P. C. 374. 652. 708.

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are governed by intentions, as qualified by them; ſo that in divers caſes the *intention* makes the act more or leſs criminal.

THE KING *againſt* COUPER.

Whereupon the judgment was affirmed, and the defendant fined one hundred marks, and committed till paid.

1. Lev. 146. 1. Sid. 230. 8. Mod. 92.

2. Hawk. P. C. ch. 25. ſ. 18. c. 65. ſ. 1. 1. Hale, 229. 429. 502. 532. 561.

Keat *againſt* Barker. Caſe 103.

AN ACTION was brought againſt the defendant for ſix years wages due to the plaintiff for his ſalary, being a ſteward. There was a verdict for the plaintiff at the aſſizes in *Berkſhire*, and only ſeven pounds damages given.

A plaintiff, ſince 2. *Jac.* 7. c. 4. cannot *diſcontinue* or be *nonſuited* after verdict, as he might at common law.

It was moved to *diſcontinue* the action, and that *the poſtea* might not be brought in.

Sed non allocatur; for after a *general verdict* the Court will not ſuffer the plaintiff to *diſcontinue* his action: it has been allowed after a *ſpecial verdict*, and an argument at bar (*a*); ſo likewiſe after a joining in demurrer, but not after arguing ſuch demurrer (*b*). But the ſtatute 2. *Hen.* 4. c. 7. ordains, "that after "verdict a plaintiff ſhall not be nonſuit;" which was otherwiſe at common law, for if he did not like his damages he might be nonſuit.

Cro. Jac. 35. 2. Roll. 173. Hutt. 36. Hard 152. Carth. 87. Comb. 170. 1. Bac. Abr. 525. 3. Bac. Abr. 681.

(*a*) Earl of Oxford *v.* Waterham, Cro. Car. 575.

(*b*) Lord Howard's Caſe, 1. Sid. 84. Robinſon *v.* Banbrough, 2. Sid. 113. But on ſpecial circumſtance and payment of coſts the Court will permit a diſcontinuance after demurrer argued. Jones *v.* Pope, 1. Sid. 305. S. C. 1. Saund. 37.

The King *againſt* The Inhabitants of Haſwell. Caſe 104.

THE STATUTE 14. *Car.* 2. c. 12. enacts, "That upon the "complaint of the churchwardens and overſeers of the poor "to any juſtice of the peace, within forty days after any perſon "cometh to ſettle himſelf in a tenement under the yearly value of "ten pounds, that two juſtices of peace, *Quorum unus*, of that "diviſion where ſuch perſon is likely to be chargeable to the pa-"riſh, by warrant may remove him to the pariſh where he was "laſt legally ſettled. PROVIDED, if he think himſelf aggrieved "by the judgment of the two juſtices, then he may appeal to the "* next quarter-ſeſſions, who are required to do juſtice according "to the merits of the caſe."

An order of ſeſſions *ſuperſeding* an order of two juſtices is not proper; but the Court will not quaſh it for this defect.

S. C. 2. Salk. 472. Poſt. 396. 416.

* [209]

Two juſtices, by warrant under their hands and ſeals, removed a poor man from the pariſh of *Woking* to *Haſwell*; thereupon an appeal is brought, and the ſeſſions order was, "that the warrant of "the two juſtices ſhould be *ſuperſeded*, and that the party ſhould "be carried back to *Woking*."

Ante, 167. Poſt. 396. 416.

Which order being removed by *certiorari*, exception was taken to it, that the juſtices in their ſeſſions had no power to *ſuperſede*

THE KING *against* INHABITANTS OF HASWELL. *Vide* 2. Salk. 472. 475. 477. 481. Carth. 469. Cases in Law and Equity, 103.

the warrant made by the two justices, because they had only power to *quash* or *affirm* it; and the word "*supersedeas*" is properly applicable to process before judgment, and not to the judgment itself: as if a man be in custody upon a writ, and then come a "*supersedeas*" to the writ, the prisoner is thereby discharged.

THE COURT were of opinion, that "*supersedeas*" was not a proper word in this case, but would not quash the order; but referred the matter to THE JUDGE OF ASSIZE.

Case 105.

Stokes *against* Oliver.

If the *vouchee* in a common recovery be a *feme covert*, and *under age*, and appear by *attorney*, instead of vouching in *person*, or by *guardian*, THE RECOVERY is erroneous, and may be reversed after *full age*; but a *scire facias*, according to *the practice* of the Court, must first be issued to the *tertenants*

* [210]

Hob. 197. Cro. Car. 307. 1. Roll. Abr. 731. 751, 752. 1. Sid. 321. Cro. Eliz. 569. 853. 2. Keb. 878. 3. Lev. 38. 2. Saund. 94. Comb. 63. 101. Carth. 122. 3. Com. Dig. (2. C. 2.) 4. Bac. Abr. 344. Fitzg. 1. 1. Burr. 361.

WRIT OF ERROR was brought to reverse a *common recovery*, and a *scire facias* against the *tertenants*, who are summoned and appear, and the sheriff has returned, that there is no other tenants.

The error assigned was, that *the vouchee* was a *feme couert*, and *under age*, and appeared by *attorney*.

If she had vouched *in person*, or *by guardian*, such a recovery should not be reversed for error after full age; because *a guardian* is made by the Court, who will not admit of any one but such who shall be answerable for the loss that the infant may sustain; but *an attorney* is made by the party, and an infant may not have discretion enough to choose an attorney who will be faithful to him (*a*). Therefore she appearing by attorney, and suffering a recovery, it shall be reversed for the same after the party comes of age, because it shall be tried by the country, Whether the warrant of attorney was made when under age, or not (*b*)? Neither can the husband, though of full age, make an attorney for himself and wife under age, to bind the inheritance of the wife; but she being the principal must be barred by her own act; and therefore she must appear in court in such manner as the law has directed by reason of her infancy. * It may be a question, Whether she can be barred by any act of her own, besides *a fine*; for she is not examined upon *a common recovery*? But this is not like the case of a fine levied by an infant, for that cannot be reversed but by the infant himself during his nonage (*c*): for it being the act of the Court to suffer such a one to levy a fine, the Court must therefore reform the same by inspection, which cannot be after full age.

For this reason, the recovery was reversed *nisi causa* the end of the Term.

(*a*) Holland *v.* Jackson, Bridgm 73. See S. C. under title Darcey *v.* Jackson, Palm. 123. 149. 224. 1. Roll. Rep. 73. 101. Moor. 622. Cro. Eliz. 739. 774.

(*b*) Raby *v.* Robinson, 1. Sid. 321. 1. Lev. 142. See Co. Lit. 380. 3. Bac. Abr. 142.

(*c*) 3. Lev. 36.

Haines Barley's Caſe.

Caſe 161.

EJECTMENT for lands in *Eſſex* tried at bar. The plaintiff claimed as heir at law to one *James Wade*, who had iſſue *William Wade*, and one daughter, who was now the *Lady Baſh*, and leſſor of the plaintiff. *William Wade* had likewiſe iſſue, one ſon and two daughters, who were all dead without iſſue.

In what caſe a *deed* may be produced in evidence without being proved. 6. Mod. 225. 248. and poſt. 385, 386.

The defendant made a title under a conveyance by leaſe and releaſe, dated the twenty-firſt of *May*, in the twenty-firſt year of *Charles the Second*, and made between *William Wade* of the one part, and *Haines Barley* and *John Turner* of the other part, by which the lands in queſtion were ſettled upon them and their heirs to the uſe of *William Wade* for life; ſo to his firſt, ſecond, and third ſon in tail-male; like remainder to *John*, *William*, *Haines*, and *Charles Barley*; remainder to *Haines Barley* the father; remainder to the right heirs of *William Wade* for ever.

The plaintiff then produced a deed made in the year 1633, between the ſaid *James Wade* of the one part, and *Charles Mordant* and his wife, and *John Mordant*, of the other part; which deed was atteſted by three witneſſes, two of which were proved to be dead, and the other could not be found: by which deed it appeared, that A FINE was levied, and the uſes thereof were declared to *James Wade* for life, remainder to his firſt ſon, and the heirs males of his body; ſo to his ſecond, third, and all other the ſons of the ſaid *James Wade* in tail-male; remainder to the iſſue females; then to the wife of *William Mordant* for life; remainder to *Charles Mordant* and his heirs for ever.

So that *William Wade* was tenant in tail, and could not bar the remainder without *a recovery*, which was then produced, and a deed to lead the uſes thereof, and * livery and ſeiſin indorſed, to make a tenant to the *præcipe*. But it happened that one *Frances Douglas* had at that time an *eſtate for life* in theſe lands as her jointure, but the jointure-deed could not be produced: but they proved, that in 1661 ſhe levied A FINE *ſur conceſſit*, and demiſed the ſame to one *Woolly* for ninety-nine years, if ſhe lived ſo long, for ſecuring the payment of four hundred pounds; which mortgage was afterwards aſſigned to one *Monteatz*, and both of them joined in a leaſe to *William Wade* for ſixty years, if the ſaid *Frances* lived ſo long, under the yearly rent of two hundred pounds.

* [211]

Parol teſtimony of a mortgage made under a jointure, is evidence to ſhew an eſtate for life *in eſſe* at the time of *a recovery* ſuffered by tenant in tail, if the *jointure deed* be loſt. 4. Com. Dig. "Evidence," (A. 4.).

This was admitted to be a ſufficient proof of the jointure.

And to the like purpoſe they produced depoſitions in chancery, which they offered to be read, the bill and anſwer being taken off the file, and loſt.

The depoſitions taken in chancery may be read in evidence, if the *bill* and *anſwer* be proved to be loſt. Poſt. 386. 1. Mod. 4. 2. Vern. 471. 591. Skin. 584. 673. 4. Com. Dig. "Evidence" (C. 4.). 1. Atk. 445. 2. Bac. Abr. 308. 1. Salk. 278. 281, 286. 2. Salk. 555. 6. Mod. 225. 248. Stra. 920. Cowp. 594.

The entry of bill and answer in the Six Clerks book is evidence of their having been filed. Hob. 112. Bull. N. P. 240.

But they offered to give an account that it was once filed, which was by the *Six Clerks book*; and produced an inrolment of the decree, which mentioned both bill and answer.

And THE COURT was of opinion, that the jointure-deed being lost, they might supply the proof by memorials thereof, since it was impossible to shew the deed itself.

So the plaintiff had a verdict for so much as was in jointure.

Case 107.

Martin *against* Monke.

If a *nisi prius* roll state th issue to be before "*the* "*lord the king* "*and lady the* "*queen*," when in fact *the queen* at the time was dead; or if it mis-state *the day* on which the assizes were held, it cannot be amended although the *plea roll* be right. Post. 399. 3. Salk. 50. Carth. 506. 6. Mod. 164. 268. Bar. K. B. 31. 2. Ld. Ray. 1518. * [212] 2. Stra. 843. 1. Bac. Abr. 100.

MOTION to amend a fault in the *jurata* after verdict found for the plaintiff at the assizes in *Sussex*:

It was "*nomina juratorum*" between the plaintiff and defendant, *de placito, &c. ponitur in respectu coram dom. reg. et dom. regina apud Westm.' &c. nisi justiciar', &c. ad assisas capiend. assign. prius die, &c. vicesimo die Martii.*

It should have been *coram domino rege* only.

And the day of *nisi prius* was mistaken; for the assizes were the twenty-third of *March*.

The record was right, by which he prayed it to be amended; and for authorities, the case of *Merchant v. Reason* (*a*) was cited, where the record was *de placito debiti*, upon the statute 2. *Edw.* 6. c. 13. for not setting out tithes, and the *jurata* in the record of *nisi prius* was *de placito transgressionis*; and this was amended after a verdict for the plaintiff, because it was only a misprision of the clerk. So where it was upon a *nisi prius*, that challenge was made to the sheriff after issue joined (*b*), and *venire facias* awarded to *the coroner*; but the record was, that the *venire facias* was awarded unto *the sheriff*, which was not entered at the time * of the trial, but is usually made up afterwards in time of vacation; yet this being only a misprision of the clerk, shall be amended by the record.

BUT ON THE OTHER SIDE it was insisted, that this was not amendable, for the Justices of *nisi prius* had no authority to take such a record. The misprision of a clerk in a writ of *nisi prius* is amendable by the statute of 8. *Hen.* 6. c. 12. but then it must have sufficient matter expressed or implied to give authority to the Judge to try the issue, for without that writ he cannot try the cause; and therefore in debt (*c*) against the defendant "husbandman," the question was, Whether he was so *die impetrationis brevis?* And the writ of *nisi prius*, by which the cause was tried, takes notice that the defendant was a husbandman; but the material part of the issue was left out, *viz.* Whether he was so

(*a*) Le Merchant *v.* Rawson, Cro. Car. 274. 1. Roll. Ab. 202. pl. 7.

(*b*) Musgrave *v.* Wharton, Cro. Jac. 354. See also Fowls *v.* Child, Cro. Jac. 396. and Aquila Weeks' Case, Cro. Car. 203. Palm. 378. Godb. 328.

(*c*) Blackmore's case, 8. Co. 161.

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die impetrationis brevis, or not? There was a verdict for the plaintiff; and though the record was right, the Court would not suffer the writ of *nisi prius* to be amended (*a*), because by that writ the Judges had no power to try the issue in the record. In all the cases where the record of *nisi prius* has been amended by the roll, the writ of *distringas* has been right; which, together with the *nisi prius*, is a sufficient authority for the Judge to try the cause (*b*); but here the *distringas* was wrong, for it was "*Gulielmus et Maria, Dei gratia, &c.*" which could not be; for the queen died in *December*, and the cause was tried the twenty-third of *March* following.

MARTIN *against* MONKS.

For which reason THE COURT held this not amendable.

* [213]

Thwaites and his Wife *against* Ashfield.

Case 108.

In an action of debt on a lease for rent at two pounds thirteen shillings a-year, if the plaintiff declare for one hundred pounds due for so many years arrear, and it appear that a mistake has been made, and that he has declared for eight pounds too much, yet, after verdict, if he release the eight pounds, he shall have judgment for the residue.

S. C. Comb. 365. S. C. 12. Mod. 93. Hob. 89. Cro. Car. 104. 137. Hutton, 96. Latch. 175. 2. Keb 576. Cro. Eliz. 22. Yelv. 5. 1. Saund. 282. (C. 84.).

AN ACTION OF DEBT was brought for rent upon a lease of a house to be made by three Judges, pursuant to the act for erecting a court of judicature for determination of differences concerning houses built in *London*, whose judgment and decrees by the said act are made a record and entered in a book, and kept by *the lord mayor*, with the records of the city; in which lease the rent of two pounds thirteen shillings was reserved *per annum*, and the plaintiff declared for a hundred pounds, due for so many years; and it appeared upon the record, in casting up the sums, that he had declared for eight pounds too much.

* The defendant pleaded "*nul tiel record*," and there was a judgment for the plaintiff, that he had produced the record.

It was moved in arrest of judgment, that this being in *debt for rent*, and an entire demand of a sum certain, the plaintiff could never have judgment, because it appeared, upon his own shewing, that he had not any cause of action for the whole. If it had been an action of *covenant* to pay a yearly rent, and the breach had been assigned for non-payment of a certain sum at such days, and the whole had not amounted to so much as demanded, that might be well enough (*c*); because in *covenant* damages are to be recovered according to the evidence, and not as the party hath summed it up. But my LORD COKE was of opinion, that upon *debt for rent* it was otherwise, because in that action you recover the sum demanded. In all actions of debt, the plaintiff is privy to the sum in demand, and therefore ought, at his peril, to declare for the true debt; and the reason why he ought to demand the very sum, is, because if he should do otherwise and recover, he might afterwards

Cro. Jac. 128. 499. 569. 2. Lev. 4. 5. Com. Dig. Pleader" (C. 84.).

(*a*) Year Book, 11. *Hen.* 6. pl. 11.
(*b*) 8. Co. 166. Carth. 506. Salk. 48. 88. Post. 399. 1. Bac. Abr. 100, 101.
(*c*) Ferrar *v.* Snelling, 1. Roll. Rep. 335. S. C. 3. Bulst. 145.

bring

THWAITES AND HIS WIFE *againſt* ASHFIELD.

bring an action for the true ſum, and ſo the defendant would be doubly charged; and therefore in debt upon a bond, if the plaintiff declare for leſs than due, he ſhall never have judgment (*a*).

To which it was anſwered, that though the action was for an entire ſum, yet it was made up of ſeveral rents to be paid at divers days, and ſo muſt be taken as ſeveral demands for the rent; as where debt was brought upon three bonds, and upon *oyer*, the defendant pleaded condition performed, and there was a verdict for the plaintiff. Now though the plaintiff could not have judgment as found by the verdict, yet releaſing damages and coſts, he had judgment for the two firſt bonds (*b*). So where the defendant avowed for five pounds rent, and a *nomine pœnæ* for non-payment at the day, but laid no actual demand of the rent, the avowry was held naught as to the *nomine pœnæ*, becauſe it could not be forfeited without a demand of the rent; yet he had judgment for the return of the cattle, becauſe he had a lawful cauſe to diſtrein for rent arrear, and the demands were ſeveral (*c*). The like judgment was given where a plaintiff brought an action of debt for forty pounds upon the ſtatute of *Uſury*, and declared, that the defendant *corruptivè* did lend forty pounds *contra formam ſtatuti*, and ſuch a day did alſo lend twenty pounds *contra formam*, &c. * [214] but * did not ſay *corruptivè*; upon *non debet* pleaded, the plaintiff had a verdict; and it was moved in arreſt of judgment, that the declaration was not good for the laſt twenty pounds, becauſe it wanted the word *corruptivè*; but the Court gave judgment for what the plaintiff had well declared; and *nil capiat per billam* was entered as to the reſidue (*d*). So it would have been if it had been upon demurrer. But there is a later book which ſeems to warrant this caſe, in which the caſe of *Dupper v. Baſkervill* (*e*) is reported, which was an action of debt for arrear of rent, in which the plaintiff declared for more rent, and for a longer time than upon his own ſhewing appeared to be due to him; which the defendant perceiving, pleaded *nil detinet*, but concluded his plea with *hoc paratus eſt verificare*, and not to *the country* as he ought to do, on purpoſe that the plaintiff might demur; which was done accordingly, and had judgment againſt the defendant for the ill concluſion of his plea: but the plaintiff afterwards finding his miſtake, he entered a *remittitur* for ſo much in the declaration more than was due to him, and took his judgment for the reſt; and thereupon the defendant brought a writ of error in the exchequer chamber, and this very exception was taken to the declaration, and all the caſes before-mentioned were cited, to prove that the plaintiff might releaſe the ſurpluſage before judgment, which if he had neglected, the Court ought to give judgment for ſo much as was well demanded in the declaration. And this

(*a*) Pemberton *v.* Shelton, 2. Roll. Rep. 54. 4. Bac. Abr. 26, 27. Symmons *v.* Knox, 3. Term Rep 65.

(*b*) Andrew *v.* Delahay, Hob. 178.

(*c*) Howell *v.* Sambech, Hob. 133.

(*d*) Woody's caſe, Cro. Jac. 104.

(*e*) 1. Saund. 284. S. C. 2. Keb. 576.

ſeems

ſeems agreeable to the fourth rule in *Godfrey*'s *Caſe* (*a*), That if a man bring an action for ſeveral things, and upon his own ſhewing it appear that he cannot have an action for one thing, the writ ſhall not abate for the whole, but he ſhall recover for what the action will lie, and be barred for the reſt. And laſtly, for a caſe in point, that of *Barber v. Pomeroy* (*b*) was cited, which was debt for rent as this is; and the plaintiff had declared for more than was due upon his ſhewing, and upon *nil debet* pleaded the plaintiff had judgment, and damages and coſts; and it was moved in arreſt of judgment, for the plaintiff had made an entire demand for rent to a certain ſum, when it appeared that he could not have an action for ſo much; yet the Court held that he might releaſe the ſurplus and damages, and take judgment for the reſidue. * It is true, my LORD HALE ſaid, that judgment was never given in this caſe; but my LORD ROLLE cites *the Number-Roll*, and *the Term* when it was entered. If this had been pleaded in *abatement*, the action had been diſcharged; but the Court *ex officio* are not bound to abate it, eſpecially ſince the defendant had waived that matter, and pleaded *nul tiel record*, and inſiſted upon the right.

THWAITES AND HIS WIFE *againſt* ASHFIELD.

1. Saund. 285. Pal. 524. Yelv. 71.

* [215]

THE COURT was of opinion, that if an action of debt be brought upon ſeveral bonds, and it appear that one is not due, the plaintiff may recover the reſt. So here the plaintiff demands a hundred pounds upon ſeveral arrears of rent, and it appears that the whole is not due, but falls ſhort ten pounds, he may recover for the reſidue.

1. Saund. 284. 1. Sid. 417. Comb. 365.

(*a*) 11. Co. 45. Yelv. 71. (*b*) 1. Roll. Abr. 785. Stiles, 175.

Memorandum.

Caſe 109.

IN the vacation after this Term, died SIR WILLIAM GREGORY, *Knight*, one of the Judges of the court of king's bench: he was ſucceeded in his office by SIR JOHN TURTON, *Knight*, who was removed out of the exchequer; and BLENCOWE, *Serjeant*, was made one of the barons of the exchequer in his place.

1. Ld. Ray. 86.

TRINITY TERM,

The Eighth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.* } *Juſtices.*
Sir Samuel Eyre, *Knt.*
Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

Caſe 110.

* DORSET, ſſ. } DOMINUS REX *mandavit vic. com. præd. breve ſuum clauſum in hæc verba, ſſ.* WILLIELMUS TERTIUS *Dei gra. Angl. Scot. Franc. et Hibern. rex, fidei defenſor, &c. vic.* DORS. *ſalutem. Præcipimus tibi ſicut alias tibi præcipimus quod capias* BONHAM STRANGEWAIES *ar. et* JOHANNEM DOE *ſi invent. fuerint in balliva tua et eos ſalvo cuſtod. ita quod habeas corpora eorum coram nobis apud* WESTM. *die Mercurii prox. poſt tres ſep. Sanctæ Trinit. ad reſponden.* ROBERTO FOREST *et* SUSANNÆ *ux. ejus de placito tranſgr. ac etiam bil. ipſius* ROBERTI *et* SUSANNÆ *verſus ipſum* BONHAM *pro cent. libr. ſecundum conſ. cur. noſtr. coram nob. exiſten. et habeas ibi tunc hoc breve. Teſte* JOHAN. HOLT *mil. apud* WESTM. *ſexto die Maii anno regni regis ſeptimi.*

HOLT & COLMAN.

Executio iſtius brevis patet in quadam ſchedula huic brevi annex.

WILLIELMUS BENNET *Ar. Vic.*

Virtute iſtius brevis mihi direct. et huic ſchedulæ annex. quoddam warrant. meum ſub manu mea et ſigillo officii mei vic. com. mei infraſcript. feci et direxi THOMÆ MEREST *al.* MERRICE JOHANNI HINTON *et* EDWARDO GRIMSTED *ballivis meis in hac parte ad arreſtan. et capien.* BONHAM STRANGEWAIES *ar. in dict. brevi nominat. ſecund. exigen. ejuſd. brevis; qui quidem*

THO.

THO. MEREST *al.* MERRICE *et* JOHANNES HINTON *ballivi mei virtute warrant. mei præd. decimo die Maii anno regni dom. noſtri* WILLIELMI TERTII *infraſcript. ſeptimo apud* PORTLAND *in com. meo* DORSET *ceper. et arreſtaver. præd.* BONHAM STRANGEWAIES *et ipſum in cuſtod. ſua adtunc et ibidem habuer. et detin. et ſic in cuſtod. ſua adtunc et ibid. exiſten. poſtea ſcilicet eiſdem die et anno quidam* THOMAS GILBERT *de* PORTLAND *præd. yeoman,* WILIELMUS ELLIOT *de ead. yeoman,* JOHANNES OYLES *de eadem yeoman,* ROBERTUS OYLES *de ead. yeoman,* CHRISTOPHORUS WITT *de eadem yeoman,* EDWARDUS GLOVER *de eadem yeoman,* JOHANNES FARR *de eadem yeoman,* JOHAN. WHITE *de eadem yeoman, et* JOHANNES PETERS *de eadem yeoman, adtunc* [217] * *et ibidem vi et armis, &c.* VIZ. *baculis, gladiis, ſclopis,* ANGLICE " piſtols," *et cultellis, adtunc et ibidem riotoſe, routoſe, et illicite in ipſos* THO. MEREST *alias* MERRICE *ballivos meos inſult. fecer. et ipſos verberaver. vulneraver. et maletractaver. ita quod de vitis eorum deſperabatur. et præfat.* BONHAM STRANGWAIES *a dictis ballivis extra cuſtod. ſuos contra voluntates eorundem ballivorum adtunc et ibidem vi et armis, &c. ceper. et reſcuſſer. et ipſum* BONHAM STRANGEWAIES *ad largium ire poſuer. et permiſer. ac idem* BONHAM STRANGEWAIES *ſeipſum extra cuſtod. ballivorum contra volunt. eorum ballivorum adtunc et ibidem ſimiliter reſcuſſerunt et reſcuſſit contra pacem dicti domini regis nunc coron. et dignitat. ſuas, &c. Et poſtea idem* BONHAM STRANGEWAIES *ante retorn. brevis præd. non eſt invent. in balliva mea.*

W. BENNET, *Ar. Vic.*

Caſe III.

Bonham Strangewaie's Caſe.

If the return of a reſcue be, that *A. B.* was in the cuſtody of *three* of the bailiffs, and that the defendants " *vi et* " *armis* on *balli-* " *vos meos*" made an aſſault, and " *a cuſtodia balli-* " *vorum meorum,* " *&c.*" the ſaid *A.B.* did reſcue, is bad.

6. Mod. 141. 173. 210. 2. Mod. 114. 1. Bac. Abr. 403, 404.

THE SHERIFF OF DORSETSHIRE returned, that by virtue of a writ to him directed, he made a warrant to three bailiffs to arreſt *Bonham Strangewaies, Eſq.* which ſaid bailiffs did take him, and had him in their cuſtody; and that one *Gilbert* and others, *vi et armis,* on *Thomas Merrice* " *ballivos meos inſultum fecerunt, &c.* and the ſaid defendant " *adtunc et ibidem a cuſtodia ballivorum* " *meorum et contra voluntates ſuas,*" did RESCUE.

Exception was taken to this return, for that the reſcous was alledged to be *ex cuſtodiâ ballivorum*; whereas it ſhould have been *ex cuſtodiâ vicecomitis,* becauſe the ſheriff, and not the bailiff, is the officer of this court, and the proceſs is directed to him. In the thirty-ninth year of *Henry the Sixth* (*a*), a writ was directed to the coroners of *Surrey* to arreſt a man, and one of them made a return in his own name alone, that he had made a warrant to his ſervant to arreſt the defendant named in the writ, who took him, and that afterwards he was reſcued from his ſaid ſervant, when it ſhould have been from himſelf; for the arreſt by the ſervant is the arreſt made by the maſter, and by conſequence the reſcous muſt be from him. And ever ſince that caſe this has always been allowed to be a

(*a*) Year Book 39. *Hen.* 6. pl. 42. Bro. Abr. "Reſcous," pl. 15.

good

good exception to a return of reſcous, where the party is indicted for it, and reſcued out of the cuſtody of the ſheriff's bailiff *(a)*. But it may be otherwiſe if he had been reſcued from a bailiff of *a particular liberty*, becauſe he is an officer known in law *(b)*. * In the nineteenth year of *Charles the Second* the like exception was taken to a return of a reſcous: and TWISDEN, *Juſtice*, affirmed in this court, that it had been ruled both ways: but KELYNGE, *Chief Juſtice*, was of another opinion, and that it had been uſually quaſhed for this reaſon. It is true, if an action on the caſe be brought againſt the party for a reſcous, there the plaintiff may declare *ſecundum veritatem facti*, that the defendant reſcued the priſoner out of the cuſtody of the ſheriff's bailiff or deputy: but if he be indicted for it, then it muſt be *ſecundum veritatem in lege, viz.* that the priſoner was reſcued out of the cuſtody of the ſheriff himſelf.

BONHAM STRANGEWAIE'S CASE.

* [218]

8. Mod. 357.

But becauſe it was returned, that the party was in cuſtody of three of the bailiffs, and the defendants *inſultum fecerunt* upon one, which the ſheriff called *ballivos meos*; for that reaſon it was quaſhed.

(*a*) Cro. Car. 212. 2. Roll. Rep. 78. Hetley, 145. (*b*) Litt. Rep. 236. March, 92. Stiles, 417. 1. Sid. 332.

The King and Queen *againſt* Thorp and Others.

Caſe 112.

Hilary Term, 6. Will. & Mary, Roll

SOUTHAMPTON, *to wit.* } BE IT REMEMBERED, that EDWARD WARD, *Knight*, attorney general of our preſent lord the king and lady the queen, who for our ſaid preſent ſovereign lord the king and lady the queen in this behalf proſecutes in his proper perſon, comes here into court of our ſaid preſent ſovereign lord the king and lady the queen, before the KING and QUEEN themſelves, at *Weſtminſter*, on *Tueſday* next after the octave of *Saint Hilary* in this ſame Term, and for our ſaid preſent ſovereign lord the king and lady the queen, gives the Court here to underſtand and be informed, that *Henry Thorp*, late of *Reading*, in the county of *Berks*, gentleman; *Urſula Holton*, late of *London*, widow; *Thomas Deer*, late of *Winton*, in the county of *Southampton*, yeoman; *Anne Deer*, wife of the aforeſaid *Thomas*; *Elizabeth Streper*, wife of *William Streper*, late of *Reading*, in the county of *Berks*, gentleman, otherwiſe called *Elizabeth Streper*, late of *Reading* aforeſaid, in the county aforeſaid, widow, otherwiſe called *Elizabeth Streper*, late of the ſame, ſpinſter; and *Francis Harguile*, late of *Reading*, in the county of *Berks*, yeoman; being perſons, and each of them being a perſon, of evil name, fame, and diſhoneſt converſation, and diſregarding the laws of this realm of *England*, on the tenth day of *October*, in the fifth year of the reign of the *Lord William* and the *Lady Mary*, of *England*, *Scotland*, *France*, king and queen, defenders of the faith, &c. and on divers other days

AN INFORMATION by *the attorney general* againſt ſeveral perſons for conſpiring to marry a young gentleman of fortune with a woman of inferior character and condition.

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days and times, as well before as after, at *Winton*, in the county of *Southampton*, wickedly, deceitfully, and unlawfully, conſpiring, contriving, and intending, one *Edward Mitchell*, gentleman, being within the age of eighteen years, and the ſon and heir of one *Robert Mitchell* (*a*), of *Petersfield*, in the county of *Southampton*, eſquire, out of the cuſtody, counſel, and government of the ſaid *Robert Mitchell*, without notice, and againſt the will of the aforeſaid *Robert Mitchell*, to take and ſeduce, and with one *Cornelia Holton*, a perſon of bad name, fame, and diſhoneſt converſation, and alſo of no fortune or ſubſtance, the ſame *Edward Mitchell* in matrimony to join, and in purſuance of the ſaid conſpiracy, contrivance, and diabolical intention, the ſaid *Henry Thorp*, *Urſula Holton*, *Thomas Deer*, *Anne Deer*, *Elizabeth Streper*, and *Francis Harguile* afterwards, to wit, on the aforeſaid tenth day of *October*, in the fifth year of the lord the now king and the lady the now queen abovementioned, at *Winton* aforeſaid, in the county aforeſaid, wickedly, unjuſtly, and unlawfully, confederated and aſſembled themſelves; and that the ſame *Henry Thorp*, *Urſula Holton*, *Thomas Deer*, *Anne Deer*, *Elizabeth Streper*, and *Francis Harguile*, afterwards, to wit, on the ſame day and year aforeſaid, at *Winton* aforeſaid, in the county of *Southampton* aforeſaid, in execution of THE CONSPIRACY aforeſaid ſo as beforementioned between them, falſely, maliciouſly, unjuſtly, and deceitfully had, by divers falſe, malicious, and deceitful ways, *did inveigle* and perſuade, and each of them the aforeſaid *Henry Thorp*, *Urſula Holton*, *Thomas Deer*, *Anne Deer*, *Elizabeth Streper*, and *Francis Harguile*, then and there did deceive and perſuade the ſaid *Edward Mitchell* the ſaid *Robert Mitchell* his kind and tender father to hold in hatred and contempt, and alſo to relinquiſh and abdicate the ſchool at *Winton*, in the county of *Southampton* aforeſaid, where the ſaid *Edward Mitchell* to be inſtructed and educated in ſound literature and good morals, was by his ſaid father before that time placed, and alſo the houſe of him *Henry Thorp*, being at *Winton*, in the county of *Southampton* aforeſaid, to frequent. And the ſame *Henry Thorp*, *&c.* by divers iniquitous and falſe ſolicitations then and there did perſuade and unlawfully compel, and each of them the aforeſaid *Henry Thorp*, *&c.* did perſuade and compel, the ſaid *Edward Mitchell* divers very ſtrong and intoxicating waters and liquors to drink, and the aforeſaid *Edward Mitchell* then and there made and cauſed to be made, and each of them made and cauſed to be made, drunk. And alſo with the aforeſaid *Cornelia Holton* then and there, and on the aforeſaid other days and times afterwards, in company, the aforeſaid *Edward Mitchell* deceitfully and craftily introduced and procured, and by divers flattering, falſe, and deceitful ſpeeches and words, unlawfully and deceitfully then and there perſuaded and ſolicited the aforeſaid *Edward Mitchell* the ſaid *Cornelia Holton* to join in matrimony. And the ſaid ATTORNEY GENERAL of our ſaid lord the king and lady the queen, for the ſaid lord the king and lady the

(*a*) Doth not ſay that *Mr. Mitchell* was a man of an eſtate.

queen,

queen, gives the court here further to underſtand and be informed, that the ſame *Henry Thorp*, *Urſula Holton*, *Thomas Deer*, *Anne Deer*, *Elizabeth Streper*, and *Francis Harguile*, in the further proſecution of their machination and intention aforeſaid, afterwards, to wit, on the ſixteenth day of *October*, in the fifth year of the reign of the lord the now king and lady the now queen, at *Winton* aforeſaid, in the county of *Southampton* aforeſaid, unlawfully, falſely, and wickedly, and by divers falſe aſſeverations and promiſes, ſolicited, incited, and procured the ſame *Edward Mitchell* from his ſchool aforeſaid frequently to ſtay, and thencefrom to depart, againſt the will and without notice or conſent of the aforeſaid *Robert Mitchell* his father; and alſo the ſame *Edward Mitchell*, without notice, and againſt the will of the ſaid *Robert Mitchell*, then and there received, maintained, and kept, with intention to deceive and perſuade the ſame *Edward Mitchell* in matrimony with the aforeſaid *Cornelia Holton* to join: and that the aforeſaid *Cornelia Holton* afterwards, to wit, on the twentieth day of *October*, in the aforeſaid year of the reign of the ſaid lord the now king and lady the now queen abovementioned, at *Watlington*, in the county of *Oxford*, by the abetment and aforeſaid falſe means of the ſaid *Henry Thorp*, *&c.* contracted matrimony with the ſaid *Edward Mitchell*; to the great damage of the ſaid *Edward Mitchell*; to the miſery, diſconſolation, and ſorrow, of the aforeſaid *Robert Mitchell*, the ſaid father to the ſaid *Edward Mitchell*, and all his friends; in manifeſt contempt of the laws of this realm of *England*, in evil example of all others in like caſe offending, and againſt the peace of our ſaid lord the now king and lady the now queen, their crown and dignity, &c. Whereupon the ſaid ATTORNEY GENERAL of our ſaid lord the now king and lady the now queen for the ſaid lord the king and lady the queen prays the conſideration of the court here in the premiſes, and that due proceſs of law may be awarded againſt them the aforeſaid *Henry Thorp*, *&c.* in this behalf, to make them anſwer to our ſaid lord the now king and lady the now queen of and in the premiſes aforeſaid, &c.

And THE JURORS, &c. ſay, that the defendants *Urſula Holton*, *Thomas Deer*, *Anne Deer*, the wife of the ſaid *Thomas*, *Elizabeth Streper*, the wife of *William Streper*, and *Francis Harguile*, are NOT GUILTY; and that the defendant *Thorp*, as to all things in the information contained, except compelling the ſaid *Edward Mitchell*, in the information aforeſaid mentioned, to drink the ſtrong waters and liquors in the information aforeſaid, is GUILTY; and as to the compelling the ſaid *Edward Mitchell* to drink the waters and liquors aforeſaid the jurors aforeſaid ſay, that the defendant *Thorp* IS NOT GUILTY.

Case 113.

* The King and Queen *againſt* Thorp and Others.

A father has the guardianſhip of his ſon and heir apparent until he attains the age of twenty-one years; and therefore the Court will grant an *information* for maliciouſly conſpiring to inveigle a young man, heir to a conſiderable eſtate, and under the age of eighteen, out of the cuſtody and government of his father, and reducing him into a diſgraceful marriage.

S. C. Carth. 384.
S. C. Comb. 456.
S. C. Holt, 333.
S. C. Comy. 27.
1. Salk. 14, 15. 21.
2. Salk. 456.
1. Mod. 4.
2. Mod. 306.
1. Lev 275.
1. Lutw. 122.
1. Vent. 12. 18. 25.
1. Sid. 424.
6. Mod. 261, &c.
1. Burr. 606.
Andr. 310.
Stra. 1107. 1162.
1. Bac. Abr. 62.
3. Bac. Abr. 573.
2. Hawk. P. C. ch. 26. ſ. 8.

INFORMATION againſt *Thorp* and others, ſetting forth, that they and each of them, being perſons of ill fame, did, on the tenth of *October*, in the fifth year of *William and Mary*, and at divers other times, as well before as after, wickedly, unlawfully, and deceitfully, conſpire, at *Wincheſter*, to take one *Edward Mitchell*, being under age of eighteen years, and the only ſon and heir of *Robert Mitchell*, *Eſq.* and to carry him out of the cuſtody, counſel, and government of his ſaid father, without his notice, and againſt his will, and to marry him to *Cornelia Holton*, a perſon of ill name, and of no fortune; that the defendants did unlawfully aſſemble themſelves together to accompliſh the ſaid conſpiracy and wicked intentions; that they, and every one of them, by divers falſe, malicious, and deceitful inſinuations, did falſely, unjuſtly, maliciouſly, and deceitfully perſuade the ſaid *Edward Mitchell* to hate his father, and to leave *Wincheſter School*, where he was placed by his father for his learning, and to frequent the houſe of the defendant *Thorp* at *Winton*, and did perſuade the ſaid *Edward Mitchell*, and by divers falſe allurements did compel him to be drunk with ſtrong waters and other liquors, and that they introduced *Cornelia Holton* into his company, and did unlawfully and deceitfully, by falſe ſpeeches, perſuade and ſolicit him to be married to her; that in further proſecution of their intentions the defendants, and every of them, on the ſixteenth of *October*, in the fifth of *William and Mary*, did, by divers falſe aſſurances and promiſes, ſolicit, invite, and procure the ſaid *Edward Mitchell* to leave the ſaid ſchool, againſt the will and without the notice or conſent of his father, and did receive, maintain, and keep him, with an intent to perſuade him to marry the ſaid *Cornelia Holton*; that the ſaid *Cornelia Holton* did contract matrimony with the ſaid *Edward Mitchell*, on the twentieth day of *October*, in the fifth year aforeſaid, at *Watlington*, in the county of *Oxford*, by the abetting and falſe means of the ſaid defendants, to the damage of the ſaid father, &c.

Upon *not guilty* pleaded, this information was tried at the aſſizes at *Wincheſter*, and all the defendants were found *not guilty*, except *Thorp*, and he was acquitted of compelling the * ſaid *Mitchell* to be drunk, and found *guilty* of all the reſt in the information.

It was moved in arreſt of judgment; and the exceptions taken were,

*[222] FIRST, That this information does not contain any matter of miſdemeanor.

SECONDLY, It is laid by way of *conſpiracy*, and the defendant *Thorp* being only found *guilty*, there can be no judgment againſt him, becauſe one cannot conſpire.

THIRDLY, Here is a *miſ-trial*; for the conſpiracy being laid in *Hampſhire*, and the marriage being in *Oxfordſhire*, it ought not to be

be tried by a jury of *Hampſhire* alone, but by a jury of both counties.

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As to THE FIRST POINT, Here is no miſdemeanor laid in this information: for by the laws of *England* a young man of the age of fourteen years and upwards may diſpoſe of himſelf in marriage; and it is no offence to perſuade him to marry, though it be to a woman of mean fortune, and without the conſent of the father; for he cannot have an action for the loſs of the marriage of his eldeſt ſon and heir, except where he be taken by force and married: for an action will not lie for any ſolicitation, becauſe people may differ in opinion; one man may think it a convenient match, and another may be of a contrary opinion; therefore the plaintiff ought to ſhew, that the defendant did ſolicit or procure his ſon to be married by ſome unlawful means. The information is too general; he ſhould have ſhewed a particular offence. Beſides, it does not appear that either the young man or his father had any eſtate real or perſonal: it is ſaid, he was ſon and heir of *Robert Mitchell*, but *non conſtat* that he had any eſtate.

Cro. Eliz. 55. 1. Leon. pl. 63. Jones, 411, pl. 4. Style, 216.

As to THE SECOND POINT, The intent of this information was to make theſe defendants guilty of *conſpiracy*. Every act which is laid to be done by them is in order to accompliſh a joint intention; for it is laid, that all the defendants did wickedly, &c. conſpire, endeavour, and intend to get the ſon out of the government of his father, and marry him, &c. which is a joint act. If it * had not been laid by way of *conſpiracy*, it ſhould have been *quilibet eorum* did endeavour and intend, &c. ſo that all being acquitted but *Thorp*, the verdict has falſified the information; for one cannot conſpire.

1. Roll Abr. 111. Cro. Eliz. 701. Cro. Jac. 194. Cro. Car. 239. 3. Mod 220. 1 Hawk P. C. c. 72. ſ. 8.

* [223]

As to THE THIRD POINT, This information conſiſts of two parts; the perſuading the young man to marry the woman, which is laid to be in *Hampſhire*; and the execution of their deſign, which is marriage itſelf, and that is laid to be in *Oxfordſhire*; which being two facts in different counties, ought not to be tried by a jury of one county alone, but both ought to join. If a man *forge* a deed in one county, and publiſh it in another, the trial ſhall be by a jury of both counties; for the writing, as well as the publication of that writing, is material (*a*). So in *replevin*, the defendant ſaid, that the *locus in quo*, &c. contained four acres in *Coningham*, which was his freehold, and ſo juſtifies the taking *damage feaſant*; the plaintiff in bar to the avowry pleaded, that the *locus in quo*, &c. was parcel of a greater common field in *Coningham*, and that he *prædicto tempore*, &c. was ſeiſed in fee of a meſſuage, and fourteen acres of meadow and paſture thereunto belonging, and preſcribed to have common for his farmers and tenants of the ſaid meſſuage for his cattle *levant et couchant tanquam ad tenementum præd. ſpectan.*; and upon this an iſſue was taken, and a verdict

If, in an information for a conſpiracy, the *conſpiring* be laid in one county, and the *execution* of the deſign in another county, it may be tried in either county.

2. Roll. Abr. 601. 607. Heb. 330. 2 Brown. 272. Skin. 43. 1. Sid. 405. Comb. 75. 115. 1. Salk. 174. 2. Salk. 669. 2. Lev. 121. 2. Term Rep. 238. 241. 3. Term Rep. 387. 652.

(*a*) Year Book 4. *Hen.* 6. pl 4. 2. Roll. Abr. 607.

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for the plaintiff; but the judgment was ſtayed, becauſe it was not ſet forth in the bar where the meſſuage and land was to which the common did belong *(a)*; which ought to be, becauſe the *venire facias* muſt be where the houſe and land were, and not where the common was, for that may be either appurtenant or appendant to land in another county.

E contra. As to THE FIRST OBJECTION it was anſwered, that there is a plain offence ſet forth in this information; and this appears upon the very reading of it.

SECONDLY, It is not only an information grounded upon a conſpiracy, but it is laid by way of aggravation in the beginning; and when the particular facts are ſet forth, then it is alledged, that *quilibet eorum* did wickedly perſuade, &c. In *Eaſter Term*, in the twentieth year of *Charles the Second*, an action was brought in this court *(b)*, grounded upon *a tort*, wherein the plaintiff declared againſt the defendant, that *per conſpirationem inter eos habitam*, and to oppreſs and impoveriſh the plaintiff, they cauſed a * [224] * plaint to be levied againſt him in the ſheriff's court of *London*, and the plaintiff to be arreſted, &c. and upon not guilty pleaded, they were all acquitted but one, as in this caſe, and the like exception was then taken in arreſt of judgment; but the Court were of opinion, that notwithſtanding theſe words "*per conſpirationem*, "*&c.*" it was an action on the caſe, the ſubſtance whereof was the illegal arreſting the plaintiff, and not the conſpiracy, and that being found by the jury, the plaintiff had his judgment *(c)*. That which is lawful for one man to do, may be made unlawful to be done by conſpiracies: for inſtance, it is lawful for any brewer to brew ſmall-beer, but if ſeveral ſhall conſpire together to brew no ſtrong but all ſmall beer, on purpoſe to defraud the king of his duties, ſuch conſpiracy is unlawful. And ſo it was held in *Sir Samuel Sterling's Caſe (d)*, who, becauſe he could not farm the exciſe, did confederate with ſeveral brewers to brew ſmall-beer only.

THIRDLY, It is true, if a deed be forged in one county and publiſhed in another, theſe are ſeveral and diſtinct offences, and therefore ſhall be tried by different juries *(e)*. So in the caſe of a common in one county, by reaſon of lands in another, if an action of treſpaſs be brought for feeding in the common, and the defendant juſtifies by reaſon of a preſcription as belonging to lands in another county, there, if iſſues be taken upon the preſcription, it muſt be tried in the county where the land lies, and not where the common is *(f)*. But in an indictment the counties are never joined.

1. Salk. 169.

(a) Broxelme *v.* Thorold, Yelv. 177.

(b) Skinner *v.* Gunton, 1. Saund. 228.

(c) NOTE, MORTON was of another opinion; and SAUNDERS himſelf was alſo of opinion, that the plaintiff ſhould not have judgment, becauſe by theſe words "*per conſpirationem*" it ſeemed to be a formed action of conſpiracy, and the declaration was falſified by the verdict, one of the defendants being only found guilty. *Vide* 1. Saund. 228, 229. NOTE *to former edition.*

(d) 1. Sid. 174. 1. Lev. 125.

(e) See French *v.* Kent, Raym. 33.

(f) Co. Lit. 154.

CURIA.

THE KING AND QUEEN *against* THORP AND OTHERS. Carth. 386.

CURIA. It is a misfortune that the marriage is good (*a*); it is true, it is lawful to marry, but if it be obtained by unlawful means, it is an offence (*b*). The queſtion is, Whether a father has not the guardianſhip of his ſon and heir apparent till the age of twenty-one years (*c*), as he had when there was tenure in *knight's ſervice*? For the father has ſuch an original right inveſted in him by nature, that he might have an action of treſpaſs againſt the lord, *quare filium et hæredem ſuum rapuit.*

Adjournatur (*d*).

(*a*) But ſee the Marriage Act, 26. *Geo.* 3. c. 30.

(*b*)

(*c*) Co Lit. 84.

(*d*) This caſe was moved again in Eaſter Term, 9. *Will.* 3. and Holt, *Chief Juſtice*, ſaid, that the father is the guardian to his ſon until the age of twenty-one years, by our law which is founded upon the laws of nations; but he has only remedy in caſe of his eldeſt ſon. S. C. Comy. 27. And THE COURT were of opinion, that it was a great crime and worthy to be puniſhed, if they could any way come at it, S. C. Comb. 458. But no judgment was given, S. C. Carth. 386. 2. Hawk. P. C. c. 26. ſ. 1. But in the caſe of Rex *v.* Twiſelden, it was agreed by all the Judges, that this is an offence at common law for which an *information* will lie, 1. Sid. 387. S. C. 1. Lev. 257. See alſo Rex *v.* Series and Others, Cro. Car. 557. in point; Lord Grey's Caſe, Skin. 81. Ray. 259. 2. Hawk. P. C. c. 26 ſ. 1. 1. Black. 386. and R. *v.* Blacket and Robinſon, 7. Mod. 39.

* [225]

* Newnham *againſt* Lunn.

Caſe 114.

AN ACTION of debt was brought by a *common informer* upon the ſtatute 23. *Hen.* 6. c. 10. againſt the defendant, for taking five ſhillings and ſixpence for *an arreſt* on a bond.

Qu. If debt by a *common informer*, on the ſtatute 23. *Hen.* 6. c. 10. for penalty for extortion on an arreſt, muſt be brought in the *proper county*?

S. C. Comb. 370. Poſt. 425. 1. Salk. 373. Sellon's Prac. 133.

The ſtatute enacts, "That the ſheriff ſhall have twenty-pence, "and the bailiff who makes the arreſt four-pence, and that the "ſheriff or bailiff who doth contrary, ſhall pay treble damages to "the party grieved, and forfeit the ſum of forty pounds, one "moiety to the king, and the other to the party that will ſue: "and that the juſtices of aſſize in their ſeſſions, juſtices of the one "bench and of the other, and juſtices of peace in their county, "may determine the ſaid offences."

There was a verdict for the plaintiff.

It was moved in arreſt of judgment, for by the ſtatute of 21. *Jac.* 1. c. 4. "all offences committed againſt any penal ſtatute, "for which any *common informer* may have a popular action, bill, "plaint, ſuit, or information, ſhall be proſecuted in the counties "where the offence was committed, and not elſewhere;" and ſo it was adjudged in this court, in the caſe of *Nicholes v. Cockerill* (*a*); for if *debt* will lie *here* by a common informer upon a penal law, then the ſtatute of 21. *Jac.* 1. c. 4. will be wholly avoided (*b*).

(*a*) Eaſter Term 27. *Car.* 2.

(*b*) See Shulman *v.* Henbert, 4. Term Rep. 109.

Newnham against Lunn.

The action was brought in *London*, and the offence was committed in *Buckinghamshire*.

Adjournatur.

Case 115. Jones *against* Bodinham.

In trespass, if the defendant justify under an impossible writ, and there is a verdict for the plaintiff, the judgment shall be entered on *the confession* and not upon *the verdict*.

IN trespass for taking cattle, the defendant pleads, that in *Hilary Term*, in the sixth year of *William and Mary*, a writ issued out of this court, reciting that such a one was outlawed; whereupon the sheriff was commanded to levy the goods into the king's hands, &c.; that this writ was delivered to the sheriff, who made a warrant directed to an officer to levy the goods, &c. who, by virtue of that warrant, took the cattle upon part of the lands contained in the outlawry. The plaintiff replies, that he did not take the goods upon those lands. Upon which issue was joined, and there was a verdict for the plaintiff.

S. C. post. 310.

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S. C. 1. Salk. 173.
S. C. 1. Ld. Ray. 90.
S. C. Comb. 379.
S. C. Carth. 370.
S. C. Holt, 349.
S. C. Comy. 8.
Cro. Jac. 251.
Cro. Eliz. 214.
Ld. Ray. 924.
Stra. 873.
1. Com. Dig. "Amendment" (O.).
Comy. 548.
1. Burr. 299.
Cro. Eliz. 227. 214.
Moor, 867.
Hob. 326.
Ray. 458.
1. Sid. 218.
8. Mod. 356.

And now it was moved in arrest of judgment, that the justification of the defendant consists in three parts, *a writ*, * and *a warrant*, and *taking the cattle* upon the land: now there could be no such writ, for there was no such Term as the sixth of *William and Mary*, for THE QUEEN died before.

The question therefore was, Whether this ill pleading of *the writ* had made the whole plea void? If so, then it was said, that issue being taken upon a void plea, which contained no matter of bar, the verdict therein was void also.

IT WAS SAID *for the plaintiff*, that issue was not taken upon the bad part of the plea, but upon the taking of the cattle upon the land. Now the defendant had admitted the taking, but avoided it, by saying that it was in such a place, which *primâ facie* is a good defence and justification; and though the issue be joined upon a thing not material, yet, after verdict, it is aided by the statute 32. *Hen.* 8. c. 30. of *feofails*, which helps mispleading, insufficient pleading, and misjoining of issue after an issue tried.

But IT WAS SAID *for the defendant*, that this plea contained no matter of bar, because there could be no such writ under which he justified; and if there be no bar, there can be no issue, and so not aided by the statute. If the defendant plead a proper plea, though it be not full, it is aided by the statute; and therefore in all cases where issue is taken upon an insufficient plea in bar, and which would have been ill upon demurrer, it is held, that, after a verdict, the defendant shall not take advantage thereof *(a)*; but here is no plea at all, for it is merely void. Therefore in trespass *(c)*, where the defendant pleaded *a concord* in bar, but not with *satisfaction*, issue being taken upon *the concord*, the plea was ill for want of *satisfaction* being pleaded; yet it was not wholly void,

(a) 4. Bac. Abr. 89.
(b) Bartholomew v. Dighton, Cro. Eliz. 778. 1. Roll. Abr. 225. Moor, 696.

because

becauſe *concord* was a good plea to ſuch an action, though not ſo fully pleaded as it might. So in debt upon a ſingle bill, payment without an acquittance is an ill plea (*a*); yet it is a proper plea to ſuch an action, and the iſſue being found for the plaintiff, he ſhall have judgment. So in debt for rent upon a leaſe for years (*b*), entry is a proper plea, but not good without ſaying that he did expel and hold him out; yet if iſſue be taken upon *non dimiſit*, and found for the defendant, he ſhall have judgment. But here is no matter of bar in this plea, and therefore an iſſue joined upon it is void (*c*). * To this purpoſe there was a caſe in this court (*d*), in treſpaſs for taking his cattle; the defendant juſtified for an amerciament in a court leet, for which he preſcribed to diſtrain the cattle of any which came within the manor, and were in the poſſeſſion of any amerced; and ſays, that they were in the poſſeſſion of ſuch a perſon, who was amerced, &c.; and iſſue was taken that they were not in his poſſeſſion, and there was a verdict for the plaintiff, and a writ of error brought, and the error aſſigned, that the iſſue was joined upon a thing merely void; for the preſcription being void, there is no matter of bar to the action; and the judgment was traverſed. The plaintiff cannot have judgment upon this verdict for the damages found, becauſe iſſue is joined upon a void plea; and therefore the Court may award a judgment againſt him (*e*), as by *nil dicit*, and ſo the plaintiff may have a new writ of enquiry of damages. There was a caſe in *Michaelmas Term*, in the firſt year of *Charles the Firſt* (*f*), in this court, which was debt upon a bond againſt an adminiſtrator, dated the twentieth of *May*, in the twentieth of *James the Firſt*; the action was commenced in *Hilary Term*, in the laſt year of *King James*, and entered in *Eaſter Term*, in the firſt of *Charles the Firſt*, and then the defendant pleaded a judgment upon another bond, dated *anno quarto regis nunc*, which was impoſſible, it being the firſt year of the king, *ultra quod*, &c.; the plaintiff replies, that recovery was by fraud; and iſſue thereupon, which was found for the plaintiff; and the defendant moved in arreſt of judgment, for that it was impoſſible in the firſt of the king that a recovery ſhould be in the fifth year, and therefore no judgment could be given upon this iſſue; yet the plaintiff had judgment. But this is no authority againſt this caſe, becauſe that was debt againſt an adminiſtrator who had pleaded a falſe plea, which was found againſt him, and had not confeſſed aſſets, but only to ſatisfy that judgment.

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CURIA. When iſſue is joined upon an ill plea, and a verdict for the plaintiff, yet he ſhall have judgment; for the defendant ſhall not take advantage, after a verdict, of his ill pleading. As in ejectment (*g*) the defendant pleaded, that one *Ridler* was ſeiſed in

(*a*)

(*b*) Reynolds *v.* Buckle, Hob. 326. 2. Roll. Abr. 709.

(*c*)

(*d*) Loveſaſs *v.* Grimſden, Cro. Eliz. 227.

(*e*) Lacy *v.* Reynolds, Cro. Eliz. 214. 2. Roll. Abr. 99.

(*f*) Knight *v.* Harvey, Cro. Car. 25.

(*g*) Johns *v.* Ridler, Cro. Jac.

JONES *against* BODINHAM.

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fee, and made a leaſe to him for five years, by virtue whereof he was poſſeſſed, until the leſſor of the plaintiff entered and diſſeiſed him, and made a leaſe to the plaintiff; that thereupon he re-entered and ejected him, *prout ei bene licuit*; the plaintiff replies, that his leſſor was ſeiſed in fee, and leaſed * to him, and the defendant ouſted him, ABSQUE HOC that he did diſſeiſe the defendant; upon which iſſue was joined, and found for the plaintiff. Now this was a very vain iſſue, for it is impoſſible that a leſſee for years ſhould be diſſeiſed; but the defendant ſhall not take advantage of ſuch an ill plea, but having confeſſed a leaſe made to the plaintiff, and it being true he did not diſſeiſe the defendant, the judgment is well given, for it ſtands with the law, that the plaintiff did not diſſeiſe him; but if there had been a verdict for the defendant, he could not have judgment, for then the jury would have found, againſt the law, that a termor was diſſeiſed (*a*).

(*a*) The verdict was ſet aſide, and a writ of enquiry awarded, becauſe the poſtea being mony retd the jury had no power to enquire of damages, and judgment was entered for the plaintiff on the confeſſion. S. C. 1. Salk. 173. S. C. 1. Ld. Ray. 90. S. C. Comb. 380. See Lacy v. Reynolds, Cro. Eliz. 214.; Price v. Pitchampton, 1. Ld. Ray. 390.; Rex v. Philip, 1. Burr. 202.; Craven v. Hanley, Comy. Rep. 548.

Caſe 116.

Hartop *againſt* Holt.

A writ of error in THE EXCHEQUER, as well on the judgment as in the awarding execution.

S. C. 3. Ld. Ray. 73.

WILLIAM THE THIRD, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, &c. To our right truſty and well-beloved *Sir John Holt*, *Knt.* our chief juſtice, aſſigned to hold pleas in our court before us, greeting: Whereas in the ſtatute ſet forth in the parliament of the lady *Elizabeth*, late queen of *England*, holden at *Weſtminſter* the twenty-third day of *November* in the 27th year of her reign, it was enacted by the authority of the ſame parliament, that where any judgment ſhould, at any time thereafter, be given in the court of king's bench in any ſuit or action of debt, detinue, covenant, account, action upon the caſe, *ejectione firmæ*, or treſpaſs, firſt commenced, or to be firſt commenced there (other than ſuch only where the ſaid queen's majeſty ſhould be party), the party, plaintiff or defendant, againſt whom ſuch judgment ſhould be given, might at his election ſue forth out of the court of chancery a ſpecial writ of error, to be deviſed in the ſaid court of chancery, directed to the chief juſtice of the ſaid court of the king's-bench for the time being, commanding him to cauſe the ſaid record, and all things concerning the ſaid judgment, to be brought before the juſtices of the common-bench and the barons of the exchequer into the exchequer chamber, there to be examined by the ſaid juſtices of the common bench and barons aforeſaid; which ſaid juſtices of the common bench, and ſuch barons of the exchequer as are of the degree of the coif, or ſix of them at the leaſt, by virtue of that ſtatute ſhould thereupon have full power and authority to

to examine all ſuch errors as ſhould be aſſigned or found in or upon any ſuch judgment, and thereupon to reverſe or affirm the ſaid judgment, as the law ſhould require, other than for errors to be aſſigned or found for or concerning the juriſdiction of the ſaid court of king's bench, or for any want of form in any writ, return, plaint, bill, declaration, or other pleading, proceſs, verdict, or proceeding whatſoever; and after that the judgment ſhould be affirmed or reverſed, the record, and all things concerning the ſame, ſhould be brought back into the ſaid court of king's bench, that ſuch further proceeding ſhould be had thereupon, as well for execution as otherwiſe ſhould appertain, as in the ſaid ſtatute, among other things, more fully appears; and foraſmuch as in the record and judgment, and alſo in the giving of judgment in a plaint which was in our court before us by bill, between *Thomas Hartop* and *Richard Holt*, otherwiſe called *Richard Holt* of *London*, mercer, as well of a debt of 335l. which the ſaid *Thomas* demanded of the ſaid *Richard*, as of 43s. for his damages which he ſuſtained by occaſion of the detaining of that debt, and alſo in the awarding of execution of the judgment aforeſaid, upon our writ of *ſcire facias* iſſuing out of our ſame court for the ſaid *Thomas* againſt the ſaid *Richard* of the debt and damages aforeſaid, manifeſt error hath intervened, as by the complaint of the ſaid *Richard* we are informed; which ſaid error in no manner concerneth us, or the juriſdiction of our ſaid court of king's bench, or the want of form in any writ, return, plaint, bill, declaration, or other pleading, proceſs, verdict or proceeding whatſoever, as we are informed; we willing that the ſaid error, if any be, be corrected, according to the form of the ſtatute aforeſaid, and full and ſpeedy juſtice done to the ſaid parties in this behalf, do command you, that if judgment be given, and an award of execution of the ſame judgment upon our writ of *ſcire facias* be adjudged, that as well the record and proceedings aforeſaid, as all things concerning the ſame, before the ſaid juſtices of the common bench and barons of our exchequer aforeſaid, in the exchequer chamber aforeſaid, on *Saturday*, to wit, the ſecond day of *May* next coming, you cauſe to be brought before our ſaid juſtices and barons, that they having examined the record and proceſs aforeſaid, may cauſe farther to be done thereupon that which of right and according to the law and cuſtom of our kingdom of *England* ſhall be meet to be done. Witneſs Ourſelf at *Weſtminſter* the twelfth day of *February* in the ſeventh year of our reign.

Hartop *againſt* Holt.

Caſe 117.

If a writ of error in the exchequer chamber be brought

THE PLAINTIFF had judgment in an action of debt in this court. A writ of error was brought in the exchequer chamber and the judgment affirmed. Afterwards a *ſcire facias* was on a judgment in *debt*, obtained in the king's bench, and, after judgment affirmed, a *ſcire facias* to have execution be ſued out, a WRIT OF ERROR will not lie in the exchequer chamber upon an award of execution on a judgment on this *ſcire facias*; for the 27. *Eliz.* c. 8. intends only a writ of error on the *merits* of a caſe.—S. C. 1. Salk. 263. S. C. Comb. 393. S. C. Holt, 271. S. C. 12. Mod. 105. S. C. 1. Ld. Ray. 97. S. C. 3. Ld. Ray. 73. Skin. 590. Comb. 12. 264. 8. Mod. 122. 1. 7. 353. Fitz. 173.

brought

Error for against Holt.

brought *quare executionem non*, and an award of execution thereupon; then a writ of error was brought *tam in redditione judicii quàm in adjudicatione executionis*, &c. which was allowed by the clerk of the errors; pending which writ, the plaintiff took out execution.

And now a motion was made to set it aside, because it was sued forth when there was a writ of error depending, which is a *superfedeas*.

* [230]

Comb. 19. Cro. Car. 286. 1. Roll. Rep. 264. 3. Vent. 38. 5. Com. Dig. "Pleader" (3. B. 12.) 2. Bac. Abr. 209. 4. Bac. Abr. 410. Dougl. 352.

* The question was, Whether a *writ of error* would lie in THE EXCHEQUER CHAMBER, upon an award of an execution of a judgment upon a *scire facias* now after an affirmance of the first judgment?

It was admitted, that the statute gives a writ of error upon judgments in seven actions only, of which a *scire facias* is none; but it being for execution of a judgment in an action of debt, it is within the meaning and equity of the act (*a*), which was to relieve as well against an erroneous execution as an erroneous judgment; for that may be affirmed, and yet the execution reversed (*b*). This was the opinion of my LORD HALE (*c*); and the reason by him given was, that a judgment in a *scire facias*, grounded upon one of those actions mentioned in the statute, is in effect a part of the first suit, and they having cognizance of the original action, have also cognizance of all the dependencies. But the plaintiff shall not be judge whether this writ of error be well brought or not; it is *primâ facie* a good *superfedeas* to his action, and he must not undertake to determine the validity thereof after it is allowed; therefore he ought not to take out execution without leave of the Court, or without pleading it in abatement, or demurring.

On the contrary it was said, that a *scire facias* is a judicial writ, and the award of execution upon it, is not such a judgment upon which a writ of error will lie in the exchequer chamber; it is not a judgment upon any of the seven causes of action mentioned in the statute, and therefore such a writ of error has been disallowed upon a judgment in *scandalum magnatum* (*d*), and likewise upon a judgment on the statute of Usury (*e*), for taking more than six pounds for the loan of one hundred; but it has been allowed upon the statute of Tithes, for that gives an action of debt.

Afterwards, in *Michaelmas Term*, THE COURT gave judgment, *viz.* The design of the act of parliament (*f*) was to give a writ of error upon the merits of the case (*g*); but here the right is

(*a*) Nevil *v.* South, Cro. Car. 286. 1. Roll. Abr. 929.
(*b*) Cro. Car. 464.
(*c*) 1. Mod. 79.
(*d*) Cro. Car. 142. Stratford *v.* Needham, 1. Sid. 143. Dougl. 351. (337.)
(*e*) Whitton *v.* Preston, 1. Sid. 240. See Vent. 49.
(*f*) 27. Eliz. c. 8.
(*g*) Crow *v.* Maddock, Andr. 287.

determined,

determined, and the writ of error is brought upon the award of execution; ſo that the exchequer chamber have no authority after they have affirmed the firſt judgment.

Therefore the writ of error is no *ſuperſedeas*.

Har... against Holt.

* [231]

* Johnſon *againſt* Lee.

Caſe 118.

Hilary Term, 3. Will. & Mary. Roll

BERKSHIRE, *to wit.* } *MEMORAND. quod alias* SCILICET *Termino Paſchæ ult. præterit. coram domino rege et domina nuper* REGINA MARIA *apud* WEST. *venit* WILLIELMUS JOHNSON *gen. qui tam pro domino rege et dicta domina nuper regina quam pro ſeipſo in hac parte ſequitur per* THOMAM CHADWICKE *attorn. ſuum et protulit. in cur. tunc ibidem quandam billa. ſuam verſus* GODFRID LEE *gen. in cuſtod. mar. &c. de placito tranſgr. et contempt. contra eos qui ſecut. ſunt placitum in cur. chriſtianitat. poſt prohibition. regiam eis prius inde in contrar. direct. et deliberat. et ſunt pleg. de proſequen. ſcilicet,* JOHANNES DOE *et* RICHARDUS ROE; *quæ quidem billa ſequit. in hæc verba: ſſ.* BERKS. *ſſ.* WILLIELMUS JOHNSON *gen. qui tam pro domino rege et domina regina quam pro ſeipſo ſequit. in hac parte queri it. de* GODFRID. LEE *gen. in cuſtod. mar. Mo. ſc. dominis regis et dominæ reginæ coram ipſis rege et regina exiſten. de placito tranſgr. et contempt. contra eos qui ſecut. ſunt placitum in cur. chriſtianitat. poſt prohibition. regiam eis prius inde in contrar. direct. et deliberat. pro eo videlicet quod cum ſecund. leg. et conſuet. hujus reg. Angliæ omnia et ſingula placita et cog. placit. de quibuſcunque debit. contract. tranſgr. ſuper caſu expenſ. ſive feod. infra hoc regn. Angl. contingen. ſive emergen. cæteraque hujuſmodi placita et negotia et eorum placitorum cognition. ad dictos dom. regem et dominam reginam nunc et coron. ſuam regiam ſpecialit. ſpectant. et pertinent. ac per communem legem terræ hujus regni Angliæ et non in cur. chriſtianitat. per leges ſive cenſuras eccl. ullo modo triari terminari aut diſcuti debeant et ſemper hactenus debuer. et conſuever. cumque etiam per quendam actum in parliamento dom.* HENR. *nuper regis Angliæ octavi anno regni ſui viceſimo tertio tent. edit. et proviſ. inter alia inactitat. fuit authoritate ejuſdem parliamenti quod nulla perſona foret citat. ſummonit. vel alit. vocat. ad comparen. per ſeipſum vel ſeipſos aut per aliquem procurator. coram aliquo ordinario archidiacono commiſſar. official. aut aliquo al. judice ſpiritual. extra dioceſ. vel peculiar. juriſdict. ubi eadem perſona quæ foret ſic citat. ſummonit. vel alit. vocat. foret inhabitans* ANGLICE dwelling *tempore adjudication. ſive emanation. ejuſdem citation. ſive ſummonition. niſi foret per in vel ſuper certis cauſis in eodem actu particularit. except. mentionat. quodque nullus archiepiſc. neque epiſcop. ordinar. official. commiſſar. vel aliquis al. ſubſtitut. vel miniſtr. aliquorum præd. archiepiſc. epiſc. archidiacon. vel aliorum ten. aliquam ſpiritual. jur. ad * aliquod tempus à feſto Paſc. prox. ſequen. poſt edition. actûs præd. peterent demandarent caperent vel reciperent de aliquibus ſubdit. dict. domini regis aliquam ſummam vel ſummas pecuniæ*

* [232]

JOHNSON against LEE.

cuniæ pro ſigil. action. alicujus citation. poſt præd. feſtum adjudicat. vel obtent. quam tant. tres denar. ſterlings ſuper pœnas et pœnalitat. in eodem act. content. et limitat. prout per eundem actum (relation. inde habit.) plenius liquet et apparet; cumque etiam præd. WILLIELMUS JOHNSON *modo ſit et per ſpatium duorum annorum jam ult. elapſ. fuit reſiden. et inhabitans apud paroch. de* HUNGERFORD *in eodem com.* BERKS *infra peculiar. jur. decani de* SARUM *ac infra dioceſ.* SARUM, *et non eſt nec infra ſpatium duorum annorum jam ult. elapſ. fuit inhabitan. ſive reſiden. infra civitat.* LONDON. *vel ſuburbium ejuſdem civitatis neque alibi infra dioceſ. Cantuar. ac etiam liber homo hujus regni Angl æ jam exiſtit; et ſic per totum tempus vitæ ſuæ extitit ac ratione inde omnibus et ſingulis libertatibus privileg. et liberis conſuetud. hujus regni Angliæ quatenus ligeus domini regis et dominæ reginæ nunc et progenitorum ſuorum nuper regum et reginarum hujus regni Angliæ uſitat. et approbat. gaudere debeat; præd. tamen* GODFRIDUS LEE *præmiſſ. non ignarus ſed machinan. ipſum* WILLIELMUM JOHNSON *contra debit. hujus regni Angliæ formam opprimere et dict. dominum regem et dominam reginam nunc exhæreditare ac cognition. placiti quæ ad cur. dict. dom. ni regis et dominæ reginæ nunc pertinet ad aliud examen in cur. chriſtianitat. trahere ipſum* WILLIELMUM JOHNSON *primo die Septembris anno regni dict. domini regis et dominæ reginæ nunc quinto apud* HUNGERFORD *in com.* BERKS. *præd. ac infra dict. dioceſ.* SARUM *citari cauſavit ad comparen. coram venerabili viro* GEORGIO OXENDEN *leg. doctore offic. cur. Cantuar. de Arcubus* LONDON. *offic. al. principal. ejuſve jurisdict. aut al. judice ſpiritual. in ea parte competen. in aula voc.* Doctors Commons *ſcituat. infra civitat.* LONDON. *ſecundo die Octobr. extunc prox. ſequen. Ad quem diem et locum præd. coram præfat.* GEORGIO OXENDEN *tunc judice ſpirituali (eodem* WILL. JOHNSON *ſecundum exigen. citation. præd. comparen.) præd.* GODFRIDUS LEE *actum. et ibid. coram præfat. judice ſpirituali petiit decerni* WILLIELMO JOHNSON *pro feod. et expenſ. ſeparat. denar. ſummas in toto ſe attin. ad quind. libr. quatuor ſolid. et octo denar. in ſchedul. libello poſthac mentionat. annex. particularit. expreſſ. ſcilicet pro denar. expendit. quinque libr. et octo denar. et pro feod. decem libr. et quatuor ſolid. cauſe et ſubdole verſus ipſum* WILLIELMUM JOHNSON *litigando quod ipſe* GODFRIDUS LEE *fuit et eſt procurator. cur. conſiſtor. epiſcopi* LONDON. *ac quod in vacation. poſt Terminum Sanctæ Trin. anno Dom. 1683. vel Term.*

[233] *Sanctæ Mich. prox. et immediate ſequen. * dictus* WILLIELMUS JOHNSON *tunc minor ætaſtin. annos ætat. vigint. et dimid. ſed viceſimum primum ætat. ſuæ ante tunc temporis non compleverit et eadem cauſa perſon. habilem ſtandi in judicio ad recuperan. legatum per* WILLIELMUM JOHNSON *ejus patrem nuper defunct. ſibi relict. et donat. non habend. quandam* MARGARETAM CHRISTIAN, *vid. curatorem ſibi ad officium præd. dicto* WILLIELMO JOHNSON *aſſign. onus curation in ea acceptavit; eademque* MARGARETA CHRISTIAN *et dictus* WILLIELMUS JOHNSON *vel aliquis al. amicus dicti* WILLIELMI JOHNSON *conjunctim. ſeu eorum alt. conſueverit dictum* GODFRID. LEE *de proſequen. legitime contra quoſdam* RICHARDUM PRICE

Johnson against Lee.

PRICE *et* THOMAM BATTALL *executor. teſti. dict.* WILLIELMI JOHNSON *defunct. ad exhiben. inventor. et reddi. comp utum de bonis et catallis præd.* WILLIELMI JOHNSON *defunct. fuer. dictum* GODFRIDUM LEE *procurator. ad proſequen. cauſam præd. Licet quod dictus* GODFRIDUS LEE *in vacation. ante Termin. Sancti Michaelis ipſo Term. Sancti Michaelis anno Domini* 1683 *ſuper dicto citation. contra dict.* RICHARDUM PRICE *et* THOMAM BATTALL *executor. teſt. ad. di* WILLIELMI JOHNSON *defunct. ad exhiben. inventor. et computum ſuum de bon.* WILLIELMI JOHNSON *defunct. et ad reſponden. dict.* WILLIELMO JOHNSON *jun. per decret.* MARGARETAM CHRISTIAN *executatr. aſſign. in cauſa ſubſtraction. legat. præd. ſub ſigillo cur. conſiſtor. epiſcopat.* LONDON. *miſit et in dict.* RICHARDUM PRICE *perſonaliter evocari et dict. executor. pro nim compar. juxta tenor. commiſſion. decreti eius et modis in dicta cur. conſiſtor. epiſcopal.* LONDON. *pro contumacion ſua excommunicari pronunciat ac quod omnia et ſingula feod. et cæter. tenuiæ jurisdict. in eadem ſchedula ſpecificat. exhibitor. cur. conſiſtor. epiſcopi à tempore immemorial. et in præſenti ſunt debita et debite ſolven. advocat. procurator. regiſtrar. et aliis miniſt. dictæ cur. prout in eadem ſchedula continetur; et quidpretat.* WILLIELMUS JOHNSON *ſolution. feod. et cæterarum pecun. ſummarium in dicta ſchedula mentionat. et expreſſ. in ſe juſcepit et promiſit ſolvere præfat.* GODFRIDO LEE *ſed nondum ſolvit aut ſatisfecit prout per ipſum libellum et ſchedulam eidinde annex. hic in cur prolat. lect. et auct. plenius liquet et apparet, ac licet ipſe præfat.* WILLIELMUS JOHNSON *ad aliquod tempus infra ſex annos ante diem exhibition. quer. ſive libelli præfat.* GODFRIDO LEE *præd. non aſſumpſit juſtum ſe ad ſolven. præfat.* GODFRIDO LEE *debit. feod. ſeu expenſ. in ſchedula libello præd. annex. mentionat. vel aliquam inde partem hactenus præfat. juſtice ſpiritual. monſtrare per libellum præd. apparet quod præfat.* WILLIELMUS JOHNSON *fuit infra ætat. viginti et unius annorum ubi facta præd. verſus præfat.* RICHARDUM PRICE *et* THOMAM BATTALL *proſecut. fuit per præd.* GODFRIDUM LEE; *hactenus etiam idem* WILLIELMUS JOHNSON *omnia et ſingula* * *præmiſſa præd. per ipſum* WILLIELMUM JOHNSON *ſuper ſuggeſt. et allegat. in præd. cur. chriſtianitat. coram præfat. judice ſpiritual. in exoneration. ſuam et diminution. ibid. in præmiſſ. ſæpius placitavit allegavit et ill. inevitabiliter ſuſt. non et veritat. probare obtulit, idem tamen judex ſpiritual. placitum allegation. et probat. ill. admittere ſeu recipere penitus recuſavit et præd.* GODFRIDUS LEE *ipſum* WILLIELMUM JOHNSON *per definitivam dict. cur. chriſtianitat. ſententiand. et ſuper præmiſſis præd. condemnare ac ipſum* WILLIELMUM JOHNSON *ad ſolven. eidem* GODFRIDO LEE *omnia et ſingula feod. et expenſ. in ſchedula libello præd. annex. mentionat. compellere tot. ſuis viribus conatur et indies machinatur in dict. domini regis et dominæ reginæ nunc contempt. et in ipſius* WILLIELMI JOHNSON *grave damnum præjudicium gravamen et diſtauperation. manifeſt. ac contra form. ſtatuti præd. ac licet breve dict. domini regis et dominæ reginæ nunc de prohibition. præfat.* GODFRIDO LEE *in hac parte decimo die Martii anno regni dict. domini regis et dominæ reginæ nunc ſexto apud*

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HUNGERFORD

JOHNSON against LEE.

HUNGERFORD *præd. in com. præd. in contrarium inde direct. et deliberat. fuit idem tamen* GODFRIDUS LEE *placitum præd. post prohibition. regiam prius ei in contrar. inde in forma præd. deliberat. postea scilicet decimo quarto Martii anno sexto supradicto apud* HUNGERFORD *præd. in com.* BERKS *præd. ult. prosecut. et in placito il. processit dict. brevi dict. domini regis et dominæ reginæ nunc de prohibition. in forma præd. direct. in contrar. inde quovis modo non obstante in dict. domini regis et dominæ reginæ nunc contempt. et ipsius* WILLIELMI JOHNSON *damnum præjudic. depauperation. et gravamen manifestum, unde dicit quod deteriorat. est et damnum habet ad valen. quadraginta librarum, et inde tam pro dom. rege et domina regina quam pro seipso in hac parte producit sectam, &c.*

Et modo ad hunc diem scilicet diem Mercurii prox. post Octab. Sancti Hillar. isto eodem Term. usque quem diem præd. GODFRIDUS LEE *habuit licen. ad billam præd. interloquen. et tunc ad respondend. &c. Ante quem diem præd. nuper domina regina* MARIA *diem suum clausit extremum coram dom. rege apud* WESTM. *ven. tam prædictus* WILLIELMUS *per attorn. suum præd. quam præd.* GODFRIDUS *per* JOHANNEM LEE *attorn. suum, et idem* GODFRIDUS *defen. vim et injur. quando, &c. et omnem contempt. et quicquid, &c. et dicit quod ipse non secut. est placitum in præd. cur. christianitat. post prohibition. regiam ei in contrar. inde direct. et deliberat. modo et forma prout prædictus* WILLIELMUS JOHNSON *qui tam, &c. superius versus eum queritur, et de hoc pon. se super patriam. et præd.* WILLIELMUS JOHNSON *qui tam, &c. inde similiter, &c. Sed per breve dict. domini regis de consultation. in hac parte impetran. idem* GODFRIDUS *protestan.* * *quod præd.* WILLIELMUS JOHNSON *in ead.* [235] *cur. christianitat. superius mentionat. non placitavit seu allegavit quod ipse idem* WILLIELMUS *ad aliquod tempus infra sex annos ante diem exhibition. querel. sive libelli ipsius* GODFRIDI *præd. non assumpsit super se ad solven. eidem* GODFRIDO *debit. feod. seu expens. in schedul. libello præd. annex. mentionat. vel aliquam inde parcel. prout præd.* WILLIELMUS JOHNSON *superius allegavit, pro placito idem* GODFRIDUS *dicit quod in eodem actu in nar. præd.* WILLIELMI JOHNSON *mentionat. inactitat. fuit quod nulla persona foret citat. summonit. vel alit. vocat. ad comparen. per seipsum vel seipsam aut per aliquem procurator. coram aliquo ordinar. archidiacono commissar. aut aliquo al. judice spirtual. extra di cesi. vel peculiar. jur. ubi eadem persona quæ foret citat. summonit. vel alit. vocat. foret inhabitan.* ANGLICE dwelling, *tempore adjudication. sive emanation. ejusdem citation. sive summonition. sub pœnis et pœnalitat. in eodem actu mentionat. except. foret in casu quod aliquis episcop. aut aliquis judex inferior habens sub ipsum jurisdiction. in suo jure et titulo vel per commission. requisition. vel instan. faceret archiepiscopo episcopo vel alicui superiori ordinario ad capien. tract.* ANGLICE treat, *examinan. vel determinan. materiam coram ipso vel ejus substitut. et id solummodo facien. in casibus ubi lex civilis vel canonicalis affirmat execution. tal. requisition. vel instan. jurisdiction. legal. seu tolerabil. esse et except. in quibusdem al. casibus in eodem actu specificat. prout in eodem actu plenius continetur. Et idem* GODFRIDUS *ulterius dicit quod ipse per spatium*

viginti

Johnson against Lee.

viginti et quatuor annorum et amplius jam ult. elapſ. fuit et adhuc eſt unus procurator cur. conſiſtor. epiſcopi LONDON. quodque ipſe idem GODFRIDUS viceſimo ſeptimo de Octobris anno Domini 1683 apud LONDON. in paroch. SANCTI BENEDICTI prope RIPAM PAULAN. in warda de CASTLE BAYNARD retent. fuit fore procuratorem ipſorum MARGARETÆ et WILLIELMI in eadem cur. conſiſtor. in cauſa infra mentionat. et tunc et ibidem ad inſtan. et requiſition. præd. MARGARETÆ et WILLIELMI JOHNSON citation. contra dict. RICHARDUM PRICE et THOMAM BATTALL executor. teſti. præfat. WILLIELMI JOHNSON defunct. avi dict. WILLIELMI qui tam, &c. ad exhiben. inventorium et computum bonorum præfat. WILLIELMI JOHNSON d funct. et ad reſponden. dicto WILLIELMO JOHNSON modo quer. per dict. MARGARETAM ejus curatricem per eandem cur. aſſign. in cauſa ſubſtraction. legat. præd. per præd. WILLIELMUM JOHNSON defunct. et donat. ſub ſigillo cur. conſiſtor. epiſcopal. LONDON. debito modo profect. fuit et eandem citation. in dictum RICHARDUM PRICE perſonalit. exequi cauſavit et dict. executor. pro ejus contumacia ſua in non comparend. juxta tenor. ejuſdem per debitum legis curſum excommunicari procuravit *, quodque omnia et ſingula feod. et denar. ſummæ in ſchedula præd. ſpecificat. juſte eidem GODFRIDO deberer. pro feod. et expenſ. ſuis in lite ſive ſecta præd. Et quia præd. WILLIELMUS JOHNSON modo quer. et præd. MARGARETA licet ſæpius requiſit. feod. et expenſ. præd. eidem GODFRIDO ſolide recuſaver. præd. GODFRIDUS eundem WILLIELMUM JOHNSON modo quer. pro recuperation. denar. in præd. ſchedula ſpecificat. in cur. peculiar. juriſdiction. decan. SARUM ſectare intendebat et conabatur. Sed ROBERTUS WOODWARD legum doctor decan. eccleſiæ cathedral. SARUM judex cur. peculiar. juriſdictionis præd. habens jur. ibid. in jure ſuo per quoddam ſcriptum ſuum ſigillo ſuo ſigillat. quem idem GODFRIDUS hic in cur. profert geren. dat. viceſimo quinto die Februar. anno Domini 1692, requiſivit venerabil. præd. GEORGIUM OXENDEN legem doctor. et almæ cur. Cantuar. judicem vocan. eundem WILLIELMUM JOHNSON per nomen WILLIELMI JOHNSON de HUNGERFORD in com. BERKS infra peculiar. jur. dict. decani coram ipſo eodem GEORGIO OXENDEN vel aliquo al. competen. judice dict. cur. ad reſponden. dicto GODFRIDO LEE in cauſa et ſubſtraction. feod. et quod cauſa præd. audit. et determinat. in eadem cur. ſecundum legem et juſtitiam prout per ſcriptum præd. plenius liquet et apparet. Et idem GODFRIDUS ulterius dicit quod lex civilis vel canonical. affirmat execution. tal. requiſition. vel inſtan. jur. legal. vel tolerabil. eſſe: ſuper quo idem GODFRIDUS præd. WILLIELMUM JOHNSON citari cauſavit ad compar. coram præfat. GEORGIO OXENDEN legum doctore almæ cur. Cantuar. de arcubus LONDON. official. principal. ejuſve jurrogat. aut al. judice competen. in aula VOCAT. Doctors Commons ſcituat. infra civit. LONDON. ſecundo die Octobris jam ult. elapſ. et in eadem cur. ante prohibition. præd. eidem GODFRIDO deliberat. præd. WILLIELMUM modo quer. pro feod. et expenſ. præd. traxit in placitum prout ei bene licuit feod. et expenſ. il. tunc et adhuc eidem GODFRIDO debit. et inſolut. exiſten. quæ eſt eadem proſecutio et in placitum tractio unde idem

* [236]

WILLIELMUS

JOHNSON against LEE.

WILLELMUS JOHNSON *superius queritur. Et hoc paratus est verificare; inde pet. judicium et breve domini regis de consultation. sibi concedi, &c.*

Et prædict. WILLIELMUS JOHNSON *qui tam, &c. dicit quod per aliqua per prædict.* GODFRIDUM LEE *superius placitando allegat. breve dict. domini regis de consultation. eidem* GODFRIDO LEE *in hac parte concedi minime debet, quia protestando quod prædict* GODFRIDUS LEE *non retent. fuit per procurator. præd.* MARGARETÆ *et* WILLIELMI JOHNSON *ad prosequen. præd.* THOMAM PRICE *et* THOMAM WHITTALL *prout prædict.* GODFRIDUS *superius inde placitando allegavit; protestando quoque etiam quod lex civilis vel canonical.*
* [237] *non * præfat.* GEORGIO OXENDEN *fact. ad tenen. placitum præd. in placito præd. tent.* GODFRIDI *mentionat. esse legal. vel tolerabil. pro placito tamen idem* WILLIELMUS JOHNSON *dicit quod placit. per præd.* GODFRIDUM LEE *quoad requisition. præd.* ROBERTI WOODWARD *decani eccl. cathedr.* SARUM *præd.* GEORGIO OXENDEN *fact. ad tenen. præfat.* WILLIELMUM JOHNSON *coram ipso præfat.* GEORGIO OXENDEN *vel al. judice competen. dict. cur. Cantuar. ad respondend.* GODFRIDO *in causa præd. pro substract. feod. et quod causa illa determinat. fuit modo et forma præd. superius placitat. materiaque in eadem content. minus sufficien. in lege existunt ad ipsum* GODFRIDUM *ad breve dict. domini regis de consultation. in hac parte impetran. an quod idem* WILLIELMUS *necesse non habet nec per legem terræ tenetur aliquo modo respondere. Et hoc parat. est verificare; unde pro defect. sufficien. respons. in hac parte idem* WILLIELMUS JOHNSON *pet. judicium et damna sua præd. occasione præd. sibi adjudicari, &c. Et prædict.* GODFRIDUS *dicit quod placitum prædict. præd.* GODFRIDUM *quoad requisition. præd.* ROBERTI WOODWARD *præd. decani præd. eccl. cathedral.* SARUM *præd.* GEORGIO OXENDEN *fact. advocan. præfat.* WILLIELMUM JOHNSON *coram ipso præfat.* GEORGIO OXENDEN *vel al. judice competen. dict. cur. Cantuar. ad respondend. eidem* GODFRIDO *in causa præd. pro substract. feod. præd. et quod causa illa determinat. in eadem cur. Cantuar. determinat. fuit modo et forma præd. superius placitat. materiaque in eodem content. bon. et sufficien. in lege existunt ad ipsum* GODFRIDUM *ad breve dict. domini regis de consultation. in hac parte impetran. Quod quid in placitum materiamque in eodem content. idem* GODFRIDUS *parat. est verificare et probare prout cur. &c. Et quia præd* WILLIELMUS JOHNSON *ad placitum il. non respon. nec il. hucusque aliquatit. dedicit idem* GODFRIDUS *ut prius pet. judicium et breve dict. domini regis de consultation. in hac parte sibi concedi, &c.*

B. S.

Et quia cur. dict. domini regis nunc hic de judicio suo de et super præmissis redden. nondum advisatur dies inde dat. est partibus præd. coram domino rege apud WEST. *usque diem* *prox. post de judicio suo de et super præmissis il. audien. eo quod cur. dict. domini regis nunc hic inde nondum, &c.*

John-

* Johnſon *againſt* Lee. Caſe 119.

PROHIBITION. The plaintiff declared, that by the ſtatute 23. *Hen.* 8. c. 9. it is enacted, "that no perſon ſhall be "cited to appear out of his dioceſe where he dwelleth;" that the plaintiff was reſident at *Hungerford* in *Berks*, in the dioceſe of *Saliſbury*; that the defendant cauſed him to be cited before the DEAN OF THE ARCHES in *London*, and libelled againſt him for *expences* and *fees* in the *conſiſtory court* of the *Biſhop of London*, and averred that ſuch fees were juſtly due according to the cuſtom of the ſaid court, and that he promiſed to pay them; and although he made no ſuch promiſe *within ſix years*, yet the Court proceeded to give ſentence againſt him; and the defendant proſecuted his plea after the writ of *prohibition* delivered to him, &c.

Pleadings in prohibition.

S. C. Show. 589. S. C. Holt, 656. 596. S. C. Comy. 18. 2. Lev. 55. 90. 173. Comb. 105. 1. Salk. 40. Carth. 33. 476. 1. Lev. 193. 2. Salk 548. 1. Saund. 402. 12. Mod. 608. 1. Roy. 703. 1. Vent. 165. Bunb. 170. 4. Bac. Abr. 256.

The defendant for *conſultation* pleads the very ſame ſtatute; by which it is enacted, "that no perſon ſhall be cited or ſummoned, "or otherwiſe called to appear by himſelf or herſelf, or by any "PROCTOR, before any ordinary, archdeacon, commiſſary, official, "or any other ſpiritual judge, out of the dioceſe, or peculiar ju"riſdiction, where the perſon which ſhall be cited, ſummoned, or "otherwiſe called, ſhall be inhabiting and dwelling at the time "of the awarding the ſame citation or ſummons: EXCEPT" (amongſt many other cauſes in the ſaid act mentioned) "that any "biſhop, or any other inferior judge, having under him juriſ"diction in his own right and title, or by commiſſion, make re"queſt or inſtance to the archbiſhop, or other ſuperior ordinary "or judge, to take, treat, examine, or determine the matter be"fore him or his ſubſtitute; and that to be done in caſes only "where the civil law or common law doth affirm execution of "ſuch requeſt or inſtance of juriſdiction to be lawful or tolerable." THAT the defendant is *a proctor* in THE CONSISTORY COURT of the *Biſhop of London*, and was retained as ſuch by the curatrix of the plaintiff (he being then under age), to proſecute a ſuit, againſt the executors of his grandfather, for a legacy given to the plaintiff, and to exhibit an inventory; that they were excommunicated for contumacy in not appearing; and that the fees and expences in the libel were juſtly due to him for proſecuting the ſaid ſuit; that he endeavoured to ſue the ſaid plaintiff for the recovery of the ſaid fees in THE COURT OF PECULIARS of the *Dean of Saliſbury*; but he being judge of the * court, and having juriſdiction in his own right, did, by a writing under his ſeal, require the *Dean of the Arches* to call the plaintiff before him, to anſwer the defendant in a cauſe for ſubſtraction of fees; which cauſe was there determined accordingly: and the defendant avers, that the civil and common law affirms the execution of ſuch requeſt to be lawful. Whereupon the defendant, before the prohibition delivered to him, did cite the ſaid *Johnſon* to appear before the ſaid judge of THE ARCHES in the cauſe aforeſaid; and avers it to be the ſame proſecution of which the plaintiff complained.

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JOHNSON against LEE.

To this plea the plaintiff demurred, and the defendant joined in demurrer.

It was argued, that no *conſultation* ought to go.

If a peculiar juriſdiction belong to the archbiſhop, a cauſe tranſmitted immediately from ſuch *peculiar* to *the archbiſhop*, omitting *the biſhop*, is within the exception 23. *Hen.* 8. c. 9.

For, FIRST, if the defendant will bring himſelf out of the ſtatute, he muſt ſhew, that the requeſt made by the inferior ordinary was made to him who had the next ſuperior juriſdiction; which he has not done (*a*): for here the requeſt is from the *Dean of Saliſbury*, who was judge of THE PECULIAR, to the *Dean of the Arches*, when it ought to have been to the *Biſhop of Saliſbury*, being the next immediate ordinary, unleſs it appear that A PECULIAR is ſuch a juriſdiction from which there is no appeal to the ordinary; or that it is a juriſdiction by preſcription (*b*). The judge of this PECULIAR is an inferior perſon to the biſhop, and THE PECULIAR itſelf may be ſubordinate to him; if ſo, he cannot tranſmit a cauſe *per ſaltum* to the archbiſhop, but muſt leave it to the ordinary, from whom his power is derived (*c*).

3. C. Skin. 589.
1. Sid. 90.
1. Lev. 225.
1. Brownl 46.
6. Com. Dig. "Prohibition" (F. 9.).
1. Bac. Abr. 617.

E contra. On the other ſide it was argued,—FIRST, That the *letter of requeſt* was to the next immediate ordinary; and if it had appeared that this juriſdiction had been ſubordinate to him, it would have altered the caſe; but the plaintiff having alledged that it is a peculiar juriſdiction, the letter of requeſt may be properly made from ſuch to the archbiſhop himſelf:—SECONDLY, That if it had been free from a general exemption from all ordinary juriſdiction, which was common, as my LORD HOBART tells us, in MONASTERIES before the diſſolution, then the cauſe muſt be remitted to the king: for this act was made as well for the preſervation of the juriſdiction of THE ORDINARY as for the care of THE PEOPLE: for otherwiſe the archbiſhop may call a cauſe to him, which is in none of the caſes within the power given him by this act, and then it will be totally eluded:—THIRDLY, That it is not enough for the plaintiff to ſay that he lived in the pariſh of *Hungerford*, within a peculiar juriſdiction of the dean of *Saliſbury*, *ac infra decan.* SARUM, but he ought to ſhew that *the peculiar* was ſubordinate to the *Biſhop of Saliſbury*, being to deprive the ſpiritual court of a juriſdiction which they had before the making of this act (*d*).

A libel in the diſjunctive.

SECONDLY, The defendant does not ſay that this was a caſe which was permitted by their law, but only that the civil *or* canon law affirms ſuch requeſt, which is in the diſjunctive, and very uncertain.

Libel larger than the requeſt.

THIRDLY, He alledged that the *Dean of Saliſbury* requeſted the *Dean of the Arches* to call the plaintiff before him, to anſwer in

(*a*) 1. Salk. 40, 41.
(*b*) Gaſtiel *v.* Jones, 2. Roll. Rep. 446. 448.
(*c*) Jones *v.* Jones, 1. Sid. 90. Cro. Car. 262.—See alſo Hob. 16. 186.
(*d*) See the opinion of HOLT, *Chief Juſtice*, on this point of the caſe, Skin. 589.

a cauſe

a cauſe for ſubſtraction *of fees*; and the libel is for ſubſtraction of fees *and expences*, which is larger than the requeſt, and therefore not good.

JOHNSON *againſt* LEE.

As to the objection, that the *libel* is larger than the requeſt, one being for *fees* AND *expences*, and the other being to anſwer in a cauſe for ſubſtraction of fees only; it was argued, that this is not material, becauſe ſuch fees muſt be intended as paid to others, as well as for ſuch as were due to the plaintiff.

* [240]

FOURTHLY, But the principal point was, Whether the defendant ought to ſue for fees in the eccleſiaſtical courts, ſince ſuch things are properly cognizable at common law, for which he * might bring a *quantum meruit* or an *indebitatus aſſumpſit*, upon the retainer for work and labour, and for money laid out; and the law raiſes the promiſe. There is no difference between fees in the prerogative court and other courts of equity, for which ſuits are uſually brought in this court; the uſage of which courts may be given in evidence at the trial; and eſpecially in this caſe, which is grounded upon a preſcription for cuſtomary fees due time out of mind, which ſhall be tried by a jury. If it be objected, that proctors fees are part of the cauſe, this cannot be, becauſe when the ſuit is determined, it cannot be afterwards continued for the fees; and ſome of the fees in that court are ſettled by act of parliament, which are thoſe relating to wills. Neither can it be objected, that becauſe this Court will not grant *a mandamus* to reſtore a proctor when removed from his office *(a)*, therefore you will not grant *a prohibition* when he ſues for a recompence for his labour and pains. The law of *England* takes notice of ſuch ſuits. But this Court will not take notice whether the party is *a proctor* or not, but will leave the determination thereof to a proper court. It is true, there is no precedent of any ſuits here for proctors fees; and it is as true, there are likewiſe no precedents of ſuch ſuits for fees in chancery. But they may be well commenced under the general terms for work and labour, and are grounded upon a cuſtom and contract, which are things triable at common law. It is true, a prohibition to the court-chriſtian has been denied by this Court *(b)*, where the libel was for proctors fees; but it was not for that reaſon alone, for the cauſe alledged for prohibition was, that the ſuit for which the fees were laid out was not determinable in that court. But the Judges thought it reaſonable not to prohibit the proctor to ſue there, for he is only a ſervant, and is not to take upon him to determine whether that court had any juriſdiction or not of the cauſe. In the caſe of *Horton v Wilſon (c)* a prohibition was likewiſe denied to the ſpiritual court, where the ſuit was for proctors fees; but there were but three Judges in the common pleas when that rule was given: the Chief Juſtice was againſt the prohibition, and the puiſne Judge for it; for he was of opinion, that ſuch fees ought not to be demanded

A PROCTOR retained by the curator of an infant to proſecute a ſuit for a legacy due to the infant, cannot *libel* in the ſpiritual court for his *expences* and *fees*, but muſt bring an action for them in the courts of common law.

1. Salk. 333. Comb. 337. Carth. 276. 1. Mod 167. Skin. 589. 4 Mod. 254. Bunb. 170. Stra. 1108. Dougl. 629. (607.). 6. Com. Dig. "Prohibition" (F. 5.). 2. Bac. Abr. 468. Comb. 337. Carth. 276. Carth. 169. Cafes in Law and Equity, 264.

(a) 3. Lev. 309. 3. Mod. 332. 1. Show. 217. 251. 261.
(b) Roll. Rep. 59.
(c) Michaelmas Term, 25. *Car.* 2. in the common pleas, 1. Mod. 167.

JOHNSON *againſt* LEE.

manded in the ſpiritual court, becauſe the plaintiff has a remedy at law, for the retainer implies a contract for which an action on the caſe will lie. WYNDHAM, *Juſtice*, who was the third
* [241] Judge, was not clear of opinion on either ſide. But even in that caſe the Court held, that the proctor having, amongſt other things, demanded a cuſtomary fee of fourpence for every inſtrument which was read in the cauſe, that the law ought to determine, whether ſuch a fee was cuſtomary or not. And why not in this caſe, where the defendant has preſcribed for certain fees time out of mind?

E contra it was argued, that this ſuit is within the cognizance of THE ECCLESIASTICAL COURT, of which *a proctor* is an immediate officer; and fees are incident to ſuits commenced there;
* [242] and they having cognizance of the ſubject-matter for which ſuch fees were expended, the determination thereof is alſo incident to the original cauſe: they have power over him, and the fees demanded by him, and may leſſen and abridge them as they ſee occaſion; and by the ſame reaſon that they may prohibit the payment thereof, by the ſame reaſon they may order the payment. If the proctor had petitioned the Court, and not proceeded by way of libel for his fees, in ſuch caſe a prohibition would not lie *(a)*; ſo that there can be no inconvenience in allowing this juriſdiction, for they are the proper judges of what buſineſs is done in their courts, and can call for vouchers better than a jury can do. Their fees are eſtabliſhed by the canon law, and are leſſened and reſtrained by the power and authority of the court. Rules are made here to oblige the attornies in matters of practice; and the like rules are made there to oblige the proctors and miniſters of the court; ſo that they muſt be allowed to be the proper judges in this matter. Matrimony and things teſtamentary were at firſt the whole buſineſs of that court *(b)*; but now in caſes where they have original juriſdiction, they do retain ſuits even for ſuch matters which may be tried at law; as a libel may be there for not repairing a way leading to a church *(c)*. This caſe may be compared to that where a prohibition was prayed to the court of admiralty, becauſe inſtead of *ſtipulation (d)* (which is *a recognizance* in their law as much as *bail* is here) they had taken *a recognizance* at common law, wherein the principal and ſureties, and their heirs, goods, and lands, were bound; whereas the libel ought to be againſt the ſhip and goods, and execution againſt the latter, and not againſt the party: but the civilians argued, that execution might be taken of the body, though not of the lands; and that this was not in the nature of *a recognizance*, but *a ſtipulation* in nature of *bail*, and might be ſued as well in the court of admiralty as at common law; and no prohibition was granted, but the matter was adjourned. The caſe in the *Modern Reports (e)* is an

2. Lev. 64. Skin. 493. Caſes in Law and Equity, 12. 64. 386. 439. 1. Vent. 274.

Skin. 494. Ray. 464. Godb. 260. Comb. 71. 109. 462. Fitzg. 197. 8. Mod. 379.

Though *Serjeant Harris* argued, that a recognizance taken there to ſtand to the order of the Court was void.

Nov. 24.

(a) Much. 45.
(b) Trott. 25. pl. 2. Juſtices Reg. 38.
(c)
(d) Greenway *v.* Baker, Godb. 260.
(e) 1. Mod. 167.

expreſs

expreſs authority to rule this, where a prohibition was denied for a ſuit for proctors fees, and there is no book againſt it. The reaſon of the law is for the plaintiff; for he being a proctor, is not a temporal officer, and what he has done is about an eccleſiaſtical ſuit, and therefore that court muſt judge of it. A prohibition has been denied in the common pleas for regiſtering fees in a cauſe between *Gyllin* v. *Dogart*, 1. *Salk.* 330. *(a)*.

Johnson, againſt Lee.

SIXTHLY, They ought to allow the plea of *non aſſumpſit infra ſex annos*, for the ſtatute of Limitations extends as well to that court as to courts of equity *(b)*.

Qu. Whether the *ſtatute of Limitations* extends to the ſpiritual courts.

* *Contra.* The ſtatute of Limitations does not extend to this caſe; for it is not properly a debt, becauſe expences and fees are of the ſame nature with the ſubject-matter for which they were demanded. It may as well be alledged, that deſamatory cauſes are within the ſtatute; ſo that the eccleſiaſtical court having original juriſdiction of this matter, no prohibition ought to go.

* [243]

Adjournatur (c).

(a) HOLT, *Chief Juſtice*, upon the point of the caſe, ſaid, that if the king erects a new office, he cannot annex a fee to it, and *a fortiori* it cannot be done by the canon law; that PROCTORS, therefore, at the original inſtitution of their office, could have no other remedy than a *quantum meruit* for their labour and pains, and that the ſums thus fixed by juries at common law came to be taken for *reaſonable fees* in the ſpiritual court; but that this could not alter the nature of a proctor's ſervice, which is temporal; for it is formed on a contract and retainer, which is a temporal act: and ROKESBY, *Juſtice*, relying on the caſe of Goſlin v. Johnſon, ſeemed to be of the ſame opinion, S. C. Skin. 92.; and it is ſaid in Gibſon's Codex, 1012. that after ſeveral motions a prohibition was granted.—See alſo Johnſon v. Oxenden, 4. Mod. 255. where a libel in the ſpiritual court for proctors fees was ſtayed, and Pollard v. Bayley, 1. L. Ray. 703. that *the* [illegible] a ſpiritual court cannot ſue for proctors fees; neither can *an apparitor* in a ſpiritual court ſue in the ſpiritual court for their fees, Pitts v. Evans, 2. Salk. 556. 13. Viner, 155. Pearle v. Campion, Dougl. 629.

(b) Birkley v. Morrice, Hard. 502.

(c) It is ſaid, that after ſeveral motions a prohibition was granted, Gibſon Cod. 1013.

Harris *againſt* Pett.

Caſe 120.

Eaſter Term, 8. *Will.* 3. *Roll* 173.

DEBT UPON A BOND. The condition thereof was, "to free "and keep harmleſs the plaintiff of and from all coſts and "damages which may ariſe by reaſon of a law-ſuit, &c."

To debt on a bond conditioned "to ſave "the plaintiff "harmleſs of, "and from all "coſts and da-"mages which "may ariſe by

The defendant pleaded "*non damnificatus*" generally, and the plaintiff demurred to the plea.

The queſtion was, Whether ſuch plea was good or not?

"reaſon of a certain ſuit at law," the defendant may plead "*non damnificatus*" generally.—S. C. Carth. 374. Savil, 50. Cro. Jac. 360. 2. Bulſt. 267. Cro. Eliz. 253. 1. Sid. 44. Show. 1. 1. Mod. 43. 2. Saund. 83. 3. Mod. 252. 2. Wilſ. 5. 11. 126. Cowp. 47. 4. Bac. Abr. 94.

HARRIS *against* PETT.

It was agreed, that if the condition had been to *keep harmleſs* only, then "*non damnificatus*" had been a good plea; but it being *to free* and *keep harmleſs*, he ought to ſhew how he had *freed* him, and not anſwered the damnification alone: and to prove this the caſe of *Brett v. Andrews (a)* was cited, which was, Debt upon bond for performance of an award; in which, amongſt other things, it was awarded, that the defendant ſhould acquit, diſcharge, and ſave harmleſs the plaintiff of ſuch a bond; and the like plea was pleaded as in this caſe; which was held inſufficient, becauſe the defendant ought to ſhew how he had diſcharged him. If the award had been made, reciting a ſuit in chancery between the parties, and that the ſuit ſhould ceaſe, and the plaintiff *ſtaret acquictatus pro quâlibet materiâ in præd. billâ*, there a plea *quod ſtetit quietus inde* is good enough, without ſhewing how, becauſe he is acquitted by the award itſelf, viz. *ſtaret acquictatus*. But if a man had been obliged to acquit another from a debt or ſuit, it is not ſufficient to plead "*non damnificatus*" generally, but he ought to ſhew how and in what manner; and this was the caſe of *Freeman v. Sleen (b)*.

To which it was anſwered, that the caſe of *Brett v. Andrews (c)* differs from that at bar, becauſe it was to acquit the plaintiff from a peculiar obligation; which word "acquit" implies, that it muſt be by deed, and therefore he ought to ſhew by what
* [244] deed. * But this condition was not to *ſave* and *acquit* the plaintiff from a ſuit, but to *indemnify* him from the conſequences of it, which are coſts and charges; and the defendant has pleaded, that no damage happened to him, ſo that it lies upon him to prove that he was damnified. An action on the caſe *(d)* was brought againſt the defendant, who promiſed, that in conſideration the plaintiff would diſcharge a third perſon then under an arreſt, that he would pay the money, and alledged in fact that he *exoneravit*; the plaintiff had judgment in the common pleas; and upon a writ of error in this court, one of the errors aſſigned was, that "*exoneravit eum*" was not good, without ſhewing how; but the Court held it well enough, and that it need not be as a diſcharge of a bond, or a rent, which ought to be ſhewed in what manner. If this had been pleaded in the *affirmative*, "that he had freed "and acquitted the plaintiff," there he muſt ſhew how *(e)*. But it being in the *negative*, the plaintiff ought to ſhew how he was damnified *(f)*.

And of this opinion was THE COURT, that it was a good plea, becauſe the condition was to ſave the plaintiff harmleſs from ſomething that was uncertain at the time of the making thereof, *viz.* from the coſts and charges of the ſuit, that no coſts might be recovered againſt him; but if it had been to ſave harmleſs from a

(*a*) 1. Leon. 71. Owen, 7.
(*b*) Cro. Jac. 339. 1. Roll. Abr. 432. pl. 2.
(*c*) 1. Leon. 71. Owen, 7.
(*d*) King *v.* Hobbs, Cro. Eliz. 913.
(*e*) Mauſel's Caſe, 2. Co. 4.
(*f*) Cro. Jac. 363. 634. 2. Saund. 84. Co. Ent. 139.

particular

particular thing, there ſuch a negative plea generally would not have done, becauſe the defendant ought to ſhew how he indemnified the other.

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Whereupon the Counſel, perceiving the opinion of the Court, moved to have leave to *diſcontinue* the action.

Loveday *againſt* Winter.

Caſe 121.

TRESPASS AND EJECTMENT. The jury found a ſpecial verdict, the ſubſtance whereof was as follows:

George Pawlet was ſeiſed in fee of the manor of *M.* whereof the lands in queſtion, being copyhold, were parcel. Upon the marriage of *Edward* his eldeſt ſon, he ſettled the manor and lands, &c. upon truſtees and their heirs, to the uſe of himſelf for life, and after his deceaſe to the uſe of his wife for life; then to *Edward Pawlet*, and the heirs of his body lawfully to be begotten; remainder to his own right heirs. * PROVISO, "That it ſhall be lawful to and "for the ſaid *George Pawlet* and *Elizabeth* his wife, by deed "indented, to make leaſes in *poſſeſſion* for one, two, or three lives, "or for thirty years, to commence after one, two, or three lives, "or for any other term, determinable upon one, two, or three "lives, or in reverſion for one, two, or three lives, or for thirty "years, or for any other number of years, determinable upon one, "two, or three lives, ſo as ſuch demiſe be not made of the ancient "demeſne lands parcel of the ſaid manor, or of any other lands "uſed therewith for the ſpace of ſeven years, and ſo as the ancient "rent be reſerved." *George Pawlet* by deed indented, reciting that the lands were *copyhold*, made a leaſe thereof to one *Robert Blanchlow* for thirty years. The leſſor of the plaintiff claims as heir in tail to *George Pawlet* his father.

If *a manor* and *other hereditaments* be ſettled with A POWER to the tenant for life to make leaſes "in *poſſeſſion* or in *reverſion*, for one, two, or three lives, or for thirty years, or any other number of years determinable on one, two, or three lives, ſo as ſuch demiſe be out of the *ancient demeſne lands* parcel of the premiſes, or any other lands uſed therewith for ſeven years previous to the ſettlement, ſo as the ancient rent be reſerved," AN ABSOLUTE LEASE for thirty *years* of lands then in leaſe for the term of two lives, to commence after the ſaid two lives then in being is in this caſe a good execution of the POWER: but a leaſe of *copyhold lands* parcel of the manor is not warranted by this POWER; for all copyhold lands being *ancient demeſne*, they are excepted, as being "*ancient demeſne lands* parcel of the manor." The *rents* and *ſervices*, however, may be demiſed within the power.—S. C. poſt. 378. S. C. 2. Salk. 537. S. C. Comb. 371. S. C. Carth. 244. S. C. 12. Mod. 147. S. C. Holt, 414. S. C. 1. Ld. Ray. 267. S. C. 2. Freem. 268. S. C. Comy. 37. *Vide* 6. Mod. 20. Poph. 8. Moor, 494. 6. Co. 33. 8. Co. 70. 3. Abr. 418. Powell on Powers, 398. 405. 407. 423. Cowp. 266. 651. 714. 1. Term Rep. 6. Co. 37. Comb. 371. 387. Cro. Jac. 76. Moor, 759. Skin. 296. Co. Lit. 58. Poſt. 378.

The queſtion was upon this PROVISO in the marriage-ſettlement, Whether this was a good leaſe, or not?

THOSE WHO ARGUED in the negative inſiſted, that it was not warranted by the power, either as to *the land* itſelf, or as to *the term*.

FIRST, As to the tenure of the land, which is expreſsly found to be *copyhold*, it could never be intended that he ſhould make any new eſtate of copyhold lands; for the eſtates he was to make are to be by *deed indented*; and copyhold cannot be let by ſuch deed, ſo it is not within the power; and the acceptance of a leaſe of the ſame lands by a copyholder is a determination of his copyhold

LIVEDAY against WINTER.

eſtate (*a*) The exception is of "all *ancient demeſne* lands parcel "of the manor," which are ſufficient words to exempt theſe lands out of the power of leaſing; for a manor conſiſts of *demeſnes* and *ſervices*, and theſe are not only found to be copyhold, but parcel of the *demeſnes*.

SECONDLY, But if the lands in queſtion had been comprehended under the general words, yet the leaſe made by *George Pawlet* is void, by reaſon of the term demiſed; for it is expreſsly againſt the power reſerved, which ought to be taken ſtrictly againſt the leſſor. * And therefore where a manor is in leaſe, and he who has the reverſion in fee levied a fine to the uſe of himſelf for life, then to his eldeſt ſon in tail, but reſerved a power for him to make leaſes for twenty-one years, who made a leaſe before that in being expired, to begin after the determination thereof; it was adjudged void (*b*), for it ought to be a leaſe in poſſeſſion, and not an intereſt to begin *in futuro*.

* [246]

To which it was anſwered,

FIRST, That as to the objection, that THE PROVISO did not give *George Pawlet* any power to make leaſes of *copyhold lands*, becauſe they are parcel of *the demeſnes* of the manor; for nothing but the capital houſe, and the lands therewith occupied, are properly *the demeſnes* of a manor; but in the ſimple acceptation of the word no perſon has any true *demeſnes*, becauſe all land depends on THE CROWN; that is the reaſon why in pleading it is uſually ſaid, that ſuch a perſon was ſeiſed in his *demeſnes as of fee (c)*. A manor conſiſts of *demeſnes* and *ſervices*, and nothing elſe. Now if *the demeſnes* cannot be let, then the power given by this PROVISO ſignifies nothing, for *ſervices* are not *lands*, and therefore nothing can be leaſed; and theſe powers are not to be conſtrued according to ſtrictneſs of law, but as words uſed by lawyers to ſignify their meaning. For which reaſon theſe words, "ſo as the demiſe be "not made of the *ancient demeſne lands* of the manor," muſt be taken according to the common acceptation thereof; that is to ſay, a leaſe ſhall not be made of any lands uſually occupied with the capital meſſuage.

SECONDLY, As to the term demiſed, which, as has been objected, ought not to have been for thirty years abſolute, but determinable upon one, two, or three lives.

6. Co. 65. Skin. 192.

CURIA. *Copyholds* in ſtrictneſs are part of *the demeſnes* of the manor, becauſe the tenancy being at the will of the lord, the lands are ſuppoſed to be always in his hands; but in vulgar acceptation it is otherwiſe. Now the lands which were in leaſe for lives are

(*a*) Lane's Caſe, 2. Co. 16. 4. Co. 24.

(*b*) Shecomb *v.* Hawkins, Cro. Jac. 318. S. C. Yelv. 222. S. C. 1. Brownl. 148. 6. Co. 33. a. 8. Co. 70. b. Cro. Eliz. 5.

(*c*) See Termes de la Ley, "De. "meſnes," 114.

not

not parcel of the manor during the continuance of the leaſe, but the reverſion thereof is parcel.

LOVEDAY *againſt* WINTER.

Adjournatur (a).

(a) In Michaelmas Term 9. *Will.* 3. judgment was given for the plaintiff, HOLT, *Chief Juſtice*, TURTON and EYRE, *Juſtices*, holding, that *the term* was within the power, but that the power did not warrant a leaſe of *copyhold land* held of the manor; and TURTON and EYRE thought, that the power was intended to operate on the *other lands* which were mentioned in the conveyance; but HOLT, *Chief Juſtice*, thought, that the *rents* and *ſervices* might be demiſed within the power, for that it appeared to be the intent of the ſettlement that part of the manor might be demiſed. S. C. poſt. 378. S. C. Comy. Rep. 37. S. C. Ld. Ray. 270. S. C. Powell on Powers, 378.

* [247]

* Petit *againſt* Smith.

Caſe 122.

THE TESTATOR by his laſt will appointed two executors, and gave each of them a legacy of five pounds, and did not diſpoſe of the reſidue of his eſtate. The will was proved in common form.

The *ſpiritual court* cannot compel an *executor* to make *diſtribution* of the reſiduary part of the teſtator's effects.

S. C. Comb. 378. S. C. 2. Eq. Abr. 5. 434. S. C. Comy. 3. S. C. 1. Peer. Wms. 7. S. C. 1. Ld. Ray. 86. Fitzg. 126. 1. Stra. 568. 2. Peer. Wms. 158. 162. 3 Wilſ. 40. 2. Vern. 676. 425. 1. Vern. 473. Prec. Ch. 81. 3. Peer. Wms. 194. 1. Peer. Wms. 544. 3. Atk. 230. 1. Bro. C. C. 154. 328. 1. Bac. Abr. 619, 620. 2. Bac. Abr. 398, 399. 4. Bac. Abr. 248.

The daughter of the teſtator ſued in THE SPIRITUAL COURT for *a diſtribution*; for that the executors ought to have nothing by virtue of their executorſhip, becauſe they had expreſs legacies deviſed to them by the will, which ſhews that the teſtator intended them no more. Whereupon the Court compelled them to exhibit *an inventory (a)* of the perſonal eſtate in order to make a diſtribution.

And now they moved for *a prohibition*, ſuggeſting that THE ECCLESIASTICAL COURT had not ſuch a power but only in caſes where the parties die inteſtate.

And therefore a prohibition was granted *niſi cauſa, &c. (b).*

(a) By 21. *Hen.* 8. c. 5. "An "executor ſhall, in the preſence and by "the diſcretion of two creditors or "legatees, or other honeſt perſons, "make a true and perfect inventory of "all the deceaſed's goods, and deliver "one part thereof, on oath, to the "ordinary." Raym. 471. 3. Burr. 1922.

(b) The executors were ordered to declare in prohibition, in order that the point might be more ſolemnly ſettled; and afterwards, on demur, *a prohibition* was granted, S. C. 1. Peer. Wms. 9.; for though the appointment of an executor is a gift to him of the whole, yet when a legacy is given, he is thereby excluded from the *ſurplus*, and is to be conſidered, as to that, a mere *truſtee*, 1. Brown's C. C. 332.; and therefore the ſpiritual court cannot compel an *executor* to make *diſtribution*, becauſe they cannot enforce the execution of *a truſt*, Farrington *v.* Knightly, 1. Peer. Wms. 549. The daughter, however, upon this prohibition being granted, brought a bill in chancery, as next of kin, againſt the executors, for an account of the ſurplus; and it was decreed, that it ſhould go according to the ſtatute of Diſtributions. S. C. 1. Peer. Wms. 10.—See Lord Briſtol's Caſe, 2. Vern. 645. 3. Peer. Wms. 194 *notis*, the caſe of Foſter *v.* Munt, 1. Peer. Wms. 550. 1. Stra. 673. —But ſee the diſtinctions upon this ſubject, Bowker and Others *v.* Hunter, 1. Brown's Caſes Chan. 328.

MICHAELMAS

MICHAELMAS TERM,

The Eighth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.*
Sir Samuel Eyre, *Knt.*
} *Juſtices.*

Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

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* Hallet *againſt* Byrt and Others. Caſe 123.

Trinity Term, 8. *Will.* 3. *Roll* 23.

DORSET, ſſ. } JOHANNES BYRT, *nuper de* SOUTHMORETON *in com. præd. yeoman, et* ERASMUS HALLET, *nuper de* BEAMINSTER, *in com. præd. yeoman, attach. fuer. ad reſpondendum* THOMÆ HALLETT *lanio de placito quare ipſi ſimul cum* THOMA HALLETT, *nuper de* SOUTHMORETON, *in com. præd. yeoman, vi et armis averia ipſius* THOMÆ HALLETT *lanii pretii viginti librarum apud* BEAMINSTER *præd. invent. et exiſten. abſque aliqua rationabili cauſa ceperunt et abduxerunt per quod idem* THOMAS *averia ſua præd. penitus amiſit et alia enormia ei intulerant ad grave damnum ipſius* THOMÆ HALLETT *lanii et contra pacem domini regis nunc et nuper dominæ reginæ* MARIÆ ANGLIÆ, *&c. Et unde idem* THOMAS *per* WILLIELMUM BALL *attorn. ſuum queritur quod præd.* JOHANNES *et* ERASMUS *ſimul cum, &c. primo die Auguſti anno regni domini regis nunc et nuper dominæ* MARIÆ *reg.* ANGLIÆ *ſexto vi et armis, &c. averia ipſius* THOMÆ HALLETT *lanii* VIDELICET *tres vaccas* ANGLICE COWS *et tres juvencas* ANGLICE heifers *pretii, &c. apud* BEAMINSTER *præd. invent. et exiſten. abſque aliqua rationabili cauſa ceperunt et abduxerunt per quod idem* THOMAS *averia ſua præd. penitus amiſit et*

Vide 2. Salk. 280.

HALLETT against BYRT AND OTHERS.

et alia enormia, &c. ad grave damnum, &c. et contra pacem, &c. unde dicit quod deteriorat. eſt et damnum habet ad valentiam 40 librarum; et inde producit ſectam, &c.

Et præd. JOHANNES BYRT *et* ERASMUS HALLETT *per* EGIDIUM CLARKE *attorn. ſuum ven. et defen. vim et injuriam, &c. et quod venire vi et armis ſeu quicquid quod eſt contra pacem dicti*
*[249] *domini regis nunc et * nuper domine* MARIÆ *reg. nec non totam tran-ſgreſſion. præd. præter captionem et abduction. præd. trium vaccarum de averiis præd. in narratione præd. ſuperius mentionat. dicunt quod ipſi in nullo ſunt culpabiles modo et forma prout præd.* THOMAS HALLET *hodie ſuperius inde verſus eos narravit; et de hoc ponunt ſe ſuper patriam: et præd.* THOMAS HALLET *lanius ſimiliter. Et quoad captionem et abductionem prædictarum trium vaccarum iidem* JOHANNES *et* ERASMUS *dicunt quod præd.* THOMAS HALLET *lanius actionem ſuam præd. inde verſus eos habere ſeu manutenere non debet quia dicunt quod ad hundredum de* BEAMINSTER *in com.* DORSET *præd. ſpectat et ſpectare debuit hundred. quodque diu antea præd. tempus quo ſupponitur captio. et abduction. vaccarum præd. fieri ſcilicet decimo die Maii anno reg. dom.* JACOBI SECUNDI *nuper regis* ANGLIÆ, *&c. primo coronandus in Chriſto pater ac dom. dominus* SETHUS *tunc* EPISCOPUS SARUM *ſeiſit. fuit ut de feodo et jure in jure epiſcopatus ſui* SARUM *præd. de et in hundredo præd. cum pertin. quodque idem epiſcopus et omnes prædeceſſores ſui et omnes ill. quorum ſtat. dictus dominus epiſcopus nunc habuit in hundredo præd. a tempore cujus contrarii memoria hominum non exiſtit habuerunt et habere conſueverunt quandam curiam hundred. de actionibus perſonalibus non attingen. ad quadraginta ſolid. ex de replegiare (a) vetit. namio infra hundred. præd. emergen. a tribus ſeptimanis in tres ſeptimanas infra hundredum præd. hundred. præd. coram liberis ſectatoribus curiæ præd. tenend. Et iidem* JOHANNES *et* ERASMUS *ulterius dicunt quod ipſe idem epiſcopus et omnes illi quorum ſtatus ipſe tunc in eodem hundred. habuit a tempore cujus contrarium memoria hominum non exiſtit uſi fuerunt et conſueverunt per ſe vel ſeneſchallum ſuum hundredi prædict. ſuper querimoniam domino hundredi præd. pro tempore exiſten. vel ſeneſchallo ſuo hundredi præd. in ea parte fact. in prædicta curia hundredi præd. vel extra eandem curiam infra hundred. præd. averia perſonæ ſic querentis infra hundredum præd. injuſte capt. et detent. tali quer. infra hundred. præd. replegiare et deliberare vel replegiari et deliberari cauſare. Et iidem* JOHANNES *et* ERASMUS *ulterius dicunt quod præd.* SETHUS EPISCOPUS SARUM *de hundred. præd. ſic ut præfertur ſeiſit. exiſten. ipſe idem epiſcopus poſtea ſcilicet undecimo die Maii anno regni dicti*
*[250] *domini* JACOBI II. *nuper regis* ANGLIÆ, *&c. primo * ſupradict. apud* BEAMINSTER *præd. in com. præd. per quandam indenturam*

(a) That is, where a lord of a franchiſe forbiddeth his bailiff to deliver the diſtreſs taken by him to the ſheriff when he comes to replevy. 2 Inſt. 140.

Quære, Whether one can preſcribe to have a juriſdiction *de vetito namio?* for it is not incident to a court-baron, or hundred-court, as the cognizance of a perſonal action under 40 s. is.

ſuam

HALLET *against* EVERARD *and* OTHERS.

ſuam inter ipſum epiſc. ex una parte et quendam CARLETON WHITLOCK *de* MEDIO TEMPLO LONDON *ar. ex altera parte fact. cujus quidem indenturæ unam partem ſcilic ipſius epiſc. ſigillat. iidem* JOHANNES *et* ERASMUS *hic in curia proferunt cujus dat. eſt die et anno ult. ſupradictis præd. epiſc. conceſſit eidem* CARLETON *et hæredibus et aſſign. ſuis inter alia totum illud hundredum de* BEAMINSTER *in com. præd. curias letas, curias de viſu franci plegii, et omnia alia rectas juriſdictiones franchiſ. privileg. libertates proficua commoditates emolumenta et hereditament. quæcunque cum pertinen. dict. hundred. ſpectan. ſolen. ſive pertinen. habend. et tenen. dict. hundred. de* BEAMINSTER *præd. præfat.* CARLETON WHITLOCK *hæred. et aſſign. ſuis pro et duran. vitis præd.* CARLETON WHITLOCK *et* KATHARINÆ *uxoris ejus et* ANDREÆ HENLEY *de* BROMHALL *in com.* SOUTH'TON *bar. et pro vita eorum diutius viventis; virtute cujus quidem conceſſionis idem* CARLETON *de hundredo præd. cum pertin. fuit et adhuc eſt inde ſeiſit. et ſic inde ſeiſit. exiſten. ante præd. tempus quo ſuppoſitur caption. et abduction. vaccar. præd. fieri præd.* THOMAS HALLET *modo quer. et quidam* JOHANNES RODBART *averia videlicet præd. tres vaccas in narratione præd. ſuperius mentionat. exiſten. averia cujuſdem* TH. HALLET *jun. yeoman apud* BEAMINSTER *præd. infra hundred. præd. ceperunt et ea apud* BEAMINSTER *præd. ac infra hundred. præd. imparcaverunt, pr quod idem* THOMAS HALLET *junior yeoman ante præd. tempus quo, &c. ſcilicet tricesimo die Maii anno regni dom.* WILLELMI *et nuper dom.* MARIÆ *reginæ* ANGLIÆ, *&c. ſexto ſupradict. apud* BEAMINSTER *præd. infra hundred. præd. eidem* HENRICO SAMWAIES *gen. adtunc et ibidem ſeneſchallo præd.* CARLETON WHITLOCK *curiæ hundred. ſui præd. queſtus fuit de præfat.* THOMA HALLET *modo quer. et præfat.* JOHANNE RODBART *de injuſta captione et detentione averiorum ſuorum præd. exiſten. vaccæ in narratione præd. mentionat. et adtunc et ibidem levavit quandam querelam ſuam in hundredo præd. in placito caption. et injuſtæ detentionis averiorum ſuorum præd. et invenit eidem* CARLETON WHITLOCK *pleg. tam de clamore ſuo proſequen. quam de averiis ill. returnan. ſi retorn. inde adjudicaretur. Super quo quidem* HENRICUS SAMWAIES *adtunc ſeneſchallus curiæ hundredi præd. poſtea ſcilicet eodem tricesimo die Maii anno ſexto ſuprad. apud* BEAMINSTER *infra hundred. præd. per quoddam warrantum in ſcriptis ſub ſigillo ſuo quo in ea parte uſus fuit ſigillat. ballivo hundredi de* BEAMINSTER *præd. necnon præfat.* ERASMO HALLET *direct. eis mandavit quod vaccas præd. præfat.* THOMÆ HALLET *junior yeoman ſine dilatione replegiari et deliberari facerent; et pon. per vad. * et ſalvos pleg. præfat.* THOMAM HALLET *lanium et* JOHAN. RODBART *quod eſſent ad prox. curiam hundredi præd. apud* BEAMINSTER *infra hundred. præd. tenen. viceſimo die Junii tunc prox. ſequen. ad reſponden. præfat.* THOMÆ HALLET *jun. yeoman de placito caption. et injuſtæ detentionis averiorum ſuorum præd. Quod quidem warrantum poſtea et antea præd. tempus quo, &c. ſcilicet eodem tricesimo die Maii anno ſexto ſupradict. apud* BEAMINSTER *præd. in com. præd. idem*

* [251]

THOMAS

HALLET against BYRT AND OTHERS.

THOMAS HALLET *jun. yeoman præfat.* ERASMO HALLET *cui idem warrantum in forma præd. direct. fuit deliberavit in forma juris exequen. Virtute cujus quidem warranti idem* ERASMUS *et præfat.* JOHANNES BYRT *in auxilium ipsius* ERASMI *et ad ejus requisitionem postea scilicet die et anno ult. suprad. apud* BEAMINSTER *præd. in com. præd. infra hundred. præd. dicta averia præd.* THOMÆ HALLET *jun. yeoman ceperunt et abduxerunt et replegiaver. et dict.* THOMÆ HALLET *jun. yeoman ibidem secundum formam et effectum warranti præd. deliberaver. qui eadem ex deliberatione illa ibidem adtunc recepit et adtunc et ibidem præd.* ERASMUS *posuit per vadios et salvos pleg. præd.* THOMAM HALLET *lanium et* JOHANNEM RODBART *quod essent ad præd. tunc prox. curiam hundredi præd. apud* BEAMINSTER *præd. tenen. ad responden. præfat.* THOMÆ HALLET *jun. yeoman de placito captionis et injustæ detentionis averiorum suorum præd. quæ est eadem captio et abductio vaccarum præd. unde præd.* THOMAS HALLET *lanius superius se modo queritur; absq. hoc quod præd.* JOHANNES *et* ERASMUS *sunt culpabiles de captione et abductione vaccarum præd. vel alicujus vaccæ inde ad aliquod tempus ante confection. warranti præd. seu post retorn. inde seu aliter vel alio modo quam ut præd.* JOHANNES *et* ERASMUS *superius placitando allegaverunt. Et hoc parat. sunt verificare; unde pet. judicium si præd.* THOMAS HALLET *lanius actionem suam præd. inde versus eos habere seu manutenere debeat, &c.*

E. N.

Et præd. THOMAS HALLET *lanius quoad præd. placitum præd.* JOHANNIS *et* ERASMI *quoad caption. et abduction. præd. trium vaccarum superius in bar. placitat. dicit quod ipse per aliqua per præfat.* JOHANNEM BYRT *et* ERASMUM *superius placitando allegat. ab actione sua præd. inde versus eos haben. præcludi non debet; quia dicit quod placitum præd. per præd.* JOHANNEM *et* ERASMUM *modo et forma præd. superius placitat. materiaque in eodem content. minus sufficien. in lege existunt ad ipsum* THOMAM *ab actione sua præd. versus præd.* JOHANNEM *et* ERASMUM *haben. præcluden. quodque ipse idem* THOMAS *ad placitum illud modo et forma præd. superius placitat. necesse non habet nec per legem terræ tenetur aliquo modo respondere. Et hoc parat. est* * *verificare; unde pro defectu sufficientis responsionis in hac parte idem* THOMAS HALLET *pet. judicium et damna sua occasione transgressionis illius sibi adjudicari, &c. et pro causis morationis in lege in hac parte juxta formam statuti in hujusmodi casu nuper edit. et provis. idem* THO. HALLET *lanius demonstrat et curiæ hic ostendit has causas sequen. videlicet pro eo quod placitum præd. tendit ad generalem exitum ac est duplex repugnans incertum et caret forma, &c.*

* [252]

B. S.

Joinder in demurrer.

Hallet

Hallet *againſt* Byrt.

Caſe 124.

TRESPASS againſt *Byrt* and *Hallet*, for taking and detaining the plaintiff's cattle.

The defendants plead *not guilty* as to all, but the taking three cows: and as to that, they ſay, that the *hundred of Beaminſter* is an ancient hundred, whereof the *Biſhop of Saliſbury* was ſeiſed in fee, and that he and his predeceſſors have time out of mind kept a court there from three weeks to three weeks, for the trial of perſonal actions, under the value of forty ſhillings, and ſo preſcribes to grant *replevins* either by himſelf or ſteward in court, or out of court, upon complaint made to them of the taking, and unjuſtly detaining, any cattle within the ſaid hundred; that *the Biſhop* afterwards conveyed this hundred to one *Whitlock* for three lives, by virtue whereof he was ſeiſed; that the plaintiff and one *Rodbart* took and impounded the cows within the ſaid hundred, being the cows of a ſtranger, who made complaint thereof to the ſteward, and he directed his warrant to the bailiff of the hundred, and to the ſaid *Hallet*, commanding them to replevy the cattle; by virtue whereof, *Hallet*, and the other defendant *Byrt*, *in auxilium ejus*, did take and deliver them to the owner; and traverſed that they were guilty of the taking at any time before the warrant, or after the return, *aliter vel alio modo*.

The plaintiff demurred, and ſhewed for cauſe, that this plea amounted to the *general iſſue*.

BUT IT WAS ARGUED, *to maintain it*, that there was ſufficient *colour* to make this plea good, for in an action of treſpaſs, poſſeſſion is a good colour; and the defendant may have the benefit of ſuch plea when the ſubſtance of it is by way of excuſe, though he might have pleaded the general iſſue.

* E CONTRA. The plaintiff has declared for taking his cattle, and the defendants plead, that the property was in another, ſo that they are *not guilty* of taking *his* cattle; which pleading might have been good in *replevin*, but not in an action of *treſpaſs* (*a*). And to this purpoſe a caſe was cited (*b*), where in treſpaſs for breaking his cloſe, and taking away twenty load of wood, the defendant pleaded, as to breaking the cloſe, that he had a leaſe of it at will from the plaintiff himſelf, by virtue whereof he entered; and as to the carrying away the wood, that another was poſſeſſed thereof, and of the ſaid cloſe, who made his ſon executor and died; and that the ſaid executor gave the twenty load of timber to the defendant; and traverſed that he took any of the plaintiff's wood; and the Court held this to be no more than the *general iſſue*. When ſuch pleading has been allowed to be good, it was

In treſpaſs for taking three cows, A PLEA that the cows were the property of *A.*; that the *plaintiff* impounded them; that *A.* made *replevin* thereof in the HUNDRED COURT; and that he the *defendant* took them by virtue of *a precept* granted by the ſaid hundred court, and delivered them to the ſaid *A.* and ſo juſtifying under a preſcriptive right in the hundred court to hold pleas in *replevin*, is bad, as amounting to the *general iſſue*; for being by way of *juſtification*, it ought to *confeſs* and *avoid* the cauſe of action: but ſo far from evengiving *colour* to the plaintiff, it does not ſhew that he had any *poſſeſſion* in the cows at the time of the taking; but on the contrary, by ſaying they were *impounded*, ſhews they were in the *cuſtody* of the law, and not in poſſeſſion of the party.

* [253]

S. C. 2. Salk. 580. S. C. Carth. 380. S. C. Skin. 674. S. C. 3. Salk 272. S. C. 12. Mod. 188. S. C. 1. Ld. Ray. 218. Ante, 175. Poſt. 314. Skin. 362. 3. Leon. 94. 2. Med. 274. 5. Com. Dig. "Pleader" (E. 14.) 4. Bac. Abr. 61. 64. 375. S. C. 1. Salk. 394.

(*a*) Year Book 27. *Hen.* 8. pl. 21. a. (*b*) Year Book 9. *Hen.* 6. pl. 11. a.

where

HALLET *againſt* BYRT.

Where the plaintiff had not alledged any property in the cattle, or where the defendant had confeſſed it: and therefore where the plaintiff declared of taking *quædam averia* (*a*), and the defendant pleaded that the property was in him, and that a ſtranger took them and put them in the plaintiff's cloſe, by his aſſent, where he found and retook them, *prout ei bene licuit*, that plea was held good, for the plaintiff had not claimed any property in the cattle, but only that the defendant took *quædam averia*, and does not ſay *ipſius querentis*, as in this caſe (*b*). Beſides, the defendant ought to have alledged not only a bare *poſſeſſion*, but a reaſonable *property* in this ſtranger: they ſay, that the plaintiff took the cattle mentioned in the declaration, *exiſten. averia eapſdem* THOMÆ HALLET *jun.* ſo that he might only have *a poſſeſſion* of them. As where treſpaſs (*c*) was brought for taking of boards, the defendant pleaded, that he was poſſeſſed of them, and gave them to the plaintiff to keep, and re-deliver to the defendant when he ſhould be required, and he carried them to *D.* where the defendant retook them; this was held an ill plea, becauſe the defendant had alledged no property in himſelf.

But THE COURT did not ſpeak to this point.

THEY HELD, that at common law no *replevin* was made by *plaint*, for that was a remedy given by the ſtatute of *Weſtminſter the Firſt*, *cap.* 16. the other was by *writ of Juſticies* in *replevin* directed to the ſheriff, who thereupon either went himſelf, or made a precept to his bailiff to make deliverance (*d*). * Now if the ſheriff in his county-court, which is a court incident to his office, could not make a *replevin*, but by writ in open court, before the *ſtatute of Marlbridge*, which gives a quicker remedy by *plaint*, and was made for the benefit of the owner of the cattle, that he ſhould not ſtay for them till next court, how can the *hundred-court*, which is derived out of the *county court*, preſcribe to grant *replevins* out of court, when the authority of the ſheriff himſelf ſo to do began by an act of parliament? It is true, all theſe courts do hold plea in replevins (*e*), but it is illegal, for the party ought to go to the ſheriff for that purpoſe, whoſe court is in nature of a *court-baron*.

* [254]

Cro. El. 409. Hob. 175. Skin. 41. Carth 382. Fitz. 51. Caſes in Law and Equity, 133. 8. Mod. 297.

Therefore this cuſtom was held to be void, for it was againſt law and reaſon: and ſo the plaintiff had judgment, the plea being naught.

(*a*) Rookewood *v.* Frazier, Cro Eliz. 162.
(*b*) Cro. Eliz. 329
(*c*) Year Book 5. *Hen.* 7. pl. 18. Bro. Abr. "Colour," pl. 43.
(*d*) Fitz N B. 68 Dyer, 246. Co. Lit 145. Gilbert's Law of Diſtreſs and Replevin, 59. 3. Bl. Com. 147.
(*e*) Bro. Abr. "Plaint," pl. 66.

Caſe 125. The King *againſt* The Mayor and Burgeſſes of Wilton.

Mandamus to reſtore to the office of burgeſs of a corporation, &c.

GULIELMUS TERTIUS *Dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ rex, fidei defenſor. &c. majori et burgenſibus burgi de* WILTON *in com. noſtro* WILTS *ſalutem. Cum* ELIAS CHALKE *un. burgen. burgi præd. ſecundum conſuetudinem libertat.*

et

et privilegia ejuſdem burgi debito modo elect. et præfect. fuit cumque idem ELIAS CHALKE *in locum et officium un. burgen. burgi diu ſe bene geſſit et gubernavit; vos tamen major et burgen. burgi præd. præmiſſa parvi pendentes præd.* ELIAM CHALKE *indebite et abſque cauſa rationabili ab officio et loco un. burgen. burgi præd. minus juſte amoviſtis in noſtrum contemptum et ipſius* ELIÆ CHALKE *damnum non modicum et gravamen et ſtatus ſui læſionem manifeſtum ſicut ex querela ſua accepimus; nos igitur præfat.* ELIÆ CHALKE *debitam et feſtinam juſtitiam in hac parte fieri volentes ut eſt juſtum, vobis et cuilibet veſtrum mandamus ſicut alias vobis et cuilibet veſtrum mandavimus firmiter injungen. quod immediate poſt receptionem hujus brevis præd.* ELIAM CHALKE *in locum et officium unius burgenſium burgi de* WILTON *præd. reſtituatis ſeu reſtitui faciatis una cum omnibus libertatibus privileg. præeminentiis et commoditatibus ad locum et officium ſpectan. et pertinen. vel cauſam nobis ſignificetis in contrarium ne in veſtro defectu querela ad nos perveniat iteratim; et qualiter hoc præceptum noſtrum fuit execut. nobis conſtare faciatis apud Weſtm. die Mercurii prox. poſt menſem Paſchæ hoc breve noſtrum nobis tunc remitten. ſub pœna quadraginta librarum. Teſte* J. H. *mil. apud Weſtm.* **ſecundo die Maii anno regni regis octavo.*

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ASTRY.

Per reg. cur. PARRY *pro proſecut. executio iſtius brevis patet in quadam ſchedul. huic brevi annex. reſponſ. majoris et burgenſium burgi de* WILTON *ad breve huic ſchedulæ annex. ſecundum exigentiam brevis præd. domino regi humillime certificamus quod præd. burgus de* WILTON *eſt antiquus burgus quodque infra burgum præd. talis habetur et a tempore cujus contrarium memoria hominum non exiſtit habebatur conſuetudo quod major et burgenſes burgi illius ad hoc electi et jurati extiterunt et fuerunt de ſeipſis corpus incorporat. et politicum in re facto et nomine per nomen major. et burgen. burgi de* WILTON *in com.* WILTS, *et per idem nomen placitare et implacitare placitari et implacitari conſueverunt. Ac ulterius domino regi certificamus quod per totum tempus ſupradict. iidem major. et burgen. burgi præd. aliquem burgenſem burgi præd. qui aliquid ageret ſive perpetraret in ſacramenti ſui læſionem aut quo quid detrimenti caperet reſpublica major et burgenſes burgi præd. ſuper auditum hujuſmodi burgenſis taliter delinquen. et peccantis et probatione inde ab officio et loco unius burgen. burgi præd. amovere conſueverunt et potuerunt. Et ulterius certificamus quod præd.* ELIAS CHALKE *ſexto die Maii anno regni domini* CAROLI II. *nuper regis Angliæ, &c.* 35° *apud* WILTON *præd. electus et præfectus fuit unus burgen. burgi præd. et eodem ſexto die Maii anno* 35° *ſupradicto apud* WILTON *præd. ſacramentum præſtitit corporale coram tunc majore burgi præd. juxta antiquam conſuetudinem burgi præd. quod ipſe idem* ELIAS *eſſet verus et fidelis corporationi majori et burgen. burgi præd. et præſtaret* ANGLICE would yield *optimum certamen et auxilium ſuum pro dignitate* ANGLICE the advancement *et utilitate* ANGLICE the wealth *inde et omnes terras et*

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poſſeſſiones ad inde pertinen. per omnes honeſtas et laudabiles vias et modos. Et ulterius domino regi certificamus quod poſtea et ante adventum brevis præd. idem ELIAS CHALKE *apud* WILTON *præd. elect. et præfect. fuit major burgi præd. et 23 die Octobr. anno domini* 1690. *apud* WILTON *præd. ſacramentum ſuum præſtitit corporale modo quo alii majores præd. conſueverunt, quod ipſe videret quantum poſſet quod redditus burgenſium et communitatis burgi præd. applicarentur* ANGLICE employed *ad emolumen. eorundem ac etiam in omnibus negotiis ſubſtan. tangentibus ſive concernentibus burgi præd. conſ. ſuos fratres ſuos et minime concluderet inde niſi cum eorum conſenſu; poſteaque iterum elect. idem* ELIAS *ſcil't* 13. *die Octobris anno domini* 1693 *iterum jurat. fuit major burgi præd. modo quo prius et major burgi præd. fuit et continuavit per ſpatium unius anni* * *integri poſt quodlibet tempus præd. quo ipſe jurat fuit major burgi præd. et præfertur. Et ulterius domino regi certificamus quod præd.* ELIAS CHALKE *ſacramenta ſua præd. vili pendens et dignitatem ſive utilitatem corporationis major. et burgen. burgi præd. minime cura. ipſe idem* ELIAS *miniſtros burgi præd. per commune concilium corporationis præd. debite electos et qui per commune concilium corporationis præd. et non aliter ab officiis ſuis amoverentur arbitrarie amovit ab officiis ſuis authoritatis ſuæ colore abſque conſenſu vel aſſenſu communis concilii præd. ſcil't* ROBERTUM PAINE *coram. curiam corporation. præd.* WILL'UM COWDRY *jun. ſervien. ad clavum et recept. ſeparales denariorum ſummas debitas et ſolvend. majori et burgenſibus burgi præd. quas ipſe idem* ELIAS *in uſum ſuum proprium convertit et diſpoſuit apud* WILTON *præd. et compertum inde majori et burgenſibus burgi præd. minime reddidit ſcil't unam libram et duodecim ſolidos per ipſum recept. pro redditu tolneti pontis in* HARNEHAM *in com. præd. ac debit. corporationi, ac etiam monet. m per ipſum de corporatione præd. recept. ſecundum ordinem et conſuetudinem ibidem uſitat. ritenuit diſpoſuit, viz. decem ſolidos debit.* ELIÆ GLIDE *ballivo majoris burgi præd. ac etiam idem* ELIAS CHALKE *clandeſtine et abſque conſenſu corporationis præd. cauſavit quandam intrationem electionis cujuſdam* JACOBI HOPGOOD *eſſe membrum corporationis præd. ulteriorem* ANGLICE to be ſtruck out *a quodam libro* VOCAT. the ledger-book *de et pertinen. præd. corporationi et manum ſuam propriam alias intrationi in loco intrationis ſic. ut præfertur obliteratæ et eraſæ ſcripſit et inſeruit in libro præd. ſcilicet. libro in quo actus publici reipublicam majoris et burgenſium burgi præd. aliqualiter tangentes memorantur et recordantur De quibus omnibus aliisque criminibus et object. et per ipſum exiſtentem burgen. burgi præd. in ſacramenti ſui præd. læſionem et reipublicæ præd. majoris et burgenſium burgi præd. detrimentum fact. et perpetrat. ipſo eodem* ELIA CHALKE *in communi concilio* ANGL. *alicubi* / *major. et burgenſium burgi præd. plenius audit. et ſuper præmiſſis examination. et matur conſideration. inde iidem major et burgen. burgi præd. in communi concilio præd. apud* GUILDHALL *burgi præd. 28 die Auguſti an. Dom. milleſimo ſexcenteſimo nonageſimo quinto aſſemblat. ordinaverunt eundem* ELIAM CHALKE

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CHALKE *ab officio et loco unius burgen. burgi præd. amoveri* ANGLICE disfranchiſed *et per eundem ordinem fuit amotus inde et redditus incapax aliquid amplius agen. ut membrum ejusdem corporationis hisque de cauſis eundem* ELIAM CHALKE *in locum et officium unius burgenſium burgi præd. reſtituere non poſſumus.*

W. SHARPE, *Major.*

THE KING *against* THE MAYOR AND BURGESSES OF WILTON.

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* The King *againſt* The Mayor and Burgeſſes of Wilton. Caſe 126.

MANDAMUS to reſtore one *Elias Chalke* to the place of a burgeſs in *Wilton.*

Mandamus to reſtore to the office of *burgeſs* of a corporation, and the return made thereon.

The return was, That *Wilton* is an ancient borough, wherein there was a cuſtom, that the mayor and burgeſſes ſhould be a body incorporate, and that they might diſplace any burgeſs who ſhould act any thing againſt his oath, or againſt the intereſt of the borough, upon hearing the offence, and proof of his crime: That *Elias Chalke* was choſen a burgeſs there in the month of *May*, in the twenty-ninth year of *Charles the Second*, and then took an oath to be faithful and true to the corporation, and to endeavour the advancement thereof: That he was afterwards choſen MAYOR of the ſaid corporation, and took an oath, that the rents thereof, as far as he could, ſhould be employed for the profit of the ſaid corporation; and that in all matters of moment he would conſult his brethren, and conclude on nothing without their conſent: But that he, not regarding his oath, and neglecting the profit of the corporation, did arbitrarily diſcharge *Robert Paine* and others from their offices there, and that they ought not to be removed but by the common-council: That he received ſeveral ſums of money due to the corporation, and converted the ſame to his own uſe, without giving any account thereof: That he has made undue entries of elections of members of the corporation in their ledger-book: and ſets forth all theſe matters in particular. For which, and other crimes, he being heard in common-council, and it being proved upon him, the mayor and burgeſſes of the ſaid borough, being aſſembled in common-council, did diſfranchiſe him, and made him incapable to hold that office of burgeſs any longer; for which reaſons they could not reſtore him.

Vide ant. 10, 11. poſt. 314. 404. 452. 6. Mod. 18.

S. C. 2. Salk. 428.

Thoſe who argued againſt this return, ſaid,

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FIRST, That it was inſufficient and illegal: for if the mayor and burgeſſes have an authority to diſfranchiſe, and this general cuſtom, as returned, ſhall extend to ſuch things which they may lawfully do, yet they have not well purſued it, becauſe it does not appear that he was *ſummoned* to anſwer theſe offences which are laid to his charge, or that he had due notice to defend himſelf; for a man may be heard as it is alledged in the return, but not in his own defence. * Therefore a ſummons is neceſſary in all

A return to a *mandamus* to reſtore, ſtating that the party diſfranchiſed was *heard in his defence*, is inſufficient, without ſaying that he was *ſummoned.*

S. C. 2. Salk. 428. 1. Vent 19. 11. Co. 99. Stiles, 151. 447. 2. Stra. 537. 819. 2. Ld. Ray. 1334. Cowp. 523.

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such cases, and not generally, but to answer those particular matters. Thus it is, if the party leave the corporation, and inhabit elsewhere; in such case a general summons is not sufficient, it must specify the offence of which he is accused; and therefore a general return of a summons, viz. *quod licet sæpius requisitus fuit*, has been held insufficient to turn a man out of his freehold (*a*). The end of a summons is to bring the party to give his answer by the ordinary process of the court, and likewise to give him notice of his accusation, and therefore it ought to be particular: so that though it be returned, that he was fully heard *de omnibus criminibus*, yet without a summons he may not be prepared to answer, or to make a full defence. Agreeable to this, is the resolution in *Jones Buggs's Case* (*b*), that notwithstanding a corporation have an authority to remove either by charter or prescription, and have a just cause so to do; yet if it appear by the return of a *mandamus*, that they have proceeded against the party without hearing him to what was objected, or that he was not reasonably warned, such a disfranchisement is void, and shall not bind the party (*c*).

A return, to a *mandamus* to restore, "that the "party disfranchised was "fully heard on "THAT and "all other crimes "in common "council," without saying *before whom*, is bad.

SECONDLY, The return is uncertain; for it is, that he was *plenius audit. de omnibus aliis criminibus, &c.* and that upon proof thereof he was disfranchised; which is not sufficient to justify it, because it is not positively set forth that he was heard concerning those other crimes laid to his charge, or before whom he was heard. It is true, it is alledged, that he was heard *in communi concilio*, who might be assembled in the council-house not to consult but to feast; it should have been, that it was heard *apud commune concilium, &c.* So it was held in the case of the *Mayor of Gloucester* (*d*), who returned, that he called to him thirty of the council *in domo concilii assemblat'*, and did remove the party: this was held insufficient, because it did not appear that it was *apud commune concilium*. Then they return, that the crimes were proved upon him, but do not say by what proof, or that it was upon oath. Now proof without describing in what manner, must be such which is allowed at common law (*e*); and that is by jury, which was not in this case.

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A return to a *mandamus*, that the party was heard of that & other crimes, without stating *what crimes*, is bad. Ray. 153. 365. 432. 2 Salk. 432.

THIRDLY, It does not appear but that those other crimes may be such for which they could not justify this disfranchisement. They * should have returned, that he was required to make his defence to particular crimes objected against him; for in all returns of this nature there must be a precise certainty, and the Court will intend nothing but what is sufficiently alledged. Besides, the crimes which are expressed, are not so certainly set forth that this Court may judge of the cause of this proceeding against

1. Sid. 209. Fitzg. 123. 1. Keb. 716. 1. Show. 282.

(*a*) Rex v. Clyde, 4. Mod. 33. to 38. S. C. 1. Show. 364. S.C. 1. Ld. Ray. 223. 5. Com. Dig. "Mandamus," (D. 4)
(*b*) 11. Co. 99.
(*c*) Stiles, 151. 446. 452
(*d*) 3 Bulst. 189. Poph. 133. 1. Roll. Rep. 409.
(*e*) 1. Sid. 313.

the

the party; for it is ſaid, that he removed the ſervants of the corporation from their offices, who ought not to be removed but by the common-council. Now it does not appear what intereſt thoſe perſons had in their offices, or that they were removed by him againſt their conſent, for it may be that they ſurrendered willingly. THE KING against THE MAYOR AND BURGESSES of WIL-TON.

FOURTHLY, They return, that AN ORDER was made to diſfranchiſe him, and that by virtue of that order he was made incapable of acting as a member of the corporation. This is alſo inſufficient, becauſe they cannot remove any one by virtue of an order; it muſt be by a corporate act under the common ſeal. A corporation cannot remove a corporator by *an order*, it muſt be by an act under *the common ſeal*.

Comb. 41. 279 321 Mod. 548.

FIFTHLY, As to his receiving money due to the corporation, and converting it to his own uſe, without giving any account thereof, they do not ſay, that they required him to give an account, and that he refuſed. A return that a burgeſs did not account, without ſaying he was *required* and *refuſed*, is bad.

SIXTHLY, As to his ſtriking out an election of a member in the ledger-book, and ſigning another entry inſtead of that ſtruck out, this does not appear to be any crime in him, for they do not ſay, that ſuch was an undue entry; he might ſtrike it out with an intent to write another who was lawfully choſen. It is not objected againſt him as an abuſe, or falſity. Q. If making falſe entries in the books of a corporation be cauſe of diſfranchiſement.

For which reaſons a peremptory *mandamus* was prayed.

It was argued on *the other ſide*, and THE COURT inclined, that there need not be any *ſummons* to anſwer particular matters; neither does *Bagg's Caſe* ſay that the party ſhould be *ſummoned*: it is ſufficient if he has been heard, which may be done, and was in this caſe without any *ſummons*, and if heard, the Court will intend that it was in his defence; ſo that there is no need of a *ſummons* at all, becauſe the intent of it is anſwered.

2. Salk. 428. 435 Palm. 453. Style, 51. 446, 452. 1 Buſſt. 189. 2. Keb. 489.

But this was not the grounds of the *peremptory mandamus*, which was granted for the other reaſons above-mentioned.

* *Pleas before the Lord the King at* Weſtminſter, *of the Term of Saint* Hilary, *in the ſixth Year of the Reign of the Lord* William *the Third, King of England*, &c. Roll. 729. * [260]

Leigh *againſt* Brace. Caſe 127.

WORCESTERSHIRE, *to wit.* } BE it remembered, that on *Wedneſday* next after eight days of *Saint Hilary*, in this ſame Term, before the lord the king at *Weſtminſter*, came *George Leigh* by *Thomas Callow* his attorney, and brought here into the court of the ſaid lord the king then there his certain bill againſt *Samuel Brace*, in cuſtody of the marſhal, &c. of a plea of treſpaſs and ejectment; and there are pledges Count in ejectment. S. C. 3. Ld. Ray. 99.

Leigh against Bruce,

of profecuting, to wit, *John Doe* and *Richard Roe*; which ſaid bill follows in theſe words, to wit: *Worceſterſhire*, to wit, *George Leigh* complains of *Samuel Bruce*, in cuſtody of the marſhal of the *Marſhalſea* of the lord the king, being before the king himſelf, for that, to wit, That whereas one *John Cooke*, on the firſt day of *October*, in the 6th year of the reign of the lord *William* the now king and lady *Mary*, late queen of *England*, &c. at the pariſh of *Bromſgrove*, in the county aforeſaid, demiſed, granted, and to farm let to the aforeſaid *George*, one meſſuage, thirty acres of land, ten acres of meadow, and twenty acres of paſture, with the appurtenances, ſituate, lying and being in the pariſh of *Bromſgrove* aforeſaid, in the county aforeſaid, to have and to hold the tenements aforeſaid, with the appurtenances, to him the ſaid *George* and his aſſigns, from the feaſt day of *Saint Michael* the archangel, then laſt paſt, unto the full end and term of ſeven years from thence next following, and fully to be complete and ended; by virtue of which ſaid demiſe, the ſaid *George* entered into the tenements aforeſaid, with the appurtenances, and was poſſeſſed thereof until the aforeſaid *Samuel* afterwards, to wit, on the ſame firſt day of *October*, in the ſixth year abovesaid, with force and arms, into the tenements aforeſaid, with the appurtenances, in and upon the poſſeſſion of him the ſaid *George*, entered thereupon, and him the ſaid *George*, from his farm aforeſaid, his ſaid term thereof not being ended, ejected, expelled, and removed, and him the ſaid *George*, from his poſſeſſion aforeſaid thereof, kept out, and yet keeps out, and other wrongs to the ſaid *George* then and there did, againſt the peace of the ſaid lord the now king and the late lady the queen, and to the damage of him the ſaid *George* of ten pounds; and thereupon he brings ſuit, &c.

Not guilty.

And the ſaid *Samuel*, by *John Hancocks* his attorney, comes and defends the force and injury when, &c. and ſaith that he is not guilty thereof; and of this he puts himſelf upon the country; and the ſaid *George* likewiſe, therefore let a jury come before the lord the king at *Weſtminſter*, on *Tueſday* next after eight days of the Purification of the Bleſſed Virgin *Mary*; and who neither, &c. to take cognizance, &c. becauſe as well, &c. The ſame day is given to the party aforeſaid there, &c. * Afterwards the proceſs thereupon is continued between the parties of the plea aforeſaid by the jury being thereupon reſpited between them before the lord the king at *Westminſter* until *Wedneſday* next after fifteen days of *Eaſter*, from thence next following, unleſs the juſtices of the lord the king, aſſigned to take the aſſizes in the county aforeſaid, ſhall firſt come on *Saturday* the ſecond day of *March*, at *Worceſter*, in the county aforeſaid, by form of the ſtatute, &c. for want of jurors, &c. At which day, before the lord the king, at *Weſtminſter*, cometh the ſaid *George*, by his ſaid attorney, and the ſaid juſtices before whom, &c. have ſent here their record, had before them in theſe words, to wit: Afterwards, on the day and at the place within contained, before GILES EYRE, *Knight*, one

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Niſi prius.

Poſtea.

one of the juſtices of the lord the king, aſſigned to hold pleas before the king himſelf, and THOMAS BRETON, *Eſq.* to him the ſaid GILES EYRE and WILLIAM GREGORY, *Knight*, another juſtice of the ſaid lord the king, aſſigned to hold pleas before the king himſelf, juſtices of the ſaid lord the king, aſſigned to take the aſſizes in the county of *Worceſter*, by form of the ſtatute, &c. for this time aſſociated, the preſence of the ſaid WILLIAM GREGORY not being expected, by virtue of the writ of the lord the king, of *ſi non omnes*, &c. come as well the within-named *George Leigh*, as the within-written *Samuel Brace*, by their attornies within contained; and the jurors of the jury, whereof mention is within named, being called, come, who being choſen, tried, and ſworn to ſpeak the truth concerning the matters within contained, ſay, upon their oath, that one *Walter Brace* was ſeiſed of the tenements in the declaration within-mentioned, in his demeſne as of fee; and being ſo ſeiſed thereof, the ſaid *Walter Brace*, before the ſaid time when, &c. to wit, on the twenty-fifth day of *July*, in the twentieth year of the reign of the lord *James* the Firſt, late king of *England*, &c. by his certain charter, ſealed with the ſeal of him the ſaid *Walter*, and to the jury aforeſaid in evidence ſhewn, the date whereof is the ſame day and year, enfeoffed *Thomas Wilkes* and *Thomas Flavell* of and in the tenements aforeſaid, with the appurtenances, to have and to hold to them the ſaid *Thomas* and *Thomas* and their heirs, to the uſes in the ſaid charter ſpecified, the tenor of which ſaid charter follows in theſe words: To all chriſtian people to whom this preſent writing ſhall come, *Walter Brace* of *Forkbury*, in the pariſh of *Bromſgrove*, in the county of *Worceſter*, yeoman, ſendeth, greeting: Know ye, that I the ſaid *Walter Brace*, for the natural love and affection that I bear unto my ſon *Thomas Brace*, and for divers other conſiderations me eſpecially moving, have given, granted, enfeoffed, and confirmed, and by theſe preſents do give, grant, enfeoff, and confirm, unto *Thomas Wilkes*, of *Forkbury* aforeſaid, yeoman, and unto *Thomas Flavell*, of *Bromſgrove* aforeſaid, clerk, their heirs and aſſigns, all that dwelling-houſe or tenement, with the appurtenances, which I, the ſaid *Walter Brace*, purchaſed of *Stephen Dipple* of *Bromſgrove* aforeſaid, and is ſituate in the high ſtreet * of *Bromſgrove*, between the land of *Edward Seabright*, *Eſq.* and the lands of *Gilbert Butler*, *Gent.* and now in the tenure or occupation of *Walter Roſe*; and alſo one other houſe or cottage, with the appurtenances, ſituate and being in *Forkbury* aforeſaid, wherein *Gilbert Weſtley* now dwelleth, together with the cloſe wherein the ſaid cottage ſtandeth, containing, by eſtimation, one acre and an half, or thereabouts, be the ſame more or leſs; one other cloſe of paſture, called by the name of *Whern's Cloſe*, containing, by eſtimation, three acres, or thereabouts; one other cloſe of paſture, called by the name of *Woodfell*, containing, by eſtimation, five acres, or thereabouts; two other cloſes, called the *Slade Croſts*, containing, by eſtimation, ſix acres, or thereabouts; one day mowth of meadow ground, lying in *Long*

Leigh against Brace.

Special verdict.

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Meadow next unto the eſtate there, and two fleeting acres lying in *Broad Meadow*; with all ways, waters, woods, underwoods, commons, profits, commodities, advantages, and hereditaments whatſoever unto the ſaid premiſes, and every part and parts thereof belonging, or in any wiſe appertaining; all which ſaid premiſes are ſituate, lying and being in the ſaid pariſh of *Bromſgrove* and county of *Worceſter*, to have and to hold the ſaid houſes or tenements, lands, and all and ſingular other the premiſes, with the appurtenances, and every part thereof, to the ſaid *Thomas Wilkes* and *Thomas Flavell*, their heirs and aſſigns, to the uſes, intents, and behoofs herein-after by theſe preſents mentioned and declared, and to no other uſe, intent, or purpoſe; that is to ſay, to the uſe and behoof of me the ſaid *Walter Brace*, for and during my natural life, and after the deceaſe of me the ſaid *Walter Brace*, to the uſe and behoof of the aforeſaid *Thomas Brace*, my ſon, and his heirs for ever; and for default of iſſue of the body of the ſaid *Thomas Brace*, then to the uſe and behoof of the right heirs of me the ſaid *Walter Brace* for ever, to be holden of the chief lord or lords of the fee or fees of the premiſes, by the rents and ſervices thereof firſt due and of right accuſtomed: And I, verily, the ſaid *Walter Brace* and my heirs, the ſaid houſes or tenements, lands, and all and ſingular other the premiſes, with the appurtenances, and every part and parcel thereof, unto the ſaid *Thomas Wilkes* and *Thomas Flavell* and their heirs, ſhall and will warrant, and for ever defend by theſe preſents. In witneſs whereof, I, the ſaid *Walter Brace*, unto this my preſent writing indented, have ſet my hand and ſeal the twenty-fifth day of *July*, in the reign of our ſovereign lord *King James*, by the grace of God, of *England*, *France*, and * *Ireland*, king, defender of the faith, &c. the twentieth, and of *Scotland* the fifty-fifth, *annoque Domini* 1622. By virtue whereof, and alſo by force of the act of parliament for transferring of uſes into poſſeſſion made and provided, the ſaid *Walter* was ſeiſed of the premiſes in the ſaid charter mentioned, being the premiſes aforeſaid in the declaration aforeſaid ſpecified, as of his freehold, for the term of his life, the remainder thereof to the ſaid *Thomas Brace* belonging, as the law requireth. And the ſaid jurors further upon their oath ſay, that the aforeſaid *Walter Brace* afterwards, and before the ſaid time when, &c. died, and that the ſaid *Thomas Brace*, the ſon of him the ſaid *Walter*, entered into the tenements, in the declaration within-written mentioned, and was ſeiſed thereof, as the law requireth; and that he the ſaid *Thomas Brace*, being ſo ſeiſed thereof, in due manner and form made his laſt will and teſtament in writing, on the ſixteenth day of *April*, in the thirty-third year of the reign of *Charles the Second*, late *King of England*, &c. which ſaid will follows in theſe words: "In the name "of God, *Amen*. The ſixteenth day of *April*, in the thirty-third "year of the reign of our ſovereign lord *Charles the Second*, by "the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, "king, defender of the faith, &c. *annoque Domini* 1681, I, *Thomas* "*Brace*, of *Forkbury*, in the pariſh of *Bromſgrove*, in the county "of

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Lane and Brace

of *Worceſter*, yeoman, being weak of body, but of ſound and perfect memory and underſtanding, thanks be to God, calling to mind the uncertain ſtate of this life, and being deſirous to ſettle things, in order for the leaving the world, I having lived in the enjoyment thereof till a very conſiderable age, do make this my laſt will and teſtament in manner following, revoking, by theſe preſents, all and every other teſtament or teſtaments, will and wills heretofore by me made, either by word or writing, and this to be taken only for my laſt will and teſtament. Firſt, I bequeath my ſoul unto God my creator, and to Jeſus Chriſt my redeemer, and my body to the earth, from whence it was taken, to be decently buried in ſuch chriſtian manner as to my executor herein-after named ſhall be thought moſt convenient, there to reſt until my ſoul and body ſhall meet again and be joined together at the Reſurrection: And, touching ſuch temporal eſtate as God has been pleaſed to beſtow upon me, I do order, give, and bequeath the ſame in manner following: *Imprimis*, I do hereby give and deviſe unto my ſon *Samuel Brace*, during the term of his natural life, eight pounds a-year of lawful money of *England*, to be paid him quarterly from the time of my deceaſe, by my executor herein-after mentioned, he my ſaid ſon *Samuel* permitting and ſuffering *William Fowkes* and *Jonathan Wall*, their executors, adminiſtrators, and aſſigns, peaceably and quietly to hold and enjoy the lands and tenements and premiſes to them by me ſeverally leaſed, at and under the covenants ſpecified in their ſeveral leaſes; but if he moleſt or hinder the ſaid *Jonathan Wall* and *William Fowkes* of their quiet enjoying the premiſes, or any part thereof, to them by me deviſed, then my will is, that my * ſaid ſon *Samuel* have four pounds a-year only during his life, paid him quarterly by my executor, in full diſcharge and ſatisfaction of the ſaid eight pounds a-year. *Item*, I give and bequeath unto my daughter *Elizabeth Brace*, three hundred pounds of like money of *England*, as followeth, *viz.* two hundred pounds within a year, and one hundred pounds more, the remaining part of the ſaid three hundred pounds, within two years after my deceaſe, if ſhe ſo long live, or bear any iſſue of her body, with all my goods that ſhall be in my houſe at *Whern's Aſh* at my deceaſe. *Item*, I give to my grandſon *Henry Cooks*, during his natural life, all that my meſſuage or tenement in *Forkbury*, with two acres of land to the ſame belonging, in the poſſeſſion of one *William Perkes*, and four more acres of land to the ſame adjoining, in the poſſeſſion of one *William Oxford*; the rents and profits of the ſaid meſſuage, and ſeveral parcels of land, to be received and enjoyed by my executor till my ſaid grandchild ſhall attain to the age of twenty-one years, for the maintenance and education of my ſaid grandchild. *Item*, I give and deviſe to my grandchildren *Mary* and *Hannah Cooks*, all thoſe my two cloſes of land in *Catſill*, adjoining to the common field there, called *Intall-field*, containing, by eſtimation, about four acres, and three ſeveral

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parcels

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"parcels of land in *Intall-field*, containing, by eſtimation, three "acres. And laſtly, I give and deviſe unto *John Cooks* my ſon-"in law, whom I make executor of this my laſt will, and to his "heirs on the body of my daughter *Rebecca* begotten, or to be "begotten, all my eſtate, lands, tenements, and houſes whatſoever "in *Forkbury* and *Catſill*, in the ſaid pariſh of *Bromſgrove* and "county of *Worceſter*, and not herein-before deviſed, and the re-"verſion of the ſaid meſſuage and lands herein-before bequeathed "unto my ſaid grandchild *Henry Cooks*, from and after his deceaſe, "paying the legacies and annuities in this my will comprized, &c." And the ſaid jurors further upon their oath ſay, that the ſaid *Thomas Brace* afterwards died ſeiſed of the tenements aforeſaid, with the appurtenances as aforeſaid; and that the tenements aforeſaid, with the appurtenances in the declaration aforeſaid ſpe-
[265] cified, and the tenements aforeſaid in the will aforeſaid before recited, and by the ſame expreſſed to be deviſed to the aforeſaid *John Cooks* in poſſeſſion, are the ſame tenements, with the appurtenances, and not others or divers; and that the ſaid *John Cooks*, after the death of him the ſaid *Thomas Brace*, into the tenements aforeſaid, being the tenements in queſtion, entered by colour of the will aforeſaid, and was thereof ſeiſed, as the law requireth. And the ſaid jurors, upon their oath, further ſay, that the ſaid *John Cooks*, after the death of the ſaid *Thomas Brace*, paid as well all and ſingular the legacies and annuities in the ſame will mentioned and comprized, at ſuch times, and in the manner and form, as in the ſame will is directed, as all the juſt debts and funeral expences of the ſaid *Thomas Brace*, according to the true intention of the ſaid will. And the jurors aforeſaid, upon their ſaid oath, further ſay, that the within named *Samuel Brace*, the now defendant, is the ſon and heir of the body of the ſaid *Thomas Brace*; and that the ſaid *Samuel Brace*, after the death of the ſaid *Thomas* his father, entered into the tenements aforeſaid, with the appurtenances, and was ſeiſed thereof, as the law requireth. And the aforeſaid *John Cooks*, afterwards, and before the ſaid time when, &c. to wit, on the within written firſt day of *October*, in the ſixth year of the reign of the lord *William* now king of *England*, and of the lady *Mary* late queen of *England*, &c. at the pariſh of *Bromſgrove* aforeſaid within-written, in the county aforeſaid, into the tenements aforeſaid, with the appurtenances, entered, and then and there demiſed, granted, and to farm let, to the ſaid *George* the tenements aforeſaid, with the appurtenances, to have and to hold the tenements aforeſaid, with the appurtenances, to the ſaid *George* and his aſſigns, from the feaſt day of *St. Michael* the archangel then laſt paſt, unto the full end and term of ſeven years from thence next following, and fully to be compleat and ended: by virtue of which ſaid demiſe he the ſaid *George* entered into the tenements aforeſaid, with the appurtenances, and was thereof poſſeſſed, until the ſaid *Samuel*, the defendant, afterwards, to wit, on the ſame firſt day of *October*, in the ſixth year above-ſaid, into the tenements aforeſaid, with the appurtenances, in and upon

upon the poſſeſſion of him the ſaid *George* thereupon entered, and him the ſaid *George* from his farm aforeſaid, his term not being yet ended, ejected, expelled, and removed, and him the ſaid *George* from his poſſeſſion aforeſaid thereof kept out, and yet keeps out. But whether upon the whole matter aforeſaid, by the jurors aforeſaid, in form aforeſaid found, the ſaid *Samuel Brace*, the now defendant, is guilty of the treſpaſs and ejectment within-written, in manner and form as the ſaid *George* within complains againſt him, or not, the jurors aforeſaid are wholly ignorant, and thereupon pray the advice and conſideration of the Court, &c. And if, upon the whole matter aforeſaid, by the jurors aforeſaid, in form aforeſaid found, it ſhall ſeem to the Court of the lord the king here, that the ſaid *Samuel Brace*, the now defendant, is guilty of the treſpaſs and * ejectment within-written, in manner and form as the ſaid *George* within complains againſt him, then the ſaid jurors further, upon their oath, ſay, that the ſaid *Samuel Brace* is guilty of the treſpaſs and ejectment within-written, in manner and form as the ſaid *George Leigh* within complains againſt him; and they aſſeſs the damages of him the ſaid *George Leigh*, by the occaſion within written, beſides his coſts and charges by him about his ſuit in this behalf laid out, to ſixpence, and for thoſe coſts and charges to forty ſhillings. But if, upon the whole matter aforeſaid, by the jurors aforeſaid, in form aforeſaid found, it ſhall ſeem to the Court here, that the aforeſaid *Samuel Brace*, the now defendant, is not guilty of the treſpaſs and ejectment within written, in manner and form as the ſaid *George* within complains againſt him, then they the ſaid jurors further ſay, upon their ſaid oath, that the ſaid *Samuel Brace* is not guilty of the treſpaſs and ejectment in the declaration within-written ſpecified, as the ſaid *Samuel Brace* within for himſelf in pleading hath alleged. And becauſe the Court of the lord the king now here is not yet adviſed of giving their judgment of and upon the premiſes, day is thereupon given to the parties aforeſaid before the lord the king at *Weſtminſter*, until———next after———— to hear their judgment of and upon the premiſes, for that the Court of the ſaid lord the king now here thereof is not yet, &c.

Leigh *againſt* Brace.

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Leigh *againſt* Brace.

Caſe 128.

Hilary Term, 6. *Will.* 3. *Roll* 929.

UPON a ſpecial verdict in ejectment, the caſe upon the pleading was thus:

If a feoffment in fee be made to truſtees for the uſe of the feoffor for life, with remainder to his ſon in fee, "*and for default of iſſue of the body of the ſon*," to the uſe of the right heirs of the feoffor for ever, THE SON ſhall take an *eſtate tail* only under this deed.—S. C. Carth. 343. S. C. 1. Ld. Ray. 101. S. C. 3. Salk. 337. S. C. Holt, 668. S. C. 12. Mod. 101. Plowd. 541. Hob. 172. Cro. Car. 265. Cro. Jac. 290. 415. 427. 448. Lit. Rep. 253. 3. Lev. 70. 8. Mod. 23. Salk. 734. 1. Peer. Wms. 199. 432. 563. 1. Ld. Ray. 568. Cowp. 234. 410.

Walter Brace, being ſeiſed of the lands in queſtion, did, on the twenty-fifth day of *July*, in the year 1622, make a feoffment

thereof

Brace. Brace. thereof in fee to *Thomas Wilkes* and *Thomas Flavell*, and their heirs, to the uſe of himſelf for life, and after his deceaſe to the uſe of his ſon *Thomas Brace* and his heirs for ever; and for default of iſſue of the body of the ſaid *Thomas Brace*, then to the uſe and behoof of the right heirs of the feoffor for ever. *Walter Brace* afterwards died ſo ſeiſed, and *Thomas* his ſon entered upon the lands; who, on the ſixteenth day of *April* 1681, made his will, and amongſt other things deviſed the ſame to his ſon-in-law *John Cookes* and his heirs, on the body of *Rebecca* his then wife begotten or to be begotten, paying his debts and legacies. The ſaid *Thomas Brace* died ſeiſed of the ſaid lands; and after his death *John Cookes* entered by virtue of the ſaid deviſe. *Samuel Brace* the defendant is ſon and heir of the ſaid *Thomas Brace*, and the ſaid *Samuel*, after the death of his father, did likewiſe enter upon
[267] * theſe lands. *John Cookes* afterwards entered, and made a leaſe to the plaintiff for ſeven years, by virtue whereof he entered and was poſſeſſed until *Samuel Brace* ejected him. And the Jury make a general concluſion.

The ſingle queſtion was, What eſtate *Thomas Brace* took by this feoffment?

It was argued, That he had *a fee-ſimple*, for ſuch an eſtate was expreſsly limited to him; and if the deed had gone no farther, it muſt be an eſtate in fee, and not otherwiſe. But that which makes the doubt are the words which immediately follow: "and "for default of iſſue of the body of the ſaid *Thomas Brace*, then "to the grantor and his heirs." It is true, theſe words might create an eſtate-tail in a will, and alter an expreſs limitation made of the eſtate before; and the reaſon is, becauſe a man *in extremis* is *inops conſilii*: but it is otherwiſe in a feoffment, which is ſuppoſed to be made upon deliberation, and with advice of Counſel. And therefore it was reſolved in the caſe of *Dutton v. Engram* (*a*), that where the teſtator deviſed lands to his wife for life, and after her deceaſe to *John* his eldeſt ſon and his heirs, upon condition that he granted an yearly rent "to *Stephen* and his heirs; and if "*John* died without heirs of his body, then to *Stephen* and the "heirs of his body;" that this was an eſtate-tail in *John*; though it was objected, that he muſt have an eſtate in fee, otherwiſe he could not grant the rent in fee. Now this was in the caſe of a will: but there is a wide difference between conſtructions of wills and deeds, for the latter are always taken very ſtrictly againſt the grantor, and therein the firſt intention ſhall always take place; for the law will not allow any implication which can or may be made upon a ſubſequent clauſe in a deed, to alter any expreſs eſtate therein limited before. As for inſtance: It has been ruled (*b*), that where a copyholder in fee ſurrendered "to the uſe of *Frances* and *John Reeve*, and the ſurvivor; and

(*a*) Cro. Car. 427. 1. Roll. Abr. 842. 938. (*b*) Cro. Car. 367. 2. Roll. Abr. 61. Jones, 342.

"for

for want of iſſue of the body of *John* lawfully to be begotten, "then to remain over;" with A MEMORANDUM, that the ſurrender was not to be in force till after the death of the ſurrenderor; now if this MEMORANDUM ſhould be allowed to be good, it would have made the whole ſurrender void, becauſe it had been to commence at a day to come; therefore it was held, that the ſurrender, being perfect in the beginning, ſhall not be avoided by this ſubſequent clauſe, but that *John* ſhould have an eſtate for life only, which ſhould not be enlarged by implication by a ſubſequent clauſe, either in a ſurrender or conveyance, where the party might have Counſel to direct him. It is true, my LORD COKE, in his Comment upon *Littleton* (*a*), tells us, that "if "lands are given to *B.* and his heirs, *habendum* to him and his heirs "if he hath heirs of his body, and if he die without heirs of his "body, that the land ſhall revert to the donor," this is an eſtate-tail; for the *habendum* ſhall be conſtrued upon the whole deed to be a declaration what heirs were meant in the premiſes. But this was all in one ſentence (*b*), and for that reaſon the eſtate in fee was never made perfect and abſolute: it is all but one limitation, neither did it ſtand with any implication, as in the caſe at bar; and therefore it can be no authority to prove that to be an eſtate-tail. Neither is *the Year-Book* of *Henry the Sixth* (*c*) an authority to this purpoſe; where it is held, that if a feoffment be made to a man and his heirs, and if it ſhould happen that he die without heirs of his body, the remainder over, that the law will intend it to be an eſtate-tail. It is true, the book is ſo, but it does not appear that it was the judgment of the Court, but only aſſerted by Counſel *arguendo*. But in the principal caſe, the eſtate was once made abſolute; which being done, the grantor had executed his power, and could never make any farther limitation, eſpecially it being in the caſe of a deed.

Lutw. Agard Bract.

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But *on the other ſide* it was ſaid, that this is not an entire ſentence, but it is complicated with the whole clauſe; that there are many forms of words to create an *eſtate-tail*; and though it is generally true, that the words "heirs of the body" are requiſite in a gift in tail, yet general words which are equivalent will create the like eſtate; as for inſtance, lands are given to a man *et hæredibus de carne ſuâ* (*d*); for the makers of the ſtatute *de Donis* (*e*) did not intend to enumerate all the forms of eſtates-tail. It is very true, ſuch eſtates muſt be limited by expreſs words, and it is ſufficient if by words which are of the ſame import and ſignification; therefore *Littleton* (*f*) tells us what an eſtate-tail is, but does not ſhew what words are neceſſary to create ſuch an eſtate. Now the ſubſequent words in this caſe do certainly make an eſtate-tail in the feoffee, for they ſhew what iſſue was intended to

(*a*) Co. Lit. 21. a. Hob. 172.
(*b*) See Mr. Fonblanque's edit. of Barlowe's Equity, 445.
(*c*) Year Book 19. *Hen.* 6. pl. 74. Plowd. 541.
(*d*) Co. Lit. 20. b.
(*e*) 13. *Edw.* 1. c. 1.
(*f*) Litt. ſect. 14.

inherit,

Leigh against Brace.

Inherit, *viz.* "iſſue of the body of the feoffee;" and * this will be ſufficient to abridge the precedent eſtate in fee; and if theſe words ſhould not be taken in this ſenſe, then they are vain, and to no purpoſe. Thus my Lord Rolle tells us (*a*): If lands are given to a man and his heirs, *habendum* to him and his heirs if he ſhall have any heirs *de carne ſuâ*, and if not, that it ſhall revert to the donor; though the firſt words import a fee, yet the whole make an eſtate-tail. Agreeable to the caſe at bar is that of *Walts v. Waſtfeild* (*b*), where lands were given to a man and his heirs; and if it happened that he died without "heirs of his body," remainder over; this is an eſtate-tail, for the limitation of the remainder over ſhews what heirs were intended. But *Beak's Caſe* (*c*) is in point; that was in a conveyance by way of feoffment, as this is, "to the firſt ſon who ſhall have iſſue, and to his "heirs; and for default of ſuch iſſue, the remainder over;" this was held an eſtate tail.

Curia. The intention of the feoffor is plain, that an eſtate *in fee* ſhould not paſs to his ſon; for the ſubſequent words ſhew, that he intended no abſolute eſtate ſhould veſt in him; it is no more than if a gift had been made "to a man and his heirs," *viz.* to the heirs of his body.

So judgment was given for the defendant.

(*a*) In abridging the caſe in the Year-Book, 27. Aſſ. pl. 15. 1. Roll. Abr. 838.
(*b*) 1. Roll Abr. 839.
(*c*) Litt. Rep. 344.

Caſe 129.

Breedon *againſt* Gill, *Qui Tam, &c.*

Suggeſtion for a prohibition to be directed to commiſſioners of exciſe.

S. C. 2. Salk. 555.
S. C. 3. Ld. Raym. 179.

England, to wit. } Be it remembered, that on *Tueſday*, on the morrow of *All Souls* in this ſame Term, before the lord the king at *Weſtminſter*, cometh here in court *Robert Breedon* in his proper perſon, and gives the court here to underſtand and be informed, That whereas by the laws and ſtatutes of this kingdom of *England*, every iſſue joined in any cauſe depending in any court of the king within this realm, before any judge or judges, ought to be tried and determined by the teſtimony of *vivâ voce* witneſſes produced in ſuch court, and not by the reading of notes and minutes in writing, containing the teſtimony of any witneſs or witneſſes taken in the ſame or in any other court, before the time of the trial of ſuch iſſue, by any clerk of any court: and whereas a certain information lately, to wit, on the 18th day of *January*, in the 7th year of the reign of the ſaid lord the now king, according to the form of the ſtatute in ſuch caſe made and provided, was exhibited at *London* in the pariſh of ——— in the ward of ———, before the chief commiſſioners and governors of the revenues of the ſaid lord the king of the exciſe appointed, according to the form of the ſtatute in ſuch caſe lately made and provided, by one *Thomas Gill, Gent.* who ſued as well for the lord the

BREEDON against GILES.

the king as for himſelf and the poor of the pariſh of *Saint Martin in the Fields* in the county of *Middleſex* againſt the ſaid *Robert Breedon*; ſhewing that the ſaid *Robert Breedon*, a common brewer, inhabiting and keeping a common brewhouſe for brewing of beer and ale within the limits and juriſdiction of the general office of the exciſe, ſituate in *Broad-ſtreet*, *London*, that is to ſay, in the pariſh of *Saint Martin in the Fields* aforeſaid, without firſt giving notice thereof at the ſaid office of the exciſe, or to the commiſſioners or governors aforeſaid, or to any of them within the limits and juriſdiction thereof, in and about the 16th day of *December* then laſt paſt did make uſe of and keep a private and concealed ſtore-houſe or room for laying beer and ale, or worts in caſks, the ſame not being ſuch as was openly known, diſcovered, or made uſe of in his common uſual brewhouſe, to the damage and prejudice of the ſaid lord the king in his revenue of the exciſe, which was contrary to the form of the ſtatute in ſuch caſe made and provided, and therefore he prayed the judgment of the ſaid commiſſioners and governors by that information, as in and by the laws of the exciſe was deviſed and appointed; to which ſaid information before the ſaid commiſſioners and governors, the ſaid *Robert Breedon* afterwards, to wit, on the third day of *March*, in the 8th year of the reign of the ſaid lord the now king, there appeared and pleaded that he was not guilty of the offence in the ſaid information contained, and iſſue thereupon was there joined: and in ſuch manner it was thereupon proceeded before the ſaid commiſſioners and governors of the revenue of the ſaid lord the king of the exciſe, that afterwards, to wit, on the ſaid third day of *March* in the 8th year aboveſaid, there the ſaid commiſſioners and governors adjudged the ſaid *Robert* to be guilty of the premiſes objected to him by the information aforeſaid; from which ſaid judgment and determination, and for having relief in the premiſes, the aforeſaid *Robert Breedon* afterwards, to wit, on the 24th day of *April*, in the 8th year of the reign of the ſaid lord the now king, according to the form of the ſtatute in ſuch caſe lately made and provided, appealed to the commiſſioners of the appeals, by the laws and ſtatutes of this realm of *England* in ſuch caſe appointed; and the aforeſaid *Thomas*, who ſued as well for the ſaid lord the king as for himſelf and the poor of the pariſh of *Saint Martin in the Fields* aforeſaid, on the 30th day of *October* in the 8th year aboveſaid, at *Weſtminſter* in the county of *Middleſex*, before ——— *Bodington*, ——— *Lock*, and ——— *Challoner*, Eſquires, commiſſioners of the appeals aforeſaid, in due manner appointed for this purpoſe, according to the form of the ſtatute in ſuch caſe made and provided, to prove the ſaid *Robert* guilty of the premiſes in the ſaid information ſpecified, offered in evidence certain notes and minutes of the evidence given by *Thomas Everard*, *John Booth*, and *Henry Ceſebart*, then and now being in full life, and reſiding at the city of *London*, witneſſes before the ſaid chief commiſſioners and governors of the revenue, upon the trial of the ſaid iſſue, before them then taken in writing by one *Edward Nordl*, Eſq.

BREEDON *against* GILL.

Esq. clerk to the said chief commissioners and governors, without any lawful authority; and although he the said *Robert Breedon* then and there alledged and objected to the aforesaid commissioners of the appeals, that the said notes and minutes ought not by the laws to be read in evidence, and prayed that the said *Thomas Everard*, *John Booth*, and *Henry Casebart*, being then and now in full life, as afore is set forth, might be produced to give *vivâ voce* evidence upon their oaths before the said commissioners of the appeals: but the said commissioners notwithstanding have adjudged that the said notes or minutes so as aforesaid by the said *Edward Noell* taken, without any lawful authority, should be read in evidence, contrary to the laws and statutes of this kingdom of *England*; the aforesaid *Thomas Gill*, the judgment so as aforesaid given by the chief commissioners and governors of the revenue of the said lord the king of the excise upon the evidence aforesaid, daily endeavours and contrives with all his power to procure to be confirmed, in contempt of the said lord the now king, and to the damage, prejudice, and manifest grievance of him the said *Robert Breedon*, and contrary to the law and custom of this kingdom of *England*; and this he is ready to verify: whereupon he the said *Robert Breedon* prays the writ of the said lord the king of prohibition in this behalf, to be directed to the said commissioners of the appeals, to prohibit them, lest they admit the notes and minutes aforesaid in evidence in the cause aforesaid.

* [272]

Case 130.

Breedon *against* Gill, *Qui Tam*, &c.

If a statute give jurisdiction to the commissioners of *the excise*, with an appeal from their decision to commissioners of *appeal*, requiring them to examine the fact "upon proof made either "by confession "of the party, "or by the "oath of one "or more *witnesses*," the commissioners of appeal must examine witnesses *de novo*, and cannot determine on the evidence of the written minutes of the depositions of the witnesses examined before the commissioners *of excise*, if such witnesses are alive and forthcoming; and if they do, the court of king's bench will grant A PROHIBITION *quoad* the reception of such written evidence, although the statute say, "that the judgment of the commissioners of appeal shall be *final*."—S. C. 2. Salk. 555. S. C. Comb. 414. S. C. 1. Ld. Ray. 219. S. C. 3. Ray. 267. Ante, 151. 6. Com. Dig. "Prohibition" (A. 1.). (F. 13.). 4. Bac. Abr. 251, 252.

BY the statute 12. *Car.* 2. c. 23. certain impositions are given to THE KING upon *beer* and *ale* and other liquors for the increasing his majesty's revenue; and the forfeitures and offences within that act which are committed within the limits of the chief office of excise in *London*, are to be determined by the commissioners and governors of excise appointed * by the king, or the major part of them; or in case of an appeal, then by the commissioners of appeal for regulating that duty.

By 15. *Car.* 2. c. 11. an additional act made for the better collecting the said duty, and preventing the abuses therein, it was enacted, "That no common brewer shall set up or alter any "brewing vessels, without notice thereof given to the office of "excise, or shall use or keep any private or concealed storehouse, "cellar, or other place, for the laying any beer, ale, or worts in "casks, other than which be used in his common brewhouse, "and which are openly discovered or known, upon pain to "forfeit fifty pounds for every tun, vat, back, copper, and "cooler, set up and made use of without such notice given as "aforesaid."

NOTE.

BREEDON *against* GALE.

NOTE. The appellant is firſt to lay down the ſingle duty of exciſe in the hands of the commiſſioners, and to give ſecurity to the commiſſioners of appeals for the fine and forfeiture which was adjudged againſt him, if the judgment ſhould be affirmed upon the appeal, and likewiſe to pay double coſts; but if reverſed, then the informer is to pay double coſts.

Show 158. 172. 1. Sid. 65. 332. 6. Mod. 252. Raym. 137. 148.

The plaintiff *Breedon* ſuggeſts, for *a prohibition*, that by THE LAWS OF ENGLAND, when an iſſue is joined between the parties it ought to be tried by the evidence of witneſſes *vivâ voce*, and not by notes or minutes of their teſtimony; that an information was exhibited againſt him before THE COMMISSIONERS OF EXCISE, ſetting forth, that he was a common brewer, and did keep a private ſtorehouſe without acquainting the ſaid commiſſioners therewith; that he was found guilty; and that he appealed from their ſentence to THE COMMISSIONERS OF APPEALS, before whom *the informer* produced as evidence *the minutes* taken before THE COMMISSIONERS OF EXCISE, and that *the witneſſes* who gave evidence there were ſtill alive; which minutes were allowed as evidence by THE COMMISSIONERS OF APPEALS, &c.

The queſtion now was, Whether a prohibition ſhould be granted, directed to them, not to admit ſuch evidence?

Carth. 146.

THOSE WHO ARGUED *for the prohibition* inſiſted, that ſuch evidence before THE COMMISSIONERS OF APPEALS was irregular, and that it ought not to be allowed in any court where the party may be examined *vivâ voce*; that the words of the ſtatute are penned, as if on purpoſe to prevent ſuch proceedings, for after the appeal is given to the party grieved, and authority to THE COMMISSIONERS OF APPEALS to determine the ſame, the ſtatute requires them "to * ſummon the offender, and upon his appear- * [273]
"ance or contempt to examine the fact, and upon proof made, *Vide* Neſſ. Lut. 205, 206.
"either by confeſſion of the party or by the oath of one or more "witneſſes (which oath two of them have power to adminiſter) "to give ſentence, and to iſſue out warrants to levy the forfeitures, "&c." So that the ſtatute having provided in what method THE COMMISSIONERS OF APPEALS ſhall proceed, and having given them power to adminiſter *an oath* to the *witneſſes*, it is plain that *depoſitions* taken before THE COMMISSIONERS OF EXCISE cannot be read as evidence before them. Beſides, the reaſon of the thing ſpeaks that ſuch depoſitions cannot be given in evidence there, becauſe the ſtatute has not appointed any officer to take ſuch minutes: neither is their clerk upon his oath: and the party can have no remedy againſt him if he take ſuch minutes wrong; nor can he compel him to take them right. He cannot be compelled to put them in writing; what is done is to help his own memory; and never ſigned by the witneſſes till of late. This is *a new offence* created by the ſtatute, and *a new penalty* impoſed, which muſt have been determined in the courts of common law, if the law-makers had not ſhewed how the proceedings ſhould be,

Brereton against Gill.

and what proof ſhould be made, *viz.* "a voluntary confeſſion, of "oath of one or more witneſſes," which THE COMMISSIONERS OF APPEALS have power to adminiſter. Now it would have been to very little purpoſe to give them that power, if they might as well admit any former depoſitions to be read in evidence, which indeed can be no evidence before THE COMMISSIONERS OF EXCISE themſelves, and much leſs before THE COMMISSIONERS OF APPEALS; for they are to hear the cauſe originally, without any regard to what has been done by THE COMMISSIONERS OF EXCISE. They are directed to proceed in a different manner from the common law, by which law all examinations of fact are to be made by witneſſes and a jury. It is true, a jury is not required in this caſe, but witneſſes are ſtill neceſſary to prove the fact, and that upon oath *viva voce*; and the rather, becauſe the party may have liberty to croſs-examine them. In attaints, the witneſſes are examined upon oath *de novo*, though no other can be produced but ſuch who gave evidence in the original cauſe. So here the witneſſes are examined by the COMMISSIONERS OF EXCISE but on one ſide, and judgment is given by default; therefore the party muſt have a right to have the witneſſes

* [274] * examined *de novo* upon the appeal, eſpecially ſince the cauſe is now before another juriſdiction, which was created for the benefit of the party, that he might have juſtice done. Beſides, where-ever an act of parliament gives an appeal, *the fact* as well as *the law* is always examined upon the appeal. As, for inſtance, in the caſe of *baſtardy*, where two juſtices have power by the ſtatute 18. *Eliz.* c. 3. to make an order to charge the parents for the maintenance of the baſtard, from which order they may appeal to the ſeſſions; and there it is the conſtant practice to examine the fact again, and not to rely upon the examination taken before the two juſtices. It cannot be objected, that depoſitions taken in inferior courts are tranſmitted both to THE DELEGATES and to THE CHANCERY, and read and allowed there without re-examining the witneſſes; for this caſe is not like the proceedings in thoſe courts, where ſuch depoſitions may be read as evidence, becauſe the chancery is a court by preſcription and ancient uſage, and there are commiſſioners on both ſides to ſee juſtice done; but a conſtant uſage cannot be in this caſe, for it is a new-created juriſdiction. The ſtatute 43. *Eliz.* c. 2. gives authority to two juſtices of peace to determine the ſettlement of a poor man likely to be chargeable to a pariſh; but there is an appeal given to the quarter-ſeſſions; but it was never known that the ſeſſions was governed by any notes taken by the clerks of the two juſtices who made the original order. The commiſſioners of bankrupts are appointed by a new law; but if bankruptcy or not ſhould be the queſtion at a trial at law, the depoſitions taken before ſuch commiſſioners ſhall not be read as evidence, but the witneſſes ſhall be examined again *viva voce*.

Poſt. 307, 309.

THE NEXT QUESTION will be, Whether this court will now interpoſe, ſince by the ſtatute the judgment of THE COMMIS-

SIONERS

SIONERS OF APPEALS is to be final? As to that matter, the grievance of the plaintiff begins at this court of appeals, who have proceeded in another method than what is directed by the act; and therefore the remedy is proper in this court, who are not desired to determine the cause, but only to interpose where another court uses any extravagant method, in proceeding contrary to their power. * For this court prohibits the *court of admiralty* and the *ecclesiastical courts*, even in such cases where they have an original jurisdiction, if they either deny or delay justice (*a*). So in suits for tithes, if any thing arise concerning the bounds of parishes, or a *modus decimandi*, they are prohibited (*b*). So where they deny the proof of a thing by one witness they will likewise be prohibited (*c*), though this court cannot examine the original cause; for it is an oppression which the common law will not allow. So if the *spiritual court* should refuse to give a copy of the libel, this court will grant a prohibition *quousque*, &c. (*d*). So if a *justice of peace* refuse to sign the rate for the poor (*e*), or if a corporation will not chuse officers, it is usual for the court of king's bench to grant a *mandamus* (*f*), for this is for the preservation of order and government; and such proceedings are not to take any thing from a proper jurisdiction, but to hinder them from proceeding irregularly. Now although the statute says, "that the judgment of the COMMISSIONERS OF APPEALS "shall be final," and though the COMMISSIONERS OF EXCISE had a jurisdiction of the subject-matter, yet if they err in their proceeding, this Court will take notice of the whole fact, to do justice to the party injured. As if the COMMISSIONERS OF EXCISE should examine witnesses, but not upon oath, and give sentence, which is confirmed upon appeal, this court would reverse that sentence, though the statute is, "that the judgment "of the commissioners of appeals shall be final."

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* [275]

Carth. 33. 70. 142. Comb. 15. 109. 462. Fitzg. 79. 197. Ray. 360. 2. Co. 44. Moor, 761.

8 Mod. 335. Fitzg. 85.

THOSE WHO ARGUED *on the other side* said, that where a jurisdiction is created by act of parliament which gives an appeal, that must be the last resort; and in such case this court may command them to execute their power, but cannot reform their judgment (*g*). This statute gives THE COMMISSIONERS OF APPEALS power to examine witnesses, but leaves the method of such examination to themselves. Now the nature of an appeal is, that the court from whose sentence it is brought has done injustice to the party, and therefore it is very reasonable that the superior court should know upon what grounds they proceeded below; which cannot be done more effectually than by reading those very

(*a*) Fitz N. B. 41. 5. Co. 73.
(*b*) Hob. 247.
(*c*) Shotter *v.* Friend, 1. Show. 779. 353. 396.
(*d*) See 6. Com. Dig. "Prohibition" (F. 15.).
(*e*) Yelv. 93. Cro. Car. 333.
(*f*) Ante, 257. 2. Salk. 428. 435. 6. Mod. 229. Comb. 422. Foley, 36. 2. Sess. Cases, 65. 3 Bac. Abr. 535. Mr. Const's edition of Bott's Poor Laws, p. .
(*g*) See Rex *v.* Commissioners of the Land Tax, 1. Term Rep. 146

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depoſitions which were taken there. * The caſe now before the Court is not by reaſon of any complaint that ſome of the witneſſes were not examined, or that THE COMMISSIONERS OF EXCISE refuſed to take their depoſitions, and examined only one ſide, for in ſuch caſes it had been proper to make application to this court; but it is to re examine the ſame witneſſes: and to what purpoſe ſhould that be, unleſs to deny what they have already ſworn, which would be to introduce perjury. Beſides, it would tend to make the court of appeals an original juriſdiction, which is contrary to the very nature and intent of appeals; for thoſe commiſſioners are not to admit any new evidence, they muſt take the caſe as it was before the commiſſioners of excife, and judge whether they have done right or not. To ſay, that orders and decrees made by commiſſioners of charitable uſes, upon depoſitions taken before them, ſhall not be confirmed by the court of chancery upon reading thoſe depoſitions, is not applicable to this caſe. It is true, the matter muſt be re-examined there, becauſe the ſtatute gives that court juriſdiction in thoſe caſes; for it requires ſuch orders and decrees to be certified into that court, under the ſeals of the commiſſioners, within ſuch times as ſhall be limited in their commiſſions, and then the chancellor is to take ſuch order for the due execution thereof as he ſhall think fit. Neither can the practice of the juſtices of peace in the ſeſſions upon appeals rule this caſe, for they have a diſcretionary power to examine the witneſſes again *vivâ voce*, or take ſuch examinations as have been made by thoſe of the inferior juriſdictions. Nor is this caſe like thoſe where prohibitions have been granted to *eccleſiaſtical courts*, becauſe by bringing the appeal, you admit the juriſdiction of thoſe courts.

Caſes in Law and Equity, 386. Comb. 254. Carth. 143.

As for thoſe prohibitions to *ſpiritual courts*, where they deny the proof of any payment by one witneſs, it ſeems to be very unreaſonable, when they have an original juriſdiction of the cauſe, that they ſhould not proceed in their own methods. It is true, the ſtatute empowers them to examine witneſſes upon oath, but does not ſay whether it ſhall be in writing or not. Now if THE COMMISSIONERS OF EXCISE cauſe ſuch depoſitions to be written which have been taken before them, and tranſmit them to THE COMMISSIONERS OF APPEALS, that is an examination upon oath.

* [277] * It is much better for the party himſelf, that the depoſitions ſhould be in writing; for if a witneſs ſhould die before he can bring an appeal, he may have the benefit of ſuch depoſitions to be read in evidence for him as well as againſt him. Laſtly, The proceedings upon the ſtatutes againſt *bankrupts* cannot be objected to this purpoſe, becauſe ſuch proceedings in inferior courts are not concluſive; but when actions are brought in this court, they muſt be determined according to the conſtant method uſed there.

Comb. 203.

Neither does the court of king's bench ſend mandatory writs to others to direct them what judgment to give, but to command them to proceed according to juſtice. Now THE COMMISSIONERS OF APPEALS proceeded, and gave judgment in this caſe according to ſuch evidence as was given below; and it is in their power,

power, whether they will have the oath in writing or not; but it has been the conſtant practice to have it in writing. It muſt be agreed, that this act has ſettled no courſe of proceeding in this caſe, it has only excluded trials by jury; and where no ſuch trials are, the fact is always determined by depoſitions in writing: as in chancery, there are caſes of the higheſt nature tried by the oaths of witneſſes, upon written depoſitions taken before an examiner in a cloſet. BRETTON *againſt* GILL.

CURIA. The common law does not require, that witneſſes ſhall be examined *vivâ voce*, except where the trial is by *jury*. Theſe depoſitions were taken in court, where the evidence is entered; and when that is done, the party has nothing to do but to appeal from an injury ſuppoſed to be done by an inferior court; and it is very fair to tranſmit that evidence which was given before them, and upon which they gave their judgment. It is true, they would have THE COMMISSIONERS OF APPEALS try the cauſe *de novo*, which is contrary to the very nature of an appeal. This ſtatute directs, "that the commiſſioners ſhall "proceed by the oath of witneſſes, or the confeſſion of the party." And the laſt reſort is in THE COMMISSIONERS OF APPEALS, if they do not meddle with what is out of their juriſdiction; which is not the complaint now, but only of the courſe and method of the proceedings. The caſe of *Shotter v. Friend* (*a*), which was lately adjudged in the court of king's bench, comes near this caſe; for there a prohibition was granted to THE CONSISTORY COURT of the *Biſhop of Exeter* after ſentence, becauſe they refuſed to allow the proof of a payment of a legacy by one witneſs. * But a prohibition was never yet granted to any *eccleſiaſtical court* for proceeding according to ſuch evidence as is allowed by the common law. *Vide* ante, 9. 1. Salk. 286. 275. 2. Salk. 555. 1. Show. 171. 1. Vent. 291. Hob. 178. Comb. 160. Carth. 142. Cro. El. z. 88. 666. Moor, 413. 907 Hob. 247. 188 * [278]

For which reaſons nothing was done at this time.

But after, in *Eaſter Term*, in the ninth year of *William the Third*, upon farther conſideration, *a prohibition* was granted *quoad* the admitting of the depoſitions taken in writing before the commiſſioners of excile, for the commiſſioners of appeal ought to examine the witneſſes *de novo* on the appeal. See 2. H. Bl. Rep. 88.

(*a*) 1. Show. 172.

Crumwell *againſt* Grunſdale. Caſe 131.

MIDDLESEX, *to wit.* BE IT REMEMBERED, that heretofore, to wit, in *Michaelmas Term* laſt paſt, before the lord the now king and the *Lady Mary* the late queen, at *Weſtminſter*, came *George Cromwell*, by *Samuel Aldridge* his attorney, and produces here in court then there his certain bill againſt *John Grunſdale*, adminiſtrator of goods and chattels, rights and credits, which were of *Roger Urlwyn*, late of *Iver*, otherwiſe *Ever*, in the county of *Bucks*, yeoman, deceaſed, otherwiſe called *Roger Urlin*, of *Iver*, otherwiſe *Ever*, in the county of *Buckingham*, yeoman, who died inteſtate,

CRUMWELL *againſt* GRUNSDALE.

inteſtate, as it is ſaid, in the cuſtody of the marſhal, &c. of a plea of debt; and there are pledges of proſecuting, to wit, *John Doe* and *Richard Roe*; which certain bill follows in theſe words, to wit: "MIDDLESEX, to wit. *George Cromwell* complains of *John* "*Grunſdale*, adminiſtrator of all and ſingular the goods and chat- "tels, rights and credits, which were of *Roger Urlwyn*, late of *Iver*, "otherwiſe *Ever*, in the county of *Bucks*, yeoman, deceaſed, "otherwiſe called *Roger Urlin*, of *Iver*, otherwiſe *Ever*, in "the county of *Buckingham*, yeoman, who died inteſtate, as it is "ſaid, in the cuſtody of the marſhal of the *Marſhalſea* of the "lord the king and the lady the queen, being before the king "and queen, of a plea that he render to him *forty pounds* of the "lawful monies of *England*, which he from him unjuſtly detains, "for that, to wit, that whereas the aforeſaid *Roger* in his life-time, "to wit, on the firſt day of *July*, in the year of Our Lord one "thouſand ſix hundred and ſeventy-four, at the pariſh of *Saint* "*Clement Danes*, in the county of *Middleſex* aforeſaid, by his "certain writing obligatory, ſealed with the ſeal of him the ſaid "*Roger* in his life-time, and to the court of the ſaid lord the king "and lady the queen now ſhewn, the date whereof is the ſame "day and year aboveſaid, acknowledged himſelf held and firmly "bound to the aforeſaid *George* in the aforeſaid *forty pounds* by "theſe words, *in quadranti libris*, to pay the ſaid *George* when he "might be thereunto required; yet the aforeſaid *Roger* in his "life-time, and the aforeſaid *John* after the death of him the ſaid "*Roger*, though often required, the aforeſaid *forty pounds* to the "ſaid *George* have not, nor has either of them, paid, but him the "aforeſaid *Roger* in his life-time, and the aforeſaid *John* after the "death of him the ſaid *Roger*, hath hitherto wholly refuſed, and "the aforeſaid *John* doth ſtill refuſe, and unjuſtly detains, to the
* [279] "damage of him the ſaid *George* of * twenty pounds; and there- "fore he brings ſuit, &c."

And now here at this day, to wit, on *Wedneſday* next after the Octave of *Saint Hilary*, in this ſame Term, until which day the ſaid *John* had leave to imparl, and then to anſwer, &c. before which day the aforeſaid lady *Queen Mary diem ſuum clauſit extremum*, before the ſaid lord the king at *Weſtminſter* came as well the aforeſaid *George*, by his attorney aforeſaid, as the aforeſaid *John*, by *Robert Stone* his attorney; and the ſaid *John* defends the force and injury when, &c. and ſays, that he ought not to be charged with the debt aforeſaid, becauſe he ſays, that the ſaid writing obligatory is not the deed of him the ſaid *Roger Urlwyn*. And of this he puts himſelf upon the country; and the aforeſaid *George* likewiſe. Therefore the ſheriff is commanded, that he cauſe to come here before the lord the king at *Weſtminſter*, on *Wedneſday* next after fifteen days of *Eaſter*, &c. by whom, &c. and who neither, &c. to take recognition, &c. becauſe as well, &c. The ſame day is given to the parties there, &c. Afterwards the proceſs between the parties aforeſaid is thereupon continued of the plea aforeſaid,

by

by reſpiting the jury thereof between them, before the lord the king at *Weſtminſter*, until *Friday* in the morrow of the *Aſcenſion of Our Lord*, unleſs the truſty and well-beloved of the lord the king JOHN HOLT, *Knight*, Chief Juſtice of the ſaid lord the king, aſſigned to hold pleas in the court of the ſaid lord the king before the king himſelf, ſhall before come, on *Wedneſday* next after fifteen days of *Eaſter*, at WESTMINSTER, in the great hall of pleas there, by force of the ſtatute, &c. for want of jurors, &c. At which day before, &c. ſent here his record before him had in theſe words, to wit, AFTERWARDS, on the day and at the place within contained, before JOHN HOLT, *Knight*, Chief Juſtice of the lord the king aſſigned to hold pleas in the court of the ſaid lord the king before the king himſelf, aſſociated with JOHN IVES, Gentleman, by form of the ſtatute, &c. comes the within-named GEORGE CRUMWELL, by his attorney within contained, and the within-named JOHN GRUNSDALE, although ſolemnly called, did not come, but made default; therefore the jury whereof mention is within made is taken againſt him by default. And the jurors of that jury being called, ſome of them, to wit, *James Porter* one of the pariſh of *St. Giles in the Fields*, &c. came, and are ſworn upon that jury; and becauſe the reſt of the jurors of the ſame jury did not appear, therefore others of the bye-ſtanders, by the ſaid ſheriff of the county of *Middleſex* within-written being choſen for this purpoſe at the requeſt of him the ſaid GEORGE CRUMWELL, and by the command of the juſtices aforeſaid, are newly appointed, whoſe names are affiled in the panel within-written, according to the form of the ſtatute in ſuch caſe lately made and provided. And the jurors ſo newly appointed, that is to ſay, *John Crix* and *Timothy Thornbury*, being called, likewiſe came, who being choſen, tried, and ſworn to ſpeak the truth concerning the matters within-contained, together with the other jurors aforeſaid before impannelled and ſworn to this purpoſe, ſay upon their oath, that one *Roger Urlwyn* inteſtate, the ſaid JOHN GRUNSDALE in his life-time, together with one *Anne Urlwyn*, wife of the aforeſaid *Roger*, ſigned and ſealed, and each of them ſigned and ſealed, as his deed, and that they delivered, and each of them delivered, to the ſaid *George Crumwell*, a certain writing, in form of a writing obligatory, which certain writing follows in theſe words: "NOVERINT "UNIVERSI *per præſentes nos* ROGERUM URLWYN and ANNE "my wife, of IVER, *alias* EVER, in the county of *Buckingham*, "yeoman, *teneri et firmiter obligari* GEO. CRUMWELL *in* "*comitat. pramid. de viginti in quadrants libris bonæ et legalis* "*monetæ Angliæ ſolvend. eidem* GEO. CRUMWELL *aut ſuo certo* "*attorn. executoribus, adminiſtratoribus vel aſſign. ſuis, ad quam* "*quidem ſolutionem bene et fideliter faciend. obligo me hæredes,* "*executores, et adminiſtratores, meos firmiter per præſentes: ſigillo* "*meo ſigillat. dat. primo die Julii, anno regni* REGIS CAROLI "SECUNDI, *milleſimo ſexcenteſimo ſeptuageſimo quarto.*" "THE "CONDITION of this obligation is ſuch, that if the above-named "*Roger Urlwyn* and my wife, his heirs, executors, adminiſtrators, "or aſſigns, ſhall pay, or cauſe to be paid to the aboveſaid *George*

CRUMWELL against GRUNSDALE.

POSTEA.

Tales de circumſtantibus.

* [280]

CRUMWELL against GRUNSDALE.

" *Crumwell*, his heirs, executors, administrators, or assigns, the sum " of twenty pounds and twelve shillings of good and lawful " money of *England*, in and upon the twenty fifth of *December* " next ensuing the date hereof, at or in the dwelling-house of the " aforesaid *George Crumwell* in *Sunbury*, that then this present " obligation shall be void and of no effect, or else to remain in " full force and virtue.

ROGER URLWYN.
The mark X *of*
ANNE X URLWYN.

as by the same writing is manifest and appears. But whether, upon the whole matter aforesaid, by the jurors aforesaid in manner and form aforesaid found, the aforesaid writing obligatory, in the declaration within mentioned, specified to be the deed of the aforesaid *Roger Urlwyn*, or not, the same jurors are wholly ignorant, and therefore they pray the advice and consideration of the court here. And if upon the whole matter, by the said jurors in form aforesaid found, it shall appear to the court here, that the said writing, in the declaration within-written specified, be the deed of *Roger Urlwyn* the intestate, then the same jurors say upon their oath, that the said writing is the deed of the aforesaid *Roger Urlwyn* the intestate, and then they assess damages of him *George Crumwell*, by occasion of the detention of the debt within-written, besides his costs and charges by him about his suit in this behalf laid out, to twelvepence, and for those costs and charges to twenty shillings. And if upon the whole matter aforesaid, by the said jurors in form aforesaid found, it shall appear to the court here, that the aforesaid writing is not the deed of the said *Roger Urlwyn* the intestate, then * the same jurors upon their oath say, that the writing aforesaid is not the deed of the said *Roger Urlwyn*, as the aforesaid *John Grunsdale* within by pleading hath alledged. And because the court of the said lord the king now here are not yet advised what judgment to give of and upon the premises, a day is thereof given to the parties aforesaid before the lord the king at *Westminster*, until ——— day next after ———, to hear their judgment of and upon the premises, for that the court of the lord the king here is not yet advised thereof, &c.

* [281]

Case 132.

Cramwell *against* Grunsdale.

A declaration in debt on a bond for *forty pounds* is supported by evidence of a bond *de viginti in quadrants libris*.

DEBT upon a bond for forty pounds brought against the defendant as executor of *Roger Urlwyn*. The plaintiff declared, that *Roger Urlwyn*, otherwise *Urlwyn*, in the year 1674 did, by a certain writing obligatory sealed by him, &c. become bound to the plaintiff in forty pounds by these words, " *in* " *quadrants libris*."

S. C. 2. Salk. 462. S. C. 1. Ld. Ray. 335. S. C. Comb. 477. S. C. 3. Salk. 73. S. C. Holt, 322. 502. S. C. 12. Mod. 193. 2. Jones, 58. Comb. 60. 86. 187. 226. 477. 1. Carth. 204. 4 Co. 5. 3. Bac. Abr. 693. Cowp. 148.

Upon

CRUMWELL against GRUNDALL.

Upon *non eſt factum* pleaded THE JURY found a ſpecial verdict, that *Roger Urlin* did ſign, ſeal, and deliver to the plaintiff a certain writing following: "NOVERINT, &c. *nos* ROGERUM URLIN, &c. "*teneri et firmiter obligari* GEORGIO CRUMWELL *in com. prædict.* "MID. *de viginti in quadrants libris, &c. dat. primo die Julii,* "*anno regni* REGIS CAROLI SECUNDI, 1674." They find the condition of the obligation was for payment of twenty pounds twelve ſhillings, and that it was ſigned with the mark of *Roger Urlwyn.*

The queſtion was, Whether the bond found by the jury will warrant that ſet forth in this declaration?

THOSE WHO ARGUED *for it* inſiſted,

That this was a good declaration and a good verdict. They agreed, that if the condition had been collateral, there might have been ſome difficulty to find out the meaning of theſe words in the bond: but here the bond and condition make one entire obligation, and the *viginti* ſhall be rejected as ſurpluſage; for it can have no ſignification here, becauſe it is not according to the condition. If ſo, then *quadrants* muſt be taken to be the word to ſignify the ſum in which the obligor intended to be bound, and then no rule in law will be broken; for though it is an inſenſible word, yet the bond is good. As for inſtance, a man was bound in *ſeſſanta* for *ſexaginta libris*, and the bond was held good *(a)*. So if a man be bound in *ſeptuaginta et quinquaginta libris*, this is good for ſeven hundred and fifty pounds *(b)*, though the jury did not find that the obligor intended to be bound in ſuch a ſum.

IT WAS ARGUED *on the other ſide*, that "*quadrants*" will not anſwer the word "*quadraginta*;" and that in all the caſes where bonds of this nature have been adjudged good, the words which denote either *tens* or *hundreds* are plain and clear. As to the caſe of *Parry v. Dale (c)*, in my *Lord Hobart*, who has reported it different from all the reporters of that time; for it was, "NOVE-"RINT *univerſi per præſentes nos, &c. teneri, &c. in quinque-*"*gintis libris*;" this was adjudged againſt the plaintiff in this court, becauſe "*quinquegintis*" was not a *Latin* word. It is true, upon a writ of error brought in the exchequer chamber, he tells us, that moſt of the Judges were of opinion, that it was a good bond for five hundred pounds; but no judgment was given upon the writ of error, the cauſe being ended by agreement: but all the other reporters of that caſe ſay, that the word ended in "*gentis*," which always ſignifies an hundred pounds. JUSTICE CROKE *(d)* tells us, that it was *in quemquegentis libris.* JUSTICE YELVERTON *(e)* ſays, it was "*in quimquegent.*" And my LORD ROLLE *(f)*, "*in quinquegentis libris.*" And yet judgment was given for the defendant, becauſe "*quimque*" or "*quemquegent*" was an inſenſible word, by which a man could not be bound,

(*a*) 2. Roll. Abr. 147. Cro. Jac. 208. Hob. 19.
(*b*) Hob. 116. 2. Roll. Abr. 147.
(*c*) Hob. 119.
(*d*) Cro. Jac. 146.
(*e*) Yelv. 65.
(*f*) 2. Roll. Abr. 146.

So

CRUWELL against GREENSDALE.

So in the case of *Walter v. Piggot (a)*, the "*septua*" for "*septuagentis libris*" had a plain signification; for "*septua*" is part of a good *Latin* word, as *septuaginta*. But *sexagint* can never be taken for *sexcenta*, for there is no such word, as it was held in the case of *Gery v. Davis (b)*; and though JUSTICE CROKE has reported it (*c*) to be *sexagintis*, yet judgment was given for the defendant. It is true, if it had been "*sexigint*" or "*sexingint*" for "*sexaginta*," that is good, because those words have all the same intendment, and the *ginta* is right; but "*quadragent*" for "*quadraginta*" is wrong, and so is "*octigent*" for "*octoginta (d)*." "*Sessanta*" instead of "*sexaginta libris*" has been held good (*e*), because it was an *Italian bond*, and not intended to be put into *Latin*. So is "*ottogesimo libris*" a good bond for eighty pounds, for it has the same signification (*f*).

* [284] * But the word "*quadrantes*" in this case is indefinible, there is no such *Latin* word, and so the defendant is bound in no sum at all; and if so, the plaintiff cannot have judgment upon this declaration and verdict, either as to the sum, for that is not known, nor in what year the bond was made.

* [282]

In debt on bond, if the declaration state "the "date whereof "is the first of "*July*, in *the* "*year of Our* "*Lord* 1674," and the bond produced in evidence appears to be "dated "the first of "*July*, in *the* "*year of the* "*reign of* "*Charles the* "*Second*, "1674;" *quære*, If the bond being dated on an impossible *day* makes the *variance* material.

* But THE SECOND and more difficult point was concerning the date of this bond, which seemed impossible; for the *year of the Lord* was applied to the *year of the king's* reign. And as to that, there was a case relied on for this purpose (*g*), *viz.* the bond was full of false *Latin*, and is transcribed by YELVERTON, *Justice*, who was COUNSEL *for the plaintiff*; it was dated, *tres viginti die Octobris, anno regni regine domine nostre Jacobi, Dei gratia Anglie, Scotie, &c. de Scotie sexto, de Anglia quadragesimo secundo*, 1608; and upon demurrer the plaintiff had judgment; for in that case the parties to the bond, and the sum in which the obligor was bound, was sufficiently expressed; and though there was no such year as the forty-second year of that king's reign over *England*, or the sixth of *Scotland*, that was not held material, because a man may suggest a date where there is no date at all, if the deed be good; for the defendant must answer that, and not the date (*h*). The law was held to be so in the reign of *Edward the Fourth* (*i*); for then an action of debt was brought on a bond, in which the plaintiff declared for so much *Flemish money*, and shewed that the bond was dated 8. *die Decembris, anno* 78, without saying what year of *the Lord*, or of *the king*, when it ought to have been *anno* 1478; this was held to be a void date, and that the plaintiff might declare of what date he would since the bond *delivered*, and say *primo deliberat.* on such a day (*k*). So where debt was brought on a bond (*l*), dated the fifteenth of *November*, in the *twenty-fifth*

(*a*) Cro. Eliz. 417.
(*b*) 2. Roll. Abr. 147. Yelv. 105.
(*c*) Cro. Jac. 338.
(*d*) Stiles, 241. 257. 2. Rol. Ab. 147.
(*e*) Hob. 19. Cro. Eliz. 208.
(*f*) 2. Roll. Abr. 147.
(*g*) 1. Brownl. 110. Yelv. 193.
(*h*) Noy, 27.
(*i*) Year Book 20. *Edw.* 4. pl. 1. 21. *Edw.* 4. pl. 38. Gilb. L. E. 214.
(*k*) Salk. 462. 12. Mod. 193.
(*l*) Cro. Jac. 136. 2. Roll. Abr. 706. Stiles, 414.

of

of *Elizabeth*, and upon *non eſt factum* pleaded, the jury found that the bond was dated the fifteenth *November*, in the *twenty-third* of *Elizabeth*; but not ſealed until the *eighteenth of November*, in the *twenty-ſixth* of *Elizabeth*; and the Court was unanimouſly of opinion, that the verdict was well found for the plaintiff, becauſe, upon this general iſſue, it appeared to be the defendant's deed, though there was a variance in the date of the bond itſelf upon which the plaintiff had declared. So it was held in *Goddard's Caſe (a)*, that the date was not any part of the ſubſtance of the deed; that caſe was thus: *Goddard*, as adminiſtrator, brought an action of debt upon a bond againſt the defendant, which was made to his inteſtate, and dated the fourth *April*, in the *twenty-fourth* of *Elizabeth*; the defendant pleaded, that the inteſtate died before the date of that bond; and concluded his plea, that the writing *non eſt factum*, &c.; the jury found that the defendant did deliver it as his deed the *thirtieth* of *July*, in the year before, at which time the inteſtate was living, and they found the bond *in hæc verba*, but that he died before the date in *April*, * yet the plaintiff had judgment; for though in pleading he cannot allege the delivery before the date, becauſe he is eſtopped (that is, he is concluded to ſet forth the truth), yet that ſhall not conclude the jury to find it. * [283]

But as to this it was argued, that the variance between the date of the bond as found by the jury, and the date in the bond on which the plaintiff declared, is very material; for the date in the declaration is part of the deſcription of the bond itſelf; and by ſaying "*cujus dat. eſt eiſdem die et anno*," the plaintiff has tied himſelf to that very date, and therefore it is neceſſary that ſhould be found. It cannot be denied, that if he had declared on a bond *bearing date* ſuch a day, and the bond had been found to be of another day, that had been void. Now this is to the ſame effect, for there can be no difference between *geren. dat.* and *cujus dat. eſt*, &c. The date of the deed which the plaintiff has ſet forth in his declaration is the only thing which can entitle him to an action; and if the date of the bond found vary from that date, then there is no ſuch bond as that upon which he had declared. If a man make a feoffment in fee, dated the *tenth* of *September* (*b*), and the feoffee, reciting that a feoffment was made to him the *eleventh September*, give authority to another to receive livery and ſeiſin for him, *ſecundum formam chartæ*, this is held a void feoffment, becauſe the warrant to receive livery is by a letter of attorney, which gave him power to take it *ſecundum formam chartæ*, dated the *eleventh September*, when in truth the feoffment was made the day before; ſo there being no feoffment made on that day, by conſequence he could not have any warrant to receive livery *ſecundum formam chartæ*, dated the *eleventh* day; therefore it was held void. As to *Goddard's Caſe (c)*, that cannot be urged as an authority againſt the defendant, becauſe the jury found the date of the bond to be according as the plaintiff had declared; for, in truth, the bond was dated the

(*a*) 2. Co. 5. (*b*) Cro. Eliz. 603. (*c*)

fourth

CRUMWELL *against* GRUNSDALE.

fourth *April*, the twenty-fourth of *Elizabeth*, and the plaintiff declared upon a bond of that date, and the jury found it *in hæc verba*, though the delivery was before, *viz.* in the life-time of the plaintiff's inteſtate; but here the jury have found the date of a bond which differs from that upon which the plaintiff declared, ſo not like this caſe. * In the caſe of *Dodſon v. Key*, which was objected out of *Yelverton* (*a*) on the other ſide, though the year of *the king* was miſtaken, as in this caſe, yet the year of *the Lord*, 1608, was right; which was the true reaſon that prevailed with JUSTICE CROKE to give judgment for the plaintiff. In the caſe of *Lane v. Plegdal* (*b*) the declaration was general. But in all theſe caſes the jury found it to be the deed of the defendant, though dated at another time; but here they have not found it to be his deed, but that he ſealed *quoddam ſcriptum*, and ſo leave it to the Court to judge whether it was the ſame deed upon which the plaintiff had declared; ſo that if there be any *variance* between the finding of the jury and the declaration of the plaintiff, the Court cannot judge it to be the ſame bond.

* [285]

THE COURT held the date in this caſe to be impoſſible, ſo it is a void date. The plaintiff has declared upon a bond *cujus dat. eſt* ſuch a day, and the jury find the bond to be of an impoſſible date; ſo that the bond found by the verdict cannot be the ſame upon which the plaintiff had declared. And upon this exception they inclined againſt the plaintiff.

But *adjournatur*.

(*a*) Yelv. 193. (*b*) Cro. Jac. 136.

Caſe 133.

Lyndſey *againſt* Sir Thomas Clerke.

The entry of a *capiatur* in ejectment will render the record erroneous.

S. C. Salk. 54. S.C.Carth. 390. S.C.Comb.387. S. C. 12. Mod. 301. Ante, 65. 67. 3. Lev 401. Rum. Eject. 50. 132.

IN EJECTMENT there was a verdict for the plaintiff in the court of king's bench, and a writ of error brought in the houſe of peers.

A motion was afterwards made for the direction of the Court, Whether a *capiatur* ſhall be awarded againſt the defendant? which is uſually done *ex officio* for a fine to the king for a breach of the peace.

But now by a late ſtatute, 5. & 6. *Will.* 3. c. 12. it is enacted, "That no *capias pro fine* ſhall be proſecuted againſt the defendant, "either in treſpaſs, *ejectment*, aſſault, or falſe impriſonment; "in lieu whereof the plaintiff is to pay the proper officer, upon "ſigning the judgment, ſix ſhillings and eightpence over and "above the uſual fees." So that now it will be *error* to have a *capias* awarded, ſince the act prohibits its execution by remitting the fine.

THE COURT, therefore, was of opinion, that the *capias* ſhould be wholly omitted.

Blackwell

* Blackwell *againſt* Eales.

Caſe 134.

The alledging of the *treſpaſs* in a declaration of aſſault and falſe impriſonment, on an impoſſible day, or on a day ſubſequent to the trial, is aided by the verdict.

S. C. 2. Salk. 662.
S. C. 3. Salk. 8.
S.C. Carth. 389.
S. C. 12. Mod. 102.
S. C. Comy. Rep. 12.
Heb. 189.
Cro. Jac. 626.
Cro. Eliz. 97. 377.
Yelv. 94.
Bunb. 223.
Salk. 561.
Stra. 232. 245. 1095.
3. Burr. 1729.
1. Bac. Abr. 192.
5. Bac. Abr. 317.
5. Com. Dig. "Pleader" (C. 19.).
5. Bac. Abr. 214. 317.
Bull. N. P. 86.
Dougl. 681.

IN treſpaſs, aſſault, and falſe impriſonment, the plaintiff declared, that the defendant, "on the firſt day of *February*, in the eighth "year of the reign of the lord *William the Third*, now *King of* "*England*, &c. with force and arms, &c."

Upon *not guilty* pleaded, the plaintiff had a verdict; and THE POSTEA being ſtayed, the queſtion was, Whether the plaintiff ſhould have his judgment? for the declaration was of *Eaſter Term* laſt, and he had declared of a treſpaſs on the firſt day of *February*, in the eighth year of *William the Third*, which time was not yet come.

IT WAS ARGUED *for the judgment*, that an *impoſſible time* is no time at all, and that this miſtake ſhall be helped by the verdict; that the plaintiff could never have had a verdict, unleſs the treſpaſs had been proved to have been done before the bill filed; and that he could give nothing in evidence after the action brought. So where the plaintiff declared (*a*), that the defendant returned him in ſuch a pariſh, *quod aptaret et conficeret* a ſuit of clothes for him, and does not ſhew the day or place, this was held good after a verdict.

But *on the other ſide* it was ſaid, that the plaintiff could not have judgment in this caſe: for as it is certainly true, that he ſhould never recover where the cauſe of action appears to be after the ſuit commenced, ſo the reaſon is the ſame where the day is not come at the time of the judgment given, as where the cauſe appears to be after the action commenced; and the reaſon why it is erroneous is, becauſe the plaintiff had ſued, when it appears he had no cauſe for ſuch ſuit. When the defendant had pleaded "*not guilty*," he then denies the charge in the declaration, and it is impoſſible that the jury ſhould find him guilty of a fact which never was committed; therefore it muſt certainly be wrong to give a judgment for that which, upon the face of the record, appears to be impoſſible. The want of alledging a place cannot be helped even after a verdict; as in an action on the caſe in nature of a conſpiracy brought againſt two (*b*), ſetting forth, that they were joint merchants of a ſtock of wares, and did not ſhew where, the * plaintiff had judgment; but it was reverſed in the exche- * [287]
quer-chamber for that very reaſon. Now if the want of alledging a place is not helped after a verdict, no reaſon can be given why want of time ſhould. The caſe of *Hambleton v. Veer* (*c*) is an expreſs authority that the plaintiff cannot recover damages for a time to come after the action brought: it was an action on the caſe, wherein the plaintiff declared, that one *Veer* became his apprentice on the twenty-ninth of *September*, in the ſixteenth year of

(*a*) Cro Jac. 626.
(*b*) 2. Leon. 75. Moor, 188.
(*c*) 1. Lev. 299. 2. Saund. 169. 2. Keb. 693. 697.—See alſo Comy. Rep. 232.

Charles

BLACKWELL *againſt* EALES.

Charles the Second, and was to ſerve him nine years; that he ſerved him five years; and the defendant on the laſt day of *October*, in the twenty-firſt year of *Charles the Second*, had procured the ſaid apprentice to depart out of his ſervice, *per quod* the plaintiff loſt the profit of his ſervant *per totum reſiduum termini prad. ventur.*; and it was adjudged, that the plaintiff could not recover damages for ſo much of the term which was to come. It is true, that too much time was laid in that declaration; and the reaſon why the plaintiff could not recover damages was, becauſe the apprentice might return. But in this caſe the jury could not have any conſideration of a time which was not come. As to the objection, that an *impoſſible time* is no time, and if ſo, the want of alledging a time is helped after verdict, that may be true, and yet not to this purpoſe, becauſe here is a certain time ſet forth in the declaration, which will come. *Time* and *place* are ſuch material circumſtances, that they require certainty in a declaration, and ſome day muſt be laid before the action brought, which is not done here; for to make this to be in the eighth year of *King William*, you muſt reject twenty days, which will never be allowed.

Dougl. 681.

CURIA. There muſt be evidence given of a fact done before the action brought; the time is but a circumſtance of a thing done; for when by a traverſe it is made part of the iſſue, ſuch traverſe is never good.

So the plaintiff had judgment.

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Caſe 135.

The King *againſt* Keat.

Counſel aſſigned, on the prayer of a priſoner, to argue a ſpecial verdict on an indictment for murder at common law, and on the ſtatute 3. *Jac.* 1. c. 8.

S. C. 1. Salk. 47.
S. C. Comb. 406.
S. C. Skin. 666.
S. C. 12. Mod. 118.
S. C. Holt, 481.
S. C. 3. Salk. 191.
3. Bac. Abr. 567.
Kely.

THE DEFENDANT was indicted at the laſt aſſizes, both at *common law*, and upon the *ſtatute of Stabbing (a)*, for the murder of one *James Wells*; which indictment being tried before HOLT, *Chief Juſtice*, the jury gave a ſpecial verdict to this effect:

Before the ſaid fact committed, *viz.* the fifteenth of *June* 1696, the defendant retained the ſaid *James Wells* to * ſerve him as a gardener, and being in a little room near the kitchen, he ſent to the ſaid *Wells* to deliver the key of the garden to the defendant, which he refuſed to ſend. One *Henry Phillips*, who was the perſon ſent to demand the key, returned, and told the defendant that *Wells* refuſed to deliver it. The defendant immediately went into another room and fetched his ſword, and came to *Wells*, and expoſtulated with him about the delivery of the key. *Wells* told the defendant, that he might have it if he would: thereupon the defendant ſtruck him on the head with his ſword, and *Wells* having a ſnead of a ſcythe in his hand ſtruck at the defendant; but the force of the intended

(a) 3. *Jac.* 1. c. 8.

blow

THE KING against KYNASTON.

blow was prevented by the rack in the kitchen, in which the ſcythe ſtuck. Afterwards *Wells* thruſt at the defendant ſeveral times, and thereupon the defendant killed him with the ſword.

The queſtion was, Whether this was murder or not?

The defendant being at bar, deſired that SIR BARTHOLOMEW SHOWER and MR. EYRE might be his Counſel, which was granted; and MR. COWPER was aſſigned by the Court to be of Counſel for the king.

Then they moved that he might be bailed, being a gentleman of quality; which was denied by the Court, as it was in *Buckner's Caſe (a)*, HOLT, *Chief Juſtice*, affirming, that the Court could not bail in *manſlaughter* till after the party had his clergy allowed.

The king's bench will not bail in *manſlaughter* till clergy allowed. Poſt. 455.

1. Salk. 105. Skin. 683. 1. Vent. 93. Comb. 111. 298. Stiles, 467.

* [289]

In the *Hilary Term* enſuing it was argued for THE KING, that this was *murder*, and that for two reaſons, though there was no expreſs malice found.

A maſter, on his ſervant refuſing to deliver the key of the garden, goes into an adjoining room, fetches his ſword, returns and expoſtulates with his ſervant, and on receiving a provoking anſwer ſtrikes him on the head with his ſword. The ſervant aims a blow at the head of his maſter with a *ſcythe* which he had accidentally in his hand, but miſſes him; and the maſter, on the ſervant's continuing to thruſt at him ſeveral times with *the ſcythe*, killed the ſervant with *the ſword*—*Quære*, If this be *manſlaughter* or *murder*.—S. C. Comb. 406. Jones, 340. Godb. 154. Keilw. 136. Kely. 65. 1. Hale, 454-473. Foſter, 262. 1. Hawk. P. C. ch. 29. ſ. 5. 9. Cowp. 832. 3. Bac. Abr. 567. 671. 4. Bl. Com. 176.

FIRST, Becauſe the defendant was doing an unlawful act when the death of the party enſued.

SECONDLY, The deceaſed was killed without any provocation.

And in both theſe caſes the law implies malice.

FIRST POINT. The defendant was doing an unlawful act, which was, in correcting his ſervant with a ſword drawn, a very improper inſtrument for that purpoſe; and death thereupon enſuing, the law will imply malice from the nature and manner of doing it to make the act murder *(b)*. * My *Lord Coke (c)* mentions ſeveral caſes which have been adjudged murder, where death immediately follows the doing an unlawful act; as in ſtealing deer in a park, and the thief ſhooting at the deer and killing a boy in a buſh *(d)*; ſo the ſhooting at a cock or hen, or any other tame thing in which one has a property, and a man is killed, this is murder, becauſe the act was unlawful *(e)*. There could be no malice in thoſe caſes either againſt the man or the boy, for the defendants were not acquainted with them; but the facts being unlawful, the law couples the event to the cauſes, and ſo implies malice to make it murder. Nay, *Lord Coke (f)* goes a little farther; for he tells us, that if death enſue an act done with an ill intent, though that intent extend not to death, and though the criminal did not know the party ſlain, yet it is murder. And he

(a) Stiles, 467.
(b) 3. Inſt. 51. Hale P. C. 44.
(c) 3. Inſt. 56.
(d)
(e)
(f) 3. Inſt. 57.

gives

THE KING *against* KEAT.

gives an inſtance of a man throwing a ſtone over a wall amongſt a multitude of people, which he knew were coming from church, with an intention only to fright them, and one is killed, this is murder (*a*). This is applicable to the caſe at bar; for the defendant might not intend to kill his ſervant when he firſt corrected him with a ſword; but that being a very improper inſtrument for correction, ſhews that he had ſome ill intent; and death enſuing, it is murder. Agreeable to this was the reſolution formerly in the king's bench, in the caſe of *Rex v. Wormall and Others* (*b*), in the eighteenth year of *James the Firſt*: they entered *Hyd. Park*, and one *Hillock* and others, who were ſervants to the keeper, commanded them to ſtand, which they refuſed, but fled; thereupon one of the ſervants ſhot at them, and wounded one; then they all turned back, and one of them killed *Hillock*, for which they were all indicted for murder *ex malitiâ præcogitatâ*, and were convicted; for though there was no malice to the party ſlain, yet they all coming into the park with an ill intent, and to do ſome unlawful act, and death enſuing, the law implies malice. The like indictment was againſt my *Lord Dacres* and others (*c*) for the like offence, for which they were convicted and executed. Now all theſe caſes extend to make that murder by implication of malice prepenſed where death enſues by the means of doing ſome unlawful act by the perſon killing, though death was not at firſt intended by him (*d*). But there is yet a ſtronger caſe where, by the opinion of ALL THE JUDGES OF ENGLAND, it was ruled murder in the keeper of a park for killing another, though the perſon killed
* [290] was at * that time doing an unlawful act himſelf: and this was *Holloway's Caſe* (*e*), which was thus: A boy climbed a tree in *Auſterley Park* to cut boughs, and *Holloway* the woodward commanded him to come down, which he did; he then tied him with a rope to a horſe's tail, and ſtruck both the boy and the horſe, which running away with the boy, thus tied, broke his ſhoulder, and thereupon he immediately died; and this was adjudged murder, though *Holloway* had no intention to kill the boy; but being killed without making any reſiſtance, by one who had no authority to correct him in that manner, and though the perſon thus killed was doing an unlawful act in cutting the boughs, the law implies that malice was prepenſed, which was the reaſon of that judgment. Now the moſt favourable thing which can be ſaid for the defendant *Keat* is, that his ſervant ſent him a ſaucy anſwer, for which he might have corrected him; but then it muſt be done with a fit and proper inſtrument, and not with a ſword. It is not a material objection to ſay, that becauſe he had no intention to kill
1. Hale P. C. 39. 440. 472. his ſervant, therefore it cannot be murder; for in *Holloway's Caſe*, before-mentioned, he had no intention to kill the boy, yet that was held murder. The law was the ſame in the eleventh year of *Henry the Seventh* (*f*), when FINEUX, *Chief Juſtice*, gave the rule, "That if two be playing at ſword and buckler by

(*a*)
(*b*) 2. Roll. Rep. 120. S. C. Palm. 35.
(*c*) Moor, 86.
(*d*) 1. Hawk. P. C. ch. 31. ſect. 46.
(*e*) Cro. Car. 131. S. C. Palm. 547. S. C. Jones, 198.—See Foſter, 292.
1. Hale P. C. 454. 4. Bl. Com. 199.
(*f*) Year Book 11. *Hen.* 7. pl. 14.

"conſent,

"consent, and one kill the other, it is felony," becauſe ſuch plays are unlawful; and yet there is no intention of killing. So in this caſe, the firſt act of beating the ſervant with a ſword was unlawful; and it has been conſtantly ruled that where death enſues an unlawful act it is murder; for it cannot be intended in this caſe, that the maſter thruſt at his ſervant with a ſword *animo corrigendi*. So it is where *A.* meets *B.* in the ſtreet and cudgels him, and *B.* draws his ſword, and then *A.* kills him, it is murder (*a*); for the firſt act of beating him was unlawful, and the ill event ſhall be coupled to the firſt act.

SECOND POINT. The deceaſed was killed without any provocation; and in ſuch caſes likewiſe the law ſuppoſes malice prepenſed. The puſhing the priſoner with the ſnead of the ſcythe cannot be a provocation to juſtify this fact, becauſe it was in defence of his perſon; it was ſubſequent to the fact begun by the maſter, which was unlawful, *viz.* the ſtriking the ſervant with a ſword; for which reaſons this muſt be murder.

* THOSE WHO ARGUED *for the defendant*, began with the definition of MURDER, which, in the old books, is defined to be "*occulta hominis occiſio*;" and the reaſon of it was, becauſe in former ages, when *the Danes* and *the Normans* inhabited here, the malice between them and *the Engliſhmen* was ſo great, that if any perſon was killed, and it was not known by whom, the murderer was taken to be either *a Dane* or *a Norman*, unleſs there was plain proof that it was done by *an Engliſhman*. It has now another definition; for "MURDER is where a man of ſound mind and "memory unlawfully kills a reaſonable creature *in rerum naturâ* "under the king's peace with malice forethought, either expreſſed "by the party, or implied by the law, ſo as he die within a year and "a day after the fact (*b*)." MALICE muſt therefore be the foundation of *murder*, both at common law and upon the ſtatute of ſtabbing; and ſuch malice, my *Lord Coke* (*c*) tells us, is "the "compaſſing to kill, wound, or beat another *fedato animo*;" ſo that if there be any ſudden occaſion of heat or quarrel amongſt men, and they immediately fetch their ſwords and go into the field to fight, and one is killed, this is not murder, becauſe it was not *ſedato animo*, without which there can be no malice, and conſequently no murder. The law of God admits of this diſtinction, and has in ſome meaſure diſpenſed with the Sixth Commandment, by which we are forbidden to kill: for God commanded the children of *Iſrael*, when they divided the *land of Canaan*, to give *the Levites* ſix cities of refuge, and to appoint ſome ſuch cities for themſelves, that the ſlayer might fly thither who killed another unawares (*d*), that is, without malice; and this was to preſerve himſelf from the next kinſman, who had power to put him to death: but his power did not extend to take vengeance on him

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1 Hawk. P. C. c 31. ſ 9.

(*a*) 1. Sid 277.
(*b*) 3 Inſt. 47.
(*c*) 3. Inſt 51.
(*d*) The Book of Numbers, chap. xxxv.

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who killed another without any malice; and therefore this remedy was provided, leſt he ſhould deſtroy him in his rage. But if he ſmote the deceaſed with an inſtrument of iron, that is, purpoſely or wilfully to kill him, or with throwing a ſtone which might probably kill him, or with a hard weapon of wood, or if he thruſt him out of hatred, which muſt be malice forethought, or ſmote him in enmity, ſo that he died; in all theſe caſes it was murder. So that if the man ſlayer was not in enmity with the perſon ſlain, or did not ſeek his harm, then the magiſtrates of the city were to give judgment between him and the next kinſman, * and to deliver him to the city of refuge whither he fled, where he was to be confined till the coming of the high prieſt. It is plain, therefore, that if there was no malice in the ſlayer againſt the perſon ſlain, he was not to be puniſhed as a murderer by the law of God. Sanctuaries were alſo allowed here in *England* formerly; but they were taken away by the ſtatute 23. *Hen.* 8. c. 1. which likewiſe takes away the benefit of clergy from thoſe who ſhall commit wilful murder of malice prepenſed. And another ſtatute, 1. *Edw.* 6. c. 12. provides, that in other caſes, that is to ſay, if there be no malice prepenſed, the party ſhall have the benefit of clergy, and the privilege of ſanctuary. To apply this to the preſent caſe: there is no expreſs malice found; ſo that if there were any, it muſt be implied by law either for killing the ſervant in purſuance of an unlawful act begun by the maſter, or by killing him without any manner of provocation, as it has been argued againſt the priſoner. The malice cannot be implied in this caſe for killing the ſervant in purſuance of an unlawful act. My *Lord Coke* (*a*) has put the caſe ſo generally as to the unlawfulneſs of the act, that little can be collected from it: he tells us, that if the firſt act be unlawful, and death enſue, it is murder. It is true, he inſtances in a man intending to ſteal a deer in a park, and ſhooting at the deer, he kills a boy hid in a buſh; this he ſays is murder, though he had no intent to hurt the boy, becauſe the firſt act was unlawful: ſo likewiſe in the caſe of throwing a ſtone over a wall and killing another, which has been obſerved on the other ſide; this is murder, becauſe the law implies malice. But my *Lord Hale* (*b*) was of another opinion, for he tells us, that if the unlawful act want deliberation, or if no perſonal hurt was intended to another, it is no more than man-ſlaughter. Beſides, that intent muſt extend to death, for if it be only to commit a treſpaſs, or to beat a man, and death enſue, that will not make it murder. Therefore my *Lord Coke* diſtinguiſhes with too much nicety upon the life of a man, and directly contrary to the *Levitical law*, and it is not warranted by the authorities which he has cited in the margin of his Third Inſtitutes; which are theſe: * The firſt is in the reign of *Henry the Fourth* (*c*), which is no more than the opinion of the Court, that if a man kill another by miſ-

* [292]

1. Hawk P. C. c. 72. ſ. 22.

* [293]

(*a*) 3 Inſt. 56.
(*b*) 1 Hale, 441. 1 Vent. 265.
(*c*) Year Book, 1. Hen. 4. pl. 18.

fortune

fortune he ſhall forfeit his goods, but ſhall have his pardon *ex gratiâ*: now this is rather an authority for the priſoner, than againſt him. The other caſe was in the reign of *Henry the Seventh* (*a*), where, by the opinion of FINEUX, *Chief Juſtice*, it is held, that if two play at ſword and buckler by the command of the king, and one is killed, it is not felony; but if the king had not commanded it, it is otherwiſe; for though ſuch games are ſuffered, they are not lawful; which is as much as to ſay, that the king may tolerate what is unlawful, and that is not to be preſumed. The ſame Chief Juſtice was of opinion, that if a man throw a ſtone over a houſe and kill another, it is not felony; which is denied by *Brooke* in abridging the caſe (*b*), ſo that it is but one Judge's opinion againſt another: beſides, FINEUX does not ſay it is *murder*, but only *felony*; neither does he mention whether that felony is without the benefit of clergy. And my *Lord Coke* (*c*) himſelf gives ſome inſtances where death enſues an unlawful act, and yet it is not murder: as if two men fall out, and preſently fetch their ſwords and go into the field and fight a duel, and one is killed, it is not murder, becauſe there was no malice prepenſed (*d*). Now it cannot be denied, but that it is an unlawful act to fight a duel (*e*), and yet he was of opinion, that this was not murder. Thoſe caſes of ſhooting at a deer and killing a man are not applicable to this fact; for the act of ſhooting was not only unlawful, but it was voluntary, and the immediate cauſe of death: ſo likewiſe was the throwing a ſtone; for though no malice was intended to the perſon ſlain, yet it is plain that the ſlayer did not value who was killed. Therefore great care ought to be taken to diſtinguiſh rightly in ſuch caſes where the life of a man is concerned. For my *Lord Coke*'s diſtinction is too narrow, in ſaying, that "it is murder if death enſue an unlawful act," becauſe the act muſt not be only *unlawful*, but *voluntary*. If a man ſhould climb an apple-tree to ſteal the fruit, and fall down by misfortune upon the head of another under the tree, and kill him without hurting himſelf, this is not murder, and yet no man will deny but ſtealing the apples was an unlawful act, and death did enſue that act; but the fall which was the cauſe of it was involuntary, and therefore it is not murder. It is likewiſe to be conſidered, whether the act is done *ſedato* or in paſſion; for if in paſſion, it is not material who was the aggreſſor: as for inſtance: If there be malice between *A.* and *B.* and they fight, and *A.* is killed, it is murder in *B.* though *A.* gave the firſt blow; ſo if he had aſſaulted *B.* and then fled to a wall, and in his own defence had killed him: though it is queſtioned by my *Lord Hale* (*f*), whether this is murder or not. But both theſe caſes are put, where the malice was prepenſed, for it is that which is the material matter to make it murder, and not by whom the firſt

1 Hawk. P. C. c. 31. § 21.

1 Hale's Pleas of the Crown, 426. 477.

* [294]

(*a*) Year Book, 11. *Hen.* 7. pl 23 a.
(*b*) Bro. Abr. "Corone," pl. 228.
(*c*) 3. Inſt. 51.
(*d*)
(*e*) 1 Hawk. P. C.
(*f*) Hale's Summary, 47. 1. Hale's P. C. 466.

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ſtroke was given. The caſe in *Croke* (*a*) is much ſtronger than this now at bar. Two boys were fighting in a field; one beat the other ſo that his noſe bled; the boy went home to his father, being a mile diſtant from the place where they fought, and complained to him; who immediately came into the field where the other boy was, and after ſome foul language ſtruck him with a cudgel, of which ſtroke he died; this was adjudged *manſlaughter* only, becauſe it was upon a ſudden occaſion; the father was provoked by ſeeing his ſon's blood, and no precedent malice in him; and though it was at the diſtance of a mile, yet it was but one continued paſſion, and the firſt heat of blood not cooled. This was a caſe which my *Lord Hale* (*b*) put for law; and yet it was as unlawful for the father, upon ſuch a provocation, to correct that boy, as it was for the priſoner to beat his ſervant. The caſe of *Rex v. Wormall* (*c*) mentioned on the other ſide, is not like this; becauſe he and his companions came with a malicious intent to rob the park, and either to maintain their purpoſe or kill the oppoſers. And as for *Holloway's Caſe* (*d*), the act was ſo barbarous, that it could not be found otherwiſe than murder; for the boy who was killed gave the keeper no manner of provocation, but ſubmitted himſelf to his mercy, and he turned him over to the mercy of his horſe.

1. Hawk. P. C. c. 31. ſ. 27.

SECOND POINT. Malice cannot be implied in this caſe by killing the ſervant without any provocation, becauſe there was undutiful and irreverent language given by him to his maſter. It is true, this is not ſuch a provocation which will juſtify the maſter in cutting his ſervant on the head with a ſword, much leſs for killing him; but ſtill it is a provocation, and the books mention, *that the law implies malice where a man is killed without any provocation, which is not this caſe, for there was a provocation (*e*). A butcher and others quarrelled, and in the affray the butcher was hurt; one of the perſons in that former quarrel came by his ſhop three days afterwards, and made a wry mouth at him; upon which he came out of his ſhop and cut him on the calf of his leg with a ſword, whereof he inſtantly died (*f*). Now here being a former quarrel, which had continued three days, the Court, upon the whole matter, directed this to be found murder; but if there had been no precedent quarrel, and the wound had been given upon a ſudden provocation, by making a wry mouth, without any intention of killing at that time, it had been otherwiſe.

1. Hawk. P. C. c. 29. ſ. 5.

[* 295]

CURIA. It was juſtifiable in the ſervant to uſe the ſnead of the ſcythe after a cut made on his head by his maſter. The provocation given to him was very ſlender, and may be eſteemed as

Poſt. 301. 4. Black. Com. 193.

(*a*) Cro Jac 2 .6.
(*b*) Hale's Summary, 48.
(*c*)
(*d*)
(*e*) 9 Co. 67.
(*f*) Cro Eliz. 694 778 Noy, 171.

none

none at all, becauſe, after the anſwer ſent by the ſervant, the priſoner expoſtulated with him for ſome time.

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Sed adjournatur (*a*).

(*a*) HOLT, *Chief Juſtice*, was clearly of opinion that this was *murder* at the common law, the refuſing to ſend the key not being a ſufficient provocation to extenuate the act to manſlaughter; and cited the caſe of *Rex v Grey*, Kely 87. See alſo 2 Ld. Ray. 1493. Foſter, 291. 1 Hawk. P. C. ch. 31 ſ 32. But he thought that it was not within the 1. *Jac.* 1. c 8 for *the head* was clearly *a weapon* drawn within the meaning of the ſtatute. S. C. Skin. 666 But becauſe ROKEBY, *Juſtice* once.ved that it was not clearly found by the verdict that the ſtroke with the ſword by the priſoner was given before the thruſt with the ſpear by the deceaſed, S. C. Comb 409. the matter was adjourned, S. C. Holt, 481. And afterwards both the indictments were quaſhed for defects of form, and the priſoner diſcharged on bail S. C 12. Mod 118. S C. 3 Salk. 191.

Swinſted *againſt* Lydall.

Trinity Term, 8. *Will.* 3. *Roll* 229.

Caſe 136.

AN action of treſpaſs and falſe impriſonment was brought for detaining the plaintiff in cuſtody until he had paid eleven ſhillings for his deliverance.

A plea in juſtification to falſe impriſonment for detaining the plaintiff *until* he paid eleven ſhillings is good, although it do not go to the whole ſum.

The defendant pleads the juriſdiction of the *court of conſcience* in *London*; that they had power to make orders and exact obedience to them; that an order was made by that court for the plaintiff to pay ten ſhillings and four-pence, &c. which he not performing, the defendant took him by virtue of *a precept* of that court; and ſo juſtifies the impriſonment, and detaining him till he had paid that ſum.

S. C. 1. Salk. 408.
S C. 3. Salk. 219.
S. C. Skin. 664.
1. Roll. Rep. 265.
Moor, 704.
Cro. Eliz. 667,
2. Saund. 5.

To this plea the plaintiff demurred, becauſe the juſtification did not go to the whole ſum of *eleven ſhillings*, but only to *ten ſhillings and four-pence*.

To which it was anſwered, that the ſum was no part of the treſpaſs, but only an aggravation of the damages; that the impriſonment was juſtified, which in this caſe is ſufficient, ſo that the defendant could not be puniſhed for falſe impriſonment, though he might for extortion; but that muſt be by another action. * As for inſtance: In an action of aſſault and battery (*a*), and falſe impriſonment, at *Charlton*, till he had paid twenty-eight pounds, the defendant pleaded *not guilty* as to all except the impriſonment; and as to that, he juſtified by a proceſs out of the *court of ſtannaries*, by virtue whereof he took the plaintiff, and detained him till he paid the money; and upon demurrer to this plea, one exception was, that the defendant having pleaded *not guilty* as to all except the impriſonment, he muſt of conſequence be *guilty* as to the taking the twenty-eight pounds, and then the juſtification of the

* [296]

(*a*) Eveley *v.* Stoley, 1. Roll. Rep. 264.

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impriſonment till he had paid the twenty-eight pounds, is repugnant in itſelf, ſo that he ought to have made a particular anſwer to the payment of the twenty-eight pounds; but the Court was of another opinion, becauſe, having anſwered the impriſonment, that ſhall be a good anſwer likewiſe to the payment of the money, for that takes in the whole ſubſtance of the action. So that this plea is good, though it do not come up to the whole ſum; for if he had ſaid nothing to it, yet his plea had been good.

A juſtification under an order of the *ſheriff's court* muſt ſhew that the party was taken to *the compter*.

ANOTHER EXCEPTION was, that the defendant did not ſet forth that he took the plaintiff to carry him to THE COMPTER.

The anſwer was, That it is ſufficient to ſay, that he took him *virtute præcepti*. It is true, by law, the defendant ought to have carried him to priſon, but he may keep him a reaſonable time in his cuſtody till he can find bail, and it is not falſe impriſonment, though he do not immediately carry the priſoner to gaol (*a*).

Cro. Eliz. 404. T. Jones, 97. 2. Show. 87. 139. 12. Mod. 230. Lutw. 580. Gilb. Execut 16.

CURIA. This is a ſpecial authority given by act of parliament to this *court of conſcience* to commit, &c. (*b*) but the officer is not to detain the perſon in cuſtody till the money is paid to him; for neither he nor the ſheriff ſhould receive it, unleſs it is upon a *fieri facias*.

And afterwards, in Hilary Term, for this reaſon, JUDGMENT was given for the plaintiff.

(*a*) But ſee the 2. *Geo.* 2. c. 22. (*b*) 3. *Jac.* 1. c. 15.

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Caſe 137.

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S.C. 2. Salk. 560. S. C. 3. Salk. 24. 40. S. C. 12. Mod. 385. S. C. Show. P. C. 212. S. C. Skin. 651. S. C. 1. Ld. Ray. 292. Poſt. 335. 2. And. 32. 3. Lev. 377. Moor. 413. Hob. 224. 230. 2. And. 32. 36. 154. 4. Mod. 200.

THIS was a writ of error to remove a record of *quare impedit* brought againſt the *Biſhop of Cheſter*, and *Richard Peirce*, and *Richard Cook*, for hindering the plaintiff to preſent to the church of *Bedall*, ſetting forth, that *Queen Elizabeth*, on the twelfth of *February*, in the twelfth year of her reign, was ſeiſed of the advowſon of *Bedall* in fee *ut de jure groſſo*, and, being ſo ſeiſed, ſhe preſented thereunto one *John Tymms*, PROUT by the enrollment of ſuch preſentation in the court of chancery, and there remaining, it does appear; that *Tymms* was inſtituted and inducted; and that after the death of the queen the ſaid advowſon deſcended to KING JAMES; that the church being void upon the death of *Tymms* the king preſented *Dr. Wilſon*, and afterwards died ſeiſed, and the ſaid advowſon deſcended to KING CHARLES THE FIRST; that upon the death of *Dr. Wilſon* that king preſented *Dr. Wickham*, who was inſtituted and inducted, and died; that upon the death of *Dr. Wickham* one *John Peirce*, the father of *Richard Peirce* the now defendant, preſented *William Metcalfe* by uſurpation, who was likewiſe inſtituted and inducted; that upon the demiſe of that king the ſaid advowſon deſcended to KING

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CHARLES THE SECOND, who on the twenty-eighth of *August*, in the firſt year of his reign, preſented one *Peter Samwaies* upon the death of the ſaid *Metcalfe*; that the ſaid advowſon afterwards deſcended to KING JAMES THE SECOND, upon whoſe abdication it came to KING WILLIAM and QUEEN MARY; that the church became void by the death of *Samwaies*, ſo that it belonged to them to preſent, who were hindered by the defendants.

THE BISHOP pleaded, that he claimed nothing but as ordinary; upon which there was judgment againſt him in common form.

The other defendant *Richard Peirce* pleads, that *bene et verum eſt* that KING CHARLES THE FIRST was ſeiſed of this advowſon, *de uno groſſo et de feodo*, PROUT in the declaration, and that he preſented *Dr. Wickham*, who was inſtituted, &c. but further ſays, that the ſaid king, being ſo ſeiſed, did by letters patents dated the nineteenth of *July*, in the fourteenth year of his reign, grant the ſame to *William Feckſtone*, *tunc* ARMIGERO *poſtea* MILITI, and to his heirs; * that *John Peirce*, by uſurpation, preſented the ſaid *Metcalfe*, and that *Sir William Feckſtone* releaſed the ſaid advowſon to *Peirce* and his heirs, who thereupon became ſeiſed in fee, and died ſo ſeiſed; that the ſaid advowſon deſcended to the defendant *Richard Peirce*; that the church became void upon the death of *Metcalfe*, and that afterwards KING CHARLES THE SECOND preſented the ſaid *Samwaies* by lapſe, who died, ſo that now it belonged to him the ſaid *Richard Peirce* to preſent, and traverſed that KING CHARLES THE FIRST died ſeiſed *modo et forma*.

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The other defendant, *Cook*, pleads the like plea by way of excuſe (for he could not plead to the right of the advowſon); and that *Richard Peirce* preſented him.

* THE ATTORNEY GENERAL demands *oyer* of the letters patents of KING CHARLES THE FIRST, which are entered *in hæc verba*, reciting that QUEEN ELIZABETH granted to the *Earl of Warwick*, and his heirs, the manor of *Bobbe*, and the advowſon thereunto appendant, HABENDUM, &c. *in capite* by the fortieth part of a knight's fee, which rent deſcended to KING JAMES, who on the eighteenth of *Auguſt*, in the ſeventh year of his reign, granted the ſame to *Sir Chriſtopher Hatton* and his heirs; and that the advowſon did afterwards come to *Sir William Feckſtone* and his heirs, to whom the king did ratify and confirm the ſame. In which grant there is another recital and clauſe confirming all that was granted by QUEEN ELIZABETH and KING JAMES; and that *Sir William Feckſtone*, by virtue of that grant, claimed the ſaid advowſon; that upon a vacancy by the death of one *Petty* KING JAMES preſented *Dr. Wilſon* by lapſe; and after his death KING CHARLES preſented *Dr. Wickham*, againſt whom *Sir William Feckſtone* brought a *quare impedit*; that being at iſſue, an agreement was made, that *Dr. Wickham* ſhould hold the living during his life. Then follow theſe words: "KNOW YE THEREFORE, that we *ex ulteriori gratiâ noſtrâ concedimus* WILLELMO

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"FEEKSTONE, *militi, advocationem, donationem, et liberam diſpo-*
"*ſitionem eccleſiæ de* BEDALL *quando et quomodo* it ſhould become
"void, HABENDUM to him, his heirs, and aſſigns," under whom *Peirce* the now defendant claimed.

This being the caſe upon the *letters patents* and the pleadings, there was a demurrer to this plea, and JUDGMENT given in the common pleas that the grant made by KING CHARLES THE FIRST was a void grant, becauſe it was of this advowſon as *appendant* to the manor of *Bedall*, when it was an advowſon *in groſs*; and if ſo, the defendants have not well induced the traverſe;

[299] * IT WAS NOW ARGUED *for the defendants*, that the letters patents were good; for admitting that this advowſon was granted by THE QUEEN to the *Earl of Warwick* as *appendant* to the manor, when it was *in groſs*, it does not therefore follow that KING CHARLES, reciting that void grant in his letters patents, can give no title to *Sir William Feekſtone*; for every miſtake or miſapprehenſion in letters patents will not make them void: as for inſtance, if the king ſhould be miſtaken in the law when he is truly informed of the fact, that will not make his grant void. But it does not appear that THE QUEEN was miſtaken in her grant, for ſhe was not only ſeiſed of this advowſon, but of the manor of *Bedall* by the death of one *Simon Digby*; then ſhe granted it as an advowſon *appendant*, and KING CHARLES THE FIRST granted it as ſuch. Therefore it muſt be a very immaterial allegation at this time to ſay that it was *in groſs*, eſpecially ſince it tends to vitiate two royal grants, one of them being made above one hundred and twenty years ſince: ſo that though THE QUEEN might be miſtaken then, yet that miſtake ſhall not turn to the prejudice of the defendant's title now, becauſe of the length of time; for they cannot take iſſue upon it, whether *appendant* or not, or traverſe that it was an advowſon *in groſs*. Neither does THE ATTORNEY GENERAL rely upon this wholly as his title, but he goes on and lays a ſeiſin in KING JAMES and KING CHARLES; he might have begun it in either of thoſe kings, which would have been good to reveſt the advowſon in the crown; and there was no neceſſity to reſort to the ſeiſin of the queen, for it is not material whether ſhe was ſeiſed of this advowſon *in groſs* or not, or whether ſhe was ſeiſed at all, becauſe the defendant could not take iſſue upon it, or traverſe it: ſo that it being not material to their title, and they having no way to come at it in pleading, this Court will not take notice of it; or if it do, the Judges will expect a very clear evidence that it was an advowſon *in groſs* in the queen, before they will avoid thoſe letters patents by a ſuggeſtion that it was not. It is plain, that the queen granted the advowſon to *the Earl of Warwick*, and whether *appendant* or not, is but *ſurpluſage*, and need not be ſet forth: as where the demandant brought A FORMEDON *in deſcender* (*a*) upon the grant

Carth. 321.

(*a*) Year Book, 9. Hen. 4. pl. 39. 14. Hen. 4 pl. 31.

of

of a reverſion to two by fine, the remainder to his anceſtor who was ſeiſed, &c. the tenant would have taken advantage that there was no ſuch fine, but the Court would not admit it, becauſe the mentioning a fine was but ſurpluſage; for A FORMEDON *in deſcender* may be maintained without deed or fine. * So where the defendant pleaded to an information of intruſion (*a*), that, before that time, ANNE *Counteſs of Warwick* was ſeiſed in fee, and that ſhe, in the third year of *Henry the Seventh*, levied a fine to him, and the heirs males of his body, the reverſion to *the Counteſs* and her heirs, after whoſe death it deſcended to EDWARD *Earl of Warwick*, her couſin and heir, who, in the nineteenth year of *Henry the Seventh*, was attainted of treaſon by act of parliament: by which ſtatute it was enacted, "that he ſhould forfeit all his lands;" ſo that *Henry the Seventh* was ſeiſed of the reverſion in fee; after whoſe death, both the eſtate-tail and reverſion in fee deſcended to *Henry the Eighth*; that on the fifth of *July*, in the twenty-third year of his reign, it was found by office, that *the Counteſs* levied a fine; that ſhe died ſeiſed of the reverſion; that it deſcended to the *Earl* of *Warwick*; that he was attainted of treaſon in the nineteenth year of *Henry the Seventh*, by force of which attainder *King Henry the Seventh* was ſeiſed in fee, and died ſeiſed; after whoſe death it deſcended to *Henry the Eighth*, who granted it to one *Walſh*; and an exception was taken to this pleading, becauſe it did not appear when the *Earl of Warwick* died; for though it is ſaid in the act of attainder "that he ſhall forfeit," yet thoſe words veſt nothing in the king at common law until death or office found; ſo that there could be no ſeiſin in *Henry the Seventh* as alledged; and if ſo, it could not deſcend to *Henry the Eighth*; therefore that allegation being wrong, it made the grant to *Walſh* void; but the Court was of another opinion, that the plea was good in ſubſtance, for they would not take notice of the ſeiſin of *Henry the Seventh*, and the deſcent from him to *Henry the Eighth*, for that was altogether immaterial, becauſe *Henry the Eighth* was entitled by virtue of the office found, and therefore his grant to *Walſh* was good. So here the Court will not take notice whether THE QUEEN was ſeiſed of this advowſon either as *appendant* or *in groſs*; for when KING JAMES and KING CHARLES had preſented to the church, and their preſentees were inſtituted and inducted, and enjoyed the ſame under ſuch preſentations, it is not material whether the queen was ſeiſed or not. Neither can it be objected, that the defendant in pleading has alledged this advowſon to be *in groſs*. It is true, he ſays, that *bene et verum eſt* that KING CHARLES was ſeiſed thereof in fee *ut de uno groſſo*, but that cannot be any conceſſion that it was ſo in THE QUEEN. And after all, admitting that the king was miſtaken in the law, yet if he was truly informed of the fact, ſuch a bare miſtake ſhall not avoid his grant. * Here the letters patents of THE QUEEN are truly recited, of which he was well appriſed; then here happens

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Caſes in Law and Equity, 362.

367.

* [300]

8. Co. 55.
2 Lev. 171.
3 Lev. 135.

* [301]

(*a*) 1. Co. 41. Mcor. 413. 2. Roll. Rep. 114. 2. And. 154. 1. Jones, 79.

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to be a falſe ſuggeſtion of the patentee, and the King ratified and confirmed it, but did not grant all that was in thoſe letters patents. Now if he apprehended that the advowſon paſſed by this grant, it is his own collection, and not what was falſely ſuggeſted by *Sir William Feckſtone*. So is my *Lord Chandois's Caſe* (*a*), to whom *Henry the Seventh* granted a manor in tail; and the ſame king, by other letters patents reciting the former grant, and that in conſideration of the ſurrender thereof to be cancelled, he was and is ſeiſed in fee, did grant the ſaid manor to huſband and wife, and to the heirs of the huſband, &c. Now though by the ſurrender of the firſt letters patents the eſtate-tail was not determined, and ſo the king not ſeiſed of the manor in fee as he recited he was in the ſecond grant, for he had only a reverſion in fee expectant upon the determination of the eſtate-tail; yet that clauſe, *viz.* "by "virtue whereof we are ſeiſed in fee," was but what the king collected to be the conſequence of the ſurrender; ſo that being truly informed by the party both of the intail and the ſurrender, the miſtake which he made in the law being no part of the conſideration ſhall not avoid his grant. But admitting, in the preſent caſe, that THE QUEEN was miſtaken in her grant, and ſo it became void, yet KING CHARLES having recited the ſame by other letters patents, and having granted this advowſon to *Sir William Feckſtone* and his heirs, *non obſtante aliquo defectu vel aliquibus defectibus* in THE QUEEN's grant, he has a good title by ſuch grant, for otherwiſe theſe words ſignify nothing; but the natural ſenſe and meaning of them is, that if the grant of the queen was not good, yet this ſhall be a good grant to the patentee. Therefore it is a good rule taken in the *Earl of Cumberland's Caſe* (*b*), that if the king's grant may be taken to two intents, one of which may be good and the other not, it ſhall be conſtrued to ſuch an intent that the grant may take effect (*c*): as if he grant *totum illud manerium ſuum, ſive totam illam rectoriam ſive advocationem*, &c.; now if he had a manor and no rectory, or an advowſon and no rectory, or a manor or a rectory impropriate, yet that which he had ſhall paſs, becauſe it was the effect of the grant. So here, whether the advowſon was *appendant* or *in groſs*, it is not material, for nothing ſhall paſs but what the king had.

Comb. 308. 4. Co. 45.

* [302]

In *quare impedit*, if title be made to the advowſon, by virtue of letters patent granted to *A.* "*then* ESQUIRE, and *afterwards* KNIGHT," and upon oyer, it appears that the grant was made "to *A.* KNIGHT," the *variance* is fatal, for it cannot be intended that *A.* in the pleadings, and *A.* in the letters patent, are the ſame perſon; "*knight*" being a name of dignity, and "*eſquire*" a name of worſhip.—S. C. Carth. 440. S. C. 2. Salk. 560. Reg. 287. Cro. Car. 205. Comb. 65. 188. Latch. 161. 8. Mod. 84. 1. Salk. 7. 50. 1. Show. 394. 3. Bac. Abr. 623, 624. 4. Bac. Abr. 211.

* Afterwards in *Hilary Term* THE COURT gave judgment, *viz.* Two Judges were of opinion againſt the judgment in the common pleas, not upon the matter in law, but for the *variance*

(*a*) 6. Co. 55. Hob. 224. 7 Roll Rep. 277. 360. Line. 3. 7. 9. 76. 112.

(*b*) 8. Co. 167. Lane, 39.

(*c*) Dav. 45. 7. Co. 14. 4. Bac. Abr. 213.

between

between *the pleading* and *the letters patents*; for the defendant has ſet forth a grant made to *William Freſtone*, *tunc* ARMIGERO, *poſt a* MILITI, and upon *oyer* of the letters patents it is to *William Freſtone* MILITI. Now he could not be *a knight* and *eſquire* at the ſame time. "*Knight*" is a word of dignity and part of his name, but "*eſquire*" is not; and ſo are all the old authorities (*a*). A BISHOP entered into a bond; the obligee was then an *eſquire*, but was afterwards made *a knight*, and died; an action of debt was brought againſt the biſhop by the plaintiff, as executor of ſuch a one "*eſquire*," which was according to the bond; but RICKHILL, *Chief Juſtice* of the common pleas, gave judgment, that the writ ſhould abate, becauſe he was not named *knight* (*b*). So where the heir apparent of the *Earl of Shrewſbury* brought an action by the name of *John Talbot knight*, and pending the ſuit his father died, the queſtion was, Whether the writ ſhould abate becauſe the plaintiff was then *an earl?*; PRIESTLY, *Chief Juſtice* of the common pleas, held that it ſhould not; but it was for this reaſon, becauſe his dignity deſcended to him by the act of God (*c*); but if it had come to him by the act of the law, it had been otherwiſe. It is likewiſe ſo where there is an addition of *knight* when the perſon is not knighted, as where it is omitted when he is really ſo (*d*); for in both caſes it is void in pleadings or grants, though not in a conveyance (*e*): and the reaſon is, becauſe *knight* being made part of the name of the grantee, when in truth he was not ſo, he cannot be intended to be the ſame perſon mentioned in the grant. As to the *Lord Ewr's Caſe* (*f*), who had a grant made to him by the name of RALPH EVER *knight*, LORD EURE, when he was not at that time *a knight*; it is true, it was held good, becauſe *ſatis conſtat de perſonâ* by the addition of *Lord Eure*, for there is but one lord of that name in *England*, and therefore the addition of *knight*, though falſe, ſhall not vitiate the true deſcription of the perſon. So if a grant ſhould be made to JOHN *biſhop of Winton*, when his name was *Peter*, the grant is good; for there is but one *biſhop of Winton*, and therefore he is ſufficiently deſcribed by that addition (*g*).

* But HOLT, *Chief Juſtice*, and ROKEBY, *Juſtice* of the king's bench, were of opinion, that this was a good grant in law; for they did not ſpeak to *the variance* between the pleadings and the grant.—They held, that it was not material to alledge the exact time when THE QUEEN was ſeiſed of this advowſon *in groſs*; it is ſufficient to alledge a ſeiſin generally; and therefore an addition of that which is immaterial will not help. As in debt upon bond, conditioned, that if the plaintiff did not depart out of the de-

(*a*) 2 Inſt. 594. Bro. Abr. "Additions," pl. 58.

(*b*) Year Book, 7. *Hen.* 4. pl. 7 14. *Hen.* 6. pl. 15. Bro Abr. "Noſme," pl. 33.

(*c*) Year Book, 22. *Hen.* 6. pl. 29. Bro. Abr. "Noſme," pl. 61.

(*d*) But ſee Larch. 161. Hutt. 41. Lit. Rep. 181 Jones, 215.

(*e*) Long Quinte, 106. b 8. *Flow.* 4. pl. 23. Bro. Abr. "Grants," pl. 50. 2. Roll Abr 198.

(*f*) Cro. jac. 240.

(*g*)

fendant's

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fendant's ſervice without his leave, &c. then if he paid the plaintiff one hundred pounds within twenty-eight days upon demand, the bond ſhall be void; and the defendant pleaded, that the plaintiff, on the fourth day of *May*, in the thirtieth of *Elizabeth*, departed out of his ſervice, and without his leave; and the plaintiff replied, that on the ſixth day of *September*, in the ſame year, ſhe departed with leave; and that afterwards, on the fourth of *October*, ſhe demanded the hundred pounds, which the defendant refuſed to pay, ABSQUE HOC that ſhe departed on the fourth of *May* without leave; and it happened that the demand was laid to be the fourth day of *October*, and the writ was *teſted* on the eighteenth *October*, ſo that there was not twenty-eight days between the demand and the action brought; yet the plaintiff had judgment (*a*), though upon his own ſhewing he brought the action fourteen days too ſoon; for the iſſue was upon the departure, and the demand in the replication was altogether immaterial, and therefore ſhall be rejected as ſurpluſage (*b*). Every thing in a grant ſhall be intended to be good, if the contrary do not appear. As in debt upon the ſtatute 2. *Edw.* 6. for not ſetting out tithes, the plaintiff declared (*c*), that the defendants were occupiers of one hundred and twenty-eight acres of meadow in *Radley*, and he derived a title under letters patents of QUEEN ELIZABETH to himſelf for life, out of which, &c.; the defendant craved *oyer*, *&c.*; and it appeared that THE QUEEN demiſed the tithes of certain lands in *Bremere* and *Barton Bremere*, in the pariſh of *Radley*, but did not mention the hundred and twenty-eight acres, &c. yet, upon demurrer, judgment was given for the plaintiff, though it did not appear that the tithes of one hundred and twenty-eight acres were granted to him by thoſe letters patents; neither was it averred that thoſe acres were any of the lands mentioned in the letters patents, becauſe the plaintiff had alledged that THE QUEEN granted to him *prædictas decimas*, which was a *ſufficient averment that thoſe tithes paſſed by that grant; and if it had been otherwiſe, the defendant ought to have pleaded *quod non conceſſit*.

Then as to the other matter, this advowſon might be *appendant* when the *Earl of Warwick* had it, and it might afterwards be *in groſs*. It was certainly once appendant to the manor: and this appears in my *Lord Coke's Entries* (*d*); for there we find that one *Digby* was tenant in tail of this manor, who committed treaſon, and the church being void, THE QUEEN preſented, then the advowſon muſt be *in groſs*; the tenant in tail was afterwards attainted, then it became *appendant* again by reaſon of ſuch attainder, for there was no act done to ſever the advowſon from the reverſion in fee. But if it did not appear to be *appendant* at the time of THE QUEEN's grant, yet it will paſs by that grant of CHARLES THE FIRST; for it is granted in full, expreſs, and large words, without any manner of reſtriction. And there are

(*a*) 2. Leon. 99.
(*b*) Hob. 71.
(*c*) Cro. Jac. 679.
(*d*) Co. Ent. 477.

ſtronger

THE KING *against* THE BISHOP OF CHESTER, PEIRCE, AND COOK.

ſtronger caſes than this, where the king's intention appearing to paſs an intereſt, though there happen a fault in the grant, yet it ſhall paſs accordingly. To inſtance in ſome, *viz.* as where *Edward the Second* (*a*) by letters patents granted the caſtle and manor of *Skipton* in *Craven* to *Robert de Clifford* in tail, and *Henry the Sixth* granted *reverſionem præd. caſtri et manerii* to THOMAS Lord CLIFFORD, *necnon caſtrum et manerium præd.*; now if the eſtate-tail was good, then he had granted the reverſion only; if not, then by the words "*necnon caſtrum et manerium præd.*" he granted the poſſeſſion. So a grant of a manor, though it be not really ſo, but only in reputation, is a good grant (*b*), and the manor will paſs. There are many other caſes in THE BOOKS where the king's grants have been adjudged good, and many favourable conſtructions have been made by the Judges to ſupport them; as where the ſurrender of lands in *Suſſex* was made the conſideration of the queen's grant, when in truth the lands were in *Eſſex*, and ſo the county miſtaken, yet the grant was held good (*c*), becauſe a miſpriſion in the recital of a thing ſhall not make the grant void. * So likewiſe where *Edward the Sixth* (*d*) "granted *totam illam rectoriam de* DALE *ac omnes decimas, &c. quæ* "*quidem omnia et ſingula præmiſſa* are of the true yearly value of "thirty-two pounds," and at the time of this grant there was a farm in the pariſh of *Dale*, in leaſe under a yearly rent; now the words "*quæ quidem omnia, &c.*" refer only to tithes of that yearly value, and it may be the king intended to paſs no more; yet having granted *totam illam rectoriam* generally, it was adjudged that the tithes of that farm ſhould paſs, though it made it more than thirty-two pounds a year. The true way had been to have taken iſſue upon the traverſe (*e*). * [305]

(*a*) 8. Co. 166.
(*b*) 6. Co. 63.
(*c*) 1. Roll. Rep. 23.
(*d*) 2. Roll. Rep. 118.
(*e*) The judgment of the Common Pleas was affirmed by HOLT, *Chief Juſtice*, and by TURTON and EYRE, *Juſtices*, S. C. 2. Salk. 561. S. C. Skin. 604 the three Judges being of opinion that *the tenancy* (Vide ante, 302.) was ſo great an obſtacle that they could not come at the merits of the cauſe, and that for this defect THE PLEA WAS ILL S. C. Ld Ray. 305 But a writ of error was brought in parliament, and this judgment was reverſed. S. C Show. Caſes in Parl. 224. S. C. 12. Mod 187.

Gatehouſe *againſt* Row.

Caſe 138.

WRIT OF ERROR on a judgment in the Common Pleas, in an action on the caſe upon an *indebitatus aſſumpſit* and *quantum meruit*, brought by *Gatehouſe* for meat, drink, &c. which the defendant had when he ſtood for burgeſs for *Stockbridge*.

Declaration upon three ſeveral promiſes, the laſt ſtating *cumque etiam* the aforeſaid defendant, in conſideration that the plaintiff provided goods, &c. *ſuper ſe aſſumpſit* is good after verdict.—S. C. 2 Salk. 663. S. C. Comb. 404. S. C. Carth 379. S. C. 1. Ld. Ray. 145 Cro. Eliz 79. 147. 660. Cro. Jac. 504. 1. Sid. 309. 3. Lev. 55. 1. Saund. 6. 6. Mod. 227. 260. 7. Mod. 143. Lutw. 234. 2 Ld. Ray. 1517.

The declaration ſtated three ſeveral promiſes, the laſt of which was thus, "*cumque etiam præd.* (the defendant) *in conſideratione* "that the plaintiff at his requeſt had found and provided for him

"meat,

GATEHOUSE *againſt* ROW.

" meat, drink, &c. *ſuper ſe aſſumpſit*," and does not ſay that the defendant *ſuper ſe aſſumpſit*. This cauſe was tried at the aſſizes at *Winton*, and a verdict for the plaintiff *Gatehouſe*, and entire damages given.

It was now moved in arreſt of judgment, that the laſt was a void promiſe, becauſe it was not alledged that *the defendant* had promiſed: ſo that poſſibly a ſtranger might make the promiſe, and then the defendant is not bound by it. It cannot be taken by intendment to be the defendant, becauſe it is the very *giſt* of the action, and ſince the jury have found that " *Row ſuper ſe aſſumpſit modo et for-* " *mâ*," and have aſſeſſed entire damages *occaſione præmiſſorum*, and every promiſe being a diſtinct declaration, and one of them being wrong laid, it is therefore naught. As for inſtance, in *aſſumpſit* the plaintiff declared *(a)*, that in conſideration he would marry the defendant's daughter, *ſuper ſe aſſumpſit* to pay the plaintiff one hundred pounds. Upon *non aſſumpſit* pleaded, the plaintiff had a verdict; but the judgment was arreſted, becauſe it was not alledged that the defendant *ſuper ſe aſſumpſit*, which is this very caſe in point. * This might have been good in an *indebitatus aſſumpſit (b)*, becauſe where there is a debt, the law fixes a promiſe upon the debtor to pay it.

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To which it was anſwered, that if the conſideration be void, then the [illegible] have not given damages for it, for they cannot give a verdict either for no promiſe, or a bad promiſe. As to that caſe in *Croke* before-mentioned, there were three perſons named in that declaration, of which the defendant's daughter was laſt named, and the words *ſuper ſe aſſumpſit* immediately following might relate to her, which was the reaſon of that judgment; but here there are but two perſons named, ſo that when the plaintiff declares againſt the defendant, it muſt of neceſſity be intended, that the defendant *aſſumpſit*, and nobody elſe, becauſe the conſideration ariſes from him, and thoſe words *cumque etiam* in the third promiſe couple that ſentence to the firſt. If it had been, that the plaintiff *aſſumpſit* to pay himſelf, it had been good after a verdict *(c)*. So if there are ſeveral conſiderations alledged in one declaration, and one of them is ſufficient, though the other are wrong, both as to matter and form, yet the declaration will be good *(d)*. So where an *aſſumpſit* was brought againſt an executor upon the promiſe of the teſtator, and the defendant pleaded, that *he himſelf* made no ſuch promiſe; after a verdict it ſhall be intended to refer to the promiſe of the teſtator *(e)*.

Carth. 6. 86. 304. Comb. 149. 2 Ld. Raym. 426. 1. Vent. 122. 3. Lev. 336. Stiles, 295.

Afterwards, in Hilary Term, the plaintiff had judgment, it being after a verdict.

(*a*) Cro. Eliz. 913. S. C. Noy. 50.
(*b*) 1. Salk. 23 28.
(*c*) 1. Sid. 306. 2. Vent. 141.
(*d*) Cro. Eliz. 848.
(*e*) 1. Sid. 292. Latch. 125.

Warſopp

Warſopp *againſt* Abell.

Caſe 139.

Trinity Term, 8. *Will.* 3. *Roll* 594.

The admittance of the *tenant for life* of a copyhold eſtate is the admittance of the ſe in *remainder*.

1 Salk. 185. 2. Howrl 301. Cro. Jac. 31. 4. Co. 22. Cro. Eliz. 662. 4. Leon. 111. Moor. 356. 1 Mod. 102. 120.

IN treſpaſs and ejectment for a copyhold, upon the demiſe of *John Spencer*, the jury found a ſpecial verdict:

The ſubſtance whereof was, That *John Spencer* purchaſed this copyhold, and on the twenty-third of *October*, in the year 1652, took a ſurrender thereof to the uſe of himſelf for life, then to *Alice* his wife for life, and to the ſurvivor of them, and after their deceaſe, then to the uſe of the laſt will of the ſaid *John Spencer*, and for default of ſuch will, to his own right heirs; that he was admitted, &c.; that he made a will, and deviſed all his whole eſtate, both real and perſonal, to *Alice* his wife, after his * deceaſe, the remainder to be divided between his relations on both ſides, according to the diſcretion of his executors, and died; that the executors entered with an intent to divide the eſtate, purſuant to their will; but that they were not admitted to this copyhold.

* [307]

The queſtion therefore was, What eſtate was veſted in them before admittance, and what paſſed by this will?

And IT WAS HELD, that the admittance of tenant for life upon a ſurrender, is an admittance of thoſe in remainder.

Bennet *againſt* Talbot.

Caſe 140.

It is actionable at common law to hunt in the ſoil of another; and therefore a declaration in *treſpaſs*, containing one count at common law; and another on the 4. and 5. *Will & Mary*, c. 23 deſcribing the defendant, *a clothier*, as an *unfrequented ſman*, for *hunting* in the grounds of the plaintiff, is good, although it conclude *contra formam ſtatuti*; and the plaintiff is intitled to *full coſts*, although the damages are under forty ſhillings, for the 4 and 5. *Will. & Mary*, c. 23 ſ. 10 is a repeal of the 22. and 23. *Car.* 2. c. 25 as to *coſts* — S. C. Comy. 26. S. C. 1. Ld. Ray 149. S. C. 1. Salk. 272. S. C. Comb. 420. S. C. Carth. 382. S. C. 12. Mod. 121. S. C. Holt, 561. Vent. 103 8 Mod. 238. 2. El. Rep. 900. 4. Bac. Abr. 96. Sayer's Coſts, 54. Hullock on Coſts, 91. 2. Wils. 70.

TRESPASS. The plaintiff declared *de placito quare vi et armis clauſum ipſius* (the plaintiff) *fregit et intravit; et herbam pedibus ambulando conculcavit; et cum averiis bobus et vaccis* did eat his graſs; *necnon* that the defendant being an inferior tradeſman, *viz.* a clothier, *adtunc et ibidem, in clauſo præd. venatus fuit, et alia enormia ei intulit; contra pacem, et contra formam ſtatuti, &c.* There was a general verdict for the plaintiff at the aſſizes at *Saliſbury*.

It was moved in arreſt of judgment, becauſe part of the action was for a treſpaſs at *common law*, and part upon the *ſtatute*; and having concluded *contra formam ſtatuti*, that goes to the whole.

The ſtatute 13. *Rich.* 2. c. 13. enacts, "that no layman who "has not lands of the yearly value of forty ſhillings, nor clerk "who has not ten pounds a year revenue, ſhall have or keep a "greyhound."

The ſtatute 22. and 23. *Car.* 2. c. 25. provides, "That perſons "not having lands, or ſome other eſtate of inheritance in their own

"or

BENNET *againſt* TALBOT.

" or wives right of one hundred pounds a year, or of one hun-
" dred and fifty pounds a year for life, or for ninety-nine years,
" ſhall not keep guns, &c."

And by the ſtatute 22. and 23. *Car.* 2. c. 23. it was enacted, " That if the jury find the damages under forty ſhillings in actions " of treſpaſs, the plaintiff ſhall recover no more coſts, and if more " coſts are awarded, the judgment ſhall be void."

By the ſtatute 4. and 5. *Will.* c. 23. it is enacted, " That all " and every law and ſtatute now in force for the better preſer-" vation of the game, ſhall be duly put in execution" *(a)*. Then there is this clauſe, " And whereas great miſchiefs do enſue by " inferior tradeſmen, apprentices, and other diſſolute perſons neg-" lecting their trades and employments, who follow hunting, fiſh-
* [308] " ing, and other game, to the ruin of themſelves, * and damage of " their neighbours;" for remedy whereof BE IT ENACTED, &c. " that if any ſuch perſon, as aforeſaid, ſhall preſume to hunt, hawk, " fiſh, or fowl (unleſs in company with the maſter of ſuch appren-" tice duly qualified by law) ſuch perſon or perſons ſhall be ſubject " to the penalties by this act, and ſhall or may be ſued and proſecuted " for their wilful treſpaſs in ſuch their coming on any perſon's " land, and if found guilty, the plaintiff ſhall not only recover his " damages, thereby ſuſtained, but his full coſts of ſuit, &c."

Now this clauſe is a repeal of the ſtatute 22. and 23. *Car.* 2. c. 23. which gives no more coſts than damages. As to the matter of coſts, it was ſaid, that this was an independent clauſe. The plaintiff ſhould have declared that he hunted, being an *inferior tradeſman* *(b)*, which had been ſufficient to entitle him to coſts upon a general law; and the beſt way had been to omit *contra formam ſtatuti*. As for inſtance: one was indicted for ſtabbing another *(c)*, and two others for being preſent, and abetting, and concluded *contra formam ſtatuti*; they were all found guilty, when it is plain that he could only be ſo who gave the ſtroke; yet that indictment was held good, becauſe they might have been found guilty at common law upon the ſame indictment, for the ſtatute does not alter the nature of the offence, but takes away the privilege of the clergy allowed by law, and need not conclude *contra formam ſtatuti.*

Allen 43. 1. Hale's P. C. 437. 468. 4. Co. 43. 1. Hawk. P. C. c. 30. ſ. 7. 2. Hale 344.

But this being moved in *Hilary Term*, THE COURT was of opinion, that where a ſtatute makes an offence, the concluſion muſt be *contra formam ſtatuti.* But this was an offence before the making that act *(d)*, which only repeals that clauſe of the ſtatute 23. *Car.* 2. c. 23. and therefore, though the declaration concludes *contra formam ſtatuti*, it is well enough.

And ſo the plaintiff had judgment *niſi cauſa.*

(*a*) See 5. Ann c. 14. 9. Ann. c. 25. and 3. Geo. 1. c. 11.
(*b*) 3. Bl. Com. 215. 2. Wils. 70.
(*c*) Allen, 43.
(*d*) 2. Bl. Rep. 900. See 1. Term Rep. 334.

Bracey

Bracey *againſt* Harris.

Caſe 141

BRACEY was ſummoned before COMMISSIONERS OF BANKRUPTS, to give an account of the bankrupt's eſtate.

The queſtions demanded of him were,

FIRST, To give an account of *all matters* which he knew concerning the ſaid eſtate.

SECONDLY, * When and in what manner he aided and abetted the bankrupt in carrying away his effects, or in embezzling or concealing the ſame?

Theſe queſtions he refuſed to anſwer, becauſe THE FIRST was *too general*, and THE SECOND was to *accuſe himſelf*; ſo that he would be liable to the penalty of double the value of the goods which were concealed (*a*): he was willing to anſwer what he could at preſent, or to any particular queſtion which the commiſſioners ſhould aſk. But upon his refuſal to anſwer thoſe two queſtions, he was committed.

Having brought a *habeas corpus*, it appeared, upon the return, that the warrant of commitment concluded, that *Bracey* ſhould be committed "*until he conform to the authority of the commiſſioners.*"

This was now alledged to be a void commitment, becauſe they have a ſpecial authority given them by the ſtatute 1. *Jac.* 1. c. 15. "that if the party ſhall refuſe to be ſworn, and to anſwer ſuch "queſtions as ſhall be miniſtered to him, that then the commiſ-"ſioners, or the greater number of them, may commit the perſon "refuſing to priſon, there to remain without bail, &c. *until he* "*ſubmit to the commiſſioners to be examined*," and not "till he con-"form to the authority of the commiſſioners:" and therefore it was moved, that he might be diſcharged.

To which it was anſwered, that, as to the general queſtions, the ſtatute does not give the commiſſioners power to aſk ſuch queſtions, even of the bankrupt himſelf, and that the concluſion of the warrant is well enough, for the words of the act are, "that "the commiſſioners may commit till *he ſubmit to be examined*;" which is a conſequence that *he conform to their authority.*

But THE COURT ſeemed to incline, that the party need not pay a univerſal obedience to the commiſſioners, ſo as to anſwer all queſtions, but only to anſwer what he knows concerning the carrying away of any part of the bankrupt's eſtate by any perſon, but not by himſelf (*b*). But for that fault in the concluſion of the warrant of commitment, *Bracey* was diſcharged.

Commiſſioners of bankrupts cannot aſk a perſon examined before them, "what he "knows of *all* "*matters* con-"cerning the "bankrupt's "eſtate," for "it is too *gene-ral*; nor in what manner he aſ-ſiſted the bankrupt to *conceal his effects*, for it tends to *criminate him*, and, on commitment, if they conclude their warrant, "*until be conform* "*to our autho-*"*rity*," it is bad, and he ſhall be diſcharged; for the words of the ſtatute ought to have been purſued

S C 1. Salk. 384 348.
S C Comb 390.
S C Sett & Rem. 234.
S C Holt, 94.
Vide poſt. 368.
1 Salk 348 351.
Ld Ray. 99. 153.
2 Stra. 880. 1005.
2 Bl. Rep. 882. 1144.
Co Bun. Laws, 486.
1. Bac Abr. 382.
2 Hawk. P. C. ch 16 ſ 18.
1 Term Rep. 651

(*a*) By the ſtatute 13 *Eliz* c 7 But ſee 5 *Geo* 2 c 30

(*b*) See Miller's Caſe, 3 Wils 427. 2. Bl Rep 881. Langhorn's Caſe, 2 Bl Rep 919. Preſcott's Caſe, 2. Burr. 1122 and Pedley's Caſe, Cook's B. L. 480 Caſes in Crown Law, 268.

Caſe 142.

* Jones *againſt* Bodiner.

Eaſter Term, 8. *Will.* 3. *Roll* 382.

An attorney of the *Common Pleas* who is ſued in the *King's Bench*, may, notwithſtanding the ſuppoſition that he is in the *cuſtody of the marſhal*, plead his *privilege* in abatement, provided he has not admitted the juriſdiction.

S. C. Ante, 225. S. C. 1. Salk. 1. 173. S. C. 1. Ld. Ray. 135. 1. Vent. 1. 1. Mod. 10. Comb. 319. Carth. 126. 363. Stra. 191. 837. 864. 2. Ld. Ray. 1567. 2. Bl. Rep. 1085. 1. Wils. 306. 298.

AN action of treſpaſs was brought in this court for taking the plaintiff's ſheep.

The defendant pleaded his *privilege*, as AN ATTORNEY of the court of Common Pleas.

The plaintiff replied, *Quod per aliqua præallegat. Curia hic a cognitione placiti præd. repelli non debet, quia dicit quod præd.* WILLIELMUS BODINER, *tempore exhibitionis billæ ipſius*, (the plaintiff) *ſcil't* 25 *die Maii anno regni dom. Will'i tertii nunc regis Angliæ, &c. octavo, fuit in cuſtodia Mar. Mareſc. dom. regis coram ipſo rege exiſten. ſcil't apud Weſtm. præd. in com. præd. ad ſectam cujuſdam* CATHERINÆ MADERN *vid. in quodam placito tranſgr. et adtunc et ibidem per curiam præd. idem* WILLIELMUS *tradit. fuit in ballium in placito præd. ad ſectam dictæ* CATHERINÆ *prout patet per recordum inde in curia dicti domini regis coram ipſo rege nunc hic apud Weſtm. præd. remanen. Super quo præd.* (the plaintiff) *poſtea ſcil't eodem* 25 *die Maii anno octavo ſupradicto (placito præd. præfat.* CATHERINÆ *minime determinat. exiſten.) ſecundum conſ. hic a tempore cujus contrarii memoria hominum uſitat. et approbat. billam ſuam verſus præd.* WILLIELMUM *in curia hic exhibuit prout ei bene licuit: et hoc paratus eſt verificare; unde petit judicium, et quod præd.* WILLIELMUS *ad billam ſuam præd. reſpondeat, &c.* B. SHOWER.

Demurrer, and joinder in demurrer.

IT WAS INSISTED *for the defendant*, that he being in the cuſtody of the marſhal, ſhall not hinder him from pleading his privilege of an attorney of the common pleas; and to prove it, a caſe was cited out of *the Year-Book* (*a*), which was an action of treſpaſs brought in the king's bench, ſuppoſing it to be done in a franchiſe; and the bailiff of that franchiſe demanding cognizance (which is the ſame thing as privilege) it was oppoſed, becauſe it was not claimed whilſt the proceſs was continued; but the Court was of opinion, that it might be demanded at any time.

27. H. 6. 6. a. 2. Roll. Abr. 275.

THE COURT. It is by compulſion of law that the defendant was in cuſtody of the marſhal, and therefore he ſhall have his privilege (*b*) of attorney of the common pleas; but if he had admitted the juriſdiction of the court of king's bench, it had been otherwiſe.

Judgment, that the bill ſhall abate.

(*a*) 22. Aſſize, pl. 83. 2. Roll. Abr. 275
(*b*) Year Book 27. *Hen.* 6. pl. 6. a.

Norris

* Norris *againſt* Mawditt. Caſe 143.

Michaelmas Term, 8. *Will.* 3. *Roll* 169.

WRIT OF ERROR on a judgment in the common pleas, in an action of debt brought upon the ſtatute 23. *Hen.* 6. c. 15. for a falſe return of a burgeſs to ſerve in parliament for the borough of *Liverpool:* the action was, *ad reſpondendum tam dom. regi quam* (to the plaintiff) *qui ſequitur, &c.*

Qu. Whether in a declaration on the 23. *Hen.* 6. c. 15. for a falſe return of the election of a burgeſs to parliament, it is neceſſary to aver that the perſon elected was not one of thoſe deſcriptions of perſons who are excluded by the act.

The ſtatute enacts, "That if any mayor, &c. ſhall return other "than the perſon choſen by the burgeſſes of the borough where "ſuch election ſhall be made, that he ſhall forfeit to the king forty "pounds, and alſo gives an action of debt for forty pounds againſt "ſuch mayor, &c. his executors and adminiſtrators, to any perſon "choſen and not returned, or to any other perſon who, in default "of ſuch burgeſs ſo choſen, will ſue for the ſame."

The plaintiff declared, that the town of *Liverpool* was an ancient borough, out of which two members were to be choſen to ſerve in parliament by thoſe burgeſſes there, who have a right to vote; that upon the death of the *Earl Rivers*, his honour deſcended to the *Lord Colcheſter*, who ſerved for that borough; and that, he being removed to the houſe of peers, a writ iſſued out of chancery, directed to the chancellor of the *Duchy of Lancaſter*, *&c.* who directed his writ, under ſeal of the *county palatine of Lancaſter*, to the ſheriff of that county, commanding him to cauſe another burgeſs to be elected in his room; that the ſheriff made a precept to the mayor, &c. of *Liverpool*, commanding them to proceed to an election, &c.; that the plaintiff, on ſuch a day and year, was, and is ſtill a free burgeſs of that place, on which day he was choſen a burgeſs to ſerve in parliament for that borough, in the room of the *Lord Colcheſter*; but that the defendant had returned *Mr. Brotherton.* There was a judgment againſt the defendant by default, and a writ of error brought, and the general error aſſigned.

S.C. Comb. 430. 1. Mod. 145, 146, &c. 2. Lev. 114. Pollex 470. Fareſt. 13. 6. Mod. 45. 49. 3. Keb. 365. 380. 664. 1. Salk. 19. 2. Salk. 503, 504. 1. Show. 353. 4. Mod. 129. Comb. 194.

And now ſeveral exceptions were taken to the declaration.

FIRST, As to the perſon ſuppoſed to be elected, he ſhould have averred, that he was none of thoſe excluded by the act, as ſheriff, lawyer, merchant, or infant; for the authority given by the act is limited both as to the perſon to be choſen, and by whom the choice is to be made; and the plaintiff had not brought himſelf within either.

To this exception it was anſwered, that it is ſufficient to ſhew that the plaintiff *debito modo fuit electus*, and he need not ſet forth, that thoſe who choſe him had a right to elect, or that he is not a perſon excepted, and the rather becauſe the action is brought againſt the defendant for a wrong done.

A declaration on 23. *Hen.* 6. c. 15. stating that *the sheriff* directed his precept to *the mayor*, to chuſe a burgeſs of the diſcreet men of the borough, is good, although the precept do not direct the choice, purſuant to the ſtatute, to be "*by burgeſſes.*"

* SECONDLY, This action is founded on the ſtatute 23. *Hen.* 6. c. 15. which directs how and in what manner the ſheriff, after the receipt of the writ, ſhall make his precept under his ſeal, *viz.* to the mayor, &c. (reciting the writ) and commanding him by the ſaid precept (if it be in a borough) to chuſe a burgeſs *by burgeſſes.* But this precept, ſet forth in the declaration, is directed to *the mayor* to chuſe one burgeſs of the diſcreet men of the borough, and does not ſay "by burgeſſes". It is not enough for the plaintiff to ſay, that he was a free burgeſs on ſuch a day, &c. and that he was choſen on that day; for he ought to ſet forth how, and by whom, either by the burgeſſes, or by virtue of the precept directed to the mayor and burgeſſes, which gives them power to chuſe. The plaintiff might have waived this *action of debt*, and brought one for *a falſe return*; but having founded it on the ſtatute for a ſum certain, and not purſued the directions on that ſtatute, he cannot come at the penalty.

As to this objection concerning the form of the precept directed to the mayor, to chuſe one burgeſs, without ſaying "by burgeſſes," and ſo not purſuant to the ſtatute, it was ſaid, that no advantage ſhall be taken of this omiſſion now, as it might, if the precept had been void of itſelf; becauſe the mayor is bound to obey. It is like the caſe of a ſheriff who levies goods upon a *fieri facias* without a *teſtatum*, and upon an action brought againſt him, it will not be allowed that he ſhall take any advantage of an irregular proceſs. But by returning *Mr. Brotherton*, he has admitted the precept to be good, and when he took it as ſuch and executed it after a wrong manner, he muſt be charged with an action. Neither is it neceſſary for the plaintiff to ſhew that he was choſen by virtue of that precept; for he alledged, that he was choſen *loco domini Colcheſter*, and that is ſufficient.

THE COURT ſaid, the precept was well enough, for it commands them to chuſe burgeſſes *de eodem burgo*, which is more than what the law was before the making of the act.

A declaration on 23 *Hen.* 6. c. 15. in debt *tam pro domino rege quam ſeipſo*, is good.

Ld. Ray. 78. 6. Mod. 219. 3. Bac. Ab. 506. Dougl. 235. 1. Bl. Rep. 312.

THIRDLY, The action is not well brought as to the form in the commencement of it, for it is in debt, *tam pro domino rege quam ſeipſo*, when, in ſuch caſe, the king ought to be made a party. The difference is thus: When a ſtatute makes an offence, and adds no penalty, the action brought againſt the offender muſt be *qui tam, &c.* but where a penalty is given to the party injured, the king muſt never be joined in that action. Now in this caſe, there is a particular meaſure of the ſubject's wrong, and likewiſe a meaſure of the forfeiture to the king; for which reaſon, they ought not to be joined in this action (*a*). As in debt upon the ſtatute of 2. and 3. *Edw.* 6. c. 13. for not ſetting out tithes, if it is in the *qui tam, &c.* it is naught, becauſe the treble value is given to the party grieved, and the king can have no benefit of it (*b*). All the pre-

* [313]

(*a*) Moor, 63. 1. And. 138. (*b*) Cro. Eliz. 621. Moor, 911.

cedents

cedents in cases of this nature begin with "*summonitus fuit ad respondendum*" to the plaintiff; and conclude, "*per quod actio accrevit*" to him alone (*a*).

As to this objection, *viz.* that in this action the king ought not to be made a party, it was answered, that the form is well enough, for it is brought in the *qui tam, &c.* for a contempt to the king, who has a disappointment of a member to serve in parliament; and this was occasioned by a false return; but, at the most, it is but matter of form and surplusage. The statute 8. *Hen.* 6. c. 10. gives an action on the case and treble damages to the party grieved, who by conspiracy is indicted in any other county than where he dwells, and is acquitted; and yet such action is brought *tam pro domino rege quam pro ipso.* So it is upon the statute of HUE AND CRY, and it is always so in prohibitions, for there is a fine due to the king for the contempt to his laws; and therefore it must be *tam pro domino rege, &c.* (*b*).

NOTE, READER, This is not very clear, for no penalty is given to the king by those statutes, and in such case a fine is always for a contempt; but here is a penalty of forty pounds given by this statute to the plaintiff.

But to proceed. A man was outlawed after judgment (*c*), and arrested upon the *capias utlagatum*, and escaped; and in an action brought against the sheriff, *tam pro domina regina, &c.* * this was assigned for error, but adjudged good; for it is a contempt of the queen to suffer a person outlawed to escape. *[314]

CURIA. As to the objection to the form of this action, that it is brought *tam pro domino rege quam pro ipso*, it is true, that where a statute gives damages to the party injured, as for instance the statute of 2. *Rich.* 2. c. 5. for a *scandalum magnatum*, it is usual to join the king with the party (*d*); but where a sum certain is given, as in this case, they need not be joined (*e*). So upon the statute of HUE AND CRY, they are always joined. But here is a contempt made by the defendant to an express law, which is punishable by fine (*f*), and therefore the action may be brought *qui tam, &c.* There was the like precedent in this court, between *Culliford and The Mayor of Dorchester* (*g*), in the third year of *William and Mary*, which was an action of debt upon a false return in this very form.

Sed adjournatur.

(*a*) Plowd. 118. Rastall's Entries, 446. 186. Placit. Red. 72.
(*b*) Rastall Ent. 403.
(*c*) Eden v Lloyd, Cro. Eliz. 877.
(*d*) See also 3. *Edw.* 1. c. 34. 12. *Rich.* 2. c. 11. and Rastall Ent. 593.
(*e*) Co. Ent. 349.
(*f*) 2. Hawk. P. C. c. 22. f 34.
(*g*) 4. Mod. 129 S. C. 1. Show. 353. S. C. Comb. 194. S. C. 12. Mod. 26.

Case 144.

Hackſhaw *againſt* Clerke.

To caſe on a *bill of exchange*, A PLEA, that he gave *a bond* in diſcharge of *the bill*, is bad; for it amounts to the *general iſſue*.
Ante, 253.
Poſt. 367.
Co. Lit. 303.
1. Sid. 450.
Cro. Eliz. 201.

AN action on the caſe was brought upon a *bill of exchange*, to which the defendant pleaded, that, after the acceptance of the bill, he gave *a bond* in diſcharge thereof.

Upon demurrer to this plea, it was objected, that it amounted to the *general iſſue*; for the debt upon the bill being extinguiſhed by the bond, the defendant ought to have pleaded *non aſſumpſit*, and to have given the bond in evidence.

And THE COURT ſeemed of that opinion. But by conſent, the defendant pleaded the general iſſue.

3. Mod. 166. 5. Com. Dig. "Pleader," (E. 14.) (2. G. 12.) 4. Bac. Abr. 63.

Caſe 145.

The King *againſt* Owen.

A *mandamus* to a mayor to deliver the enſigns of his office to his ſucceſſor, is good, though the words, "*or ſignify to us cauſe to the contrary*, &c." be omitted.

MANDAMUS to ſhew cauſe why the defendant did not deliver THE MACE, and other enſigns of mayoralty, to one *Bennet*, the ſucceeding mayor, &c. in which writ the uſual clauſe, "*vel cauſam nobis ſignificetis*," was left out.

Upon a motion made to quaſh the writ, it was argued, that thoſe words were ſo material, that they could not be omitted; and it was compared to a *præcipe quod reddat* for land, or a *præcipe quod reddat rationabilem computum*; which writs muſt always conclude thus, "*vel oſtenſuras quare non fecerit, &c.*"

* [315]

S. C. 4. Mod. 293.
S. C. Comb. 399.
S. C. Skin. 669.
S. C. Holt, 190.
2. Jones, 177.
1. Sid. 31.
Skin. 359.
Comb. 102.

* But on the other ſide, the caſe of *The King v. St. John's College* (*a*) was remembered in this court, where the ſame words were left out of a *mandamus*, the writ concluding *ſicut informamur*; and the Court would not quaſh it (*b*), becauſe, it being a *mandatory writ*, the perſon to whom it is directed ought to make a return, or obey it, and it is not abſolutely neceſſary that theſe words ſhould be inſerted. They were firſt introduced in *James Baggs's Caſe* (*c*), but have been omitted in many caſes ſince.

And therefore a *pluries mandamus* was now granted.

5. Com. Dig. "Mandamus," (C. 3) 2. Stra. 948. 2. Bar. K. B. 235. 3. Bac. Abr. 537.---544.

(*a*) 4. Mod. 233. 4. Mod. 241. *notis*.
(*b*) But ſee Skin. 549. Comb. 282. (*c*) 11. Co. 93.

Caſe 146.

Blanchly *againſt* Fry.

In treſpaſs for breaking and entering the plaintiff's cloſe, and cutting down his corn, there ſhall be no more *coſts* than *damages*, unleſs the judge certify under 22. 23. *Car.* 2. c. 9. that the freehold or title were in queſtion.—S. C. 1. Salk. 193. S. C. Comb. 399. S. C. Skin. 666. S. C. Comy. 19. Ante, 74. Carth. 224 2. Vent. 180. Stra. 645. 633. 3. Burr. 1282. Dougl. 780. 1. Term Rep. 655. Hullock on Coſts, 66. 3. Com. Dig. "Coſts," (A. 3.) Bull. N. P. 329.

TRESPASS *quare clauſum fregit*, and for cutting and carrying away his corn. The jury found the defendant *guilty* of breaking the cloſe and cutting the corn, but not of the carrying it away, and gave ten ſhillings damages.

And

BLANCHETT against FAY.

And now it was moved in arreſt of judgment; the queſtion being, Whether this caſe be within either of the ſtatutes, which give no more coſts than damages?

The ſtatute of 43. *Eliz.* c. 6. enacts, "That if upon any perſonal action to be brought in the king's courts at *Weſtminſter*, "not being for any title or intereſt of lands, nor concerning the "freehold of any lands, nor for any battery, it ſhall appear to the "judge who tried the cauſe, and ſo ſignified by him, that the debt "or damages recovered ſhall not amount to forty ſhillings, or "above, that he ſhall not award for coſts more than the debt or "damages recovered."

The ſtatute 22. and 23. *Car.* 2. c. 9. recites that former ſtatute, and enacts, "That in all actions of treſpaſs, aſſault and battery, "and other perſonal actions, wherein the judge, at the trial of the "cauſe, ſhall not certify upon the back of the record, that the aſ"ſault and battery was ſufficiently proved, or that the freehold or "title was chiefly in queſtion, if the damages found be under "forty ſhillings, the plaintiff ſhall have no more coſts, and if "more ſhall be awarded, the judgment ſhall be void; and the "defendant may have an action for ſuch vexatious ſuit."

In this caſe, the freehold or title of the land was not in queſtion, the action being brought againſt a gentleman for entering into the plaintiff's ground, who was then following his game in hunting.

But it was ſaid, that in a like action for breaking and entering a houſe, and breaking the plaintiff's glaſs windows, and diſturbing him in his poſſeſſion, the plaintiff had * judgment and *full coſts*; which was denied by THE CHIEF JUSTICE to be ſo (*a*). So where the plaintiff declared for breaking and entering his cloſe, and for ploughing up his ground, he had *full coſts* (*b*). So for entering his boat, and cutting his rope (*c*), and but a penny damages, yet the plaintiff had *full coſts*.

Adjournatur (*d*).

* [316]

Comb. 75. 222. 324. Fitzg. 42. Skin. 666. 8. Mod. 371. Carth. 225. Ray. 487.

(*a*) Gardiner's Caſe, 2. Vent 215. and ſee the caſe of Brick *v.* Duffey, Bull. N. P. 33. and Beck *v.* Nichols, 1. Stra 557. accord.

(*b*) But ſee Smithſend *v.* Long, Caſes Pract. C. B. 2. and Haſeltine *v.* Workham, Hullock on Coſts, 66. contra.

(*c*) Haines *v.* Hughes, Comb 324 But ſee the caſe of Walker *v.* Robinſon, 1. Wils. 93. 2. Stra. 1232.

(*d*) THE COURT, after ſeveral debates, inclined to be of opinion, that if any thing had been *carried away*, or the defendant had entered *claiming title*, then *full coſts* ſhould have been given; but when it does not appear that the treſpaſs was committed under pretence of title, or that any thing was carried away, there we cannot make a conſtruction contrary to the expreſs words of the act of parliament, S. C. Comy. Rep. 20. S. C. Skin. 666. But it does not appear that any judgment was given, S. C. Comb. 400. It is ſaid, S. C. Skin. 666 the Court agreed that if the defendant had carried the corn away, though not off the premiſes, the plaintiff would have been intitled to *full coſts*. But in the caſe of Franklin *v.* Jolland, 1. Stra. 634. HOLT, *Chief Juſtice*, ſays, by aſportation in this caſe is meant a carrying quite away. S. P. 1. Gilb. Eq. Rep. 198 The *aſportavit* alſo muſt be of a perſonal chattel, for when the *carrying away* alledged in the declaration is only the mode in which the injury was done to the land, there ſhall be no more coſts than damages, Clegg *v.* Molyneux, Dougl. 780. See alſo Smith *v.* Charles, 2. Stra. 1130 and Hullock on Coſts, 64. to 90. where all the caſes on this ſubject are collected.

Cafe 147.

If a *mandamus* to admit a perſon *town-clerk* of a city, it is not ſufficient to return that he had not taken the oaths before *the mayor* according to the ſtatute 13. *Car.* 2. c. 1. for he might have taken them before *two juſtices*; but to an officer who is bound to take the oaths, it is no excuſe that they were not *tendered* to him.

S. C. 2. Salk. 428.
S. C. Comb. 419.
S. C. Holt, 438.
Poſt. 402. 431.
2. Jones, 121.
2. Lev. 242.
Comb. 419.
Stra. 121. 677.
4. Com. Dig "Franchiſe," (F. 29.)
* [317]
3. Bac. Abr. 726, 727.
1. Hawk. P. C. ch. 8.
3. Burn's Juſtice, 249.

The King *againſt* Slatford.

MANDAMUS iſſued to the mayor and commonalty of the city of *Oxford*, to admit *Slatford* to be their *town-clerk*. They return, that he had not taken the oaths according to the ſtatute 13. *Car.* 2. c. 1.

LEVINZ, *Serjeant*, excepted to this return. They have not returned that they adminiſtered the oaths to him; which they ſhould have done, for no man can give himſelf an oath; ſo that it was a duty incumbent on this corporation to have tendered the oaths to all their officers, and all oaths muſt be tendered by ſome perſon who had lawful authority to tender them; and for aught appears, he might deſire to take the oaths, and they would not give them.

HARCOURT, *contra*. This is an officer removeable at pleaſure by the mayor and commonalty; and if they have a power to remove him, and act in purſuance of that power, the Court will not grant a *mandamus* to have him reſtored. So is 1. *Sid.* 14. *Ventr.* 77. But with ſubmiſſion, there is very little in MR. SERJEANT'S objection, for the party is bound at his peril to take theſe oaths. And you may as well ſay, that upon a return of 25. *Car.* 2. it muſt appear that the parſon tendered the ſacrament, as to ſay, that the corporation is bound to tender the oaths.

HOLT, *Chief Juſtice*. Though a man who holds but at will may be removed without cauſe, yet the corporation here have not declared their will to remove him; which they muſt do, or elſe we cannot take notice of it. But the words of the ſtatute are very poſitive, "that at the time of the taking the oaths of his "office, he ſhall take the other oaths, and ſubſcribe the Declaration." The caſe of *the King v. Thacker* (*a*) is plain againſt you: A *mandamus* iſſued to the mayor, &c. of *Norwich* * to reſtore an alderman; they returned, that he, being elected, took the oaths in the ſaid act of 1. *Will. and Mary*, c. 6. and of 13. *Car.* 2. c. 1. and pronounced THE DECLARATION, but that he did not *ſubſcribe* when he took the oaths to execute the ſaid office; and Counſel excepted to the return, becauſe it did not appear that he was required to make the ſubſcription, or that the Declaration was tendered to him to be ſubſcribed, and the act requires tender, and the proviſo refers to it; but the Court held that tender is not neceſſary, and the officer ought to do it at his peril, and the office is void for non-ſubſcription by the words of the act; and the ſaid cauſe was allowed by the Court. Indeed, if the mayor and commonalty ſhould refuſe to adminiſter the oaths, it is a great miſdemeanor, for which an information will lie, and it is finable. And conſider whether an action will not lie againſt the mayor for not tendering theſe oaths for damages in loſing the place by it, for they ought to have tendered them; and the words of the act are, "that the oaths ſhall

(*a*) Sir T. Jones, 121.

"be

"be adminiſtered;" but however, the party muſt take them at his peril: the words of the ſtatute are ſtrong againſt him.

At another day,

Webb. My firſt exception to the return is, that they have made it narrower than it ought to have been; for they ſay, that he did not take the oaths before the *mayor and commonalty*; but they do not ſay that he did not take them before two *juſtices of the peace*; ſo that, for aught appears, he might have taken them before two juſtices of the peace, and then we have a good title; and a return muſt be certain to every intent, for we have no opportunity as in pleas in bar to reply, and therefore they need not be ſo very certain.

Second exception. They do not give us negative words; they do not ſay that "we had got no better title," for they only give us a defeaſible title; but they ought to have added, that "we have no other title;" for perhaps he might have been choſen afterwards, and might have had another good title.

Shower, *è contra*. As to the first exception, we have ſaid, that he did not take the oaths when he was choſen to this office, and that is ſufficient, for that implies he did not take them then before any one: beſides, by the act he ought to take the oaths before the mayor and commonalty.

* As for the second exception, we have ſufficiently alledged his having no title. Then this writ of *mandamus* only concerns *the poſſeſſion*, and does not determine *the right*; therefore the return to it need not be ſo very certain. Then the words of the ſtatute are, that they are authorized to tender the oaths, but not commanded to do it. * [318]

Holt, *Chief Juſtice*. The deſign of this act was to ſecure the Government in general, and likewiſe the Corporations in particular, therefore at his peril he muſt take the oaths; otherwiſe the corporation, by agreement amongſt themſelves not to tender the oaths, might diſpenſe with the act, which might prejudice the Government. A man at his peril muſt take the oaths in the corporation act.

Then the queſtion is, Whether two juſtices of the peace have power to adminiſter the oaths in caſe of omiſſion of the mayor and commonalty? If ſo, then the return is too ſhort.

At another day,

Wright, *Serjeant*. The great exception is, that it is ſaid, he ought to take the oaths *coram majore pro tempore exiſten'*: ſo that it is wholly uncertain whether it be meant before the mayor at the time of making the letters patents, or at the time of making the ſtatute in king *Charles the Second*'s time, when the ſtatute was made to regulate corporations, or at the time of the late act.

Northey.

The KING against STAFFORD.

NORTHEY. Though the ſtatute be miſ-recited, yet it being a publick act, your Lordſhip will take notice of it. As for the exception, *pro tempore exiſten'*, ſo much relied on, it ſhall be intended before the mayor for the time being at the time of taking the oaths; it ſhall be underſtood *eodem tempore* when he took the oaths.

HOLT, *Chief Juſtice*. As to the miſ-recital, if there be ſufficient recited for the plaintiff's caſe, it is well enough. So in the caſe of robbery on the ſtatute of HUE AND CRY, though the plaintiff in recital of this ſtatute omit "*murder*," yet the plaintiff will have judgment.

Afterwards, in Trinity Term following, a *peremptory mandamus* was granted, for that by the twelfth paragraph he might have taken the oaths before two juſtices of the peace. If the juſtices of the peace have power to adminiſter the oaths as well as the mayor, and you have returned only that he did not take them before the mayor, it is ill, and the return is too ſhort.

* Clark's Caſe.

Caſe 148.

* [319]

The *cuſtom of London*, that if any *freeman* refuſe to take upon him the office of *livery-man* of a company when thereto required, he may be convicted and impriſoned by the mayor and aldermen, is a good cuſtom.

S. C. Ante, 156

S. C. 1. Salk. 349.

S. C. Holt, 430.

S. C. Comb 411.

S. C. 3 Salk. 92.

S. C 12. Mod. 113.

S. C. Comy. 24.

Poſt. 442.

Ante, 104. 156.

1. Salk. 192, 193. 341. 352.

6. Mod. 123. 177.

1. Mod. 10. 164.

Ante, 104, 105. 156, 157.

6. Mod. 123.

HALL. This comes before your Lordſhip upon a return to a *habeas corpus*. They ſet forth the charter of the CITY OF LONDON, &c. and farther ſay, that in the ſaid city there are ſeveral companies and ſocieties; that THE COMPANY OF VINTNERS is one of them, &c., that thoſe companies are under the government of the mayor and aldermen; and that, if any refuſe to take upon him the office of a livery man of any company, he might be thereof convicted and impriſoned by the mayor and aldermen; that CLARK refuſed to take upon him the office of a livery-man of the COMPANY OF VINTNERS, though he was a citizen and freeman of *London*, and ſubject to the ſame; and that therefore the mayor and aldermen committed him to *Fell* the keeper of *Newgate*, until he ſhould take upon him the ſaid office. I think this caſe to be of great conſequence to the liberty of the ſubject, which, my LORD COKE ſays *(a)*, is more precious than the advantage of any particular ſociety. There have been many exceptions taken already, and many authorities quoted; and amongſt the reſt, the moſt remarkable are *Grafton's Caſe (b)*, and *Tavernor's Caſe (c)*. In this laſt caſe *Tavernor* was choſen a livery-man of THE COMPANY OF VINTNERS, and refuſed, and they aſſeſſed a fine of thirty-one pounds eight ſhillings and four-pence, according to a bye-law; and the Court ſaid, that it is not unreaſonable and againſt law. Were the fine more or leſs, it would not make the bye-law void, for it is only to bind the members of a corporation; and when a man agrees to be of A COMPANY, he thereby ſubmits to the laws thereof, and they are not to take notice

1 Mod. 18. 164. 2. Keb. 555. 1. Bac. Ab. 671. 681. 1. Salk. 192. 341. 352. 177.

(a) 2 Inſt. 45, 46. 3 Inſt. 124. S. C. March, 179.
(b) 1. Mod. 10. S. C. 2. Keb. 555. *(c)* Raym. 447.

of

of the extravagancy of the charges they lay upon themſelves; and it is convenient to keep up their reputation and the honour of the city of *London* to have ſuch power. CLARK'S CASE.

Then it has been already obſerved, that this return is only by way of recital. Now I ſhall add what occurs to me:

FIRST, It does not appear that he was choſen to be a livery-man; for the word "*electus*" is not there.

* SECONDLY, They ought to have alledged, that *Mr. Clark* had no reaſonable excuſe; for that they entitle themſelves to ſo ſupreme a power of committing his Majeſty's ſubjects to priſon. * [320]

THIRDLY, It does not appear that *Mr. Fell* was an officer of the city. (This exception was much inſiſted on in a former argument in this Caſe.) Ante, 156.

FOURTHLY, They ought to have aſked *Clark* before the commitment, What he had to ſay for himſelf? as the practice is always in criminal caſes.

FIFTHLY, A cuſtom to commit a man to priſon, is a void cuſtom. 2. *Brownl.* 191. The Caſe of the *Cinque-Ports*. 1. *Leon.* 105, 106. 4. *Leon.* 109. *Style*, 78. 84. 1. *Roll. Abr.* 364. *Marſh. Rep.* 186, 187. *Langham's caſe.* Vide ante, 106, 107. 156, 157.

SIXTHLY, As for the objection, that this cuſtom is confirmed by act of parliament, there are ſeveral ſtatutes that are adjudged to be void, which are unreaſonable in themſelves (*a*).

SEVENTHLY, Then it does not appear in all this return, that theſe *livery-men* are of any uſe to the good government of the city, which ſhould have been taken notice of.

HOLT, *Chief Juſtice*. We ought as far as we can by law to ſupport the government of all ſocieties and corporations, eſpecially this of the CITY OF LONDON; and if the mayor and aldermen ſhould not have power to puniſh offenders in a ſummary way, then farewell the government of the city. But the exception which ſticks with me moſt is, that it is not ſet out that *Fell* is an officer of the city; and indeed I think not that he is an officer of the city *quatenus* a city, though I confeſs he is an officer to the ſheriffs, as he keeps the county gaol: but it ought to have appeared, that he was committed to an officer of the mayor and aldermen.

Clark was afterwards diſcharged PER TOTAM CURIAM, though ALL THE COURT declared their opinion, that the cuſtom was a good cuſtom, and was for the advantage of the good government of the city, and therefore they would always ſupport it.

(*a*) Magdalen College Caſe, 1. Mod. 164.

The

Case 149.

* The King *against* Peckham.

If a ſtatute inflict a penalty, provided the offender be *proſecuted* within *twelve months* after the offence committed, the months ſhall be accounted *lunar months*.

S. C. Comb. 439. S. C. Carth. 406. Skin 562. Carth. 501.

THE ſtatute 3. and 4. *Will. and Mary*, c. 10. enacts, "That if "any-one ſhall unlawfully courſe, hunt, take in toils, kill, "wound, or take away, any red or fallow deer, in any foreſt, chace, "or purlieu, paddock, wood, park, or other ground encloſed "where deer are uſually kept, without the conſent of the owner or "keeper, or ſhall be aiding or aſſiſting therein, and ſhall be con-"victed either by confeſſion, or by the oath of one or more wit-"neſſes, before one or more juſtices of the peace where the offence "was committed, or party apprehended; ſuch perſon being pro-"ſecuted within twelve months after the offence committed, ſhall "for unlawfully courſing or hunting only forfeit twenty pounds "for every offence, though no deer is taken; but if killed, "wounded, or taken, thirty pounds for every deer, to be levied "by diſtreſs, by warrant under the hand of that juſtice or juſ-"tices before whom the conviction was made, one third to the "informer, another to the poor, another to the owner of the deer "or park; and if no diſtreſs can be had, then the offender is to "be impriſoned for a year, and ſtand in the pillory (*a*)."

One *Peckham* was convicted upon this act for ſtealing a deer; which conviction being removed into the court of king's bench by *certiorari* and filed,

Exception was made to it, that the conviction being made upon this ſtatute, the proſecution ought to have been within twelve months, which it was not; for the offence appeared to be done on the *fourteenth* of *Auguſt*, in the *ſeventh* year of *William the Third*, and the information was exhibited the *thirteenth Auguſt*, in the *eighth* year of *William the Third*, and not before. Now *an information* is no *proſecution*; and if ſo, the party was not proſecuted within twelve months after the offence committed.

To which it was anſwered, AND SO RULED, that the record ſets forth, that the defendant *debito modo et ſecundum formam ſtatuti convictus fuit* (*b*), which is well enough (*c*).

(*a*) Repealed by 16. *Geo.* 3. c. 30.

(*b*) See 1. Salk. 383.

(*c*) The conviction was quaſhed, becauſe where *months* are mentioned in a ſtatute, and not *years*, they are always reckoned lunar months, and in the preſent caſe twelve *lunar months* had expired before any proſecution was commenced, S. C. Carth. 407.; for the ſtatute giving the juſtices a ſpecial juriſdiction not known to the common law, muſt be ſtrictly purſued. S. C. Comb. 439.

Caſe 150.

The Inhabitants of Chittington *againſt* the Inhabitants of Penſhurſt.

An order of removal need not alledge that the party came to ſettle in a tenement under ten pounds a-year. S. C. Foley, 97. 6. Mod. 180. Poſt. 322. 325. 330. Ante, 149. 162. 208. 2. Bott. P. L. 764. 774.

AN ORDER was made by two juſtices of peace to remove a poor man from the pariſh of *Chittington* to the pariſh of *Penſhurſt*; which order was confirmed upon an appeal.

* And

* And now a motion was made to quaſh the firſt order, becauſe it did not ſhew that the man ſettled in a tenement under the yearly value of ten pounds.

THE COURT diſallowed this exception, which was the ſame formerly over-ruled in the caſe of *The Inhabitants of Marlborough v. Wootton Rivers (a)*.

SECONDLY, It was objected, that the ſtatute 13. and 14. *Car.* 2. c. 12. enables two juſtices of peace to remove the party, one of whom is to be of *the quorum*, which word was omitted in that order.

Formerly an order of removal by two juſtices, neither of whom were of *the quorum*, was bad
S C. 2. Salk. 473 475. S C Sett. et Rem 271.

And the order was quaſhed for this exception, THE COURT being of opinion, that two juſtices cannot remove a poor man out of ſeſſions, unleſs one of them be of *the quorum*, becauſe they have a ſpecial juriſdiction given by the act, which muſt be followed *(b)*.

S C Holt, 507 Comb 200 339 7 Mod 99. Stra. 300.

(a) Weſton Rivers *v* St Peter's Marlborough, Holt, 510 2 Salk 492 Carth 365 3 Salk 254 12 Mod 89. And ſee Rex *v* Wootton Rivers, ante, 149

(b) But now by 26 *Geo* 2 c 27 no order or other inſtrument by two or more juſtices, which doth not expreſs that one is of *the quorum*, ſhall be impeached, ſet aſide, or vacated, for that defect only: and by 7 Geo 2 c 21 all orders and other inſtruments by two juſtices of any corporation as have only one juſtice of *the quorum*, ſhall be valid, as if one of the ſaid juſtices had been of *the quorum* See 1 Bl Com 351

The Pariſh of Walton *againſt* The Pariſh of Cheſterfield. Caſe 151.

AN ORDER was made to remove a poor man from the pariſh of *Walton* to the pariſh of *Cheſterfield* in the county of *Derby*, which was confirmed upon an appeal.

An order of removal muſt ſtate that it was made by *two juſtices*
S C Foſt. 214. Poſt 325. Ante, 149. 163. 204 6 Mod. 180. 2 Bl Rep. 1017 Andr 238. Burr S. C. 137.

But the firſt order was now quaſhed, becauſe it did appear to be made by two juſtices of the peace, it is only, "WHEREAS *com-* "*plaint has been made to us*;" and ſo they did not recite their authority in the order. It is true, they were mentioned to be juſtices upon *the appeal*, but that will not help, for they might be ſo then *(a)*, and not at the making the firſt order.

And for this reaſon it was quaſhed *(b)*.

(a) But ſee the caſe Rex *v* Fliſher, that to ſtate upon *appeal* that the perſons whoſe acts are complained againſt are *juſtices*, is ſo far an admiſſion of their juriſdiction, Cald 135

(b) See Rex *v* Upton, Sett et Rem. 27 Rex *v* Stepney, Burr S. C 23. Rex *v* Stanſtead, 2 Salk 488 Rex *v.* Inhabitants of Statfold, 4 Term Rep 597 and Mr Conſt's Edition of Bott's Poor Laws, vol ii chap 12. ſect. 2 and 3.

HILARY TERM,

The Eighth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.*
Sir Samuel Eyre, *Knt.* } *Juſtices.*
Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

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* Memorandum.

Caſe 152.

WRIGHT, *Serjeant*, was this Term called within the bar, being made King's Serjeant, and afterwards Lord Keeper of the Great Seal. 1 Ld. Ray. 135.

Mrs. Barney's Caſe.

Caſe 153.

A BILL OF INDICTMENT was found againſt her at the quarter ſeſſions in *Norwich*, for petty treaſon and murder of her huſband.

She came now in cuſtody, and moved the court, by her Counſel, that ſhe might be bailed.

The court of king's bench may, in its diſcretion, bail a perſon indicted for *petty treaſon* and *murder*.

It is true, this caſe is not within the common rule, but it appearing by affidavits of the fact, that it was a malicious proſecution, and there being nothing done either upon the indictment or coroner's inqueſt, or at the aſſizes, and the man being dead above a year, ſhe was bailed.

S C 3 Salk 56. S C Comb 405. Poſt 455 2 Jones, 210. 2 Inſt 185. 1 Bulſt 85. Latch. 12

Stiles, 116 148 Hale P C 98 104. 1 Salk. 104 Ray 381. Skin 56 683. 3 Bac Abr. 13, 14. 2. Hawk. P. C ch. 15. ſ 47. ſ. 79.

Redwood

Case 154.

Redwood *against* Coward.

Trinity Term, 8. *Will.* 3. *Roll* 645.

A verdict entered that the jury *assident* instead of *assident damna* will not make the record erroneous.

WRIT OF ERROR upon a judgment for the plaintiff in THE PALACE-COURT. The error was assigned in the judgment itself; for it was, that the jury *assident damna* instead of *assidunt*.

It should have been in the present tense; it is like *recuperaret damna* instead of *recuperet*, which cannot be good. Now though both these words may have the same signification, as *concessum est* is the same with *consideratum est*, &c. (*a*), yet usage had made the word *assidunt* to be the proper word in such cases.

* [324]

S. C. 1. Salk. 328.
S. C. 12. Mod. 109.
S.C. 1. Ld. Ray. 147.
S. C. Holt, 272.
Plowd. 348.
4. Co. 7 b.
2. Saund. 96.
Comb. 398. 466. 479.

* To which it was answered, that "*assident*" is the most proper word, for it comes from *assideo*, so does "assessor;" and the jury are the assessors of the damages.

And THE COURT was of the same opinion, but would not allow *concessum* and *consideratum* to be the same; for it may be *concessum*, and often is without *consideratum est*.

(*a*) See 16 & 17. *Ca.* 2. c. 8. s. 1.

Case 155.

Salisbury *against* Proctor.

Quære, If a declaration in TROVER for fifty pieces of gold coined within the kingdom, without naming of what denomination of money, is good.

Sty. 31. 224. 227.
1. Sid. 60. 98.
Nelf. Lut 478.
Mar. 60.
Cro. Jac. 169.
Palm. 393.
Latch. 216.
Ante, 281.

TROVER. The plaintiff declared, that he was possessed of divers goods, *viz.* of fifty pieces of gold coined within this kingdom, "*ac de viginti petrat. carnis bovina*, ANGLICE "twenty "stone of beef," *ac de viginti vasibus*, ANGLICE "wooden ves-"sels," as his proper goods which he lost, *quæ quidem bona et "catalla, postea, apud* such a place, *ad manus et possessionem* of defendant *per inventionem debuerunt.*" There was a verdict for the plaintiff, and entire damages given.

And now it was moved in arrest of judgment, and these exceptions were taken:

FIRST, He has declared, that he was possessed of fifty pieces of gold coined within this kingdom, but does not name what money it was, for which reason it is uncertain; for "pieces of gold" are coined here of several values.

TROVER not vitiated by an improper *Latin* word.

Carth. 131.
Comb. 306.
Skin. 144.

SECONDLY, That he was possessed *de viginti petrat. carnis bovium.* Now there is no such word as *petrat.* which signifies "a stone of beef;" and there is a proper word for a stone weight. And the rule is, when an improper word is put in the declaration, for which there is a proper word to signify the same thing, it is always held to be naught.

To this objection it was said, that in the first year of the king the plaintiff declared in TROVER that he was possessed *de una pecia branditti*

branditti vini, and that it was held good after verdict, though there is a proper word for "brandy."

SALISBURY *againſt* PROCTOR.

THIRDLY, That he was poſſeſſed *de vig nti vaſibus*, ANGLICE "wooden veſſels," the word "*vas*" is too general. So *de uno pullo* has been held ill *(a)* for the ſame reaſon.

Trover *de viginti vaſibus* was too general

1 Sid 60 1 Lev 48 N Lutw 478.

FOURTHLY, It is ſaid, theſe goods *ad manus* of the defendant *per invention. debuerunt* inſtead of *devenerunt*.

Quære, If in trover the word *debuerunt* inſtead of *devenerunt* be fatal

For which reaſons this is not a good declaration *.

Adjournatur (b).

* [325]

(*a*) An Anonymous Caſe, 1 Lev 48 S C 1 Sid 60 N Lutw 478

(*b*) See Campbell *v* St John, 1 Ld Ray 20 where trover of a box and *ducentis uncis argenti*, ANGLICE plate, was held good on a demurrer to the declaration But now by 4 *Geo* 2 c 26 and 6 *Geo* 2 c 14 ſ 5 all proceedings ſhall be in Engliſh, ſo that theſe niceties cannot now take place —See 1 Com Dig 317 3 Bl Com 322

The Pariſh of Trowbridge *againſt* Weſton. Caſe 156.

EXCEPTIONS were taken to an order made by two juſtices of the peace concerning the removal of one *Anne Jervis*, a poor woman, from *Trowbridge* to *Weſton*.

An *order of removal* muſt aver that the place WHERE was the place of the pauper's "*laſt legal ſettlement*"

FIRST, The order does not affirm, that the place to which ſhe was removed was the place of her laſt legal ſettlement, it is only ſaid by the juſtices, "WHEREAS *we are credibly informed, &c.*" It ſhould have been upon oath, and being a judgment ought to be poſitive and certain.

S C 2 Salk. 473 S C Sett & Rem 244. S C Holt, 572. Ante, 322 Comb 413

But this order being confirmed upon an appeal, THE COURT held that to be a void exception, otherwiſe it had been good.

SECONDLY, It does not appear that the firſt order was made by two juſtices of peace *of the diviſion* where the perſon was likely to be chargeable to the pariſh.

An order of removal need not ſtate the juſtices to be *of the diviſion*

And the firſt was held a good exception.

The King *againſt* Morgan Rice. Caſe 157.

MANDAMUS to an archdeacon to ſwear the defendant church-warden of a pariſh, ſetting forth, that the cuſtom of the place was to chuſe *habilem et idoneam perſonam* to bear the office of church-warden, that the defendant was in court and choſen, but refuſed by "poor dairy-man, and unfit for the office," is bad, for the pariſhioners are the proper judges whether the perſon they elect is fit for the office —S C 12 Mod 116 S C 3 Salk 90 S C Comb 417. S C Carth 393 S C Sett & Rem 216 S C 1 Ld Ray 138 2 Sid 12 1 Vent. 143. Stiles, 457. 2 Salk 430 1 Salk 166. 3 Mod 335 1 Bl Rep 28 3 Burr 1420. 3 Bac. Abr 531

A return to a *mandamus* to ſwear in a *churchwarden*, "that he was a

THE KING *againſt* MORGAN RICE.

the archdeacon, &c. who returned, that the defendant was a poor dairy-man, *et minus habilis* to be a churchwarden.

Exceptions were taken to this return. That it does not appear that there was any other man in the pariſh, beſides the defendant, who was fit to execute this office. * The archdeacon has not an authority to refuſe a churchwarden being choſen; for if ſuch power ſhould be allowed, the cuſtom of chuſing him will be quite overthrown. The pariſhioners are the proper judges of his qualifications; and the archdeacon has no more to do than to adminiſter the oath, and admit the perſon choſen; and is no more a judge in this caſe than he is of an executor or adminiſtrator. The party refuſed cannot bring an action upon this return to try the right; for to ſay *non fuit pauper lactarius* would be very uncertain, becauſe he may be poor in ſeveral reſpects, and yet not be thereby diſabled to hold this office.

* [326]

E contra. The queſtion is, Whether the perſon who by law is to adminiſter the oath of office has any power to judge of the ability of the perſon choſen to ſuch office? The office is ſpiritual; therefore the eccleſiaſtical court is not only to ſwear him, but is likewiſe to judge of his ability; he is preſented to them for that purpoſe; they have a formal proceeding to examine his ſufficiency, and their determination that he is *minus habilis* muſt always be allowed where they have any juriſdiction of the cauſe. A churchwarden is an office of truſt, he is made overſeer of the poor by the ſtatute of 43. *Eliz.* c. 2. without any election; he is accountable to the pariſhioners at the expiration of his office; and therefore care ought to be taken that he ſhould be *habilis et idonea perſona.*

8. Mod 325.

But THE COURT were of opinion, that a churchwarden is a temporal officer; that he is a corporation; for actions are brought in his name, and likewiſe againſt him by his ſucceſſor, to recover an account. He being then a temporal officer *(a)*, and having a temporal truſt repoſed in him, and there being a cuſtom for the pariſhioners to chuſe him, it is the duty of the archdeacon to ſwear him when choſen, without enquiring into his ability. For why ſhould he be judge of that rather than thoſe who are moſt concerned in intereſt, which are the pariſhioners? And it is not to be preſumed, that the archdeacon will take more care to put a fit and able perſon into this office than they in whoſe power it is to chuſe him.

3 C. Comb. 147.

1. Salk. 166. Carth 118. Hard. 378 Ray. 439. 1. Vent. 115.

And for this reaſon the *peremptory mandamus* was granted.

(*a*) 2. Roll. Rep. 71. Hard 379.

The

* The College of Phyſicians *againſt* Salmon. Caſe 158.

BY the ſtatute 14. *Hen.* 8. c. 5. the charter by which THE COLLEGE OF PHYSICIANS is incorporated is confirmed; which act made them a perpetual college in *London*, and ſeven miles compaſs thereof, with power to chuſe a preſident every year. It enables them to purchaſe lands, and to ſue and be ſued; and prohibits any to practiſe phyſic within that circuit, unleſs approved under the ſeal of the College, upon pain of five pounds, to be divided between THE KING and THE COLLEGE.

The College of Phyſicians may ſue by the *corporate name*, notwithſtanding an expreſs power is given to ſue by another.

S. C. 2. Salk. 451. S. C. 3. Salk. 102. 237. S. C. Holt, 171. S. C. 1. Ld. Ray. 680. Hob. 210. 4. Mod 47. 6. Mod. 44. 1. Bac. Abr. 502. Cro Eliz. 357. Hard. 504.

An action of debt was brought upon this ſtatute by the plaintiff, by the name of "*Præſidens et Collegium ſeu Communitas Facultatis "Medicinæ London*" againſt the defendant for practiſing phyſic without licence; *per quod actio accrevit domino regi et dom. reginæ et eidem præſidenti, qui tam collegio et communitate, &c.* Upon demurrer to the declaration it was inſiſted,

FIRST, That the action was miſconceived, for it ought to be brought by the preſident of the college of phyſicians only. So is *Dr. Laughton's Caſe (a)*, who brought an action as preſident of the college of phyſicians in *London*, and of the corporation of phyſicians there; for THE PRESIDENT and THE COLLEGE being incorporated, they ought to join in the action; it had been naught if the action had been brought in the name of the preſident alone, without the college *(b)*.

To this it was anſwered, that it might be a queſtion, Whether this action had been good if it had been brought by THE PRESIDENT alone? but it cannot be a queſtion, Whether it ſhall be good or not when brought by THE CORPORATION? In the caſe of *The College of Phyſicians v. Buſh (c)*, the action was brought in the name of *præſidens collegium ſeu communitas*, and held naught. In *Dr. Goodall's* book *(d)* treating of this college there are ſeveral precedents of actions brought by them in the ſame form as this is, and it muſt be the proper way to ſue by THE INCORPORATE NAME.

HOLT, *Chief Juſtice*, ſaid, there was no judgment given in the caſe of *The College v. Buſh*; but that this is the beſt way of declaring, ſince the penalty is given to THE CORPORATION.

SECONDLY, The ſtatute prohibits the practice of phyſic within ſeven miles of *London*, unleſs the perſon ſo practiſing be approved under the ſeal of THE COLLEGE, under the penalty of five pounds, to be divided between THE KING and THE COLLEGE. They alledge, that the defendant practiſed within that circuit, not being admitted under the common ſeal of "the preſident *and* common-"alty," when the ſtatute ſays, "it muſt be by the preſident and

That the defendant practiſed without licence from "the "preſident *and* "commonalty" is good, although the ſtatute ſay, "preſident *or* "commonalty."

(a) Laughton *v.* Gardiner, Cro. Jac. 121. 129. 1. Roll. Abr. 515.

(b) Corporation of Phyſicians *v.* Dr. Tenant, Jones, 262.

(c) 4 Mod. 47. S. C. 12. Mod. 10.

(d)

THE COLLEGE OF PHYSICIANS *against* SALMON.

"college SIVE *communitas (a)*;" and by the ſtatute the penalty is given to the king and college, which is not the ſame perſon.

To this exception it was anſwered, that the words "*college*" and "*community*" are *ejuſdem ſignificationis*; and therefore ought to be taken ſo in this caſe.

* [328]

An action on 14. *Hen.* 8. c. 5. *per quod actio accrevit domino regi, &c. et præſidenti, qui tam, &c.* is good.

THIRDLY, The concluſion is, *per quod actio accrevit domino regi, &c. et præſidenti, qui tam, &c. collegio ſive communitate, &c.* when it ſhould have been brought by the informer, *qui tam pro domino rege quam pro ſeipſo.*

Cro. Car. 256.

* *E contra.* As to this exception it was ſaid, that that is of no force; for in all informations upon penal ſtatutes the concluſion is, *per quod actio accrevit domino regi*, and puts the king before the informer (*b*).

Sed adjournatur (*c*).

(*a*) The word uſed in THE CHARTER, according to *Ruffhead*, was "*and*"—*Vide* 14. & 15 *Hen* 8. c 1 f. 1. p. 13.

(*b*) The Court over-ruled this objection, ſaying, that the precedents are the one way and the other. S. C. Ld. Ray. 683.

(*c*) Judgment was given for the plaintiff. S. C. 1. Ld. Ray. 683.

* [329]

Caſe 159. * The King *againſt* The Inhabitants of Cheſterfield.

The ſervice for a year will not give a ſettlement, unleſs it be under a hiring for a year between *the maſter* and *the ſervant*; and therefore if *the friend* of *a boy* give *a barber* ſix pounds a-year to learn *the boy* to ſhave, and *the boy* ſerves with *the barber* for a year accordingly, yet he will not gain a ſettlement; for the contract was not between the ſervant and maſter.—S. C. 1. Salk 479. S. C. Skin. 671. S. C. Carth. 400. S. C. Comb. 445. S. C. 12. Mod. 132. 2 Salk. 533. Caſes in Law and Equity, 15. 287.

ONE *Francis Jeniſon* lived as a footboy with *Sir Paul Jenkinſon*, in *Walton*, which is a vill in *Cheſterfield*: *Jeniſon* was diſcharged of his ſervice, and *Sir Paul* ſent him to *Cheſterfield*, to one *Thorp*, a barber, and gave *Thorp* ſix pounds for one year to teach him to ſhave. The overſeers of the pariſh of *Cheſterfield* complained that *Jeniſon* came to be an inhabitant there, and refuſed to give ſecurity; and it appearing that *Walton* was the laſt place of his legal ſettlement, he was ſent thither by the order of two juſtices. The vill of *Walton* appealed; and, the firſt order being confirmed, he was removed hither by *certiorari*.

It was ſaid, that ſerving a year upon an expreſs agreement makes him an inhabitant at *Cheſterfield*.

E contra. The ſtatute of 3. & 4. *Will. & Mary*, c. 11. is explanatory of the former laws made about ſettlements; and the party muſt now bring himſelf within that act, or he can gain no ſettlement. That act requires, "that if an unmarried perſon, not having child "or children (*a*), be lawfully hired for a year, ſuch ſervice ſhall be

(*a*) See Anthony *v.* Cardigan, Foley, 131.; Rex *v.* Bank Newton, 2. Burr. S. C. 455.; Rex *v.* Henſingham, Cald. 206.; Rex *v.* Allendale, 3. Term Rep. 382.

"a good

" a good ſettlement." Now that muſt be a ſervice for a year. This was no lawful hiring, for it does not appear that he was retained by his own conſent; and an action would not have lain againſt him upon his departure out of his ſervice, becauſe there was no mutual contract between the maſter and ſervant. The agreement was made between *Sir Paul Jenkinſon* and the maſter, who was bound only to teach the boy to ſhav[illegible] If this ſhould amount to a contract between them, it muſt be as an apprentice; which cannot be, becauſe not by indenture, and therefore void. If he had been an apprentice, it muſt be for ſeven years, and then his trade is accounted an eſtate, which is a ſecurity to the pariſh.

THE KING *againſt* THE INHABITANTS OF CHESTERFIELD. F. N. B 168. B. Lit. F.

Adjournatur.

This caſe was ſpoke to again in *Eaſter Term* following, and it was inſiſted, that the order of ſeſſions upon the appeal was final.

But afterwards, in *Trinity Term*, THE COURT held this to be no good ſettlement in *Cheſterfield*, and that the perſon was well removed to *Walton (a)*. Carth 400

(a) See Gregory Stoke *v* Pitminſter, 2 Bott, 326, Rex *v* Wrington, Burr. S. C. 2So, Rex *v* Weyhill, Burr. S. C. 491, Rex *v* Thames Ditton, 2 Bott, 330; Rex *v* St Mary Guildford, 2. Bott, 332., Rex *v* St Matthew, Ipſwich, 3 Term Rep 449

The King *againſt* Turner. Caſe 160.

AN ORDER was made at the general ſeſſions of the peace held for the county of *Wilts*, by which the defendant was aſſeſſed towards the relief of another perſon, by virtue of the ſtatute of 43. *Eliz.* c. 2. and was indicted for diſobeying that order; which being removed hither,

An order on 43. *Eliz* c. 2. ſ. 7. for the maintenance of *a poor relation* muſt be made at a *general quarter ſeſſions*. 3. C. 2. Salk. 474 476. S C Sett. & Rem. 140. 2 Salk. 482. Carth 455. Comb 418. 1. Bott P. L 314.

This exception was taken to it: The order is laid to be made "*ad generalem ſeſſionem pacis tent. &c.*" and does not ſay *quarterialem*; when it is expreſſly required by the 43. *Eliz.* c. 2. ſ. 7. "that the relief ſhall be as the juſtices of the peace at "their *general* QUARTER *ſeſſions* ſhall aſſeſs."

For which reaſon it was quaſhed.

* The Pariſh of Dalbury *againſt* The Pariſh of Foiſton. Caſe 161.

AN ORDER was made by two juſtices of the peace to remove one *Robert Blood* from the pariſh of *Foiſton*, in the county of *Derby*, to the pariſh of *Dalbury*, being the place of his birth.

To gain a ſettlement by reſiding in a tenement under ten pounds a-year there muſt be *actual notice*, purſuant to the ſtatutes 1. *Jac.* 2. c. 17 and 3. & 4. *Will. & Mary*, c. 11.; and therefore, although a perſon be invited by the principal inhabitants of a pariſh to reſide in ſuch a tenement, and be publicly and openly employed as *a ſmith* to the pariſh for ſeveral years, yet, by ſuch a *reſidence* only, he gains no ſettlement.—S. C Comb. 410. S. C. Carth. 396 S. C. Sett. & Rem. 178. S. C. Foley, 123. Poſt. 454. 2. Salk 533, 534, 535, 536. 1. Show. 12. 3. Mod. 247. Carth. 28. 2. Salk. 533. 2. Bott P. L. 124.

THE PARISH OF DALBURY *against* THE PARISH OF FOISTON.

The inhabitants of *Dalbury* appealed to the quarter ſeſſions, and the fact was ſtated upon the order, "that he lived at *Foiſton* a "whole year, and, being a ſmith, worked for the lord of the manor "and the vicar of the pariſh, in ſhoeing their horſes;" which was held to be a ſufficient notice; and therefore the order was confirmed upon the appeal, though no *notice in writing* was given to the churchwardens and overſeers of the poor of the ſaid pariſh of the place of his abode, and the number of his family, purſuant to the ſtatute 1. *Jac.* 2. c. 17.

Theſe orders being returned hither by *certiorari*, it was moved to affirm the order made upon the appeal, and ſaid, that ſettlements will be as formerly before the making of that act, unleſs the party come clandeſtinely into the pariſh, which was not done in this caſe; ſo that having lived at *Foiſton* above forty days, he is now legally ſettled in that place. The greater part of the pariſh requeſted this man to inhabit there, becauſe they wanted a ſmith; therefore ſince he came thither at their deſire, and openly, the ſtatute will never extend to him, becauſe that was made to prevent the concealing of themſelves above forty days to gain a ſettlement. It has been held in this court, that where the pariſhioners of *Grampound* met at a poor man's alehouſe to make a rate, it amounted to notice, though no ſuch was given in writing; and it was allowed a good ſettlement after the forty days.

BUT *on the other ſide* it was ſaid, that he was no houſeholder, but lived with the widow of the former ſmith in that pariſh, and worked there as her ſervant. The intent of the ſtatute is, that by giving *notice in writing* the pariſh may know as well the number of his family as the place of his abode; but neither the lord of the manor nor the vicar can tell how many this ſmith had in his family by ſhoeing their horſes. * The laſt ſtatute, 3. & 4. *Will. & Mary*, c. 12. ſeems to be made purpoſely to prevent ſuch ſettlements, for it enacts, "that the forty days ſhall be accounted from the pub- "lication of notice in writing of the place of his abode and number "of his family, which he ſhall deliver to the churchwarden, &c.;" and by which ſtatute ſeveral things are allowed to make a ſettlement without notice in writing, as if a man execute a *public office* for a year, or ſhall be charged with *public taxes* to the pariſh, or be an unmarried perſon *hired for a year*, or an *apprentice*, &c. Since the making this act, it has been adjudged in this court, that if a man be *aſſeſſed* to the pariſh rates, and do not *pay* the ſum at which he is aſſeſſed, that ſhall make no ſettlement *(a)*; and yet in *the Caſe of Ipſwich (b)* it was held, that if a man be aſſeſſed to *the land tax* it amounts to a ſufficient notice, and yet it is no pariſh tax.

* [331]

2. Salk. 523. 534.

Caſes in Law and Equity, 14

8. Mod. 38.

Comb. 410.

CURIA. Notice by implication will defeat the ſtatute 3. & 4. *Will. & Mary*, c. 11. which is explanatory of the ſtatute 1. *Jac.* 2. c. 17. and muſt be purſued; for the Court cannot go beyond that explanation.

So the firſt order was confirmed *(c)*.

(a) See Mr. Conſt's edit. of Bott's Poor Laws, vol. ii. 220.

(b) St. Helens *v.* St Nicholas Abingdon, 2. Salk. 472.

(c) See Rex *v.* Chertſey, poſt. 454. and Rex *v.* Abbots Langley, Foley, 110. Stra 835. 2. Bott's P. L. 125. pl. 163.

EASTER

EASTER TERM,

The Ninth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.* } *Juſtices.*
Sir Samuel Eyre, *Knt.*
Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

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* Puliſton *againſt* Warburton and Others. Caſe 162.

EJECTMENT. The declaration was of *Trinity Term* laſt paſt, upon the demiſe of *John Leveſt* and *Anne* his wife, for lands in *Blymhill*, in the county of *Salop*, dated the tenth *April* 1697, and *the ouſter* is laid to be, POSTEA *ſcilicet eodem decimo die Aprilis* 1697. The defendant's attorney entered into the common rule, to confeſs *leaſe*, *entry*, and *ouſter*, and to try the cauſe at bar; and the ſame was tried accordingly laſt *Michaelmas Term*, which was in the year 1696, and which was half a year before the plaintiff had any title, as appeared by the declaration.

In ejectment, if the plaintiff by miſtake declare on a demiſe at a time ſubſequent to the trial, the judgment ſhall be ſtayed, for it is not amendable.

S C. 1 Salk. 48. S C. Carth. 401. S. C. 12. Mod. 125. 1. Sid. 316.416. Ray. 165. 1. Mod. 250. Comb. 394. 1. Com. Dig. "Amendment" (L. 2.). 1. Wilſ. 1. 2. Bac. Abr. 163. 1. Term Rep. 782.

Whereupon the defendants moved to ſtay the entry of the judgment. He had a verdict the ſame Term the cauſe was tried, by reaſon of this miſtake of the year of Our Lord in the demiſe, which ſhould have been 1696 inſtead of 1697, and they had a rule accordingly.

And the firſt day of the laſt Term the defendants moved it again, and the rule was continued till the plaintiff ſhould move the Court; which he did by SERJEANT WRIGHT laſt Term, to amend the declaration, and make the demiſe to be in the year 1696 inſtead of 1697.

PULISTON *againſt* WARBURTON AND OTHERS.

* [333]

* WRIGHT, *Serjeant.* The declaration delivered to the tenant in poſſeſſion was right, and a full defence being made at the trial, the judgment may be well entered, notwithſtanding this miſtake; and this is warranted by the ſtatute of 32. *Hen.* 8. c. 30. of Repleader, which enacts, "that in all actions after iſſue joined judgment "ſhall be given, notwithſtanding any miſpleading, lack of colour, "inſufficient pleading, miſcontinuance, diſcontinuance, or miſ-"conveying of proceſs, miſ-joining of iſſue, &c. or any other "default or negligence of any of the parties, their counſellors, or "attornies;" which are large and general words, and will juſtify the amendment in this caſe. This Court has changed the plaintiff in ejectment after the declaration delivered *(a)*, he being a witneſs to prove a deed in the cauſe. It has likewiſe enlarged the term where the cauſe has been long in agitation *(b)*; and it was never denied to amend where there is any thing to amend by *(c)*. An ejectment is an action brought by conſent, and more immediately under the power of this court than any other action, for it is a matter of form ſet out by the court *(d)*. Now the declaration below againſt the *caſual ejector* being right, that being in nature of *an original*, in whoſe room the defendants are to come in by rule of court, it is plainly the miſpriſion of the clerk, and therefore may be alſo well amended within the ſtatute of 8. *Hen.* 6. c. 15. eſpecially when the amendment is in affirmance of the judgment.

Skin. 591.

BIRCH, *Serjeant*, SIR FRANCIS WINNINGTON, and SIR THOMAS POWYS, *contra.* If by theſe general words in the ſtatute of 32. *Hen.* 8. c. 30. every thing may be amended, as it has been argued on the other ſide, then all motions in arreſt of judgment would be vain, and to no purpoſe; becauſe let there be never ſo many errors, either in title, ſubſtance, or form, they may be all amended; but the practice is otherwiſe. As to the reaſon offered why the Court ſhould make an amendment in this caſe, becauſe they have altered a plaintiff in the ſame action, that can be of little force; for it is not material who is plaintiff in ejectment, for he is only a nominal and imaginary perſon; and therefore judgment ſhall be entered againſt him after he is dead, becauſe he is not concerned in intereſt *(e)*. * This miſtake was ſeen before the trial, and the plaintiff moved the Court twice, but they would not alter it; but yet he proceeded to try the cauſe, and would not have the Court make a new record, a new leaſe, and a new *ouſter*, which could not be done without the conſent of both parties. All amendments extend to forms and miſtakes of clerks, but not to titles and ſubſtance, as this is *(f)*. It has been ſaid, that the Court ſhould give

Carth 401.

* [334]

(a) But it was before plea pleaded 1. Sid. 24. —See Ld. Ray. 771. 3. Burr. 1290.

(b) Carth. 3. Comb. 13. 50.—But ſee Carth. 401. Comb. 110. 1. Salk. 257. that it cannot be done without conſent of parties.

(c) But ſee Stra. 1211.

(d) 1 Burr 668. 3. Bl. Com. 206.

(e) 1. Mod. Rep. 252.

(f) See 4. Burr. 2449. and Runnington's Ejectments, 105.

leave

leave to amend this declaration, becauſe they enlarged the term where the cauſe has been long depend'ng; but, certainly, that can ſignify little to this purpoſe, becauſe where diffi. ..lties ariſe, *Curia adviſare vult* for two or three years together, rather than give a haſty judgment. Now that is the act of the Court, and no default of the parties, therefore they may well enlarge the term (*a*). It cannot be ſaid, with any colour of re ſon, that this action is more under the power of this court than any other; for proceedings in ejectment are as regular as in any other caſes whatſoever. In the caſe of *Thompſon v. Lea h* (*b*), an ejectment was brought for ſo many acres *ligni*, but the Court would not amend it, and put in the word "*boſci*;" and therefore the plaintiff having declared of ſeveral other things, care was taken to ſeparate the damages by the verdict. Now this being matter of ſubſtance, it cannot be amended by the ſtatute of 8 *Hen.* 6. c. 15. becauſe that does not extend to this caſe, for it muſt be after judgment, and in affirmance of the ſame; and this motion is made in arreſt of judgment. The latter ſtatutes do not extend to it, but only matter of form; ſo that it will be difficult for the plaintiff to ſhew any particular proviſion in thoſe acts to ſuit with this caſe. This Court denied to enlarge the term in an ejectment in the caſe of *Hutchins v. Baſſett (c)*, which was hung up many years by privilege of parliament. This is not the miſpriſion of the clerk, and therefore it cannot be now amended in another Term. So was the law formerly held to be in an action of treſpaſs (*d*) for breaking the plaintiff's cloſe, and carrying away his goods; which words were left out of the declaration. This was not allowed to be amended in another Term, for the plaintiff is to declare at his peril. Neither can the caſe of *Pemble v. Stern (e)* be an authority to govern this: it was a ſpecial verdict in ejectment; and an exception was taken to the declaration, becauſe it was of *a park*, without ſaying how many acres *et de pannagio*, of which an * ejectment would not lie: but the Court being divided upon another point, a rule was made to adjourn it into THE EXCHEQUER CHAMBER; and before the record was certified, SIR WADHAM WYNDHAM, one of the Juſtices againſt the judgment for the plaintiff, died; and then, there being but three Judges in court, a motion was made for judgment, according to the opinion of the other two, KELYNGE and TWISDEN, the plaintiff having releaſed the damages for theſe things without the conſent of the defendant, which could not be done by law; and it being oppoſed by WESTON, who was of counſel with the defendant, yet at laſt he conſented to it, becauſe he

* [335]

(*a*) Carth. 3. Comb. 15. 6. Mod. 130.
(*b*)
(*c*) 1. Show. 537.
(*d*) Year Book 22. *Hen.* 6 pl. 58. Bro. Abr. "Amendment" pl. 41.
(*e*) Eaſter Term 21. *Car.* 2. 1. Sid. 416.

PULSTON *againſt* WARBURTON AND OTHERS.

ſaw theſe two Judges would otherwiſe give judgment againſt his client (*a*).

(*a*) The Court agreed, that in a judgment by confeſſion on a warrant of attorney, it had, and might be amended, becauſe without ſuch amendment the agreement and intent of the parties could not be fulfilled, but denied it in the principal caſe, becauſe it altered the iſſue and made another title. S. C. 1. Salk. 48. Therefore a new trial was had at bar between the ſame parties in the Michaelmas Term following. S C Carth 402.; Bennett *v.* Gawdy, 1 Show 207 S. C. Carth. 128 *accord*—But ſee Marlborough *v.* Skinner, 2 Stra 890; Aſlin *v.* Parkin, 1 Burr 665; Baker *v.* Cole, 3 Burr 1161.; Hardman *v.* Pilkington, 4 Burr 2447; Roe on demiſe of Lee *v.* Ellis, 2 Bl. Rep. 940

Caſe 163.

Cholmondley *againſt* Broom.

To debt on bond laid in *Middleſex*, the defendant may plead to the *juriſdiction* of the *king's bench* that he was commorant within *a county palatine*; and ſuch plea need not be on oath

S C. 3 Salk. 173.
S.C. Carth. 402
S. C. 12. Mod. 123.
4. Inſt. 212.
1. Salk. 30. 201, 202.
2 Salk 515 543
Lutw. 236.
Style, 225.
1. Sid. 329.
1. Saund. 97.
Comb. 562.
4. Bac. Abr 53.
Tidd's Pra. 241.

DEBT UPON BOND was brought againſt the defendant in this court *in cuſtodiâ mareſchalli*: he pleaded, that about the time of the exhibiting the bill he was an inhabitant in the *county palatine of Cheſter*, to wit, at *Nantwich*, and notoriouſly known there. Now this being held to be *a foreign plea*, and not ſworn, the plaintiff for that reaſon ſigned his judgment.

MR. CHESHIRE moved to ſet it aſide, becauſe though it is a *plea to the juriſdiction*, yet it is not *a foreign plea*, and therefore need not be ſworn. "*Antient demeſne*," and all pleas of privilege, are pleas to the juriſdiction; but they are not foreign, and therefore they are to be received without an oath. Many inſtances may be given of *foreign pleas*, which if not collateral to the action muſt be received in that manner: as in an action of debt for money, if it appear upon the condition of the bond that it ſhould be paid out of the juriſdiction of an inferior court, and the defendant plead payment accordingly, this plea muſt be received without an oath (*a*).

And for this reaſon the judgment was ſet aſide.

(*a*) But ſee 4. & 5 *Ann.* c. 16 ſ. 11. Fort 341.

* [336]

Caſe 164.

The King *againſt* Jarvois.

In *quare impedit*, if the plaintiff derive his title under letters patent from THE KING, and the defendant plead that *hanc et verum eſt* that the king was ſeiſed of the reverſion, and granted it *prout* in the declaration, yet the plaintiff, notwithſtanding his *confeſſion* in the pleadings, muſt give ſome evidence that the advowſon was once in THE CROWN.—Ante, 297, 298, &c.

A TRIAL AT BAR in a *quare impedit* for the church of *Northfield*, ſetting forth, that *John Webly*, late prior of the diſſolved monaſtery of *St. James the Apoſtle*, of *Dudley*, in the county of *Worceſter*, was ſeiſed of the advowſon of the ſaid * church in groſs as of fee, in right of his ſaid priory, and that he and his convent, on the ninth of *June*, in the twenty-firſt year of *Henry the Eighth*, granted the next preſentation thereof to *Ralph Bradley* and others, under their common ſeal; that by the ſtatute made on the fourth of *February*, in the twenty-ſeventh year of *Henry the Eighth*, THE PRIORY was diſſolved, not having above the clear yearly

value

value of two hundred pounds, and the poſſeſſions thereof were given to the king and his heirs (*a*); that *Henry the Eighth* died ſeiſed, and it afterwards came to *Queen Mary*, and ſo on to *Queen Elizabeth*; that *Ralph Bradley*, the fourteenth of *Auguſt* 1558, which was in the laſt year of *Queen Mary*, granted the next preſentation to *Sir Richard Levingſton*, and *Edward Levingſton, Eſq.*; that *Sir Richard* died, and *Edward Levingſton* ſurvived, and was ſole poſſeſſed; that *Queen Mary* died ſeiſed of the advowſon, and the church became void by the death of *Richard Walker*, and that *Edward Levingſton* preſented *Henry Squire*, who was inſtituted and inducted; that *Queen Elizabeth* died without iſſue, and the advowſon of the ſaid church deſcended to *King James the Firſt*, and ſo derives a title to his preſent majeſty; and that the church being void, it belonged to him to preſent.

The defendant pleads, that *bene et verum eſt* that *King James* was ſeiſed of the advowſon in groſs as of fee, *prout* in the declaration; but that he by letters patents under THE GREAT SEAL, dated the eleventh of *July*, in the thirteenth year of his reign, granted the ſame to *Sir Charles Montague* and *Edward Sawyer*, and their heirs, the church being then full of the ſaid *Henry Squire*; that they, on the fifteenth of *July*, in the ſame year, granted it to *Edward Skinner* and his heirs; that *Skinner* afterwards levied a fine to *Sir Thomas Jarvois*, and declared the uſes thereof to the cognizee and his heirs; that *Sir Thomas Jarvois*, on the thirtieth *March*, in the fourth year of *Charles the Firſt*, granted the next preſentation to *Phineas White*; that the church became void by the death of *Squire*; and that *Phineas White* preſented *Timothy White*, who was inſtituted and inducted; that *Sir Thomas Jarvois* died ſeiſed, and the advowſon did deſcend to *Sir Thomas Jarvois*, his ſon and heir, and that the church became void by the death of *White*; that he thereupon preſented *John Hinkley*, who was inſtituted and inducted; * that *Sir Thomas Jarvois* died ſeiſed, and the [337] ſaid advowſon deſcended to the defendant, being his ſon and heir, and that the church being void by the death of *Hinkley*, he preſented the defendant *Hinkley* thereunto, who was inſtituted and inducted; and traverſed, that *King James* died ſeiſed of the advowſon aforeſaid *modo et forma prout* ATTORN. GENERAL. *præd. dom. regis nunc per narration. ſuam præd. ſuperius allegavit*, PROTESTANDO that *Sir Thomas Jarvois* deceaſed and the defendant *Jarvois* were ſucceſſively, for the ſpace of ſixty years and more before this writ brought, ſeiſed of the advowſon in groſs as of fee, and that *Henry Squire* died about ſixty years before the writ brought, FOR PLEA SAITH, that *bene et verum eſt* that *King James* was ſeiſed, and derived a title to the defendant *Jarvois*, ABSQUE HOC that the church was void by the death of *Henry Squire*.

THE ATTORNEY GENERAL took iſſue upon the traverſe of *Jarvois*, which was now to be tried.

(*a*) 37 *Hen* 8. cap. 8.

The

THE KING *againſt* JARVOIS.

The queſtion at the trial was, Whether the defendant ſhould give evidence, and ſhew how this advowſon came out of THE CROWN? for having alledged, that *bene et verum eſt* that *King James* was ſeiſed, and induced his title by a grant from the king, and having traverſed that the king died ſeiſed, &c. he ought to produce his grant, and ſhew how it came out of the crown; for the ſeiſin of the king being confeſſed in the plea, *ex hoc ſequitur* that he died ſeiſed.

But notwithſtanding this confeſſion in the plea, THE COURT made the plaintiff give ſome evidence that this advowſon was once in THE CROWN.

A grant made by A PRIOR of one of the diſſolved priories is not evidence of an advowſon having been in THE CROWN.

The plaintiff thereupon produced a grant of THE PRIOR made by him of the next preſentation, and THE PRIORY being now diſſolved, the advowſon of conſequence muſt be in the crown.

The defendant then produced his grant, which was by a warrant from the commiſſioners under THE GREAT SEAL for confirming defective titles.

THE COUNSEL *for the plaintiff* inſiſted, that ſuch grant was not ſufficient, becauſe thoſe commiſſioners had not an authority to make an original grant; they had only a ſpecial authority given them to ſupply defective titles, by confirming ſuch grants which were already made by the king.

This commiſſion, which is dated the twenty-fourth *February*, in the firſt year of *King James*, is upon record under THE GREAT SEAL; it is an expreſs authority given to certain perſons, and the grant made by them is with reference to that authority, for it is "*per warrantum commiſſionat.*;" therefore they muſt produce an actual grant from the crown. Now it appears, that the king was deceived, even upon the * very record; which makes the letters patents void without a *ſcire facias*, for he intended to grant nothing but what was in the poſſeſſion of the party before, or for which he had ſome colour of a grant upon which the commiſſion was to operate.

* [338]

Fitzg. 308. Comb. 308. 1. Co 45. Skin. 659. Carth. 351.

But IT WAS ARGUED *for the defendant*, that he need not ſhew a precedent grant, becauſe this made by THE COMMISSIONERS was ſufficient; for it ſhall be preſumed that THE COMMISSIONERS did purſue their authority; and the poſſeſſion having been in the defendant and his anceſtors for ſixty years and upwards, and no preſentation ſince from the crown, it ſhall never be intended that thoſe commiſſioners exceeded their power.

And of this opinion was THE COURT, eſpecially ſince the plaintiff could not produce any evidence that the king did preſent to this living ſince the diſſolution of the priory; and therefore it is poſſible that THE PRIOR might grant away this advowſon before the ſtatute of 37. *Hen.* 8. c. 8. and it might be that evidence was given of ſuch a grant to the commiſſioners. Theſe letters patents

patents were granted to commiſſioners to quiet the poſſeſſions of the people, whether the crown had any pretence or not. THE KING *againſt* JARVOIS.

The plaintiff was nonſuit.

Brace *againſt* Pennoyer. Caſe 165.

IN TRESPASS, there was a judgment in the common pleas againſt three defendants, who brought *a writ of error* in this court; and, before the record certified, one of the plaintiffs in error died; and after his death a *capias ad ſatisfaciendum* was taken out againſt the other two ſurviving without bringing a *ſcire facias*.

If on a writ of error on a judgment in *treſpaſs* againſt three, one of the plaintiffs in error die before the record be certified, the Court, on a ſuggeſtion being made of the death, will grant execution againſt the ſurvivors without a *ſcire facias*.

The queſtion was, Whether there ought not firſt to be a *ſcire facias*?

Becauſe, as it was ſaid, the execution varies from the judgment, and is not purſuant to the record, becauſe there was an alteration of the perſons from three to two. It is true, where one is not party to the record, as heir, executor, or adminiſtrator, he can have no execution without a *ſcire facias*, though it be within the year, becauſe the alteration of the perſon alters the proceſs. But it is as true, that if two plaintiffs recover, and one die before execution, the ſurvivor may take it out without a *ſcire facias*, becauſe he is party and privy to the judgment; and if it * ſhould happen that the dead man had releaſed the judgment, the defendant may bring an *audita querela* and be relieved (*a*). It is true, if one of the plaintiffs in error had died after the affirmance of the judgment, there muſt be a *ſcire facias*. In replevin, three defendants made cognizance, &c. (*b*) and a verdict was given for the plaintiff in *Michaelmas Term*, in the ſecond year of *Queen Elizabeth*; one of the defendants died after the laſt continuance, yet judgment was given againſt the other two ſurviving without a *ſcire facias*. By which it appears, that execution may be taken in this caſe without any ſuggeſtion made on THE ROLL, and without application made to the Court.

* [339]

S. C. 1. Salk. 319. S. C. Holt, 640. S. C. 8. Mod. 108. S.C Comb. 441 S.C. Carth. 404. S C. 12. Mod. 430. 21. *Hen.* 7. pl. 16. Moor, 367. Noy, 151. 2 Inſt. 471. Carter, 112. 193. 1. Salk. 264. 319. 1. Show. 404. Skin. 82. 682. 8. Mod. 108. 5. Com. Dig. (3. L. 2.). 2. Bac. Abr. 201. 360. 4. Bac. Abr. 416, 417. 419.

CURIA. A *ſcire facias* is not neceſſary upon the abatement by the death of the party; for what need is there of it, when the party cannot plead to it? If they preſs for a return of the writ of error, it will be certified; and without a ſuggeſtion upon THE ROLL, he had no means to know that one of the parties was dead (*c*). Therefore ſuch a ſuggeſtion ought to be made (*d*), and then to pray execution againſt the ſurvivors, *et quia ſuper examination. conſtat Cur.* that one of the defendants was dead; therefore the Court does award execution againſt the reſt.

And for this reaſon a *ſuperſedeas* was awarded, *quia improvidè*.

(*a*) *Vide* 1. Salk. 264. 319.
(*b*) Sackville's Caſe, Dyer, 175.
(*c*) *Vide* 1. Lilly, 2.
(*d*) See 8. & 9. *Will.* 3. c. 11. ſ. 7.

TRINITY

TRINITY TERM,

The Ninth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.* } *Juſtices.*
Sir Samuel Eyre, *Knt.*

Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

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* The King *againſt* Broom.

THE AFRICAN COMPANY, in the year 1691, hired the ſhip called "THE AMERICA," whereof one *John Lu m* was maſter, who took a *French* ſhip in the *Weſt Indies*, and ſhe was condemned there as prize, and the property veſted in THE KING. Afterwards *Broom* told the owners in *Barbadoes*, that he had ſold her, and then came home, and he was proſecuted in the ADMIRALTY COURT at the ſuit of the king; upon which proſecution there was a ſentence, and an appeal was brought from that ſentence.

Pending that appeal, *Broom* moved for a *prohibition*, ſuggeſting,

FIRST, That the ſhip and goods were taken in the *Weſt Indies*, *infra corpus comitatûs*, and ſo THE COURT OF ADMIRALTY had no original juriſdiction of the cauſe: and this was on purpoſe to ſtop the proceeding upon his own appeal.

if ſhip belonging to *July* 91, and not having *Lu* ſhip be- and then ſhip, upon ſhe being condemned in any court of admiralty, the property veſted in THE KING, in their court before the appeal aforeſaid was entered for that cauſe.

own uſe, the value may be recovered againſt him by ſuit in the ſpiritual court — S. C. Carth. 408. S. C. 1. Salk 32 S. C. Comb 444 S. C. 12 Mod 1 [illegible] 1 Salk. 31 2. Salk 441 [illegible] 551. 6. Mod. 13 4 Mod 176 2 Ld. Raym 1527 Ray 48 Show 29 1 Sid 320 [illegible] 90 Skin. 59. Raym 473. 1 Show. 326 367. 1. Lev 243 Carth 442 Comb. 554 [illegible] 3. Term Rep. 323. 4 Term Rep. 335

SECONDLY,

THE KING against BROOM.

SECONDLY, That the property being once veſted in the king, by the condemnation of the ſhip as prize, there can be no ſuit afterwards in THE ADMIRALTY COURT here; for if after ſuch condemnation the goods be converted, the king muſt bring an action of *trover*: and this is a plain action of *trover* upon the face of the libel.

To which it was anſwered, that the ſhip was taken without any *commiſſion* or *letters of marque*, and therefore it is a perquiſite to THE ADMIRALTY, and *Broom* is reſponſible to the king for the ſhip and goods.

There is nothing within the libel upon which to ground a prohibition.

* [341] * FIRST, They ſay that the ſhip was taken in the *Weſt Indies infra corpus comitatûs*, which is not ſufficient, for it ought to appear upon the libel, that the was taken upon the land beyond ſea, becauſe this Court takes no notice of counties there, and no prohibition after ſentence ſhall be granted upon a bare ſuggeſtion that the captain was not *ſuper altum mare* (*a*). That the property is not veſted in the king by the condemnation, for that only declares it to be in him, for which he may afterwards ſue in THE ADMIRALTY here, and though the goods were ſold at land, and an action might be brought at law for the converſion, yet the original cauſe ariſing upon the ſea, upon which this ſale did depend, gives THE COURT OF ADMIRALTY juriſdiction, for the converſion was at ſea, though the goods were ſold at *Barbadoes* (*b*); and the firſt motion he made toward the place was a breach of truſt, of which the converſion at land was an evidence. But it is too late to pray a prohibition *after ſentence*, and an appeal brought (*c*); for it would be a great inconveniency to allow it after ſo much expence, and no exception taken to the juriſdiction. This is a reaſon given by my LORD RAYMOND in his *Abridgment* (*d*). As for inſtance: By the ſtatute 23 *Hen* 8. c. 9. "No man is to be cited "to appear out of the dioceſe where he liveth, except, &c. upon "pain of double damages to the party grieved, and ten pounds to "the king" A ſuit was commenced in the prerogative court for a legacy, and the party had ſentence for it (*e*); and upon an appeal from the ſentence to the delegates, the ſentence was confirmed, and coſts taxed, and excommunication for non-payment. Now the executors would have *a prohibition* upon the ſtatute, becauſe they dwelled in another dioceſe; but the Court granted

Skin 299. Caſes in Law and Equity, 439.

(*a*) 3 Mod 244 1 Lev 143 1 Sid 367 1 Roll Rep 80 2 Brownl 34

(*b*) Cro Eliz 685 2 Saund. 260 1 Sid 320. 1 Mod 18. 2 Salk 540.

(*c*) But ſee B R H 317 3 Mod 286 2 Burr. 813 Dougl. 378. 2 Term Rep 473

(*d*) Friſewell's Caſe, 2 Roll Abr. 319

(*e*) Smith *v.* Executors of Poyndrell, Cro. Car 97.

a conſultation

a consultation, because they came too late for a prohibition, having so long allowed the jurisdiction of the court.

Adjournetur (*a*).

(a) It is said that it was r ... ttinued, S C Cuth ... , and therethe Court, t ... n pro ... dirilty h ... gju ... en the be ... ADMIRALTY ... ns b un ... prop ... rty, and ... courts et common law ... matter until annulled ... Salk 33 S C ... 12 Mod ... ly ap ... statute ...

The King *against* Holroy.

Case 167.

THE defendant was indicted for concealing traitors unknown, ... found guilty, and brought a writ of error, ... for ... there was a *misericordia* ... And for this reason the judgment was reversed.

In misdemeanor, the entry of a *misericordia* instead of a *capiatur* is erroneous 1 Hale P C 238

* The King *against* Greep.

Case 168.

THE defendant ... was tried at bar, upon an information ... at common law, ... that there was a trial in the common pleas ... Term, between *Richard* plaintiff and *Greep* ... *super triationem illam quandam ... praed.* ROBERTI RICHARD ... *modo jurat* ... *ibidem dat ... gen. dat ... septimo octogesimo primo ... geren. dat. ... octogesimo primo ... praefat ... DUCEM ... tur ... DUCIS ALBEMARLE ... ALBEMARLE ..., quae ... anno ... fuit situat in paroch* SANCTI MARTINI IN CAMPIS *in com.* MIDDLESEX *praed.* ... RICHARDUS STRODE *armiger*. *temporibus ... fuit praesens in domo ... DUCIS ALBEMARLE et fuit testis praed. sigillat ... et deliber ... coron et attorn. dict ... pro eodem domino rege dicit ... hic intelligi et informari quod ... in praed. octab Sanctae Trinit ... domini regis nunc ... WESTMINSTER praed in com* MIDDLESEX *in praed. ... domini regis de banco praed. ibid. quidam* ROBERTUS GREEP *nuper de paroch. de* PLIMPTON S. MARIA *in com.* DEVON. *yoman product. fuit testis ex parte praed.*

An information at common law for PERJURY in a trial at bar in replevin

THE KING *against* GREEP.

præd. HENRICI CORNFORTH *defend. in corsa præd. et adtunc et ibidem jurat. fuit super sacrosanct. Dei evangelio ad dicen. veritatem totam veritatem et nihil præter veritatem de et in præmissis in exitu inter partes præd. modo et forma præd. posit. Quodque idem* ROBERTUS GREEP *Deum præ oculis suis non habens sed instigation. diabolica mot. et seduct adtunc et ibidem per actum et consensum suos falso malitiosè voluntariè et corruptè super sacramentum suum præd. dixit deposuit juravit et juratoribus juræ præd. in evidenc. d. et concernen. præd.* RICHARDO STRODE *dedit quod circa medium Julii,* ANGLICE "the middle of *July*, octogesimo primo mensem *Julii* anno Dom. * millesimo sexcentesimo octogesimo primo *supradict. innuend.* MAGIST. STRODE *præfat.* RICHARDUM STRODE *innuendo fuit apud* NEWNHAM (*quandam domum vocat.* NEWNHAM *in paroch. de* PLIMPTON SANCTÆ MARIÆ *in com.* DEVON. *innuendo*) *et quod circa medium Julii,* ANGLICE "July," *octogesimo octogesimo primo eundem mensem Julii eodem anno* [illegible] MAGISTER STRODE *eundem* RICHARD. STRODE *ibidem innuendo fuit apud* NEWNHAM *dict. dom. vocat.* NEWNHAM *paroch. de* PLIMPTON SANCTÆ MARIÆ *in com.* DEVON. *præd. innuendo*; *et quod circa medium mensis Julii anno Dom. millesimo sexcentesimo octogesimo primo* MAGISTER STRODE *idem eodem* RICHARDUM STRODE *iterum innuendo fuit apud* NEWNHAM (*præd. domum vocat.* NEWNHAM *in paroch. præd. de* PLIMPTON SANCTÆ MARIÆ *in dicto com.* DEVON. *ibidem innuendo*), *ubi revera et in facto præfat.* RICHARDUS STRODE *circa medium dicti mensis Julii anno Domini millesimo sexcentesimo octogesimo primo supradicto vel ad aliquod aliud tempus quodcunque in dicto mense Julii eodem anno non fuit apud* NEWNHAM *præd. prout idem* ROBERTUS GREEP *super sacramentum suum præd. falso malitiosè voluntariè et corruptè dixit deposuit juravit et juratoribus ibidem juræ præd. evident. dedit, &c.*

* [343]

On an issue in *replevin*, whether *A.* died seised of certain lands in fee; *B.* the subscribing witness to a deed proves that he saw *A.* execute it in the month of *July*, at *Albemarle House*, in *London*; and *C.* swears, that *B.* was commorant about the said month of *July* at *Newnham*; this, although sufficiently material to the matter in issue, is not a contradiction sufficiently direct to support an assignment of PERJURY; nor can the contradiction be rendered certain by an "*innuendo*, a certain dwelling-house belonging to "the said *B.* at *Newnham*, in the parish of *Plimpton*, in the county of *Devon*;" for the office of an INNUENDO is only to *explain* the meaning of the proposition assigned, and not to add new terms to it.—S. C. 2. Salk. 513. S. C. Carth. 421. S. C. Holt, 535. S. C. 12 Mod. 139. S. C. Comb. 459. S. C. 1. Ld. Ray. 256. S. C. Comy. Rep. 43. 4. Co 44. 5. Co. 120. 2. Inst 318. 3. Inst. 230. 9. St. Tr. 682. Sayer, 280. 4. Com. Dig. 810. 662. Cowp. 672. 1. Term Rep. 66.

THE DEFENDANT was convicted of perjury.

AND NOW it was moved in arrest of judgment:

FIRST, For that it is not set forth that THE OATH was *material* to the matter in issue.

SECONDLY, The fact is laid, that at a former trial *Mr. Strode* gave evidence, that the indentures of lease and release were executed by the *Duke of Albemarle*, at *Albemarle House*, about the time of the date thereof, which was the sixteenth day of *July*, in the year 1681, and that he was then and there present with *the Duke*, and was a witness that *the Duke* did seal and deliver the same:

and

and the perjury now aſſigned is, that the defendant then depoſed, "that about the ſame time *Mr. Strode* was at *Newnham* (*quand. "domum vocat.* NEWNHAM *in paroch.* PLIMPTON S. MARIÆ "*in com.* DEVON. *innuendo*)."

Now the words "about which time" are very uncertain; for if he had depoſed, "*Mr. Strode* was then at *Newnham*," without ſaying any more, it muſt be agreed that had been uncertain, for it does not appear where *Newnham* * is, or that it was *Mr. Strode's* houſe, or in what county, or in what place. Then the *innuendo* muſt be the only ſupport of this information; and that makes it worſe: for the defendant ſwore, that "*Mr. Strode* "was then at *Newnham*," which may be taken or intended any *Newnham* in *England*; and by the *innuendo* it is tied up to a ſpecial *Newnham* in *Devon*, at which place it does not appear that he ſwore *Mr. Strode* then was: ſo there being no ſuch *Newnham* mentioned before, the *innuendo* is immaterial, for the duty of an *innuendo* is to aſcertain a thing mentioned before. They ſhould have ſet forth, that there was a trial, &c.; that a deed was given in evidence; that *Mr. Strode* was produced as a witneſs to ſupport that deed; that he had a houſe in *Devon* called *Newnham*; that he depoſed he ſaw the deeds executed in *Albemarle Houſe* at ſuch a time; and that the defendant ſwore that *Mr. Strode* was then at *Newnham*. When words ſpoken are uncertain, they ſhall not be made actionable by an averment; as to ſay of an attorney, "Thou "haſt forged writings," *innuendo* bonds and covenants (*a*); or to ſay, "that man had THE POX, *innuendo* THE *French* POX (*b*)." There ought to be a greater certainty of the place than of an addition to the party; and for this reaſon, Where eighteen were indicted for a riot (*c*), and there was no place named where ſeventeen of them did dwell, the indictment was quaſhed. In *Michaelmas Term*, in the thirty-ſeventh year of *Queen Elizabeth*, a man was indicted in this court upon the ſtatute 5. *Eliz.* c. 9. for perjury (*d*); the indictment ſet forth, that there was a ſuit in chancery between two parties for the manor of *Staverton* in *Devon*; that a commiſſion was awarded to examine witneſſes in that cauſe; and that the defendant, being examined, did ſwear that a ſcoffment of the manor was delivered as an eſcrow, &c. *innuendo præd. manerium*. Now it did not appear that the oath which the defendant then made of the delivery of that deed did concern the manor of *Staverton* then in queſtion; and it ſhall not be made more certain by the following words, "*manerium præd.* INNU-"ENDO," becauſe a man ſhall not be puniſhed for a perjury by the help of an *innuendo*. Now though that indictment was upon the ſtatute, yet the ſame reaſon which was then given will hold good upon an information at common law for the ſame offence. * Upon the whole matter, it is uncertain what *Newnham* was intended by the witneſs; for it is inconſiſtent with his evidence

* [344]

Caſes in Law and Equity, 197. Hob. 6. 4 Co. 17. 1 Roll. 78. Allen, 32. Yelv. 21.

* [345]

(*a*) 3. Bulſt. 265.
(*b*) 1. Roll. Abr. 43. Cro. Jac. 430. Palm. 64. Stra. 1189.
(*c*) 11. Bulſt. 183.
(*d*) Cro. Eliz. 428.

THE KING *against* GREEP.

to say, that it was *Newnham* in *Middlesex*; and the jury would have no consideration of it, unless it had been described to them by asking what *Newnham* was meant. So that, without the *innuendo*, NON CONSTAT what *Newnham* it is; for it may be a house, or a vill, or a *lieu convus*, and near *Albemarle House*; it is the distance from thence which makes the thing material. Now *Mr. Strode* having deposed, that "on or about the middle of *July* he "was a witness to the execution of the deeds at *Albemarle House*," and the defendant having sworn "he was then at *Newnham*" generally, it may be intended the very next house to *Albemarle House*; but the *innuendo* makes it to be at *Newnham* in *Devon*, which is different from what was sworn; for the law *primâ facie* intends *Newnham* to be a vill, and the *innuendo* limits it to a particular house in a parish, which alters the very signification of the word, and reduces it from a generality to a certainty. The law will not allow words to be enlarged by an *innuendo*, so as to support an action on the case for speaking them (*a*); *à multo fortiori* in cases of perjury, for that would be to convict a man of one of the highest crimes in a matter never sworn by him. This was the opinion of JUSTICE GAWDY, that a man cannot be perjured by an *innuendo* (*b*). And there is no authority cited on the other side to prove, that an *innuendo* will make words actionable which are not so in their own nature; but where a *colloquium* is laid, or the words of themselves are actionable, there an *innuendo* may explain them. And therefore it was agreed (*c*), that if a man say, "Thou hast stolen my piece," *innuendo* "my gun," the action will not lie; for though by common intendment *a piece* is *a gun*, yet it is uncertain, and it will not be helped by an *innuendo*; but if there had been any previous discourse of *a gun*, then the action might have been supported by the *innuendo*.

SECONDLY, Perjury must be in something material to the issue; for if it be wholly foreign and impertinent it is not perjury, but a vain and idle oath (*d*). In *Michaelmas Term*, in the fifth year of *James the First* (*e*), a man was indicted in the star-chamber for *perjury* committed by him in THE COURT OF REQUESTS, in giving evidence there in a cause concerning the title of lands, which was resolved by ALL THE JUDGES OF
* [346] ENGLAND not * to be punishable, for it was *an impertinent* and not *a corrupt* oath, because that court has no authority to examine such titles. The oath of a juryman is, that he shall "well and "truly try *the issue* between the parties:" so that if he do try any thing besides *the issue* it is *per non juratum* (*f*); and if his verdict thereupon be false it is not perjury, neither can he be attainted, because neither party is grieved thereby (*g*).

(*a*) Hob. 2. 6. 45. 1. Vent. 337. Cro. Jac. 126.

(*b*) Godb. 191.

(*c*) Godb. 339.

(*d*) Godb. 191.

(*e*) Rex *v.* Paine, Yelv. 111. 1. Bulst. 107.

(*f*) Hob. 53. 11. Co. 13.

(*g*) See Rex *v.* Dowlin, B. R. Trinity Term, 1793, where it was determined, that stating that at such a court *A. B.* was "*in due form of law tried upon a certain* "*indictment then and there depending* against "him for murder," and that "*at and* "*upon the said trial it then and there became* "*and was made a material question* whether "*&c.*" are sufficient averments that the perjury was committed on the trial of *A. B.* and that the question was *material* on that trial. 5. Term Rep. 311.

THE KING against GREEP.

IT WAS ARGUED *for the king*, that the *innuendo* makes the place certain enough, and that the breach of the oath is well aſſigned; for it is laid in fact, that *Mr. Strode* "was not at "*Newnham* aforeſaid." It is admitted, that an *innuendo* is not proper to extend words beyond their ordinary and common meaning; and likewiſe where a word is capable of two ſignifications, and by an *innuendo* is tied up to one, that ſhall not prejudice the party: as for inſtance, if a man ſay, "I ſtole his corn," it may be as well ſtanding corn as cut down (*a*). Neither can an *innuendo* reſtrain *a genus*, as *him* or *her* (*b*). Thus they who argued for the king, as well as thoſe who had argued for the defendant, did not differ in the law concerning an *innuendo*, but only in the application of it. Now in this caſe the Court cannot take notice judicially, that *Newnham* is a general word, or that it has two known ſignifications. But admitting that the place is not well explained, and that the *innuendo* was out of the caſe, then *Newnham* is at large, and *non conſtat* where it is; but be it where it will, it muſt be another place from *Albemarle Houſe*. Now ſuppoſing it to be near *Albemarle Houſe*, it is ſtill perjury in the defendant; for *Mr. Strode* depoſed, that "he was at ſuch a time in *Albemarle* "*Houſe*," and the defendant ſwore that "he was then at *Newn-* "*ham*," ſuppoſing it to be the next door. My LORD COKE, in his expoſition upon the ſtatute 5. *Eliz.* c. 9. (*c*), ſays, that if the thing ſworn be not true, and not material to the point in ſuit, it is not perjury, becauſe it is extra-judicial; and that act giving a remedy to the party grieved, he can in no ſort be damnified if the depoſition be not material to the matter in iſſue. * This opinion of my LORD COKE muſt be intended upon the ſtatute, and it is then a little too ſtraight; for if the thing ſworn be impertinent, or do but conduce to the matter in iſſue, and be falſe, it is ſtill perjury. But what was ſworn in this caſe was not ſo immaterial to the point in iſſue, for it may create a belief in the jury that *Mr. Strode* was not at *Albemarle Houſe* at that time he ſwore himſelf to be there. As to the caſe in *Cro. Eliz.* which has been objected, that proves nothing againſt this *innuendo*; it was a ſuit in chancery for the manor of *Staverton*, and the defendant ſwore that a feoffment of the manor was delivered as an eſcrow, when in truth it was delivered abſolutely; and this was aſſigned for perjury in the defendant, with an INNUENDO *præd. manerium*; becauſe he had not ſworn that the feoffment was of the manor of *Staverton*, but of the manor generally; the oath was held to be immaterial to the matter in iſſue; it was not ſhewn that either party produced the feoffment at the commiſſion, or, if it had been produced, that it concerned the manor then in queſtion, which being ſo very uncertain could not be ſupplied by an *innuendo*; and for this exception that indictment was diſcharged: beſides, it was an indictment upon the ſtatute, and not at common law as

Poſt. 325.

* [347]

(*a*) Barham's Caſe, 4. Co. 20. a.— See alſo S. P. Caſtleman *v.* Hobbs, Cro. Eliz. 428.; Thomas *v.* Axworth, Hob. 2.; Hervey *v.* Duckins, Hob. 45

(*b*) 4. Co. 27.
(*c*) 3. Inſt. 167.

THE KING *against* GREEP.

this is. But here the *innuendo* is explanatory (*a*), without adding any thing to the ſenſe of the words precedent; for it is laid, that *Mr. Strode*, being produced as a witneſs, did depoſe, that ſuch a day in *July* he was witneſs to the executing of deeds in *Albemarle Houſe*, in the pariſh of *St. Martin in the Fields*. The defendant ſwore, that *Mr. Strode* at that time in *July* was at *Newnham*, *ubi revera et in facto* he was at no time in *July* in that year at *Newnham*: and this is found by the verdict. An *innuendo* has been allowed to make a farther explanation of precedent words than in the caſe at bar. As in an action on the caſe (*b*) for ſlandering the plaintiff's title, he declared, that he was ſeiſed of the manor of *Upton Grey*, and that the defendant ſaid he had no title to *Upton*, INNUENDO *Upton Grey*; after a verdict for the plaintiff, this exception was taken in arreſt of judgment, *viz.* That the words were ſpoken of *Upton* generally, which cannot be intended of *Upton Grey*, and ſo could not be helped by the *innuendo*; but the Court was then of opinion, that it was ſufficient to explain
* [348] what *Upton* was intended, and ſo affirmed the judgment. * In the twenty-third year of *Henry the Eighth*, the *Marquis of Exeter* was indicted for theſe words, "I like well the proceedings of "*Cardinal Pool*, INNUENDO *Carolum Pool*, who wrote againſt the "king's ſupremacy;" and he was convicted and beheaded.

CURIA. An information for perjury at common law, as this is, does not require ſo much certainty as an indictment upon the ſtatute; for if perjury be aſſigned in ſwearing to ſeveral interrogatories in chancery, without ſhewing in which, this is good at common law, but not upon the ſtatute (*c*). Neither will an indictment lie for a perjury upon the ſtatute which may be maintained at common law; as for making a falſe affidavit in the chancery, or in this court (*d*). The ſtatute has made the offender ſubject to a certain penalty, and to a corporal puniſhment; and therefore the perjury muſt be by ſwearing falſly in *a court of record*, and in a thing material to the iſſue (*e*). But this is not required at common law; for it is perjury to ſwear falſly in *a court baron*, or in *the eccleſiaſtical court*, which are not courts of record (*f*), nor that it ſhould be in a thing material to the iſſue, for a man may be perjured in an anſwer in chancery to a thing not charged in the bill (*g*). There was a trial in which the queſtion was, *compos vel non compos*; the man died in *Kent*, and the witneſs lived in *Oxfordſhire*; at the trial he made a preface to his evidence, by telling a hiſtory of his journey, where he lay, where he dined, where he ſtayed on the road, and when he arrived at *London*, and ſo till he came to *Kent* (*h*). Suppoſe he had been indicted for perjury, in ſwearing that he dined by the way at *Uxbridge*, UBI

(*a*) Yelv. 21. Allen, 32. Cro. Eliz. 193.
(*b*) Maniers *v.* Maynard, Cro. Eliz. 419.
(*c*) 1. Sid. 107.
(*d*) 1. Roll. Rep. 79.
(*e*) 1. Hawk. P. C. ch. 69. ſ. 8.
(*f*) 2. Roll. Abr. 257. pl. 2.—See Alexander's Caſe, Caſes in Crown Law, 60.
(*g*) Rex *v.* Drue, 1. Sid. 274.
(*h*)

REVERA

REVERA he did not dine there; Is this perjury at common law? Certainly it is not.

THE KING *against* GREEN.

Adjournatur (*a*).

(*a*) The Judges, after several arguments at the bar, gave their opinions *seriatim*, S. C. 12 Mod. 139. and THE JUDGMENT was arrested by the whole Court, because the information did not shew where *Newnham* was except by the *viva voce*. But because the Court was satisfied that the defendant was guilty of *wilful and corrupt* PERJURY, he was not discharged of his bail, and leave was given to the prosecutor to file a new information. The case, however, was afterwards removed by writ of error into the HOUSE OF LORDS; and after hearing counsel, when all the Judges seemed to be of opinion to affirm the judgment, it was put to the vote, and the judgment was reversed by the majority without giving any reason, S. C. Ld Raym. 261. and the defendant taken, &c. S. C. Carth 422.

* [349]

Case 169.

The King *against* Melling.

MELLING was found guilty of *perjury* at A TRIAL AT BAR. And now a motion was made for *a new trial*,

On an *information* for *perjury* tried AT BAR, if the jury, believing the oath to have been falsely sworn, and not intending to find for the defendant, bring in a verdict, "GUILTY of "*perjury*, but "not of *wilful* "and *corrupt* "perjury;" and, on being told by the Court that the verdict was repugnant, and could not be recorded, they find a verdict "*guilty*" generally, but saying, at the same time, that "some of "the jurors "were not satisfied that "the perjury "was *wilful* and *corrupt*;" yet the Court will not grant a *new trial* on such grounds after A TRIAL AT BAR.—S. C. 12. Mod. 128. S. C. Holt, 535. 2. Jones, 163. Ray. 170. 405. 1. Sid. 49. 153. Ray. 170. 405. 1. Sid. 153. 1. Keb. 124. 2. Keb. 403. 1. Show. 336. 1. Lev. 9. 1. Stra. 101. 3. Bac. Abr. 814. 1 Hawk. P. C. c. 69. f. 2. 1. S. 2. Hawk. P. C. c. 47. f. 12. Cowp. 37. Dougl. 337. 4. Bl. Com. 354. 3. Will. 59.

FIRST, Because the verdict was against evidence.

SECONDLY, Because it was against the opinion of the jury who gave it.

*The fact was thus: THE JURY found the defendant "GUILTY "of *perjury*, but not of *wilful* and *corrupt perjury*," as it was laid in the information. And ROKEBY, *Justice*, being alone in court, asked the jury, Whether they found for the defendant? They replied, "*No*." Upon which he told them, that he could not record the verdict which they had given, for it was contradictory, and they must find him *guilty* or *acquit* him. He asked them, Whether they believed that the matter sworn was false? They replied, "*Yes*." Then he asked, Whether they believed the defendant knew it to be false? They replied, "They could "not tell that." Then the foreman said, that they agreed before they came into the court to find the defendant guilty of *perjury*, but not guilty of *wilful*, *malicious*, and *corrupt* PERJURY (*a*); and if that verdict should not be recorded, then to find him guilty *generally*, because some of the jury were dissatisfied to find him guilty of *wilful* and *corrupt* PERJURY. Whereupon, without any further consideration, they found him guilty generally, which is a verdict both ways, and not only against evidence but against their own opinions, which cannot be *dictum veritatis*.

(*a*) See the case of Rex *v.* Woodfall, Michaelmas Term 30. *Geo.* 3. 5. Burr. 2661. and Rex *v.* Daniel Isaac Eaton, Michaelmas Term 34. *Geo.* 3. 5. Term Rep.

THE KING *against* MELLING.

2. Lev. 140. 205. Stiles, 462. 2. Salk. 649.

But THE COURT held, that when a cauſe is tried at BAR, a *new trial* is never granted for the ſingle reaſon that the jury went againſt evidence. It is true, it was granted in my *Lord Fitzwater's Caſe (a)*, for there was a miſbehaviour in the jury, in flinging dice to decide whether they ſhould find for the plaintiff or defendant, which would alter the trial by verdict of *twelve* to a trial by *lot*: ſo likewiſe for *exceſſive damages* for words; as for calling the plaintiff "traitor," and the jury giving fifteen hundred pounds damages (*b*).

IT WAS INSISTED *on behalf of* THE KING, that there was no *affidavit* of any miſbehaviour of the jury, for they were all unanimouſly agreed to find the defendant *guilty*; but the ambiguity of the word "corrupt" puzzled them, which made them ſcrupulous of finding the perjury to be ſuch, becauſe they had no evidence of any bribery to forſwear himſelf. Neither is it *a miſdemeanor* in them to give a verdict which would have amounted to make the defendant "*not guilty*," and immediately, before they went from the bar, to find him "*guilty*." As to the firſt, they aſked the opinion of the Court, Whether ſuch a verdict might be received? which is what they ought to do; and if they have the opinion of the Court, that ſuch verdict which is offered is not agreeable to law, then they are to conſider what verdict to give.

* [350] * Now it is plain, they had this matter under conſideration before they came to THE BAR, becauſe when the Judge told them he would not record the firſt verdict, they immediately found the defendant "*guilty*:" which is an argument they were fully agreed on the fact to find him "*guilty*," though they could not find him *wilfully* and *corruptly guilty*, becauſe they had no evidence of it. Now to imagine this to be *a miſdemeanor* is an offence and reflection upon the Court; for if there had been any miſbehaviour the Judge would have told them of it. They ſhould have oppoſed the receiving this verdict; but ſince it is recorded, they muſt not now ſet it aſide. For authorities, a caſe in the *Year Book (c)* was cited, which was an action of conſpiracy brought againſt two; and upon *not guilty* pleaded, the jury found one *guilty*, and *acquitted* the other, and they being adviſed by the Court to conſider better of their verdict, which was contradictory in itſelf, becauſe one alone could not conſpire, they thereupon found both *guilty*, which is a ſtronger caſe than this at bar. It is no new thing for a jury to recall their firſt verdict, and for the Court to receive another at the ſame time (*d*). This was done in one *Archer's Caſe (e)*, whom the jury *acquitted* upon an indictment of felony; and immediately they recollected themſelves, and told the Court they were miſtaken, and found him *guilty*; and this was entered as their verdict.

(*a*) 3. Keb. 555.
(*b*) Styles, 462.
(*c*) Year Book 11. *Hen* 4. pl. 2. Bro. Abr. "Conſpiracie," pl. 13.
(*d*) See the caſe of Saunders *v.* Freeman, Plowd. 211.
(*e*)

E contra

THE KING *against* MELLING.

E contra. New trials have been granted in this court after a conviction of perjury. It was done in the case of one *Cornelius* (*a*), who was indicted for perjury, for having that upon a petition was at a conventicle, when in truth he was not (*b*), and it appearing that the freeman of the jury who gave the verdict was owner of the house where the conventicle was held, and being challenged for that reason, and yet two of the jury, the Court granted a new trial. It has been moved likewise for the miscarriage of the jury, to whom the plea was delivered *de bene esse* after they were gone from THE BAR (*c*). For they require the evidence to be clear to convict a man of perjury, and it ought to be of wilful and corrupt perjury. Now when the jury have acquitted the defendant was *not guilty*, of wilful and corrupt perjury, and yet find him *guilty* generally, this is a verdict which is repugnant in itself. They ought to find him guilty of "wilful and corrupt * [351] "perjury," or to acquit him. For in an indictment for perjury, brought upon the statute of the queen, the plaintiff declared (*d*), 3 Inst 176. that the defendant *falso dixit et deposuit* (which was the matter, and in what court, and concluded, *et sic corrupte juravit contra corruptum juramentum*, and the whole Court were of opinion, that this declaration was insufficient, because it was not said, that *falso et malitiose et corrupte dixit*, & for the clause which followed, *et sic commisit volens rumet contemptum juramentum*, will not help it, because it is a conclusion upon premises insufficiently alledged (*e*). The Counsel for the king would excuse this *misdemeanor* in the jury by the common case of asking the opinion of the Court in a point of law, which it is their duty to do, but that is not applicable to this, for they were agreed upon two verdicts which were inconsistent, and upon the latter without any consideration at all. It is agreed, that they may vary from *a privy verdict*. Therefore is, because it may be presumed that they had some subsequent consideration of the evidence after such verdict given. Besides, *a privy verdict* in strictness is no verdict, it is only a favour which is allowed to the jury for their ease.

CURIA. If the thing sworn was manifestly false, then mind must be corrupt, and then there need be no evidence of bribery.

Adjournatur.

(*a*) 1 Sid 58
(*b*) 3 Keb 505 Jon. 163
(*c*) See Rex v. Jolliffe, 3 Ter Rep 286
(*d*) 3 Inst 176
(*e*) See Cox Case, Cases in Crown Law, 65

Stanhope *against* Smith.

Case 170.

Michaelmas Term, 8 *Will* 3. *Roll* 462.

Note given for money won at play, *viz* eighty pounds, to the plaintiff, and forty pound more from another person, is not void by the 16 *Car.* 2. c. 7. although both sums were lost at *one sitting*, for that statute intended to prevent more than 100*l* being lost at one sitting to *one person*. Salk. 344, 345. Lutw. 100. 3 Keb 671. 4 Mod 403. Ante, 1, 2. 175. 2 Bac Abr. 623. 2. Bl Rep 233.

AN ACTION was brought upon A NOTE for money won at play. The defendant pleaded the statute 16. *Car.* 2. c. 7. of Gaming, and set forth, that at one sitting he lost eighty-five pounds to the plaintiff, and forty pounds more to one *Yate*.

Upon

STANHOPE *against* SMITH.

Upon demurrer it was argued, that the act made no *securities* void, neither was the winner to pay the treble value of the money won, unless it was above one hundred pounds, for if three men should each of them win fifty pounds, neither of them shall forfeit; for though it be more than one hundred pounds among them all, yet it is under that sum to each, and the statute makes no forfeiture but where the person winning has got above one hundred pounds at one sitting.

*[352] * ON THE OTHER SIDE *it was alledged*, that in *Hilary Term*, 27. & 28. *Car.* 2. two judgments were given *(a)*, against the pleas, to demurrers upon the like plea; and in the case of *Edgebury v. Rossindale (b)*, which was upon articles concerning a horse-match, wherein the defendant agreed to run four heats at several days for forty pounds each heat; and this was held by my LORD HALE to be but one agreement, though to be run at several times, and the defendant in that case had judgment.

But in the principal case judgment was given for the plaintiff, for the statute intends a remedy where more than a hundred pounds is lost to one person, and at one sitting; for if it be lost to several, it is not within that act *(c)*: as for instance, if a man lose ninety-five pounds to one man, and refuse to play any longer with him, and then voluntarily lose ten pounds to another at the same sitting, this shall not defeat the first person of the money which he lawfully won *(d)*.

(a) 27. & 28. *Car.* 2. Rot. 109, 110. Hodgson *v.* Mallen.

(b) 2. Lev. 54. 1. Vent. 253.

(c) The same point adjudged in Dickson *v.* Pinkett, 1. Salk. 345.

(d) But now by 9. *Anne*, c. 14. "All "notes, bills, bonds, judgments, mort-"gages, or other *securities* or conveyances "whatsoever, given by any person what-"soever, when the whole or any part of "the consideration of such security shall "be for any money or other valuable "thing won by gaming, or playing at "cards, dice, tables, tennis, bowls, or "other game or games whatsoever, or "by betting on those who do play, or for "re-imbursing or repaying any money "knowingly lent or advanced for such "gaming or betting, or lent or advanced "at the time and place of such play to "any person so gaming or betting, shall "be utterly void." And since this statute it is held, that both *contract* and *security* made or given for money *won* at play are void, Robinson *v.* Bland, 2. Burr. 1078. although the security be in the hands of an innocent indorsee, without notice, Bowyer *v.* Bampton, 2. Stra. 1155.; Peacock *v.* Rhodes, Dougl. 614.; Lowe *v.* Waller, Dougl. 736. and if the money be paid on such *void security*, it may be recovered back, Rawden *v.* Shadwell, Ambler, 269. But where money is fairly *lent* at play, this statute will not make *the contract* void, 2. Burr. 1082.; and therefore the lender may maintain his action for it, Barjeau *v.* Walmsley, 2. Stra. 1249.

Case 171.

Toddard *against* Middleton.

Easter Term, 9. Will. 3. Roll 199.

On a covenant to pay for coals shipped on the *River Tyne*, a breach that they were shipped at *Yarmouth*, must shew that *Yarmouth* is on the *River Tyne*. Ante, 286. 348.—Cases in Law and Equity, 228.

AN ACTION OF COVENANT was brought upon the penalty of certain articles, wherein the defendant had agreed to pay so much a chaldron for all coals laden either at *Newcastle* or upon the *River Tyne*, and brought to *London*; and the breach assigned was, that the coals were laden on such a ship *infra portum*

de

de TINMOUTH, *viz.* at *North Shields*, and brought from thence to *London*.

TODDARD *against* MIDDLETON.

To this declaration the defendant demurred, becauſe it did not appear that *Tinmouth* was upon the *River Tyne*, and ſo the breach is not well aſſigned, and the Court cannot take notice judicially, that *Tinmouth* is upon that river.

And for this reaſon they inclined againſt the plaintiff, but gave him leave to *diſcontinue* upon payment of coſts.

Maddiſon *againſt* Shore.

Caſe 172.

RAD'US MADDISON *per* WILLIELMUM DUNCOMB *attorn. ſuum queritur de* PATRICIO SHORE, *gen. un. attorn. curiæ domini regis de banco præſen. hic in curia in propria perſona ſua de eo quod non reddidit ei decem libras quas ei debet et injuſte detinet pro eo*, VIDELICET, *quod cum in ſtatuto in parliamento dominæ Elizabethæ, nuper reginæ Angliæ apud Weſtm. in Comm. Midd. duodecimo die Januarii anno regni ſui, quinto tent. edit. inter alia* * *inactitat. fuit authoritate ejuſdem parliamenti quod ſi aliqua perſona, &c.*

A declaration on the ſtatute 5. *Ed.* 6. c. 9. for not appearing and giving evidence at the trial of a cauſe at the aſſizes, after *ſub-pœna* delivered.

* [353]

Cumque idem RAD'US *nuper ſcil't termino Sanctæ Trinitatis, anno regni domini* WILL'I, *nunc regis Angliæ ſeptimo in curia ejuſdem domini regis nunc hic coram ipſo rege eadem curia apud Weſtm. præd. tunc exiſten. impli'taſſet quendam* STEPHANUM ROTHWELL, *per breve dicti domini regis de ſci. fa. viz. Lincoln. direct. pro reſtitution. habend. de quindecim libris quas ipſe antea in curia ejuſdem domini regis de banco apud Weſtm. per judicium ejuſdem curiæ de banco recuperaſſet verſus eum pro damnis ſuis quæ ſuſtinuit tam occaſione cujuſdam tranſgreſſionis eidem* STEPHANO *per ipſum* RAD'UM *nuper illat. quam pro miſis et cuſtagiis ſuis per ipſum circa ſectam ſuam in ea parte appoſit. Quod quidem judicium idem rex in curia ſua coram ipſo rege apud Weſtm. præd ob errores in record et proceſſu inde compert. revocaſſet et adnullaſſet; per quod conſideratum fuit in eadem curia dicti domini regis coram ipſo rege apud Weſtm. quod idem* RAD'US *ad omnia quæ ipſe occaſione judicii præd. amiſiſſet reſtituetur, et idem dominus rex nunc in dicta curia ſua coram ipſo rege ex parte ipſius* RAD'I *acciperet quod ipſe poſt judicium præd. redditum fuit et ante revocation. ejuſdem*, SCILICET, 20 *die Junii, anno regni ejuſdem domini regis* 3° *apud* WRAGSBY, *in com. Lincoln præd. ſolveret præd.* STEPHANO *præd. quindecim libras per eundem* STEPHANUM *verſus ipſum* RAD'UM *ut præfertur recuperat. in plena ſatisfactione et exoneratione damnor. præd. prout in eodem brevi de ſcire facias plenius continetur. Quod quidem breve de ſci. fa. præd.* STEPHANUS *præd. termino Sanctæ Trinitatis, anno ſeptimo ſupradicto in præd. curia domini regis coram ipſo rege apud Weſtm. præd. comparen. placitabat in barram ſive præcluſionem hujuſmodi reſtitution. verſus eum*

MADDISON against SHORE.

eum habend. quod præd. RAD'US *poſt judicium præd. reddit. et ante recuperationem ejuſdem non ſolvit eidem* STEPHANO *præd. quindecim libras modo et forma prout per dictum breve de ſci. fa. ſuperius ſuppoſit fuit; et de hoc poſuit ſe ſuper patriam. Et præd.* RAD'US *ſi'liter id' præcept. fuit vic. com. Lincoln. quod venire faciat coram domino rege à die Sanctæ Trinitatis in tres ſeptimanas ubicunque, &c. duodecim, &c. per quos, &c. et qui nec, &c. ad recogn. &c. quia tam, &c. idem dies dat. fuit partibus præd. &c. Ad quem autem coram dom. rege apud Weſtm. ven. tam præd.* RAD'US *quam præd.* STEPHANUS *per attorn. ſuos præd. et vic. com. Lincoln. mis. inde breve de venire facias in omnibus ſervit. et execut. una cum panello de nominibus ju'ræ quorum null', &c. Ideo præcept. fuit vic. com. Lincoln. præd. qd. diſtring. jur. præd. per omnes terras et catalla, &c. et quod de exit', &c. ita quod habeat corpora eor. coram domino rege à die S. Mich'is in tres ſeptiman.*

*[354]

** ubicunque, &c. vel coram juſtitiariis domini regis ad aſſiſas in com. Lincoln. capiend. aſſign. ſi prius die Lunæ decimo quinto die Julii apud caſtrum Lincoln. in com. præd. per formam ſtatuti, &c. ven. pro defectu jur'. &c. prout per record. et proceſs. inde in dicta curia dicti dom. regis coram ipſo rege apud Weſtm. præd. reſiden. plenius apparet. Cumque nuper hic idem* RAD'US *eodem termino Sanctæ Trinitatis anno ſupradicto proſecut. fuiſſet extra eandem curiam dicti domini regis breve de ſubpœna præfat.* PATRICIO *et caldam* JOHANNI DOE *direct. per quod quidem breve eiſdem* PATRICIO *et* JOHANNI *præcept. fuit quod omnibus aliis prætermiſſis et excuſationibus quibuſcunque ceſſan. in propriis perſonis, &c. Quod quidem breve de ſubpœna idem* RAD'US *poſtea et antea prad. aſſiſas, ſcilicet,* 13 *die Julii, anno* 7 *ſupradicto, apud caſtrum Lincoln. eidem* PATRICIO *deliberavit, ac duos ſolidos et ſex denarios pro ejus cuſtagiis et oneribus in hac parte ſuſtentan. eidem* PATRICIO *ſolvit; qui quidem duo ſolid. et ſex denar. fuer. ſufficien. pro cuſtagiis et oneribus ipſius* PATRICII *ſecundum diſtantiam locorum vocation. et ſtatum ipſius* PATRICII, *ac licet ad præd. aſſiſas præd. die Lunæ decimo quinto die Julii apud caſtrum Lincoln. in com. præd. tent. coram* JOHANNE POWELL *milite, adtunc un. baron. Scaccarii dict. domini regis, et* GEORGIO DODSON *ar. eidem* JOHANNI POWELL *aſſociat. et* NICH'O LECHMERE *mil. al. baron. Scaccarii dict. domini regis juſtitiar. ipſius domini regis ad aſſiſas il. in com. Lincoln. capien. aſſign. per formam ſtat. ti hac vic. aſſociat. præſentia præd.* NICH'I LECHMERE *non expectat. Virtute brevis dicti domini regis de Si non omnes, &c. venier. tam præd.* RAD'US *per attorn. ſuum præd. quam præd.* STEPHANUS *per* RICHARDUM MILNER, *attorn. ſuum et jur. juratæ illius exact. ſimiliter venerunt, et ad veritatem de exit. prad. inter ipſos* RAD'UM *et præfat.* STEPHANUM *jurat. dicend. electi triat. et jurat. fuer. præd. tamen* PATRICIUS *ſtatut. præd. minime ponderan. nec pœnam in eodem content. veren. coram præfat. juſtitiariis ad aſſiſas prad. prædicto die Lunæ decimo quinto die Julii apud caſtrum Lincoln. præd. juxta exigentiam præd. brevis*

brevis de ſubpœna non comperuit ad notitiam ſuam in cauſa præd. dicend. nullum adtunc habend. legitimum ſeu rationabile obſtaculum ſivè impedimentum in contrarium inde, ſed adtunc et ibid. in cauſa præd. jurari, et notitiam ſuam inde dicere juxta tenorem ejuſdem brevis defalt. fecit contra formam ſtatuti præd. per quod præd. RAD'US *exit. ill. ex parte ſua jur. juratæ Illius pro defectu teſtimonii præd.* PATRICII SHORE *probare non potuit nec ſectam ſuam præd. verſus præfat.* STEPHANUM *ulterius proſequi; ſicque idem* RAD'US *magnopere gravat. et multipliciter deteriorat. fuit; per quod vigore ſtatuti præd. actio accrevit eidem* RAD'O *ad exigend. et habend. de præfat.* PATRICIO *præd. decem libras præd. tamen* PATRICIUS *licet ſæpius requiſit. præd. decem libras eidem* RAD'O *nondum reddidit, ſed il. ei hucuſque reddere omnino contradixit, et adhuc contradic. unde dicit quod deter. et injuriat. eſt et damnum habet ad valentiam centum librarum, et inde petit remedium, &c.*

* [355]

Maddiſon *againſt* Shore. Caſe 173.

In an action on the 5. *Eliz.* c. 9. the delivery of *the ticket* is a ſufficient ſervice of the *ſubpœna* within the act. S. C. Comb. 240. 458. Carth. 130. Ca. Cir. 522. Stra. 510. 1150. 1251. Ld. Ray. 1529. Dough. 558.

THIS was an action of debt brought upon the 5. *Eliz.* c. 9. for not appearing and giving evidence at THE ASSIZES, being ſerved with *a ſubpœna* for that purpoſe. Upon *nil debet* pleaded, there was a verdict for the plaintiff.

It was moved in arreſt of judgment,

FIRST, That it did not appear by the declaration, that the *ſubpœna* was left with the defendant; for the delivery of *the ticket*, and reading *the writ*, is no good ſervice.

But this exception was over-ruled, for the plaintiff ſhewed that he delivered the very writ of *ſubpœna* to the defendant himſelf; but the delivery of *a ticket* containing the ſubſtance of the writ, is a ſufficient ſervice within the act.

A declaration on 5. *Eliz.* c. 9. for not appearing to *a ſubpœna*, muſt ſtate the *ſpecial damage* the plaintiff received, although it demand only the penalty. S. C. 1. Salk. 206.

SECONDLY, It was objected, that the plaintiff had not ſet forth any ſpecial damage which he had ſuſtained by the negligence of the defendant in not appearing to give evidence, as that he was non-ſuited, or could not proceed to trial for want of the defendant's evidence; for the action is given to the party grieved; and if the plaintiff be not grieved, he cannot bring this action.

IT WAS INSISTED *for the plaintiff*, that the action being only brought for the ten pounds, and not for any more damages, the declaration was well enough.

But the court of common pleas held the declaration to be ill for this laſt objection; becauſe there muſt be a *party grieved*, otherwiſe there is no cauſe of forfeiture; and there muſt be a *particular damage* ſet forth, though this was contrary to a judgment in the like

Maddison against Shorz.

like caſe, in the reign of queen *Elizabeth* (*a*), where the like exception was taken and over-ruled.

Afterwards a writ of error was brought on this judgment, but it was affirmed.

(*a*) Cro. Eliz. 130. 1. Leon. 122.

*[356]

Caſe 174.

* Vinkeſtone *againſt* Ebden.

Count in trover for an anchor, fails, and three cables.

S. C. 3. Ld. Ray. 148.

CITY OF YORK, *to wit.* BE it remembered, that heretofore, to wit, in the Term of *Eaſter* laſt paſt before the lord the king at *Weſtminſter* came *Hubert Vinkeſtone* by *Geoffry Vibergh* his attorney, and brought here into the court of the ſaid lord the king then there his certain bill againſt *James Ebden* in cuſtody of the marſhal, &c. of a plea of treſpaſs upon the caſe; and there are pledges of proſecuting, to wit, *John Doe* and *Richard Roe*, which ſaid bill follows in theſe words, to wit, City of *York*, to wit, *Hubert Vinkeſtone* complains of *James Ebden* in cuſtody of the marſhal of the *Marſhalſea* of the lord the king, being before the king himſelf, for that, to wit, that whereas the ſaid *Hubert* on the firſt day of *Auguſt*, in the 7th year of the reign of the lord *William*, now king of *England*, &c. was poſſeſſed of one anchor, and ſix ſail-cloths and three cable ropes, of the value of ten pounds of lawful money of *England*, as of his own proper goods and chattels; and the ſaid *Hubert* being ſo poſſeſſed thereof, afterwards, to wit, the ſame day and year at the city of *York aforeſaid*, caſually loſt the ſaid goods and chattels out of his hands and poſſeſſion; which ſaid goods and chattels afterwards, to wit, the firſt day of *October* in the 7th year aboveſaid, at the city of *York* aforeſaid, came to the hands and poſſeſſion of the ſaid *James*, by finding: nevertheleſs the ſaid *James*, knowing the goods and chattels aforeſaid to be the proper goods and chattels of him the ſaid *Hubert*, and of right to belong and appertain to him, yet contriving craftily and ſubtilly to deceive and defraud him the ſaid *Hubert* of the goods and chattels aforeſaid, hath not delivered the ſaid goods and chattels to the ſaid *Hubert*, although afterwards, to wit, the ſame day and year laſt-mentioned, at the city of *York* aforeſaid, he was requeſted by him the ſaid *Hubert*, but afterwards, to wit, the ſame day and year laſt-mentioned, at the city of *York* aforeſaid, converted and diſpoſed of the goods and chattels aforeſaid to his own proper uſe, to the damage of him the ſaid *Hubert* of fifty pounds; and thereupon he brings ſuit, &c.

Imparlance.

And now here at this day, to wit, *Wedneſday* next after three weeks of *Saint Michael* in this ſame Term, until which day the ſaid *James* had leave to imparl to the bill aforeſaid, and then to anſwer, &c. come as well the ſaid *Hubert Vinkeſtone* by his attorney aforeſaid, as the aforeſaid *James Ebden* by *Henry Clarebrough* his attorney, and the ſaid *James* defends the force and injury when, &c.

&c. and ſaith that he is not thereof guilty; and of this he puts himſelf upon the country, and the aforeſaid *Hubert* likewiſe, &c. Therefore let a jury come before the lord the king at *Weſtminſter*, on *Wedneſday* next after eight days of the Purification of the Bleſſed Virgin *Mary*; and who neither, &c. to recognize, &c. becauſe as well, &c. the ſame day is given to the parties aforeſaid there, &c. at which day the jury between the parties aforeſaid of the plea aforeſaid was thereupon reſpited between them here until *Wedneſday* next after fifteen days of *Eaſter* then next following, unleſs the juſtices of the ſaid lord the king, aſſigned to take the aſſizes in the city aforeſaid, by form of the ſtatute, &c. on *Wedneſday* the 11th day of *March*, at the *Guildhall* of the city of *York* aforeſaid, ſhall firſt come. And now here at this day come as well the aforeſaid *Hubert Vinkeſtone* as the aforeſaid *James Ebden* by their attornies aforeſaid, and the aforeſaid juſtices before whom, &c. have ſent here their record in theſe words, (to wit,) Afterwards, on the day and at the place within contained, before *John Turton*, *Knight*, one of the barons of the exchequer of the lord the king, and *Thomas Hæſletyne*, *Eſq.* to the ſame *John Turton* and *Edward Nevill*, *Knight*, one of the Juſtices of the ſaid lord the king of the bench, aſſigned to take the aſſizes in the county of the city of *York*, by form of the ſtatute, &c. being aſſociated for this turn by virtue of the writ of the ſaid lord the king of *Si non omnes*, *&c.* came as well the within-named *Hubert Vinkeſtone* as the within-written *James Ebden*, by their attornies within-contained; and the jury, whereof mention is within made, being called likewiſe came, who being choſen, tried, and ſworn to ſpeak the truth concerning the matter within contained, ſay upon their oath, that the aforeſaid *Hubert* within-mentioned, at the time within-written in the declaration within-mentioned, was poſſeſſed of the goods and chattels in the declaration of him the ſaid *Hubert* within ſpecified, as of his own proper goods and chattels. And the ſaid jurors upon their oath further ſay, that the town of *Newcaſtle upon Tine* is an ancient town, and that the port of *Newcaſtle upon Tine* is an ancient port, under the care, conſervation, and government, of the mayor and burgeſſes of that town; that by the cuſtom within the ſame town, from time whereof the memory of man is not to the contrary, the mayor and burgeſſes of the ſaid town, at their own proper coſts and charges, have been uſed and accuſtomed, and are obliged to repair and cleanſe the port, and to render it convenient for the ſafe and ſecure navigation and remaining of the ſhips there; and that in conſideration thereof the mayor and burgeſſes of the town aforeſaid, for all the time aboveſaid, have had and received, and have been uſed and accuſtomed, and ought to have and receive, a duty or toll of five-pence by the chaldron for all coals exported from the port aforeſaid, or put and loaded in or upon any ſhip with an intention to be exported, and that the officer called the water-bailiff of the ſaid town of *Newcaſtle* for the time being, or his deputy, from the

time

VINKESTONE *againſt* EBDEN.

Not guilty.

Niſi prius.

Special verdict.

VINKESTONE *against* EDEN.

time aboveſaid hath diſtrained, and hath been uſed and accuſtomed to diſtrain any goods and chattels whatſoever diſtrainable by law of any perſon's whatſoever exporting or loading upon a ſhip to be exported, the goods and merchandizes aforeſaid, and refuſing to pay the duty or toll aforeſaid, for non-payment of the ſaid duty or toll. And the jurors aforeſaid upon their oath further ſay, that the aforeſaid *Hubert*, before the ſaid time within ſpecified in the declaration within-written, loaded a certain ſhip of him the ſaid *Hubert*, called *The William and Thomas* of *Lyne*, with fifty chaldrons of coals of the value of twenty-ſeven pounds and ten ſhillings, within the port of *Newcaſtle* aforeſaid, with an intention to export thoſe coals from the ſaid port. And the ſaid jurors upon their ſaid oath further ſay, that the aforeſaid *James*, at the ſame time when, &c. within-mentioned in the declaration within-written, and long before, was the officer of the ſaid town and port called the water-bailiff, conſtituted in due manner by the mayor and burgeſſes aforeſaid, and the ſame *James*, finding the ſhip aforeſaid loaded with the ſaid coals as aforeſaid ready to be exported, aſked and demanded of the ſaid *Hubert* the ſaid duty or toll for the ſaid coals, and the ſaid *Hubert* abſolutely refuſed to pay the ſaid duty or toll, and thereupon the ſaid *James*, for and in the name of a diſtreſs, took and yet detains the goods and chattels within-mentioned in the declaration within-written, being part or parcel of the tackle belonging to the ſaid ſhip, for the non-payment of the ſaid duty or toll. And the ſaid jurors upon their ſaid oath further ſay, that the goods and chattels within-mentioned in the declaration within-written, at the time of the taking thereof were worth ſeven pounds ten ſhillings. But whether upon the whole matter aforeſaid by the jurors aforeſaid in form aforeſaid found, the ſaid goods and chattels are in ſuch caſe diſtrainable by the law of the land, or not, the jurors aforeſaid are wholly ignorant, and thereupon pray the advice and conſideration of the court here: And if, upon the whole matter aforeſaid, in form aforeſaid found, it ſhall ſeem to the Court here that they are not diſtrainable in ſuch caſe, then the ſaid jurors ſay upon their ſaid oath, that the ſaid *James* is guilty of the premiſes within laid to his charge, in manner and form as the aforeſaid *Hubert* within thereof complains againſt him; and then they aſſeſs the damages of him the ſaid *Hubert*, by the occaſion within-written, beſides his coſts and charges by him laid out about his ſuit in this behalf, to ſeven pounds ten ſhillings, and for thoſe coſts and charges to forty ſhillings: but if upon the whole matter aforeſaid, by the ſaid jury in form aforeſaid found, it ſhall ſeem to the Court here that the ſaid goods and chattels are diſtrainable by law in ſuch caſe, then the jurors aforeſaid upon their ſaid oath further ſay, that the aforeſaid *James* is not guilty of the premiſes within laid to his charge, as he the ſaid *James* within by pleading for himſelf hath alledged. And becauſe the court of the ſaid lord the king now here are not yet adviſed, &c.

* Vinkeſtone *againſt* Ebden. Caſe 175.

TROVER AND CONVERSION for an anchor, ſix ſail-cloths, and three cable-ropes.

If a corporation be entitled to a *toll* of five-pence a chaldron on all coals ſhipped at a certain port, *the tackle* of the ſhips on which ſuch coals are laden, or *the coals*, may be diſtrained, at the election of the party, for the non payment of the toll.

S. C. 1. Salk. 248.
S. C. Carth. 357.
S. C. 12. Mod. 216.
S. C. Holt, 674.
S. C. 1. Ld. Ray. 384.
S. C. 3. Ld. Ray. 217.
1. Sid. 348. 409. 454.
1. Mod. 47. 77. 104.
2. Mod. 99. 102.
1. Vent. 71.
2. Vent. 50.
2. Lev. 96.
3. Lev. 260.
37 424.
2. Stra. 1228.
1. Bac. Abr. 677.
2. Bac. Abr. 108.

Upon *not guilty* pleaded, a ſpecial verdict was found, that the town of *Newcaſtle* was, time out of mind, an ancient vill, in which there was an ancient port; that the mayor and burgeſſes of the ſaid town have, time out of mind, cleanſed and maintained the ſaid port for the ſafe navigation of ſhips, and for the benefit of exportation; that, in conſideration thereof, they, and all thoſe, &c. have, time out of mind, &c. received the toll of five-pence for every chaldron of coals exported, or intended to be exported, out of the ſaid port. They find that the plaintiff loaded a ſhip with fifty chaldron of coals; and that he refuſed to pay the ſaid toll. They find that the defendant was under-bailiff, and ſervant to the town of *Newcaſtle*, who diſtrained the goods in the declaration mentioned, for refuſing to pay the toll. They find alſo, that the ſaid goods were part and parcel of *the tackle* of the ſhip. Then they conclude, that they know not whether the ſaid goods are liable, or not, to be diſtrained for the duty, which they ſubmit to the Court; if they are not, then they find for the plaintiff; but if otherwiſe, for the defendant.

The ſingle point was, Whether *the tackle* of the ſhip may be diſtrained for this duty? or, Whether they ought not to diſtrain *the coal?*

THOSE WHO ARGUED *for the plaintiff* held, that the tackle were not diſtrainable, becauſe they are neceſſary to carry on the trade of ſailing, by which the owner of the veſſel gets his livelihood, and are therefore privileged. The ſtatute 51. *Hen.* 3. ſt. 4. (*a*) prohibits people to diſtrain *averia carucæ*; and this, my LORD COKE ſays (*b*), is agreeable to the civil law, which commands, that *executio non fiat in boves aratri aliave inſtrumenta ruſticorum*, becauſe they are of public uſe and benefit. And for this reaſon, neither a mill ſtone (*c*) nor a ſmith's anvil are diſtrainable (*d*); for if that ſhould be allowed, it would be a great hindrance to thoſe men who uſe thoſe reſpective trades; and for this reaſon the horſe of a carrier is privileged: and there is no difference as to this matter, between a carrier and the maſter of a ſhip, whoſe tackle ſhould be likewiſe privileged for the ſame reaſon. When a diſtreſs is taken for a toll, ſuch things ought to be diſtrained upon which the duty ariſes, but in this caſe the preſcription muſt be void, becauſe no duty at all is to be paid; for by MAGNA CHARTA, and other ſtatutes, the ſubject has liberty to go and come upon the ſea without being diſturbed. Now if the defen-

* [360]

(*a*) Statute Weſtm. 2d. c. 18.
(*b*) 2. Inſt. 133.
(*c*) Year Book 14. *Hen.* 8. pl. 25. Bro. Abr. 23.
(*d*) 2. Roll. Rep. 202.

VINKESTONE *against* EDDEN.

dant will prescribe for a toll upon the sea, he must lay a very good consideration to intitle himself to such duty (*a*), because it is against the liberty of the subject; but the consideration here laid is not sufficient; it is only for cleansing and maintaining a port which is for the public good of the subject, and the king is the governor of all the ports; and therefore, where the like prescription was made for maintaining a wharf or quay, the Judges inclined that it was void, because it was not a sufficient compensation to the subject to deprive him of the benefit of the law (*b*).

Two things are to be considered, where a distress is taken for a toll: FIRST, That the distress may be returned in the same condition in which it was taken: And SECONDLY, That it may be made upon such things which may be impounded, that a *replevin* may be made thereof, according to the course of the common law of this realm (*c*); neither of which can be done in this case; for when the ship is once replevied, and at liberty to sail, she cannot be returned in the same condition as when distrained, because the tackle may be damaged by the weather, and no man will be security for it when she is about to sail to another land. It cannot be objected, that here was any necessity for such a distress, because it is not found in the verdict, that this ship was like to sail out of the river. * And al- *[361]
though the jury have found, that there is *a custom* in the town of *Newcastle*, for the mayor and burgesses to repair and cleanse the port, and in consideration thereof to take a duty of five-pence for every chaldron of coals exported, &c. yet this is an outrageous toll, and therefore unlawful; for the coals there are not worth more than eleven shillings a chaldron. The statute of *Marlbridge* (*d*) requires, "that reasonable distresses shall be taken, 1. Inst. 107. "*et non nimis graves propter excessum*;" and therefore it has been adjudged, that where a lord distrained two or three oxen for one shilling, the party grieved might have an action upon that statute for the excessive distress (*e*).

BUT ON THE OTHER SIDE *it was argued*, that many things are privileged from a distress, as the horse upon which a man rides, or a carrier's horse, and a horse at a smith's shop, cloaths at a taylor's, because it is not agreeable, that the rent of a stranger should be Co. Lit. 47. paid by such things; but this must be understood where there is 14. Hen. 8. 25. other goods sufficient to be distrained; but if such are not to be 3. com. Dig. found, then even the beasts of the plough are to be distrained; "Distress." (C). for *Si summa quæ requiritur non ex aliis exurgit, nec arantibus parcendum est (f)*. Now, though it be generally true, that no man shall be distrained by the utensils of his trade, yet that must also be intended where there are goods, or other beasts, enough to be distrained, and nothing besides the rigging of the ship could

(*a*) Moor. Rep. 104.
(*b*) 2. Roll. Rep. 265. See also Cowp 47.
(*c*) Fitz Abr. "Avowry," pl. 192.
(*d*) 29. *Edw.* 4. c. 3.
(*e*) See Hutchins *v.* Chambers, 1. Burr. 579.
(*f*) Co. Lit. 47. 2. Inst. 132. Dyer, 312.

be

be diſtrained; for the coals are put under-board, and not to be come at. It would be altogether as inconvenient to bring an action of debt againſt the maſter, becauſe trade will be as much prevented if the maſter be arreſted, as if the rigging of the ſhip be diſtrained; for ſhe can ſail no more without a pilot than without ſails. Beſides, in the caſe of ſea-faring men, this is the moſt proper remedy; for no duty ariſes till the ſhip is about to ſail. * Then as to the *conſideration*, it is ſufficient to entitle the plaintiff to this duty; for though it is convenient that the ſhip ſhould ſail, it is inconvenient that ſhe ſhould ſail into a neglected port. The admiralty have the proper juriſdiction to take care of ſailing, and it is uſual in that court to take out proceſs againſt the ſails, which may intimate, that ſuch a thing may be done at common law.

VINKESTONE *againſt* EBDEN.

* [362]

CURIA. This is not diſtrainable of *common right*, but by *cuſtom*, which is laid to be as large as the common law. There is a difference between the diſtreſs which is allowed by the law for *rent*, and for a *toll* (*a*), as in this caſe.

Adjournatur (*b*).

(*a*) 3. Lev 260. Cro Eliz 540 596.

(*b*) In Michaelmas Term, 10 *Will* 3. judgment was given for the defendant, S. C. 1. Ld Ray. 386 S. C Carth. 359 ſed by HOLT, *Chief Juſtice*, the duty ariſes from the goods loaded on board the ſhip with which the maſter is chargeable; and therefore the ſhip and every thing there of the maſter's is chargeable as well as the goods. S. C. 1 Salk. 249.

MICHAELMAS TERM,

The Ninth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.*
Sir Samuel Eyre, *Knt.*
} *Juſtices.*

Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

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* Memorandum. Caſe 176.

HATSEL, *Serjeant*, was in this Term made a baron of the exchequer, in the place of BLENCOWE, *Baron*, who was removed into the court of common pleas. 1. Ld. Ray. 250.

The King *againſt* Cook, Snatt, and Collier. Caſe 177.

THE DEFENDANTS were found guilty upon an indictment for the following crime:

That *Sir John Friend* and *Sir William Perkins* were convicted for HIGH TREASON in conſpiring the death of the king; and the defendants being preſent with them at the place of execution, did all of them lay their hands on *Sir John Friend*, who ſhewed no repentance for the crime for which he was about to die, and *Cook* pronounced the ABSOLUTION, and *Snatt* and *Collier* ſaid *Amen.* That they all three likewiſe laid their hands on *Sir William Perkins*, who was likewiſe impenitent of this crime, and *Collier* pronounced the ABSOLUTION, and *Cook* and *Snatt* ſaid *Amen.* And that they all aſſiſted in and aſſented to the ſaid abſolution.

To abſolve, or to aid and aſſiſt in abſolving, at the place of execution, perſons condemned for high treaſon, is a *miſdemeanor*; for it implicitly encourages rebellion. S.C. Comb. 382. 3. Mod. 52. 1. Hawk. P. C. c. 23. ſ. 2. c. 17. ſ. 9.

THE KING *against* COOKE, SNATT, AND COLLIER.

The jury made a ſpecial concluſion in their verdict, Whether the laying on the hands of three, and but one at a time pronouncing the abſolution, makes them all guilty of the whole matter?

Adjournatur.

*[364]

Caſe 178.

Riccards *againſt* Corneforth.

In replevin, if the defendant avow the taking on the 26 *September* as a diſtreſs for two years and a half rent in arrear at the *Michaelmas* enſuing, the judgment is erroneous; for the diſtreſs is for half a year's rent more than was due; but he might have abated his own avowry for the half year *before judgment*, and had judgment for the reſidue.

S.C. 2. Salk. 580. S. C. Com. Rep. 42. S.C. 1. Ld. Ray. 855. Cro. Jac. 473. 1. Roll. Rep. 77. Moor, 281. Hob. 133. 208. Eſpinaſſe, 357. 5. Term Rep. 248.

WRIT OF ERROR upon a judgment in the common pleas for taking ſeveral cattle, in the declaration mentioned, on the twenty-ſixth day of *September*, in the ſeventh year of *William the Third*, in the pariſh of *Enfield*.

* The defendant made cognizance as bailiff to RALPH *Earl of Mountague* and *Elizabeth* his wife, and ſets forth, that the *Duke of Albemarle* was ſeiſed in fee of the lands in which, &c. and, being ſo ſeiſed, demiſed the ſame to *John Bathurſt* for twenty-one years, under the yearly rent of one hundred and forty pounds payable at *Lady-Day* and *Michaelmas*; that *the Duke*, being ſo ſeiſed of the reverſion, did on the fourteenth day of *July*, in the year 1687, make his will, and deviſed the reverſion to *the Dutcheſs*; that *the Duke* died, and that *the Earl* has ſince married *the Dutcheſs*; *et quia* three hundred and fifty pounds *de redditu præd. ſuper dimiſſionem præd. ſuperius reſervat. pro duobus annis et dimid. unius anni poſt mortem præd.* DUCIS, *finit. ad Feſtum S. Mich. Arch. ult. præterit. eiſdem* RAD'O COMITI MOUNTAGUE, *et* ELIZABETHÆ *uxor. ejus, tempore quo, &c. arreto fuerunt et inſolut'. idem* the defendant, *ut ballivus præd.* RAD'I COMITIS MOUNTAGUE, *et* ELIZABETHÆ *uxoris ejus, pro præd.* three hundred and fifty pounds *de reddit. præd.* made cognizance.

The plaintiff pleaded *in bar*, and ſaid, that before *the Duke* made his will he executed a *leaſe and releaſe* of theſe lands to *the Earl of Bath* in tail, and traverſed that *the Duke* died ſeiſed:

Upon which they were at iſſue, and the defendant had a verdict.

The error aſſigned was, that the declaration was of *Hilary Term* in the ſeventh year of *William the Third*, which was in the year 1695, and the avowry and pleadings are of the ſame Term, and the taking is laid to be twenty-ſixth *September* in the ſeventh year of *William the Third*, which was likewiſe in the year 1695; that the defendant juſtified the taking, becauſe three hundred and fifty pounds rent was in arrear for two years and a half, *finit. ad Feſtum S. Mich. Arch. ult. præterit'.* which muſt be *Michaelmas* 1695; and that *Michaelmas* rent was not due at the time of the taking the cattle, which was on the twenty-ſixth of *September*: ſo that the defendant had avowed for half a year's rent after the diſtreſs was taken, and for this reaſon the judgment was erroneous.

But

RICCARDS *against* CORNEFORTH.

BUT *on the other ſide* ſeveral authorities were cited to prove that ſo much certainty is not required in *an avowry* as in *a declaration*; for though an avowry is in ſome ſort a declaration, yet it is not ſo *in omnibus*; for the avowant is a defendant, and the law allows him more favour than a plaintiff in an action, who is to make out a title to the thing in demand; and therefore his declaration muſt be certain. In declarations there can be but one point in iſſue; but in an avowry there may be two, as for rent upon two demiſes, and if one be found for the avowant, he ſhall have a *return. habend'*. * If the avowant be not intitled to the whole rent for which he diſtrained, yet he ſhall have a return for ſo much as is in arrear. It is true, the Book ſays (*a*), "that the "quantity of the rent muſt be agreed in the pleading, and then "if a diſpute happen, how much is in arrear, and the defendant "avows for more than is due, he ſhall have a return." So where the defendant avowed for a rent (*b*), and a *nomine pœnæ* for non-payment of it, but laid no actual demand of the rent, the avowry was adjudged ill for the penalty, becauſe it could not be forfeited without an actual demand of the rent; but the plaintiff in replevin had a return (*c*), for he had good cauſe to diſtrain for his rent.

Comb. 27. 472 476. Carth. 122. 179. 8. Mod. 54.

* [365]

In the caſe of *Goodman v. Ayling* (*d*) the Court made a diſtinction between *a replevin* and *a treſpaſs*: It was an action of treſpaſs for entering his houſe, and taking a chafing-diſh; the defendant pleaded, that the houſe was parcel of a half-yard land, held of the *Earl of Northumberland*, as of his manor of *W.* by homage, fealty, incertain eſcuage, ſuit of court, incloſing of the park with pale, and a pound of cummin rent, and juſtified his entry and taking for the rent; the plaintiff replied, that it was held of another lord, and traverſed that it was held of the Earl *modo et formâ*; the jury found, that it was held of *the Earl* as of his manor of *P.* (which was not the name ſet forth in the avowry) by homage, fealty, incloſing of the park, and the rent of a pound of cummin, *et non aliter*. Here the verdict did in no ſort agree with the plea in the tenure, yet judgment was given for the defendant; and the reaſon was, becauſe it was an action of treſpaſs, in which the ſubſtance of the matter in queſtion was found, and which was ſufficient to excuſe the treſpaſs, *viz.* the taking for the rent; and that the houſe was held of *the Earl:* and though it was ſaid in that caſe, that it would have been otherwiſe in an avowry, for the avowant ought to make out a title *in omnibus*, becauſe the plaintiff in replevin is to have a return (*e*) yet that is not an authority againſt the caſe at bar, but agrees with it; for this avowant has demanded but one thing, which is rent, and which is found to be due, though not ſo much as mentioned in the declaration: and the true reaſon why an avowant for ſervices muſt make out a title to all, is, becauſe if it be found for him, it will

(*a*) Moor, 281. in the 8th reſolution in the Caſe of Bartey *v.* Trevilian.
(*b*) Howell *v.* Samback, Hob. 133.
(*c*) Brown *v.* Dunnery, Hob 208.
(*d*) Yelv. 148.
(*e*) Cro. Eliz. 799.

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be a perpetual charge upon the tenant; but in an avowry for ſeveral ſums of money due for rent, it is ſufficient if the ſubſtance be found, *viz.* that rent is in arrear, though not ſo much as in demand.

*[366] *It has been objected, that if a man diſtrain for rent due at ſeveral days (*a*), which diſtreſs is reſcued, and, in an action of reſcous brought, it appears, by his own ſhewing, that one rent is paſſed, but the other is not, at the time of the diſtreſs taken, and a verdict for the plaintiff, and damages intire, the plaintiff ſhall never have judgment for the damages he ſuſtained by reſcuing thoſe cattle from him which he had taken for rent before it was due. So in *aſſumpſit* (*b*), if two breaches be aſſigned, and one is ill aſſigned, and a verdict for the plaintiff, and *damages entire*, he ſhall never recover, becauſe damages are intended as well for the breach which is ill aſſigned as for the other which is well: from whence they would infer, that in replevin, as this caſe was, becauſe the defendant had avowed for more rent than was due, and damages entire, the judgment ought to be reverſed. But damages in an avowry are not given in reſpect of the rent for which the diſtreſs was made, but for taking the cattle, and are given to the defendant by the ſtatute 21. *Hen.* 8. c. 19. in ſuch manner as the plaintiff ſhould have if he had recovered, which muſt be for taking the cattle, and not otherwiſe, and ſo ſhall not vitiate this judgment.

Carth. 254. 386. 1. Vent. 103. Hob. 189. Moor, 887. 2. Cro. 115.

Comb. 307. Skin. 326.

IT WAS LIKEWISE OBJECTED, that by the judgment *in replevin* the return ought to be irrepleviſable; ſo the defendant, having diſtrained more than will ſatisfy the rent really due at the time of the diſtreſs taken, ſhall retain the ſurplus by virtue of this judgment for rent which was not then due.

BUT IT WAS ANSWERED, that if the value of the cattle be leſs than the rent really due, that will be a ſufficient anſwer to this objection. The cattle now taken were of the value of forty pounds, and no more, and the rent then due was two hundred and forty pounds.

But THE COURT reverſed the judgment principally for this reaſon, and ſaid, that the avowry, *quoad* the laſt half year's rent, ſhould have been abated, becauſe it was not due till three days after the diſtreſs made, and for which the defendant avowed (*c*). Now by the judgment in this action (the verdict being for the defendant) the cattle taken by him are for ever afterwards irrepleviſable for two years rent and an half, when, upon tender of the two years rent, the man ſhould have his cattle again, which were kept for ſuch rent for which they were not [367] taken, for it was due after the diſtreſs.

Judgment reverſed *niſi* (*d*).

(*a*) Year-Book 9. Hen. 7. pl. 3.

(*b*)

(*c*) But ſee 5 Term Rep. 248.

(*d*) But it appearing to be the miſtake of the attorney, the avowry was afterwards amended in the court of common pleas, S. C. Comy. 42.; and the Roll altered accordingly in the court of king's bench, S. C. 2. Salk. 580. and upon theſe amendments the judgment was affirmed, S. C. 1. Ld. Ray. 256.

Anonymous.

Anonymous.

Case 179.

NOTE. By a private act of parliament it was enacted, "that "if a trial be had between two inhabitants of *Newcaſtle* "*upon Tine*, and the damages not exceeding forty ſhillings, that "in ſuch caſe the plaintiff ſhall have no judgment, but the de- "fendant ſhall have coſts."

If a ſtatute enacts "that if damages be under 40s. the "plaintiff ſhall "not have *judg-* "*ment*, but de- "fendant ſhall "have *coſts*," the verdict in ſuch caſe muſt be entered for defendant.

An *indebitatus aſſumpſit* was brought, and a verdict for the plaintiff, and thirty ſhillings damages.

The queſtion was, How the defendant ſhould have his coſts?

And now a motion was made, that this matter might be ſuggeſted on THE ROLL.

But HOLT, *Chief Juſtice*, ſaid, that the judge of the inferior court ſhould have directed the jury to find for the defendant.

3. Com. Dig. "Coſts," (A 3.) Hullock, 170. 3. Term Rep. 452.

Woolvil *againſt* Young and Another.

Case 180.

THE PLAINTIFF declared upon the *cuſtom of England, viz.* "that if any perſon ſign a bill to pay money at a day, "he ought, by *the cuſtom*, to pay it upon that day;" and then ſets forth, that the defendants were *reſidentes et negotiantes infra hoc regnum Angliæ*, and that they had ſigned ſuch a bill, but did not pay the money.

A declaration on a bill of exchange muſt ſtate a *conſideration*, or ſhew it to be a *bill of exchange* within the cuſtom of merchants; for ſtating a cuſtom generally, that every perſon who ſigns a bill is bound to pay it, is not ſufficient.

And, upon demurrer to the declaration, IT WAS HELD to be ill, for this way of declaring ſo generally will exclude all conſiderations which muſt be averred. Every man is *negotians* in the kingdom; and if the plaintiff would have brought his caſe within the *cuſtom of merchants*, he ought to have ſaid *commercium habentes*, or have ſhewn that the bill ſigned was *a bill of exchange*. It is true, in the caſe of *Sarsfield v. Witherly* (*a*), the declaration was, that the defendant *Witherly* was *reſidens et negotians* at *London*, &c. without ſaying *commercium habens*; but it appeared upon the whole frame of the declaration that it was *a bill of exchange*.

1. Salk. 124, 125, 127, 130, 132. Ante, 13.

Co. Lit. 182. Yelv. 136. 4 Co. 76. Cro. Car. 301. Hend. 486. 1. Salk. 124. 130. Comb. 397. Carth. 83. Skin. 264. 1. Ld. Ray. 175 281. 2. Ld. Ray. 1542. 3. Bac. Abr. 614. 3 Mod. 226. 4. Mod. 242. 1. Show. 130. 317. Kyd on Bills of Exchange, 116.

(*a*) 2. Vent. 295.
See 9. & 10. Will. 3. c. . and 3. & 4. Ann. c. 9.

* Gregory's Caſe.

Case 181.

GREGORY was committed by commiſſioners of bankrupts for not anſwering and making a diſcovery of his eſtate; and now he appeared in court upon a *habeas corpus*.

The Court will not diſcharge a *bankrupt* committed by the commiſſioners on affidavit of his having complied. Ante, 274. 308. 2. Stra. 880. Cook B. L. 479.

It

Carochy's Case.

It was moved that the writ might be filed, and that he might be discharged upon producing affidavits that he had made a discovery.

But THE COURT would not discharge him; for if the commitment be void, he may bring an action of false imprisonment (*a*).

In what manner commissioners may examine bankrupt.

1. Atk 222
2 Burr 1124

The Court said, that the commissioners need not ask the party whether he will be examined or not, for the statute (*b*) gives them power to examine upon *interrogatories*, which they must prepare, and tender to him ready drawn (*c*). And this being not returned upon the *habeas corpus* (*d*), the warrant of commitment for that reason was held void (*e*).

(*a*) See 1 Salk, 348 2 Bl Rep 1144

(*b*) 1 Jac 1 c 15

(*c*) But now by 5 Geo 2 c 30 s 16 the commissioners may "examine, as well "by *word of mouth* as on *interrogatories* in "writing, all and every person and p "sons against whom any commission of "bankrupt shall be awarded, touching "all matters relating to the trade, de- "ings, estate, and effects of such bank- "rupt, and may also examine in manner "aforesaid every other person duly sum- "moned before or present at any meet- "ing of the commissioners touching all "matters relating to the person, trade, "dealings, estate, and effects of such "bankrupt, &c and shall reduce the "answers to the said examinations into "writing, &c &c which the party ex- "amined shall sign"

(*d*) By 5 Geo 2 c 30 s 17 "If "any person shall be committed for not "answering any question put by the "commissioners, the question or ques- "tions must be specified in the warrant "of commitment"

(*e*) By 5 Geo 2 c 3 s 18 on the return to any *habeas corpus* on such commitment, if the warrant shall appear insufficient, the Court before whom the party shall be brought, shall commit such person, unless it appear that he has fully answered, &c

Case 182.

Ellis *against* Ellis.

If, to an action for money *lent* and *laid out*, the defendant plead *infancy*, A REPLICATION that it was for *necessaries*, without saying any thing as to the *money lent*, is bad.

INDEBITATUS ASSUMPSIT was brought against an executor for sixty pounds, as well for money *lent* and *laid out* for the testator, &c. The defendant pleaded that the testator was *an infant*. The plaintiff replied, PROTESTANDO that *William Ellis* the testator was not at that time an infant, PRO PLACITO says, that he laid out money for lodging, and for meat and drink for himself and family, and that it was so laid out for *necessaries*.

And, upon demurrer to this replication, judgment was given for the defendant, for though the plaintiff had made a good answer concerning the money *laid out*, yet he said nothing to maintain his declaration for the money *lent*.

S.C. Comb 842 S.C. 3 Salk 197 S.C. 12 Mod. 197 S C Id Ray 344 1 Salk 279 386 3 Com Dig ("*Enfant*" (C 2) 2 Str. 1083. 3 Bac Ab 134 a 1. Term Rep 40

Brewſter *againſt* Kidgil.

Caſe 183.

A rent-charge in fee was granted in the year 1649, with AN INDORSEMENT on the deed, "*that the true intent and meaning of the parties was, that the ſaid rent-charge ſhould be paid clear of any taxes on the* LAND *or the ſaid* RENT;" which clauſe was confirmed in 1652. By 4 *Will. & Mar.* c. 1 four ſhillings in the pound is laid upon *land*, to be deducted by the tenant from the rent, with A PROVISO that it ſhall not alter the covenants or agreements of the parties. AND IT WAS HELD, that as the *land-tax* exiſted prior to the grant of the rent-charge, this covenant on the part of the grantor extended to it, and freed the rent-charge from it, although the particular land-tax was impoſed ſubſequent to the grant.

S.C. 1. Salk. 198. S.C. 2. Salk. 675. S.C. 3. Salk. 344. S.C. Comb. 424. 466. S.C. Carth. 438. S.C. 12. Mod 160 171. S.C Holt, 175. 609. a. 669. 5. Co. 16. Hard. 89. 2. Brownl. 281. 4. Co. 80. Carth. 135. Ld. Ray 317. 1. Bac. Abr. 540.

THIS was a ſpecial action on the caſe, upon a feigned iſſue, by conſent, to ſettle a difference between the grantor and the grantee of a rent-charge concerning the payment of taxes.

The plaintiff declared, that he was ſeiſed of a rent-charge in fee of forty pounds a-year iſſuing out of the lands of the defendant, &c. The defendant confeſſed the ſeiſin, but averred that it was lawful for him to deviſe four ſhillings in every pound out of the * ſaid rent for two years and a half, by virtue of an act of parliament, &c. The plaintiff avers, that it was not lawful for him to deduct it; and concluded to the country. The defendant joins iſſue.

This cauſe was tried in *Middleſex*, and the jury found a ſpecial verdict, *viz.* that on the twenty-ſixth day of *November*, which was in the year 1649, one *Robert Langford* was ſeiſed in fee of thoſe lands, and by a deed of the ſame date, for and in conſideration of the ſum of eight hundred pounds paid to him by the ſaid *Ellen Brewſter*, granted to her and her heirs forty pounds a-year, to be iſſuing out thereof, payable every half year. There was a covenant for farther aſſurance, on which deed this MEMORANDUM was indorſed: "MEMORANDUM, That it is the true intent "and meaning of theſe preſents within written, that the ſaid "*Ellen Brewſter* and her heirs ſhall be paid the ſaid rent charge "of forty pounds a-year for ever after, without any abatement, "deduction, or defalcation, for or on account of any taxes upon "the lands or the ſaid rent." But it was not proved when this indorſement was made, or by whom. Afterwards the ſaid *Robert Langford*, by another deed made in the year 1652, granted and confirmed this rent-charge to the ſaid *Ellen Brewſter* and her heirs, and covenanted therein, that he was ſeiſed in fee of the lands out of which the ſaid rent was iſſuing; that it was free of all incumbrances; that he had good right to grant; and that the ſaid yearly rent, free of all taxes, ſhall for ever after be paid to *Ellen Brewſter* and her heirs.

The queſtion was, Whether the indorſement in the firſt deed, or the covenant in the ſecond deed, be ſufficient to diſcharge the rent from the taxes now impoſed by act of parliament?

The firſt clauſe of this act charges four ſhillings in the pound upon land; but then there is A "PROVISO, that nothing ſhall make "void any agreements between landlord and tenant." In the ſtatute 4. *Will. & Mary*, c. 1. there is no proviſion made for rent-charges, but in the latter acts thoſe are comprehended. Now a rent-charge can be ſubject to no other but parliamentary taxes; it is not contributory to church, poor, ſewers, or highways. The

words

Brewster against Kingsh.

words "tax" and "tribute" are synonymous; and, properly speaking, no other charge upon lands is a tax but such as is impoſed by parliament; for ſums of money which are collected * for the relief of the poor are called *rates* or *aſſeſſments*, and have no other denomination; and this was firſt charged upon land by virtue of the ſtatute 43. *Eliz.* c. 2. for before that time poor people lived upon the charity of religious perſons. The word "*tax*" is alſo the ſame with *tallagium*, only the latter is a general word in which the former is included; but both are taken to be when the king has a ſhare of the goods or yearly profits of the lands, and are properly of parliamentary uſage. Now though it do not appear when this indorſement was made, yet it is plain that it muſt have been before the ſealing of the other deed. Therefore this word muſt refer to taxes impoſed by parliament, and cannot be reſtrained to other taxes alone, becauſe then it would be to avoid the intent of the grantor, who uſed general words to free the rent from taxes. And ſuch conſtruction is rather to be made of this word "*tax*," becauſe at the time when this deed was made there was an ordinance for a land-tax impoſed by the authority then in being; and all words in deeds are to be conſtrued moſt ſtrongly againſt the grantor, both with reſpect to the intereſt granted and the qualification of the grantor. It is true, that a multitude of words are now confuſedly put together by ſcriveners in all conveyances, as "that the lands ſhall be free from all taxes, ordinary or extra-"ordinary, impoſed or hereafter to be impoſed, &c." but ſuch clauſes will not guide the judgment of this Court to expound this ſentence.

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IT WAS INSISTED *on the other ſide*, that the late acts of parliament do allow the tenants of the land to ſtop the taxes out of the rent; but there is A PROVISO which excepts agreements between landlord and tenant: but this caſe is not within that proviſo, neither is any thing found by the verdict which hinders the defendant from deducting the tax out of this rent. The words of the indorſement are not found to be part of the deed, or by whom ſigned, or when, or that it was the agreement of the parties to the deed upon which the indorſement was made; for the jury find generally, that "*ſuper indentur. ſic indorſatur*;" ſo that muſt be out of this caſe. Then it muſt depend upon that covenant in the deed made in 1652, wherein the grantor covenants that the rent ſhall be "freed of all taxes, and ſhall be ever paid, &c." * Now this is not a covenant which is ſaved in this act of parliament, becauſe ſuch muſt be a proper agreement relating to parliamentary taxes only. The word "*tax*" relates to ordinary taxes and impoſts, ſuch taxes which are made for relief of the poor, or by authority of commiſſioners of ſewers. It is uſed in the very commiſſion which is given by the ſtatute of 23. *Hen.* 8. c. 5. It is alſo named in the ſtatute of *Queen Elizabeth*; and it has been ruled (*a*), that an inhabitant who has a rent charge, and no other

[371]

(*a*) See Mr Conſt's Edition of Bott's Poor Laws, vol i. ch. 2. ſect. 7.

land

land in the parish, shall be liable to that tax for the poor; therefore there is no reason to construe this word to relate to parliamentary taxes alone: And such as these were the constant taxes when this deed was made. There was nothing like this covenant in the original deed by which this rent was granted, but in the deed for further assurance, and no alteration is found of that first agreement between the parties, but these words were thrown in by a scrivener; therefore it shall not be intended that men do covenant against great and public charges unless particularly named. But if it should be otherwise construed, these words should then extend to no other taxes but such as were in being at the making of this grant, and not to future taxes, for though the word "*tax*" be a general word, yet an express covenant between the parties "to free the rent from all taxes," shall tie it up to those taxes alone. Agreeable to this is the resolution in *Nokes's Case* (*a*), which was, A man "*grants and demises*" a house for term of years (which words in a grant import a covenant in law), and he expressly covenanted for quiet enjoyment against himself and all claiming under him, and gave bond for performance of covenants, in action of debt was brought upon this bond, and the breach assigned was, that a stranger had recovered in ejectment; and the Court held, that the express covenant, which was much narrower than the covenant in law, restrained that covenant, though it was resolved against the plaintiff in another point, *viz.* because the plaintiff did not shew that the eviction was not by an elder and sufficient title upon which it was had, for though the stranger recovered by law, yet it may be without a title.

BREWSTER *against* KIDGELL.

Cro Car 176. 2 Brownl 213. Co Lit 139. b.

* CURIA. The question is, Whether this covenant *ex vi termini* is to extend to any imposition to be made by a law subsequent to that covenant? It should have been, "all taxes imposed, or "hereafter to be imposed by act of parliament." It cannot be denied, but that this covenant obliges *Lanft* and his heirs to pay the rent clear of all taxes, and if so, it extends to such taxes which shall be given by act of parliament.

* [372]

Carth 438. Comb 211. 424. 466. Dyer, 52. Plowd 1. 35 *Hen* 6. pl. 10.

FIRST, Because where *taxes* are mentioned (if the subject matter will allow it) it must be intended taxes by parliament, which are the most eminent. This is agreeable to the opinion of those in former times, who were conversant in the affairs of THE EXCHEQUER, that *a tax* was nothing else but *a subsidy* granted by parliament. There were other ways of taxation then in being, as *a fifteenth* part of the lands or goods of the laity. This was called *a quinzime*, and granted by parliament, and was at first set upon the polls, but afterwards was imposed upon every town in *England*, and then the inhabitants of the respective towns taxed themselves (*b*). The clergy paid yearly *the tenths* of all their spiritual livings, and these were called *dismes*; but when the

(*a*) Nokes *v.* James, Cro. Eliz 674. S. C. 4 Co. 80.

(*b*) See Year-Book 34. *Hen* 8. abridged by Brooke, title "*Quinzme*, pl 9.

laity

Brewster against Kidgell.

laity paid both *tenths* and *fifteenths*, that muſt be underſtood of perſonal eſtates, and not ariſing out of their lands, *viz.* the tenth part of their goods in cities and borough-towns, and the fifteenth part in the county at large; and this was the ancient way of taxing the people. Now whilſt thoſe taxes were in being, ſuch a covenant as this would have no reſpect to a rent-charge, becauſe the land was always charged, and every occupier knew what to pay, and the rent was never charged. Afterwards there were *ſubſidies*, and thoſe were always granted by parliament upon urgent occaſions, and were uſually ſet upon the perſon in reſpect of his lands or goods, *viz.* for lands at four ſhillings in the pound, for goods at two ſhillings and eight-pence: This way of taxing began about the thirty-ſecond year of *Henry the Eighth*; and in thoſe days, if the tax upon *the land* amounted to more than that laid upon *goods*, then the land uſually paid the tax, and men were then taxed where they lived, and not where they had land. * And even in ſuch caſe there had been no occaſion for ſuch a covenant, for the grantee of a rent-charge was never liable to pay ſuch taxes, which were ſtill impoſed by reaſon of the land. This way of taxing continued till the latter end of the reign of King *Charles the Firſt*; then came *aſſeſſments*, or *royal aids*, which were almoſt the ſame thing; and laſt of all, *pound-rates*. The deſign of the parties in 1649, was to eſtabliſh a rent for ever free from all taxes; it was in that very year in which taxes of this nature did obtain. If this covenant had been made in the year 1640, it would not have extended to this caſe, becauſe there were no taxes then in being which charged the land or perſonal eſtate; but in 1649, *the rent* was as much taxed as *the land*. The firſt ordinance of aſſeſſment was in *February* 1642; there was another in *February* 1644, and another in *April* 1649; and by this laſt ordinance, *rents* were taxed, and it was in force when this covenant was made. Now though theſe were not real acts of parliament, but made in the times of uſurpation, yet they had the ſame efficacy; they had power, but not a legal power, to which the people did generally ſubmit.

* [373]

ANOTHER REASON why this rent ſhould be taxed, is, becauſe the grant thereof is in fee, and it would fall ſhort of that eſtate if the covenant ſhould not extend to future acts of parliament. The expoſition of ſtatutes is the ſubject matter of this Court; and it cannot be denied that ſubſequent acts of parliament have been expounded to relate to things done long before the making ſuch acts: As where there was tenant in tail, and for want of iſſue by him, the remainder in tail to one *Baſſet* (*a*), the tenant in tail, before the ſtatute which enabled him to make a leaſe for twenty-one years, or three lives, entered into a recognizance to him in remainder, that he would not alter or diſpoſe the land, but for his own life; and it was adjudged, that if he made a leaſe purſuant to the ſta-

(*a*) Dyer, 48. b. pl. 5.

tute,

tute (*a*), it was a forfeiture of his recognizance, though made before the ſtatute. So is the *Rector of Chedington's Caſe* (*b*), to whom *Henry the Fourth*, by letters patents, granted, "that he, "and his brethren, and ſucceſſors, ſhould be for ever diſcharged of "all *taxes*, when and as often as the ſame ſhould be granted to "him by the commons, or *a tenth* by the clergy," and afterwards *a tenth* was given to the king by the clergy; the collectors of this revenue, when they came to give up their accounts, pray to be diſcharged of this matter, becauſe they could not levy *the tenth* upon the rector, by reaſon of the king's charter of exemption; whereupon proceſs went out againſt him, and he pleaded theſe letters-patents, and THE ATTORNEY GENERAL demurred; and it was objected by FORTESCUE, *the King's Serjeant*, that the grant was void, becauſe the king had not this revenue at the time of the grant made; but the latter opinions were, that the grant was good: So here, though this covenant was made in general words long before theſe ſtatutes, yet it ſhall extend to ſubſequent proviſions made by act of parliament. It has been objected, that though it may extend to *taxes* given to the crown by way of *aſſeſſment*, yet it cannot to thoſe *real taxes*. But theſe taxations differ not in ſubſtance, but in form; for *taxes* and *aſſeſſments* are of the ſame nature, and the ſame things are taxed by both, *viz.* rents as well as lands.

BARWISTER *againſt* KIDGIL.

19. H. 6. fol. 8a.

*[374]

THE COURT did not like this way of trying cauſes by *wagers* (*c*).

And they were of opinion, that the plaintiff had no remedy at law upon this covenant againſt the now defendant, for he was only a *terre-tenant*, and could not be charged as *aſſignee*, becauſe the covenant did not run with the land, neither was it annexed to the thing granted; and therefore he ought to bring an action againſt the grantor or his heirs; for this covenant does not extend to any thing or parcel of the demiſe, but to *taxes* which had not exiſtence at that time, and is, for that reaſon, a perſonal covenant, by which the heir may be charged in reſpect of aſſets deſcended, and not otherwiſe. He might have remedy in equity againſt the aſſignee, but not at law, for that would be to make this covenant of as high a nature as a *warrantia chartæ*.

The *grantee* of a rent-charge in fee cannot maintain COVENANT againſt the *aſſignee* of the land. 5. Co. 16. Spencer's Caſe, Hard. 87. Cook *v.* Earl of Arundel.

(*a*) 32 *Hen.* 8. c. 28.
(*b*) 1. Co. 153.
(*c*) See Annally's Rep. 237. 3. Term Rep. 697. 2. H. Bl. Rep. 45.

Mandamus to grant Adminiſtration.

Caſe 38.

A MANDAMUS was granted laſt Term to the judge of the ſpiritual court, to grant adminiſtration to *J. S.* who, as he ſuggeſted, was *next of kin* to the inteſtate.

If there be a controverſy in the ſpiritual court concerning *adminiſtration* to a *will*, the court of king's bench will not iſſue a *mandamus* to compel the granting of the *next of kin* to the ſuppoſed teſtator on a ſuggeſtion that he died inteſtate.—1. Salk. 308. Carth. 153. 2. Stra. 918. 1192. 1. Wils. 12. 1. Salk. 37. FITZ. 292.

NOR-

MANDAMUS TO GRANT ADMINISTRATION.

[375]

NORTHEY moved for *a supersedeas* to it, for that the fact was, That *J. S.* being cited, refused to come in; upon which another of the kindred sued for administration, but was opposed in it by one who pretended there was a will; which matter was now under controversy before the judge there; and therefore until that was determined, the spiritual judge could not obey the *mandamus*.

SHOWER. You commonly grant *a mandamus* to the judges of the spiritual court, upon suggestion that *J. S.* died intestate, and that *J. S.* is next a-kin, and if it be so, they may take issue upon it, and so they may do in this case.

HOLT, *Chief Justice*. Is there no difference between a controversy and no controversy? When there is no controversy, we do so, but here is a controversy, and we will not grant a *mandamus* until it be determined, for suppose the will shou'd prove good, what then will the granting administration signify (*a*)?

(*a*) But see Walter v Woolston, 2 S C Pr 202 Wise v Rich, 2 Atk Prec Wms 576 to 593 S - 317 2 S and Imp to Pr 2 1 6, 10th

Case 185. Sutton *versus* Moody.

Trespass for breaking a man's close, and there hunting and carrying away his conies, is good, for though conies are *feræ naturæ*, yet, whilst they are on a man's soil, he has a property in them *ratione loci*

ACTION was brought for breaking the defendant's close, and hunting his conies, &c.

GOULD, *Serjeant*, moved in arrest of judgment, that no action will lie for hunting *conies*, which are *feræ naturæ*, and so is *Greenhill's Case* (*a*). As to deer in a park, and conies in a warren, the owner has a special property in them as long as they are in the warren or the park, but if they be not in a park or warren, he may not say *suas*, unless he add, "that they were domestic." indeed, had it been *warrenam suam*, it might have been good, but now as it is laid, there can be no property presumed

S. C. 2 Salk 556 S. C. Comb 458 S. C. 3 Salk 290 S. C. 12 Mod 344. S. C. Holt, 608 S. C. 1 Ld Raym. 250. S. C. Comy Rep. 34

E contra We take it to be good enough. in *Rastal* (*b*), and in *The Register* (*c*), there is an action for breaking his close, and taking away his *sparrow hawks*, and certainly they are as wild as *conies*; so is *Thel. Digest* (*d*), and *the Year-Book* (*e*); and *Greenhill's Case* (*f*) does not come up to this case, for it must be meant, that if they are not in the plaintiff's soil, then no action lies. So in *Ventris* (*g*), where in trespass *quare pisces suos cepit in separali pischaria*, it was moved in arrest of judgment, that the plaintiff

34. Hen. 6 pl 59 5 Co 104 7 Co 17 Godb 123 Cro Jac 195. Yelv 104 Cro Car. 553. 1. Vent 122. Hutt 16 3 Lev 227 Carth 285. Owen, 98 14. Vinet, 329 18. Viner, 72. 2. Bac Abr. 613. 2. Bl. Com 419.

(*a*) Cro Car 553
(*b*) Rastal's Ent 450.
(*c*) The Reg 93.
(*d*) Theol. Dig. 196.
(*e*) Year Book 25 Hen 6 pl 59 b.
(*f*) 1 Jones, 440. S. C Cro. Car. 553
(*g*) 1 Vent. 122.

ought

ought not to have called them *piſces ſuos*, unleſs they had been in a ſtew or pond, *Sed non allocatur*; for after verdict it ſhall be intended they were in a ſtew-pond, but it had been good upon demurrer; it was good by reaſon of local property; and then * this being after a verdict, it ſhall be preſumed the plaintiff proved a property. Sutton against Moore. [376]

HOLT, *Chief Juſtice*. The conies are as much *his* in his own ground as if they were in a warren, and the property is *ratione ſoli*. The warren does not give a greater property. So in the *Year-Book* of 12. *Hen.* 8. *pl.* 10. If a man ſtart *a hare* in his own ground, he has a property in it *ratione loci*. Indeed, if *deer* eſcape out of a park into the neighbouring ground, you have no longer a property. 1. Cro. 388. 1. Roll. 405. Ray. 16 Yelv. 104. 5. Co. 405. 7. Co. 17. Cro. Jac. 195. 229.

GOULD, *Serjeant*. As for the caſe of *the hawks* (*a*), there was a property *ratione impotentiæ*.

ROKEBY, *Juſtice*. Here is *a verdict*, and it was in his own cloſe, and why ſhould any man come there?

HOLT, *Chief Juſtice*. If the declaration had been *cuniculos* generally, you ſay he ſhould recover damages; and why, in that caſe, if not in reſpect of the conies? Leave out *ſuos*, and the jury may give damages. Perhaps theſe rabbits were for the ſuſtenance of his family; and why ſhould you deprive him of it?

JUDGMENT was given for the plaintiff by THE WHOLE COURT, becauſe he had a property by the poſſeſſion.

(*a*) Dyer, 306 pl. 66

Smallcomb *againſt* Buckingham.

Caſe 186.

TWO writs of *fieri facias* were delivered to the ſheriff on the ſame day; ours was delivered firſt, which, we ſay, bound the property. Indeed, at common law, before the ſtatute 29. *Car.* 2. c. 3. of frauds and perjuries, if the writ that had the laſt *teſte* had been delivered firſt, yet the writ that had the firſt *teſte* muſt take place, as it is in *Cro. Eliz.* 174. and if the lands are charged by the delivery of the writ, no doubt but the ſheriff may ſell the goods. Now ſuppoſe, after the ſale of the goods by *fieri facias*, the king's writ comes, the goods may be ſeized again for the king; for it can be no concluſion or *eſtoppel* to the ſheriff.

If two writs of *fieri facias* be delivered to the ſheriff on the ſame day, that which is firſt *executed*, though *laſt delivered*, ſhall have priority; but the party who delivered the firſt writ, may have remedy againſt the ſheriff.

Now, for the late ſtatute of frauds and perjuries, the queſtion is, Whether there ſhall be a fraction in a day? for the ſtatute ſays,

S. C. 6. Mod. 292. S. C. Comb 428. S. C. 1 Salk 320. S. C. Carth 419. S. C. 3. Salk. 159. S. C. Holt, 302 S. C. 12. Mod 146. S. C. 1 Ld. Ray 251. S. C Comy Rep. 35. 6. Mod. 292. 3. Com. Dig. 308. 2. Bac Abr. 352. 456 4. Bac. Abr. 460. 10. Vin. Abr. "Execution," (A. a.) pl. 18. 11. Vin. Abr. "Execution," (Q. a. 2) pl. 14. Vin. Abr. "Time," (A. 3) pl. 6.

SMALLCOMB *against* BUCKINGHAM.

says, "time of delivery," but not the day (*a*) of the delivery, *viz.* "that no writ of *fieri facias*, or other writ of execution, shall "bind the property of the goods against whom such writ of exe- "cution is sued forth, but from *the time* that such writ shall be "delivered to the sheriff, under-sheriff, or coroners to be exe- "cuted and for the better manifestation of the said *time*, the sheriff, "under-sheriff, and coroners, their deputies, and agents, shall, "upon the receipt of any such writ, indorse upon the back there- "of the *day of the month*, *or year*, whereon he or they receive the "same" * Suppose the sheriff make an indorsement, yet the parties are not concluded, but the marking it is only directory to the sheriff. I agree, there is no division of a day, unless in case of necessity, as in *Co. Lit.* 135 and 6. *Co.* 33. *b.* where there was priority of an instant. If twenty four hours must be the whole time, then we are in the wrong; but if only the very time of its delivery, then, with submission, our writ ought to take place, it having been first delivered (*b*). Goods are liable to execution from the time of the *teste* of the *fieri facias*, and this shall be said *emanatio brevis* (*c*).

* [377]

Vide 1 Co 76. 174
Ow 1 6.
Cro Eliz 726 792
2 And 131

Comb. 452

SHOWER. If the king's writ of *extent* come out after execution, yet the execution is superseded, and the king's *extent* shall take up the goods, but if the sheriff had sold the goods by *bill of sale*, &c. the property is altered, and shall not be devested by the king's writ (*d*). So here are two writs indorsed the same day, and the sheriff, having made the *bill of sale* to us, is thereby concluded.

HOLT, *Chief Justice.* This is a case of some concern, and it is fit that the law should be settled, and it is worthy consideration. Indeed, here was an honest sale, you put in the writ and let it lie longer, then comes the other and brings the writ the same day, and calls for *a warrant* presently, and so gets *a bill of sale*, and executes it honestly, and now you would defeat it.

(*a*) 1 Keb 930 1 Lev 103 3 Lev 69 191 3 Mod 236 4 Term Rep 209

(*b*) 1 Sid 202 Cro Eliz 440. 3 Keb 379.

(*c*) Bailey *v.* Bunning, Ray 142

(*d*) In the case of Lechmere *v.* Thorowgood, in Trinity Term, 4 *Jac.* 2. LORD HOLT, *Chief Justice*, is made to say, that the property of the goods is vested by *the delivery* of the *fieri facias*, and, therefore, that *an extent* from the crown afterwards comes too late, Comb 123 In the case of Cooper *v.* Chitty, however, LORD MANSFIELD is made to say, that *Comberbatch* must be mistaken in this part of his report, for that no *insertion* of an execution can bar THE CROWN, 1 Burr 16 But this imputed mistake seems to be doubted, 4 Term Rep 412 And in the case of Upton *v.* Sumner, it is decided, that a judgment recovered by a subject, though not completely executed, shall be preferred to the *king's extent* sued out posterior to the judgment, 2 Bl Rep 1294. This determination was recognized as good law in the case of Rourke *v.* Dayrell, where it is determined, that if goods be taken in execution on a *fieri facias* against the king's debtor, and, before they are sold, an *extent* come at the king's suit, grounded on a bond debt, tested *after* the *delivery* of the *fieri facias* to the sheriff, the goods cannot be taken upon the *extent* 4 Term Rep 402. See also 2 Com. Dig 538. (G 8) 2. Bac. Abr. 352.

At

At another day,

SMALLCOMB *against* BUCKINGHAM.

HOLT, *Chief Justice.* Though the *fieri facias* was delivered, yet, says the party to the sheriff, you may let it lie, it requires no haste; and therefore desires no *warrant*, nor leaves any fee. Now when a second *fieri facias* comes out the same day, upon which the sheriff presently grants, and makes a *bill of sale* of the goods, the sale shall be good, and shall not be avoided. Though the second *fieri facias* was delivered a fortnight after, yet if it be the first executed, it shall be good, and the party has only his remedy against the sheriff (*a*).

(*a*) See the case of Rybot *v.* Peckham, Mich 19 *Geo* 3 B R 1 Term Rep 731 *notis*, that where a *fieri facias* is delivered to the sheriff, and the officer has levied the debt, and *mad a bill of sale*, it shall have priority of a former execution in the office and Hutchinson *v.* Johnston, Lister, 27 *Geo* 3 that when two writs of *fieri facias* against the same defendant, are delivered to a sheriff on different days, and *no sale is actually made* of the defendant's goods, the *first execution* must have the priority, even though the seizure was first made under the subsequent execution. 1 Term Rep. 729

* [378]

* Winter *against* Loveday.

Case 187.

Resolutio Curiæ.

THE case, upon a special verdict, in short, is thus: *George Pawlet* makes a settlement on marriage, in which there is this POWER: "That it shall be lawful for the said *George Pawlet*, "during his life, to make leases of the said lands, for the "term of three lives *in possession*, or for the term of thirty "years, or for any other term or number of years, for one, "two, or three lives *in reversion*, so that it be not of *an-* "*cient demesne* lands." And the lands which were leased in pursuance of this power, were *copyhold lands*, and made for thirty years, and, for aught that appeared, were in the hands of the tenants at that time, and if so, then they could not be leased out in possession.

A POWER to grant leases of "a *manor* and "other hereditaments in "*possession* for "one, two, or "three lives, or "thirty years, "or for any "other number "of years, de- "terminable "upon one, "two, or three "lives; or, in "*reversion*, for "one or two "lives, or for "thirty years, "or for any "other number "of years deter-

EYRE, *Justice.* Upon this case, two questions arise:

FIRST, Whether *George Pawlet* had power to make a lease for thirty years, or any other term, determinable on one, two, or three lives? And it is clear that he had such power. It seems to me, that here are distinct clauses; the words, "or for any other "term of years, &c." plainly describe another estate; so that he

"minable upon one or two lives, *so as* such demise be not made of any of the *ancient demesne lands* "parcel of the said manor," is well executed by the grant of AN ABSOLUTE LEASE for *thirty years*, to commence after the determination of an existing lease for two lives, PROVIDED it be not of *copyhold lands*; for *ancient demesne* being a quality inseparable from all copyhold lands, they are restrained by the PROVISO, as being "*ancient demesne lands*, parcel of the manor;" but the *rents* and *services* are demisable within THE POWER — S. C ante, 244. S. C. 2. Salk. 537. S. C. Comb. 371. S C. Carth. 427 S. C 12 Mod 147 S. C. Holt, 414. S. C. 1. Ld. Ray. 267. S. C. 1. Freem 507. S C Comy Rep 37. 6. Mod 20 Raym. 132. Poph. 9. Yelv. 222. Lutw. 269. Moore, 404 Fitz 156. 1 Salk. 187 Moor 184.

WARTER against LOVEDAY.

should have power to make a leaſe for thirty years abſolute, or to make a leaſe for any term determinable upon lives. There is a difference; where a man has a power to make a leaſe indefinitely, there he ſhall not make a leaſe upon a leaſe, &c. but where a power expreſſes what leaſe he ſhall make, as a leaſe *in poſſeſſion*, or *in reverſion*, there he may make it accordingly, *Yelv.* 222. Upon a general power to make leaſes, without more ſaying, the law ſhall adjudge, that theſe ought to be LEASES *in poſſeſſion*; for if, by ſuch power, he may make a leaſe upon a leaſe, he might make leaſes *in infinitum*, and detain thoſe in remainder from the poſſeſſion for ever; which is contrary to the intent of the parties, and againſt all reaſon.

SECONDLY, Whether he could make ſuch a leaſe of theſe lands which are copyhold; for that *demeſne lands* are excepted? So that if the lands in queſtion are parcel of the *demeſne lands*, this leaſe cannot be good. *Now if they were copyhold lands, they muſt be parcel of the manor, ſince the freehold is in the lord, and in law they are but tenants at will ſtill, and ſo is *Lit. ſect.* 553. Therefore upon this SECOND POINT, I hold that this leaſe is not warranted by the power; and that, for this reaſon, judgment ought to be for the plaintiff.

*[379]

TURTON, *Juſtice*. I concur with my brother who ſpoke laſt, that the leaſe, under which the defendant claims, is not warranted by the power.

FIRST, I take it, that *George Pawlet* had a power to make a leaſe for thirty years abſolutely; and it ſeems to me, that the intention was, that he ſhould have ſuch a power, or elſe theſe words would have been altogether inſignificant; and the words, "or for any other term," would have been ſufficient of themſelves; and if it ſhould have been for thirty years, for one, two, or three lives, it would have been too ſcanty.

Vide ante, 245, 246. 8 Mod. 20.

NOW THE NEXT QUESTION is, Whether theſe lands, being copyhold lands, could be demiſed, for that in judgment of law, copyhold lands are parcel of *the demeſnes*? So is 1. *Inſt.* And if copyholds are parcel of *the demeſnes*, then they are out of the power.

SECONDLY, The next thing I go upon, is upon the marriage-ſettlement, and the conſideration is a portion of eight thouſand pounds, and therefore it ſhall be taken ſtrictly againſt *George Pawlet*. Then it cannot be preſumed, that it was the intent of the parties, that ancient copyhold tenures ſhould be deſtroyed; and the wife here was to have ſuch a power, though ſhe had but a jointure. Beſides, here were other lands upon which the power might have been exerciſed. Upon the whole, I am of opinion, that judgment muſt be for the plaintiff.

ROKEBY,

Rokeby, *Juſtice.* I concur, that this leaſe is not warranted by this power. All powers ought to obſerve two rules: First, The conſtitution of theſe powers ought to be interpreted according to the intent of the parties. * Secondly, The powers muſt be ſtrictly purſued. As for the intention of the parties: First, It ſeems to me that their intention was not to take away the copyhold tenures, and ſo to have deſtroyed the manor; and I conceive that copyhold lands are parcel of *the demeſnes* of a manor. Secondly, I take it, that whatever number of years the leaſe was made for, it was to be ſubject to a determinability of life or lives; for the "*ita quod, &c.*" ſeems to take care, that the owners of the fee ſhould ſtill have a ſuſtenance for their families. The freehold of the copyhold is ſtill in the lord, and the copyhold itſelf is only at will. The words, "for any other term or number of years," have no weight with me; for it cannot be intended to be of the ſame duration, both *in poſſeſſion* and *in reverſion.* The caſe of *Sheecomb v. Hawkins* (*a*), was on a ſpecial verdict: Tenant in fee of the manor of *D.* which was then in leaſe for years, levied a fine thereof to the uſe of himſelf for life, and after to the uſe of his eldeſt ſon in tail, reſerving power to himſelf to make leaſes at any time for twenty-one years; before the leaſe in being expired, he made another leaſe to *J. S.* (under whom the defendant claimed) for twenty-one years, to begin after the determination of the former leaſe, and died; the firſt leaſe expired; the ſon entered, and made a leaſe to the plaintiff; and it was adjudged for the plaintiff; for it ought to have been a leaſe *in poſſeſſion*, and not an intereſt to begin *in futuro*, or reverſion, after another eſtate determined, for then he might, by infinite leaſes, detain thoſe in reverſion out of poſſeſſion for a long time, againſt all reaſon. In the caſe of *Leaper v. Wroth*, cited in *Fitzwilliams's Caſe* (*b*), there was a proviſo to make leaſes for twenty-one years; and afterwards he who had the power, on the third of *April*, made a leaſe for twenty-one years, to commence at the Feaſt of *St. Michael* then next enſuing; and although the power was general, to make leaſes for twenty-one years, without any reſtraint to make them in poſſeſſion, or any number of them, but indefinitely to make leaſes for twenty-one years, yet it was adjudged, that the ſaid leaſe was void; for that if, by the ſaid power, he might make a leaſe *in futuro*, or a leaſe in reverſion, though he might make a leaſe for twenty-one years in poſſeſſion, yet after that infinite other leaſes, &c. * Theſe caſes are full to confirm me in my opinion, and I hold judgment to be for the plaintiff.

Two rules of power.

Caſes in Law and Equity, 446. 467. 475.

* [380]

8. Mod. 249. 381.

Poph. 9. Cro. Eliz. 5. Lat. 269. Raym. 132.

Conſtruction of powers to make leaſes.

* [381]

Holt, *Chief Juſtice*, having put the caſe, *ut ſupra.* The general queſtion is, Whether this be a good leaſe by virtue of this power? And I am of opinion, that this is not a good leaſe.

(*a*) Yelv. 222. Cro. Jac. 318. S. C. 1. Brownl. 148. And ſee Powel on Powers, 413, 414.

(*b*) 6. Co. 33.

WINTER against LOVEDAY

THE FIRST QUESTION is, Whether this *term* be within the power? And I HOLD, that it is a term within the power. This depends on the penning of the words of this power. Now, in a large ſenſe, any leaſe made to commence at a day to come, may be called a leaſe *in reverſion*; but that is not meant in this caſe, but the leaſe here is rather to be taken in the common ſenſe, from and after a preſent intereſt then in being; and the power extends not only to a leaſe *for years* in reverſion, but alſo to a leaſe *for life* in reverſion; and if it be for life, it is a concurrent intereſt. But now I take it, as this power is penned, he may make a leaſe for thirty years in reverſion abſolute; for the clauſes are diſtinct, to make "a leaſe for thirty years, OR elſe for any other term of "years determinable on one, two, or three lives;" ſo that this word "*or*" disjoins what follows, and makes it a diſtinct addition to the precedent matter. So is *Finch's Caſe* (*a*). But whether this copyhold leaſe was in being at that time is uncertain; and if a man have power to make a leaſe *in poſſeſſion* or *reverſion*, he cannot do both.

Now as to THE SECOND QUESTION, Whether this power extends to make leaſes of the copyholds? I do think that this power extends not to a *copyhold eſtate*; for I agree with my brother ROKEBY, that it was never intended that this power ſhould extend to *copyhold*; for it was not their deſign to deſtroy THE MANOR. This *ſyllogiſm* will clear the caſe: All *the demeſnes* of the manor are expreſsly excepted out of this power. * The copyholders are part of *the demeſnes*; and therefore Copyholds are expreſsly excepted out of this power. That the *copyholds* are parcel of *the demeſnes*, is ſo plain, that there needs no authority to be quoted but *Alton Wood's Caſe* (*b*), and that is expreſs. And it is obvious that every manor muſt conſiſt of *demeſnes* and *ſervices*; and thoſe are ſufficient to ſupport the being of a manor; for if the lord of a manor alien his *manſion-houſe* which he had in poſſeſſion, yet if the *copyholds* and *ſervices* remain, it is ſtill a good manor. Then there was no occaſion that this power ſhould extend to *copyholds*. Indeed, it was objected by SIR B. SHOWER, that if you conſtrue this to extend to *copyholds*, there are no other lands to be demiſed. One of my brothers has anſwered, that there were *other lands* within the pariſh which might have been demiſed. But that will not do, for the land to be deviſed muſt be parcel of the manor. As to this, I anſwer, that this power was ſubject matter enough to exert itſelf upon; for he may make leaſes in the manor of the rents and ſervices; and though it be ſaid "reſerving the ancient rent," and that no rent can be reſerved out of the rents and ſervices, yet that ſignifies nothing; for though the qualification cannot be obſerved, yet the power may ſtill be executed ſo far as it may be performed. 2. *Roll. Abr.* 202. If a conveyance be of divers manors and lands to the uſe of *J. S.* for life, &c. with power to make leaſes of all, or

* [382]

3. Bulſt. 14. 3. Roll. Rep. 142. 2. Roll. Rep. 180. Skin. 192. Carth. 427.

(*a*) 6. Co. 39. (*b*) 1. Co. 46.

any

any part thereof, for three lives, &c. *ita quod* that ſuch rent, or more, be reſerved upon every leaſe, which was reſerved, or paid for it, within two years then next before, and ſome of the land was not leaſed before at any rent within the two years, he may, by force of this power, make ſuch leaſe of this land, reſerving what rent he pleaſes. *Cumberford's Caſe.* And though the words of the qualification be general, yet the application may be particular. In *Hilary Term*, 27. and 28. *Car.* 2. in the caſe of *Walker v. Web*, the leaſe for tithes was held good, without reſerving any rent, and yet the power was to reſerve rent. * Now indeed, if this exception had ſeparated the *demeſnes* from the *rents* nad *ſervices*, it would have been hard to have made ſuch a conſtruction. So that upon the whole matter, I hold,—FIRST, That this leaſe for thirty years abſolutely, is a good leaſe within the power.—SECONDLY, That theſe lands being part of *the demeſnes*, were within the exception. * [383]

JUDGMENT for the plaintiff.

HILARY TERM,

The Ninth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.*
Sir Samuel Eyre, *Knt.* } *Juſtices.*

Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

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* Trevillian *againſt* Andrew. Caſe 188.

In what caſe an entry is tolled.

EJECTMENT. The jury find a leaſe for ninety-nine years, if three perſons ſo long live; and that one of the lives was in being. They find another leaſe made to the leſſee for ninety-nine years, if he lived ſo long; and that he aſſigned his term to the other, who died inteſtate; and that this perſon was living. *Spry*, who had a grant of the reverſion, entered before ADMINISTRATION *de bonis non* was granted, and died ſeiſed.

The queſtion was, Whether that had taken away the entry of the adminiſtrator?

CURIA. The term had an exiſtence as ſoon as adminiſtration was granted, and the adminiſtrator may have a ſpecial action of treſpaſs.

Leſſee holding over is not a treſpaſſer without entry.—See 4. *Geo.* 2. c. 28.

NOTA. It was held, that if a leſſee hold over his term, you cannot bring an action of treſpaſs without an actual entry.

Mathew

Case 189.

Mathew *against* Tompson.

If a conveyance, in consideration of an intended marriage, be made to *the husband* for life; remainder to *the wife* for life; with remainder to the use of all the *issues female* of their two bodies, and the heirs of the bodies of such issues female; and the husband dies leaving issue *a daughter*; the remainder in tail to the issues female is not so attached in that daughter as not to be devested for a moiety on the birth of another daughter before the *particular estate* determines.

S. C Ld. Ray, 311.
Vaugh. 28.
2. Jones, 27.
13. Co. 56.
Yelv. 183
Co. Lit. 188.
5. Co. 8. a.
Comb. 467
2. Stra. 1152
Fearne, C. R. 462.
3. Term Rep. 484.
4. Term Rep. 462.

EJECTMENT for the scite of the late PRIORY of *Leoffield*, upon the demise of THOMAS *Earl of Sussex*. Upon not guilty pleaded, there was a trial at bar by a jury of the county of * *Bucks*; and the plaintiff's title appeared to be thus:

The lands now in question were formerly the lands of *Sir Arthur Throgmorton*, who had issue four daughters; the eldest and the youngest were out of this case.—*Anne*, the second daughter, married *Sir Peter Temple*, and in consideration of that marriage *Sir Arthur Throgmorton*, in the twelfth year of *James the First*, settled these lands in trust for himself for life; then to *Dame Anne* his wife for life; then to *Sir Peter*, and *Anne* his wife, for their lives, and the life of the survivor; and after their decease, then to trustees to preserve contingent remainders; then to the first son of the body of *Anne* by the said *Sir Peter* begotten, or to be begotten, and the heirs males of the body of such first son: "and for "want of such issue, then to the use of all the issue female of the "body of the said *Anne* by the said *Sir Peter* begotten, and to the "heirs of the bodies of such issue female;" with like remainders to her issue by any other husband; remainders to *Elizabeth* his third daughter, and the heirs of her body. *Sir Peter Temple* died without issue male, but left two daughters; *Anne*, who was the *Lady Baltinglasse*, and *Martha*, who died very young; but were both born before the *particular estate* determined, otherwise the remainder had vested in the elder.

These sisters were jointenants for life, with several inheritances, and my *Lady Baltinglasse* enjoyed the whole for forty years by survivorship, and died in *August* 1696 without issue: so that the lands must now come to the heirs of the body of *Elizabeth*, who married THOMAS *Lord Dacres*, by whom she had issue *Francis*, who had issue *Thomas* the lessor of the plaintiff. There having been some opinions formerly, that my *Lady Baltinglasse* was *tenant in tail*, by virtue of this settlement, she suffered *a common recovery* to bar the remainders.

To maintain this opinion it was now said at THE BAR, that the remainder attached in her, and could not be devested by the subsequent birth of her younger sister; for the words, "to "the use of all the issue female of the said *Anne* by *Sir Peter*, "and the heirs of their bodies," are words of *limitation*, and not of *purchase*, but if they should be adjudged words of *purchase*, then the estate-tail is vested in the eldest daughter. It is true, if there had been two issues female living at the time of the making this settlement, it would have made them

* [386] * jointenants for life, with several inheritances; but this being upon a marriage settlement, before any issue born, alters the case. The birth of the youngest daughter cannot make her jointenant with the other, for the possession was coupled with the remainder. If it should be otherwise, then these sisters will take by parcels,

parcels, which cannot be; for admitting the eldeſt ſiſter ſhould have children, and live many years, and then die, and afterwards a younger ſiſter be born, of what eſtate can the eldeſt ſiſter die ſeiſed?

But THE COURT were unanimous of another opinion.

THEN the *plaintiff* was put to prove his title, but could not produce the original ſettlement made by *Sir Arthur Throgmorton*, of which he gave this evidence.

In ejectment on a title under a deed of ſettlement, if the deed cannot be produced, the plaintiff, on proof of its exiſtence, may give parol evidence of its contents.
Ante, 211.
1 Salk. 285.
6 Mod. 44. 149. 225 248.
2 Lev. 108, 109.
1. Mod. 4. 94. 114.
2 Vern. 471 603.
Eq C. Abr. 228.
Stra. 401. 526.
2. Bac. Ab. 308.
Gilb. L. E. 4th edit. 30. 96.

He proved, that it came to the hands of the *Lady Baltinglaſſe*; and ſhe having committed a forfeiture, by ſuffering a recovery, brought the deed to *Mr. Grange*, to adviſe with him in that matter. He proved likewiſe, that this deed was produced before a maſter in chancery, in a ſuit there depending, and a copy of it made, but that *my Lady* got the copy away. He proved alſo, that there was a trial at law upon a power of making leaſes, at which trial that copy was produced, and a ſpecial verdict found, in which this ſettlement was ſet forth *in hæc verba*; the record of which verdict was now produced in court. That there was likewiſe another controverſy upon a leaſe made of this land, and a bill in chancery exhibited againſt my *Lady Baltinglaſſe*, in which this ſettlement was ſet forth, and which my Lady admitted in her anſwer.

And upon this proof, my *Lord Suſſex* had a verdict for a moiety.

* [387]

Sanders *againſt* Owen.

Caſe 190.

WRIT OF ERROR to reverſe a judgment in the common pleas, IN AN ASSIZE of *novel diſſeiſin* for the office of *clerk of the peace* of the county of *Kent*. Upon *non diſſeiſivit* pleaded, THE RECOGNITORS find a ſpecial verdict,

If a *cuſtos rotulorum* appoint a *clerk of the peace* by writing under his hand and ſeal *during his pleaſure*; and, on the ſeſſions ſcrupling to admit him, *the cuſtos* declares in court, "*I appoint A. to be clerk of the peace according to the act of parliament*," this parol declaration is a good appointment under the 1. *Will. & Mary*, c. 21. for life; although he neither names the *county* he was appointed for, nor the *particular ſtatute* he was appointed under; and being for life, he cannot be ſuperſeded by the ſucceeding *cuſtos*.—S. C. 2. Salk. 467. S. C. 3. Salk. 250. S. C. Carth. 426. S. C. Comb. 317. S. C. 12. Mod 199. S. C. Lilly Ent. 278. Carth. 426.

That HENEAGE *Earl of Winchelſea* was *cuſtos rotulorum* of that county, to whom of right it belongs to conſtitute the *clerk of the peace*. * They find the ſtatute 1. *Will. & Mary*, c. 21. by which the *cuſtos*, or other perſon to whom of right it belongs, ſhall from time to time nominate the *clerk of the peace*; that this office being vacant, the ſaid *Earl*, by writing under his hand, conſtituted *Philip Owen* to be *clerk of the peace*, to exerciſe the ſaid office either by himſelf or deputy; which writing they find *in hæc verba*; that at an adjourned ſeſſions at *Canterbury*, this writing was read in court, and there the ſaid *Earl*, without any relation to his former grant, did, *vivâ voce*, ſay, "I appointed *Philip Owen* "to be *clerk of the peace* according to act of parliament;" that the *Earl of Winchelſea* died, and that the *Earl of Rumney* was made *cuſtos*, who appointed the plaintiff to be *clerk of the peace*; and that he was a fit perſon.

There

SANDERS *against* OWEN.

There was a judgment for *Owen* in the common pleas; and a writ of error now brought.

IT WAS INSISTED *for the plaintiff in error*, that no title was found for the plaintiff; for he brought *an aſſize* for an office at *Maidſtone*, and does not ſay, that *Maidſtone* is in *Kent*, ſo it is ill in ſubſtance, and no *venue*; and the Court cannot judicially take notice that *Maidſtone* is in *Kent*.

Then as to his title, the pretences are two: FIRST, By *grant*. —SECONDLY, By *parol declaration*.

AS TO THE FIRST, he had no title by the grant. Then as to the parol appointment, there is no ſuch thing found; for the words being ſpoken at the very time the grant was read in court, muſt have reference to that; and it is all but one act. It does not mention either what eſtate the perſon ſhall have in the office, or in what county he ſhall be *clerk of the peace*, or according to what act of parliament; for both the ſtatutes of 37. *Hen.* 8. c. 1. and 3. & 4. *Edw.* 6. c. 1. and 1. *Will. & Mary*, c. 21. are all in being and do all concern this office. So that there is a very great uncertainty in this nomination. If I grant land to another, without mentioning what eſtate, it is a tenancy at will. He might nominate a man to be clerk of the peace, "according to an act of "parliament," and never intend to give him ſuch an eſtate as
* [388] directed by the act. * It was the *Earl of Winchelſea*'s intention, that *Philip Owen* ſhould have the place; but it does not appear, that he intended it for him during life. "I do appoint *Philip* "*Owen*," &c. Theſe words amount to no more than an evidence of a nomination; but it is not a nomination itſelf; like the caſe in *Noy* (*a*), where it was held, that a reſignation to *a proctor* does not make the church void, without the acceptance by the biſhop; and the jury found an inſtrument under the ſeal of the biſhop, upon which there is an indorſement that the reſignation was accepted by him; this was held to be no finding of an abſolute reſignation *in facto*. So in the caſe of a *nuncupative will*, it is not ſufficient that the jury find, that the teſtator *dixit*; but they muſt find, that he intended it to be his will, or that he ſpoke the words *animo teſtandi*. It does not appear that *the Earl* ſpoke theſe words *animo conſtituendi*; therefore they ought to find ſo much as may amount to fulfil his intent. No freehold of an office can paſs at common law without a deed or writing (*b*); it might be ſupplied by livery; but that is not found in this caſe. This office cannot be diſtinguiſhed from any other, for it is incorporeal, and therefore muſt paſs by one of thoſe ways. Nay, an uſe, after it was turned into an eſtate by the ſtatute of 27. *Hen.* 8. c. 10. could not be granted by parol. The ſtatute of 1. *Will. & Mary*, c. 21. makes no alteration as to the conſtitution, but as to the qualification of the perſon, and duration of his eſtate; it directs *the cuſtos* to give the office to the clerk of the peace, *quamdiu ſe bene*

(*a*) Noy, 147 (*b*) Co Lit 61. 1. Leon. 219. 3. Mod. 147.

geſſerit;

geſſerit; it was to make him independent of *the cuſtos*, who had an authority to grant him ſuch an eſtate. Now when the ſtatute requires a thing to be done, and does not direct in what manner, it muſt be according to the courſe of the common law, and by that law no freehold can paſs by an act executed in the life-time of the perſon, without deed in writing. And this appears by caſes of the like nature, *viz.* all commitments by juſtices of the peace muſt be *in writing*, except upon a ſudden affray in their view by a court of ſeſſions. A *parol aſſignment* of commiſſioners of bankrupts is not good.

** *E contra.* As to THE FIRST OBJECTION, "*Maidſtone*" will refer to "*Kent*" in the margin.

* [389]

The queſtion is, Whether this is a bare *authority*, or an *intereſt* claimed under *the cuſtos*? And it was inſiſted, that it was a bare authority, but the nominee had his intereſt in the office by act of parliament. And this appears by the nature of the office itſelf; for *the cuſtos* has but an intereſt at will in it; and therefore the *clerk of the peace* cannot have a larger intereſt from *the cuſtos* than he had himſelf in the office, out of which *the clerk*'s place is derived. It is like a power given to a man to make leaſes; as ſoon as the leaſe is made, the leſſee is in by virtue of the grant, and not by the perſon who made the leaſe. It is true, that things which lie in grant cannot paſs without deed, which is an inſtrument that the law has provided inſtead of livery. So where a man claims a right to an office, it muſt be by deed; but this is an authority which may be executed by parol, and then it is otherwiſe. And though it is only an authority, yet *the cuſtos* may lawfully give ſuch an eſtate as he has done: as if a man deviſe that his executors ſhall ſell his eſtate, this is an authority, and no more; and yet when the eſtate is ſold, the vendee is in by the will. The office of regiſter of the court of admiralty may be granted by parol, according to cuſtom. The ſtatute of 37. *Hen.* 8. c. 1. ſays, "give, grant, nominate, and appoint," and does not ſhew in what manner. So that in this caſe the nomination is the ſame thing with writing, for both are only to ſignify the man.

Adjournatur (a).

(*a*) The court of king's bench, after ſeveral arguments, unanimouſly agreed, that a *verbal nomination* was ſufficient, S. C. Carth. 426.; for whatever is to take effect out of a power, or authority, or by way of appointment, is good without deed, 8. C. 2. Salk. 467. But ſee the judgment of the Court on this point at large, 12. Mod. 200. The court of king's bench, however, reverſed the judgment of the common pleas, becauſe the nomination did not mention *the county* for which he was to be clerk of the peace, nor diſtinguiſh which of the ſtatutes he meant, S. C. Carth. 426 S. C. 12. Mod 199.; but afterwards the judgment of the king's bench was carried to the houſe of lords, and there reverſed, S. C. 12. Mod. 199. S. C. Lilly's Entries, 278.

Caſe 191.

Hawkins's Caſe.

If there be a *ſpecial cuſtom* in a pariſh, that the *adorning* of the inſide of THE CHANCEL of the church ſhall be done at the charge of the owners and occupiers of *ancient houſes*, yet they are not bound by ſuch a cuſtom both to *ornament* and to *repair* THE CHANCEL; for the parſon is bound to *repair* of common right, and the cuſtom does not releaſe him: nor can the owners and occupiers of *mills* or *racks* be rated towards ſuch ornaments; for where a temporal inheritance is to be charged by a *particular cuſtom*, the cuſtom muſt be ſtrictly purſued.

S. C. Holt, 139. S.C. Carth. 360. Salk. 165. Comb. 344 1. Vent. 367. 1. Mod. 79. 194. 236. 261. 4. Mod. 148. 2. Jones, 122. Poſt. 447. Comb. 132. 1. Bac. Abr. 374. 616. Hard. 379. 5. Co. 66. Cro. Eliz. 659 2. Jones, 122. 1. Mod. 79. 194. 236. 261. Raym. 246. Comb. 148. 344. Carth. 143. Comb. 298. Caſes in Law and Equity, 12. 64. 385. 439. 2. Roll. Abr. 298. Hob. 12. 12. Co. 65. Hetley, 87. 2. Inſt. 608. Lutw. 174. 1. Sid. 161. Co. Lit. 6. 2. Ld. Ray. 1390. 3. Burr. 1689.

THE CHURCHWARDENS of the pariſh of *St. Edmond's on the Bridge*, in *Exeter*, libelled againſt *Hawkins*, ſetting forth an ancient cuſtom within that pariſh, that the adorning the inſide of THE CHANCEL has been done and performed by the churchwardens, at the public charge of the owners and occupiers of ancient houſes within the pariſh, by a rate to be made by the ſaid churchwardens, by and with the conſent of * the major part of the pariſhioners, having reſpect to the annual value of the houſes; that THE CHANCEL wanted reparations and ornaments; and that the churchwardens, by the conſent of the major part, &c. made a rate, which was confirmed by the biſhop, by which *Hawkins* was rated ſeventeen pounds and one ſhilling for *mills* and *racks* within the ſaid pariſh, which was his due proportion according to the yearly value of the houſes there; and that he had not paid the ſame.

The defendant ſuggeſted for *a prohibition*, that the pariſhioners ought not to contribute to the repairs, and the adorning the inſide of THE CHANCEL, and denied the cuſtom; and that the rate was not made by the major part of the pariſh.

The firſt iſſue was found for the plaintiff, that there is ſuch a cuſtom: and the ſecond iſſue was found againſt him, *viz.* that the rate was not made by the major part of the pariſhioners.

IT WAS MOVED *in arreſt of judgment*, and that *a conſultation* might be granted, becauſe THE SPIRITUAL COURT having the original juriſdiction of reparations of churches, muſt likewiſe have the ſame juriſdiction of all the incidents thereunto belonging, as rates, &c.; and the verdict cannot ſtand in the way, for the trial is void, becauſe the matter was not triable at law; and therefore the juriſdiction is ſtill ſaved. If a plea "*ne unques accouple*" ſhould be tried at the aſſizes, neither party would be concluded by a verdict upon that iſſue. If there had been any inequality in the rate, it might have been tried at law; but whether a rate or not, belongs to another juriſdiction (*a*). And to prove, that where the original matter is of eccleſiaſtical cognizance all the dependants thereon are ſo likewiſe, there was a caſe cited in this court (*b*), where the churchwardens libelled againſt a pariſhioner for a church-tax, but the ſentence was againſt them; whereupon they appealed to the metropolitan, and, pending that appeal, one of them gave the pariſhioner a releaſe of all actions and demands; the other ſtill proceeding to reverſe the ſentence, the pariſhioner moved for

(*a*) See 3. Term Rep. 3.

(*b*) Hilary Term, 7 *Jac.* 1. Starkey *v.* Barton, Yelv. 172.—See alſo Raym. 246. March, 73.

held

a *prohibition*, ſuggeſting this releaſe; and upon demurrer it was held to be no cauſe for a prohibition, becauſe the principal matter was merely ſpiritual; and therefore the temporal court would not determine Whether the releaſe, which was dependant upon it, was a bar or not? * And for this reaſon, though part of the iſſue be found againſt the plaintiff, yet he ſhall have judgment notwithſtanding: as where the defendant avowed for rent (*a*), ſuppoſing that one *Vavilor* was ſeiſed in fee of the *locus in quo*, &c. and granted the rent; and, upon *non conceſſit* pleaded, it was found ſpecially, that another perſon was ſeiſed, and made a leaſe to this *Vavilor*, who granted the rent. Now it happened that this leaſe was determined before the diſtreſs taken; and therefore, though the iſſue be found for the avowant, "*quod* VAVISOR *conceſſit*," yet the eſtate being determined out of which the rent was ſuppoſed to be granted, the Court gave judgment for the plaintiff, though the iſſue was found againſt him.

HAWKINS's CASE.

* [391]

E contra. No man can ſay that the pariſhioners ought of common right to repair THE CHANCEL; there muſt be either *a cuſtom* or *preſcription* to charge them.—There are two reaſons why the defendant cannot be charged in this caſe: FIRST, They alledge *a cuſtom* for owners and occupiers of *ancient houſes* to be contributory to the ornaments of THE CHANCEL; but they have not brought the defendant to be within that cuſtom, for they do not charge him in reſpect of *houſes*, but for *racks* and *mills*. Now if *a mill* ſhould be conſtrued to be *a houſe*, yet *a rack* is not.—SECONDLY, The charge "for and towards the ornaments of a "church or chancel" is a perſonal charge, and ſhall never be impoſed upon the lands of the pariſhioners, but upon the inhabitants themſelves: if it had been for the repairs of the church, there the land is liable to be rated, but this rate cannot be good, becauſe it is made for him to pay ſo much for *ornaments* in proportion to the yearly value of his *racks* and *mills*.

2 Roll Rep. 262. 270. 2. Roll Abr. 291. K. Ante, 68. Poſt. 393. 452.

CURIA. Without a *ſpecial cuſtom* the pariſhioners are not to repair THE CHANCEL. The parſon is bound to do it of common right; but where a temporal inheritance is to be charged by a particular cuſtom, the churchwardens muſt bring the defendant within the cuſtom, otherwiſe it is not good; for it is the cuſtom which gives the juriſdiction. Now in this caſe the cuſtom was alledged for owners of *houſes* to repair, and they have rated the defendant as owner of *a mill*, which cannot be intended *a houſe*; for in a *præcipe* * *quod reddat* a *mill* cannot be demanded by the name of *domus*, but it muſt be *de molendino*.

* [392]

Adjournatur.

(*a*) Harriſon v. Metcalf, Cro. Jac 442.

Anonymous.

Caſe 192.

Anonymous.

On producing the *writ*, the *return*, and a *certificate* that common bail was not filed in *eight days*, judgment may be ſigned immediately.

Stra. 737. Gilb. K. B. 369. Tidd's Pract. 322.

BY THE STATUTE 5. & 6. *Will. & Mary*, c. 21. (*a*), for granting to their Majeſties ſeveral duties upon parchment, paper, &c. it is enacted, "That ſixpence ſhall be paid for every "piece of parchment on which any *common bail* ſhall be filed, and "on which an appearance ſhall be made upon ſuch bail; which "appearance or common bail the defendant ſhall cauſe to be "entered or filed in *eight days* after the return of *the proceſs*, on "pain of five pounds, to be paid to the plaintiff, for which the "Court ſhall immediately give judgment, and the plaintiff take "out execution."

The *writ* and *return* was brought into court, and a *certificate* from the proper officer that *common bail* was not filed within *eight days*, *&c.*

Upon which a motion was made, and THE COURT gave judgment *niſi*, *&c.*

(*a*) See 9. & 10 *Will.* 3 c 25. ſ. 33. 12. *Geo.* 1. c. 29. ; and 5. *Geo.* 2. c. 27.

EASTER TERM,

The Tenth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.* } *Juſtices.*
Sir Samuel Eyre, *Knt.*
Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

* The King *againſt* Stainford.

Caſe 193.

THE defendant was indicted, For that he on the nineteenth of *June*, &c. and before, being an inhabitant of a town in *Derbyſhire*, was ſummoned *to watch* with one *Booth* a conſtable, and that he obſtinately, contemptuouſly, and maliciouſly made default.

Exceptions were taken.

FIRST, The indictment ſtates, that he was an inhabitant on the nineteenth of *June*, and before, and does not ſay that he continued to be ſo.

SECONDLY, It does not ſay, that *notice* was given to him to watch within the pariſh.

THIRDLY, It ſtates that he did not watch with one *Booth* a conſtable; but it ought to have ſaid that he did not watch at all; for poſſibly he might watch that night with another conſtable.

E contra. This indictment is founded at *common law*, and not upon the *ſtatute of Winton*.—And as to the ſecond exception, it is ſaid that he was ſummoned to watch with the conſtable, but does not ſay within the pariſh. Now there may be a place extraparochial,

The Court will not quaſh an indictment for not keeping *watch*, although it do not ſtate, that the defendant continued *an inhabitant*, or that he had *notice* to watch, &c. but will put the party to demur.

Ante, 68.
1. Mod. 73.
1, Sid. 218.
2. Keb. 713.
2. Saund. 423.
Comb. 243.

THE KING *against* STAINFORD.

chial, where the constable is to watch. As to the other exceptions nothing was said.

CURIA. Demur to the indictment. They would not quash it.

Case 194.

Saville *against* Roberts.

Trinity Term, 9. *Will.* 3. *Roll* 724.

An action on the case will lie for falsely and maliciously procuring the plaintiff to be indicted for *a riot*.

S. C. post 405.
S. C. 1. Salk. 13.
S. C. Carth 416.
S. C 3. Salk. 16.
S. C. 1 Ld. Ray 374.
S. C. 12. Mod. 208
S. C. Holt, S. 150. 193.
S. C 3. Ld. Ray. 396.
1. Roll Abr. 112.
Moor. 600.
Leon 107.
9. Co. 57.
Yelv. 15 116.
Ray. 374.
2. Mod. 306.
6. Mod. 30 90. 137. 185 169.
Bridg 131
1. Sid. 424. 463.
Nat. Brev 98.
Hob. 205.
2. Inst. 544.

* [395]

Cro. Eliz. 378.
Skin. 131.
Carth. 113.
Stra. 144. 691.
1. Bac. Abr. 61, 62.
Bull. N. P. 14.
1. Hawk. P. C. c. 72. f. 2.
1. Bl. Rep. 385.
Dougl. 214.

THE now plaintiff was indicted for *a riot*, and acquitted; and he brought an action on the case against the defendant, for that such a day, in such a year, he did falsely and maliciously procure the plaintiff to be indicted, &c. and had judgment in the common pleas. And now a *writ of error* was brought to reverse the same.

The question was, Whether an action will lie for causing another maliciously to be indicted of *a trespass* (*a*)?

It was insisted, that the judgment was well given, and ought to be affirmed. It must be admitted, if the indictment be not good, the action will fail, because the party is not *legitimo modo acquietatus* (*b*). But there is no such objection here; for it is not pretended but that the indictment was good both in substance and form. The most material objection is, that a man shall not be sued or vexed for prosecuting the king's writ. It is true, that it is lawful to prosecute such writ; but though the suit is legal, yet if it be for a thing which is false, and known to be so even by the plaintiff himself, an action will lie against him for his unjust vexation and malice: And this was the opinion of my LORD HOBART, in giving judgment in the case of *Freeman v. Waterer* (*c*): It was an action on the case for a double execution; judgment was given for the plaintiff, though he was not twice charged with the damages; for the goods levied by the first execution remained in the sheriff's hands *pro defectu emptorum*, but he was maliciously vexed the second time. It is the *malice* that is the foundation of all actions of this nature, which incites men to make use of law for other purposes than those for which it was ordained. Actions on the case are frequently brought for suing without any cause of action; and it is never allowed to say, that the plaintiff has a sufficient recompence by costs obtained by such suits; for those are but *experse litis*; it is the unjust trouble and vexation which intitles him to the action. It lies for maliciously prosecuting one in the ecclesiastical court, and causing him to be excommunicated; in which cause this very objection was made, that a man shall not be punished for prosecuting the king's writ; and it was also objected, that an action will lie for falsely indicting a man for a trespass; yet the Court were of opinion, that a citation *ex officio* prosecuted with malice, was a sufficient ground for the

(*a*) See note (*a*) to an Anonymous Case, 2. Mod. 306.
(*b*) 2 Inst. 385.
(*c*) Hob 205.

action.

action. An action on the caſe, in the nature of a conſpiracy, will lie againſt two for conſpiring a falſe indictment, and by the ſame reaſon, an action will lie where one alone cauſes another to be indicted *falsò et malitiosè*. And this ſeems to be the ancient law; for in the reign of *Edward the Third*, a bill of conſpiracy was allowed in the court to be brought by him who was indicted of a common treſpaſs and acquitted (*a*).

SAVILE *againſt* ROBERTS.

1 Vent. 86. Hocking *v.* Matthew, Cro. Car 291. 2. Inſt 562. 11. H 7. 26.

2 Cro. 193. Cox *v.* Vinal, 1 Reſi. Abr 112. placito 10. 3. Aſſ. placito 13. placito 7 Fitz N. B 116. Litt fol 3 Reg 134 b.

(*a*) The Court was of opinion that the action was well brought, and the judgment of the Common Pleas was affirmed. S. C. poſt 455.

Atkinſon *againſt* Corniſh. Caſe 195.

BY THE COURT. If an infant be made *executor*, and THE ORDINARY commit adminiſtration to another *durante minore ætate*, this adminiſtration ceaſes when the infant attains his age of ſeventeen: But if ſuch adminiſtration be granted *durante minore ætate* of one who is not made an executor, it does not ceaſe until the party be of full age.

An adminiſtration *durante minore ætate* of an infant EXECUTOR ceaſes at *ſeventeen*; of an infant ADMINISTRATOR, at *twenty-one*.

The caſe of *Pigot v. Gaſcoigne* (*a*) was cited to maintain this opinion; which was, *Anthony Longvill* made *William* his executor, who was under age: the plaintiff took out adminiſtration to *Anthony durante minore ætate* of *William*, and brought an action of debt upon a bond, and averred that *William* was alive, and within the age of one and-twenty.

S.C. Comb. 475. S C. 3. Danv. 356. S C. Carth. 446. S C. 12. Mod. 194. S C Holt, 43. S.C 1. Ld. Ray. 338. 1 Salk 29. 39.

Now becauſe it did not appear that this adminiſtration was granted whilſt he was under the age of ſeventeen, the plaintiff was nonſuited.

Fitz 162 1 Salk 37 1 Vent 219 Sid. 155. Comy Rep. 109 159 4 Burn E L. 239. 2 Bac. Abr. 582 3 Bac Abr 121. 1. Ld Ray 667. 12 Mod. 560. Harg. Co. Lit. 89. b. note (6).

(*a*) Cro. Eliz 662. See the Prince's Caſe, 5 Co. 29.

* [396]

Cox *againſt* Copping. Caſe 196.

A DIFFERENCE ariſing between *Cox* the plaintiff, who was impropriator, and the pariſhioners, concerning the right of a houſe, he brought an *ejectment*.

If an impropriator bring ejectment to recover a houſe which the pariſhioners ſay belongs to the pariſh, the Court will not make an order for him to inſpect the *pariſh-books*.

And by his Counſel he moved the Court, that the church-wardens, who had the cuſtody of the pariſh-books, might * produce them, ſo that he might have a ſight thereof, and copies of what concerned his title. And this was compared to the caſes of *corporations* and *copyholders*, who upon ſuch motions have frequently obtained rules of this Court for the ſteward to grant copies, and that the court-rolls might be produced at trials. It was likewiſe ſaid, that if the plaintiff ſhould exhibit *a bill* againſt the church-wardens, he would have an account of the pariſh-books.

2 Stra. 1005. 1223 1. Wils. 240. 1 Bl. Rep 37 351. 1. Term Rep. 689.

Cox *againſt* Copping.

But THE COURT were of opinion, that this caſe differed from that of *copyholders*, becauſe all the tenants of the manor have an intereſt in the court-rolls; but here the impropriator has a diſtinct intereſt from the pariſhioners, for it was not a *parochial right*, but a *title* which is now in queſtion. And therefore it was not enough the pariſh-books ſhould be produced, which would be to ſhew the defendant's evidence. Then as to church-wardens, they are not a corporation without the pariſh (*a*).

Comb. 417.

(*a*) See *Rex v. Overſeers of Hanwell*, 1. Wils. 232. *Rex v. Mayor of Lynn & Denton*, 239. *Rex v. Weſton*, 3 Wils. 368. *Rex v. Bethnal-Green*, 2. Str. 830. The Corporation of [illegible] prec. Lutley, 3 Term Rep 303.

Caſe 197. Inhabitants of Petterſea *againſt* Wilſham.

The ſeſſions may *confirm* an order of removal, though it has been previouſly *quaſhed*, during the ſame ſeſſions.

TWO juſtices made an order to remove a poor man from *Wilſham* to *Battherſea*. The pariſhioners of *Petterſea* appealed to the ſeſſions, and the order of the two juſtices was ſet aſide: afterwards, but in the ſame ſeſſions, upon allegation of Counſel, the ſeſſions made a new and a fair order, and confirmed the order of the two juſtices.

Ante, 208, 209. Poſt. 416

A motion was made in the Court, and it was alledged, that the record was in the hands of the Clerk of the peace, the whole ſeſſions, and therefore they could not legally do it in their own order.

2. Sall. 477. 494 606. Comb. 418.

To which it was anſwered, that they having once executed their authority, they could not recall it.

THE COURT affirmed the ſecond order of ſeſſions, and quaſhed the firſt.

* [397]

Caſe 198. Anonymous.

A writ of error *reverſing* a recovery may be *reverſed* if brought by him who is not in the *immediate* remainder

NOTA. PER CURIAM. A writ of error was brought in this court, to reverſe a common recovery, and there was a *ſcire facias* to the tenant of the freehold, and they made default. The recovery was reverſed, and it appearing afterwards, that the plaintiff in the writ of error had no title, but being a remainder man before him, the Court reverſed their former reverſal: *Quod nota.*

Dyer, 90. 1. Roll. Abr. 749. Cro. Jac. 158. 1. Sid. 339. 2. Sid. 67. 288. 298. 6 Mod. 4. 319. 2. Burr. 756. 5. Com. Dig. "Pleader," (3. L. 5.) 4. Bac. Abr. 419.

Caſe 199. The King *againſt* Eaſtbridge.

An order taxing *one pariſh* in aid of another *pariſh* within the ſame *hundred*, made originally at the ſeſſions to this effect, viz.

AN original order was made at the ſeſſions to this effect, viz.

" It appearing to this Court, that the pariſh of *Dimchurch*, " in the hundred of *Heath*, being over-burdened with poor, and

Ante, 163 209. 1. Str. 56.

Poſt 416. 2. Sall. 482. [illegible] 1. Bott. 304. 305.

"that the parish of *Fe[illegible]*, within the [illegible] hundred of [illegible], having no poor [illegible] within their said parish; IT IS OR-DERED, that the said parish of *[illegible]* be from henceforth annexed to the said parish of *[illegible]*, and that the occupiers of lands and tenements within the said parish of *[illegible]* be chargeable and contributory [illegible] of the poor of the said parish of *Dun[illegible]*, [illegible] by monthly payments [illegible] parish [illegible] over-burdened, and no poor [illegible]."

THE KING [illegible] *contra* [illegible].

A motion was made to [illegible] was in nature of an act of parliament.

But it was quashed, [illegible] it should have begun with two [illegible]

[illegible]

[illegible]

Case 200.

TWO justices made an order [illegible] "BEING INFORMED that the [illegible] "overseers [illegible] one shilling a-week "to a poor man; they [illegible] shall continue "to pay him the arrears till they find him a house."

An order of relief to a person "until the overseer find him "a house," or omitting to state that he is "poor," or "impotent," is bad. Ante, 325. 2. Salk. 473. 491.

It was objected against the order,

FIRST, That the overseers have not power to find a house for him; that must be done by the consent of the lord of the manor, or by the justices in sessions.

SECONDLY, It did not appear that he was *poor* or *impotent* (a).

And for these reasons it was quashed.

(a) See Rex [illegible] Stone [illegible]

[illegible]

Case 201.

THERE were [illegible] they [illegible] judgment [illegible] in the *[illegible]* but it was quashed, because they were not parties to the original judgment.

In bill bring error both in the judgment in *sci. fa.* and in the original order, [illegible] C. [illegible] Cas. 281. 1. Salk. 89. S. C. 7. Mod. 3. S. C. 1. Ld Ray. 553. [illegible] 2. Salk. 603. Stiles, 171. 2 Ld Ray. 821. [illegible] 217, 218.

* Savage *against* Robery.

Case 202.

THE plaintiff was a tradesman, who brought an action against the defendant for scandalous words spoke of him, "You are "a cheat, and I will prove you a cheat for many years."

To say *passionately* to a tradesman, "You are "a cheat," is not actionable, unless alledged in something concerning his trade.—S. C. 2. Salk. 694. 1. Vent. 117. 263. Ray. 62. 169. Jones, 156. 1. Lev. [illegible] [illegible] 114. 2 Sand. 307. Skin. 364. 1. Lev. 115. 250. Stra. 696. 1. Com. Dig. 8vo. 270. 4 Bac. Abr. 492, 493. Ld. Ray. 1417.

The

SAVAGE *against* RUSBURY.

The plaintiff had a verdict.

But the judgment was arrested, because these were words of *heat*, and not actionable, having not alledged that *the cheat* was in any thing concerning his trade. QUOD NOTA.

Case 203

Addingson *against* Oakley.

After judgment, the defendant cannot take any advantage of a mis-entry on the *nisi prius* record

1. Sid. 203. Skin 289. Carth. 6. 86. 131. 189. 206. 272. 304. 389. Comb. 149 284 426. Fitzg. 174 2-5. Cases in Law and Equity, 145. 285. 210. 230 301.

THE plaintiff had a verdict at THE ASSIZES in *Oxford*, and a motion was made to stay the judgment till he brought in THE POSTEA, for it did not appear to the Court on what day THE ASSIZES were held; for the record of *nisi prius* was, "*Nisi* "*Justiciar. domini regis ad assisas in com. praed. capiund. assign. &c.* "*die Jovis decimo sexto die Martii apud Oxon'. &c.*" The *distringas* for the jury to appear, was, "*Si prius die Jovis vicesimo* "*sexto die Martii apud Oxon'. &c.*" So was the *jurata*.

THE COUNSEL *for the defendant* desired, that it might be referred to the master of the office to be examined.

But THE COURT would not allow it, for it was to examine matter of fact against a record: but they held, that the defendant could not take advantage of this after judgment; for if the *clerk of the assise* will enter judgment for *the plaintiff* instead of *the defendant*, he has no remedy but by action.

* [399]

Case 204.

Carter *against* Shephard.

If a person go to a banker's to receive a draft of 100l and is desired to tell 50l in part, which another is come to pay, and he counts out 50l from the 100l and puts it into a *bag*, and lays it on the counter, this is a good *part payment* of the draft, and therefore if the bag be stolen from the counter, the banker shall be only answerable for the remaining 50l

S. C Salk 507 S. C. Comb 475 S C. 12. Mod 289. 3 Mod. 86. Molloy L. 2. ch. 10. 2. Mod. 23. 3. Lev. 259. Ld. Ray 928. Com. Rep. 138. 3. Lac. Abr 562. Gilb. L. E. 115.

THE plaintiff had a note of a hundred pounds drawn upon him, which he brought to his shop in order to receive the money. At the same time, another person came thither to pay the goldsmith eighty pounds, which he desired the plaintiff to tell in part of his hundred pounds. Accordingly the plaintiff told fifty pounds thereof, and put it in his own bag, and laid it upon the counter, and whilst he was telling the rest, another person, there being several in the shop paying and receiving money, stole away the bag of fifty pounds The action was now brought against *the goldsmith* for the hundred pounds,

* It was said, that this fifty pounds was not paid to *the plaintiff*, for the whole money must be in the possession of *the goldsmith* till all was told, for the telling is only in order for payment; and as long as it is subject to be retold by *the goldsmith*, it is not in *the receiver's* possession. Now though the fifty pounds was put up in the bag, yet if the eighty pounds had been told short, *the goldsmith* would have retold the fifty pounds,

CURIA. Telling the money, and resting satisfied when told, is sufficient to carry the possession to *the receiver*, and he, and not

the

the goldſmith, might have maintained an action of *detinue* for this money in the bag; but the plaintiff had judgment for fifty pounds, and *nil capiat per billam* as to the reſt.

CARTER *againſt* SHEPHARD.

Dubartine *againſt* Chancellor.

Caſe 205.

AN action was brought againſt the defendant, for lying with the plaintiff's wife: he pleaded in *abatement*; and there being a judgment to *anſwer over*, iſſue was joined, and it was tried in the country, and the plaintiff had a verdict.

A *plea in abatement* muſt be entered on the NISI PRIUS ROLL.

S. C. Carth. 447. S. C. 12. Mod 189. S. C. 1. Ld. Ray. 329. Ante, 212. 1. Salk. 47, 48, 49 53.

It was moved to ſet aſide this judgment, becauſe the *plea in abatement* was not entered on the NISI PRIUS ROLL; the PLEA ROLL was right, but the NISI PRIUS ROLL ſhall not be amended by that.

And for this reaſon THE COURT did ſet aſide the judgment.

3 Bulſt 311. Carth. 506. Comb 393 Dyer, 260. 1 Cro. 275.

The King *againſt* the Mayor of Lincoln.

Caſe 206.

WILLIAM THE THIRD, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, *&c.* To the mayor and ſheriffs, citizens, and commonalty of the city of *Lincoln* in our county of *Lincoln*, greeting: Whereas from time whereof the memory of man is not to the contrary, there hath been had ſuch a cuſtom within the ſaid city, that every perſon who ſhould ſerve as an apprentice within the city aforeſaid in any art or myſtery with any freeman or his aſſigns, freemen of the city aforeſaid, for the ſpace of ſeven years, might claim the liberty and privilege to be admitted into the place and office of one of the freemen of the city aforeſaid, &c. into the freedom of the city aforeſaid, and according to the cuſtom of that city to enjoy and uſe all the liberties, privileges, pre-eminences, and commodities, belonging and appertaining to a freeman of the city aforeſaid. And alſo whereas one *Abraham Morris* hath lately ſerved as an apprentice within the city aforeſaid for the ſpace of ſeven years, in the art or myſtery of a mercer, with a freeman of the city aforeſaid, and his aſſigns, freemen of the city aforeſaid, according to the cuſtom of the ſaid city, and thereupon hath claimed the liberty and privilege to be admitted by you into the place and office of one of the freemen of the city aforeſaid, and into the freedom of the ſaid city to be admitted, and hath offered himſelf to perform the oath in that caſe required by a ſolemn affirmation or declaration according to the act made and ſet forth in the parliament holden in the 7th and 8th years of the reign of *William the Third* now king of *England*, *&c.* he the ſaid *Abraham* being then and there one of the diſſenters commonly called quakers; nevertheleſs you the ſaid mayor, &c. well knowing the premiſes, have not admitted the ſaid *Abraham Morris* into the aforeſaid place and office of one of the freemen, and into the freedom of

Mandamus to admit *a quaker* into the freedom of a city, on his affirmation.

S. C. 3. Ld. Ray. 203.

THE KING *againſt* THE MAYOR OF LINCOLN.

the city aforeſaid, nor have permitted the aforeſaid *Abraham Morris* to make a ſolemn affirmation or declaration according to the ſaid act, inſtead of the oath in that caſe uſed, according to the duty of your office, but to do you do unjuſtly refuſe, in contempt of us, and to the great damage of him the ſaid *Abraham*, and to the manifeſt grievance and hurt of his eſtate, as we have received intimation by his complaint: We, therefore, willing that due and ſpeedy juſtice in this behalf be done to the ſaid *Abraham* as is right, command you and every of you, firmly enjoining that immediately after the receipt of this writ, you admit the aforeſaid *Abraham Morris* to the place and office of one of the freemen, and to the freedom of the city aforeſaid, together with all liberties, privileges, pre-eminences, and commodities thereunto belonging, and permit the ſaid *Abraham Morris* to make the ſolemn affirmation or declaration aforeſaid, inſtead of the oath in that caſe uſed; or ſignify to us cauſe to the contrary, leſt through your default complaint be again made unto us, &c. Witneſs, &c.

The Return of the Writ.

The execution of this writ appears in a certain ſchedule to this writ annexed.

GEORGE BRACEBRIDGE, *Mayor.*

The Anſwer of the Mayor, Sheriffs, Citizens, and Commonalty of the City of Lincoln *to the Writ to this Schedule annexed, according to the Command of the ſaid Writ.*

WE humbly certify to the lord the king, that the city of *Lincoln* aforeſaid is not in the county of *Lincoln*, but in the county of the city of *Lincoln*, and that there is had, and from time whereof the memory of man is not to the contrary, there hath been had ſuch a cuſtom within the city aforeſaid, that every perſon who hath ſerved as an apprentice within the city aforeſaid in any art or myſtery with any freeman of the ſaid city, freeman of the city aforeſaid, for the ſpace of ſeven years, hath afterwards offered himſelf in the common council of the mayor, ſheriffs, citizens, and commonalty of the city aforeſaid, to perform the oath in that caſe uſed in theſe *Engliſh* words following: You ſhall bear faithful allegiance to our ſovereign lord the king (naming the king then upon the throne), and to his heirs, kings of *England*; and be meet and juſtifiable to the mayor of this city that now is, and his ſucceſſors that hereafter ſhall be, all that may be for the common profit of this city you ſhall do, and all liberties and franchiſes thereof you ſhall maintain: to your power, all ordinances and cuſtoms made and to be made, you ſhall keep. You ſhall be *levant* and *couchant* to keep houſe or chamber within this city, and all manner of charges and offices laid to you for commonweal, worſhip or profit of this city you ſhall bear, and be contributory to your power. You ſhall have no part of merchandize with any merchant ſtranger to ſell or colour by any means, but you ſhall pay toll

toll for it. You shall colour none of unfranchised men's goods, whereby the sheriffalty or the commonalty should lose their right. You shall nothing do nor labour that shall be to the prejudice, derogation, or hindrance of the commonweal or profit of this city, but all points and articles, and what else belongs to be done by a freeman of this city, you shall keep and maintain to your power. So help you God. And not before, hath claimed the liberty and privilege to be admitted into the place and office of one of the freemen of the city aforesaid, and into the freedom of the said city, according to the custom of that city, and to enjoy and use all the liberties, privileges, pre-eminences, and commodities, belonging and appertaining to a freeman of the said city, and after the performing of the said oath, and not before, ought to be admitted by the common council of the mayor, sheriffs, citizens, and commonalty of the city aforesaid, one of the freemen of the city aforesaid, and into the freedom of the city aforesaid, according to the custom of that city, and to enjoy and use all the liberties, privileges, pre-eminences, and commodities, belonging and appertaining to a freeman of the city aforesaid. And we further certify that the said *Abraham Morris* lately, to wit, on the 10th day of *February*, in the eighth year of the reign of the lord the now king, hath served as an apprentice within the city aforesaid for the space of seven years, in the art or mystery of a mercer, with a freeman of the city aforesaid, according to the custom of the said city; and afterwards, on the said 10th day of *February*, in the same eighth year of the reign of the said lord the now king, thereupon at the common council of the mayor, sheriffs, citizens, and commonalty of the said city, then holden within the city, claimed to be admitted then and there by the common council aforesaid to the liberty and privilege into the place and office of one of the freemen of the said city, and to the freedom of the said city, and then and there offered humbly, instead of the usual form of oath aforesaid, to make his solemn affirmation or declaration of the words of the oath aforesaid, according to the act made and set forth in the parliament holden in the seventh and eighth years of the reign of the said lord the now king of *England*, &c. intitled, An act that the solemn affirmation and declaration of the people called quakers shall be accepted instead of an oath in the usual form, he the said *Abraham* being then and yet one of the dissenters commonly called quakers; but the said *Abraham* then and there refused to make the oath in the usual form aforesaid, according to the custom of the said city. And we further certify to the said lord the king, that the office and place of a freeman of the city aforesaid, is an office and place of profit in the government in the aforesaid act mentioned; and that within the city aforesaid there is had, and from time whereof the memory of man is not to the contrary, there hath been had such a custom, that every freeman of the city aforesaid should have a voice in the chusing two citizens to serve for the said city in the parliament of this kingdom, whensoever the king should ordain a parliament to be holden, and

that

THE KING *againſt* THE MAYOR OF LINCOLN.

that every freeman of the ſaid city hath common of paſture in the waſtes lying within the city aforeſaid, for three horſes, or for three cows or three heifers, at all times of the year. And we further certify to the ſaid lord the king, that the ſaid *Abraham Morris* never offered himſelf in the common council of the mayor, ſheriffs, citizens, and commonalty of the city aforeſaid to take, nor ever hath taken the ſaid oath in the uſual form aforeſaid: and for theſe cauſes the ſaid mayor, ſheriffs, citizens, and commonalty of the city aforeſaid, have not admitted the ſaid *Abraham Morris* into the ſaid place and office of one of the freemen, and to the freedom aforeſaid, nor have permitted the ſaid *Abraham Morris* to make his ſolemn affirmation or declaration, according to the act aforeſaid, inſtead of the oath in that caſe uſed to be made, but refuſed ſo to do the ſaid 10th day of *February*, in the ſaid eighth year of the reign of the ſaid lord the now king.

GEORGE BRACEBRIDGE, *Mayor.*

Caſe 207.

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The King *againſt* The Mayor of Lincoln.

THIS was *a mandamus* to the mayor, &c. of *Lincoln*, to admit one *Abraham Morris* to his freedom, he having ſerved an apprenticeſhip there.

The ſtatute 7. and 8. *Will.* 3. c. 34. admits QUAKERS to make *affirmation* inſtead of *oath*, provided it be not to bear any office or place of profit in the government. But the being *freeman* of a city is not an office under government. Therefore A QUAKER may be admitted to the *freedom* of a city on his *affirmation*.

He was *a quaker*, and the late ſtatute 7. and 8. *Will.* 3. c. 34. enacts, "That every *quaker*, &c. who ſhall be required upon any "lawful occaſion to take an oath, where by law an oath is required, ſhall, inſtead of the uſual form, be permitted to make "his ſolemn affirmation or * declaration, &c." Then there is A PROVISO, "That no *quaker* or *reputed quaker* ſhall, by virtue of "that act, be qualified to give evidence in any criminal cauſe, to "ſerve on any jury, or bear any office or place of profit in the "government (*a*)."

The mayor returned, that the *city of Lincoln* is an ancient city, and alledges a cuſtom, time out of mind, for every perſon who has ſerved an apprenticeſhip there, to offer himſelf to the mayor and common council to take the uſual oath (which is ſet forth *in hæc*

S.C. Carth. 448. 3. Sid. 29. 71. S. C. 12 Mod. 190. 1. Lev. 91. 1 Sid. 107. 2 Jon. 52. 3. Mod. 333. 2. Ld. Ray. 1238. 3. Bac. Abr. 535. 556. Vide ante, 316, 317. poſt. 431, 432.

(*a*) Continued by 13. and 14. *Will.* 3. c. 4. and made perpetual by 1. *Geo.* 1. ſt. 2. c. 6. But ſee the 8. *Geo.* 1. c. 6. for the forms in which *quakers* are to make the *declaration of fidelity* required by 1. *Will. and Mary*, c. 18. the *ſolemn affirmation* required by 7. and 8. *Will.* 3. c. 34. and the *oath of abjuration* required by 1. *Geo.* 1. ſ. 2. c. 6. And now by 22. *Geo.* 2. c. 46. ſ. 36. in all caſes where by any ſtatute then made, or thereafter to be made, *an oath* is required, the *ſolemn affirmation* or *declaration* of the people called QUAKERS, in the forms preſcribed by the ſaid act of 8. *Geo.* 1. c. 6. ſhall be allowed and taken inſtead of ſuch oath, except "in any criminal caſes; or to ſerve on "juries; or to bear any office or place of "profit in the government."

verba),

verba), before he ſhall be admitted to his freedom (*a*); that the ſaid *Morris* had ſerved an apprenticeſhip there to a *mercer*; that thereupon he claimed his freedom of the ſaid city, and offered to take the ſolemn *affirmation* and declaration; that he was *a diſſenter* called *a quaker*, and refuſed to take the uſual oath according to the cuſtom of the ſaid city; that to be *a freeman* thereof is a place of profit in the government; that there is a cuſtom there, for every freeman to vote in the election of two citizens to ſerve in parliament for the ſaid city, and to have paſture for three horſes in the common, &c.; that the ſaid *Morris* never offered himſelf in common-council to take the ſaid oath in the uſual form; and that for that reaſon they did not admit him to his freedom upon his ſolemn *affirmation* and declaration, &c. which they would not ſuffer him to take.

The queſtion was, Whether *the freedom* of this city was a place of profit in the government?

And IT WAS ARGUED, that it was not; it is only a qualification or a privilege to agree or conſent to the perſon who ſhall be his repreſentative in parliament.

ON THE OTHER SIDE *it was ſaid*, that the deſign of the act is to give eaſe to the *quakers* who ſcruple to take an oath, and to relieve them from penalties and puniſhments for refuſing to ſwear where by law an oath is required. That an oath is not required here, ſo as to ſubject a perſon to a penalty for the refuſal, becauſe he who bears an office is not obliged to take an oath but for his own benefit; and he incurs no penalty to refuſe it, but only acquits himſelf of the office. This is either a publick or a private place in the government; it is publick, as it entitles him to vote for repreſentatives in parliament, or private, as to be a magiſtrate in that particular place where he has obtained a freedom.

CURIA. This perſon has a precedent right to have his freedom: the *quakers* are uſually admitted in *London* upon their ſolemn affirmation.

And ſo he was in this caſe (*b*).

(*a*) By 12. *Geo.* 3. c. 21. "Where any perſon ſhall be intitled to be admitted to his freedom, and ſhall apply to the mayor of the corporation or other perſon who is authorized to adminiſter, &c. to be admitted a citizen, burgeſs, or freeman thereof, and ſhall give notice, ſpecifying the nature of his claim, to ſuch mayor or other perſon, that if he or they do not ſo admit ſuch perſon within *one month* from the time of ſuch notice, the court of king's bench will "be applied to for a *mandamus*; if ſuch "mayor, &c. ſhall, after ſuch notice, re- "fuſe or neglect to admit ſuch perſon, a "writ of *mandamus* ſhall iſſue to compel "ſuch mayor, &c. to admit ſuch perſon, "&c."

(*b*) See Rex *v.* March, where this caſe is recognized by LORD MANSFIELD as good law, and where it is determined that a *quaker* may, on his *ſolemn affirmation*, be admitted a member of THE TURKEY COMPANY, although by 26. *Geo.* 2. c. 18. ſ. 2. it is enacted, that no perſon, unleſs he take *the oath* therein preſcribed, ſhall be admitted to his freedom in the ſaid company. 2. Burr. 1000.

Case 208.

* The King *against* Blythe.

If the local statutes of a college provide that the person "for whom the "master and "the major part "of the fellows "shall vote, "shall be elected," the master has only a *negative voice*; and if one candidate be chosen by *eight fellows*, and another by *the master* and *six fellows*, the Court will grant a *mandamus* to THE VISITOR to determine the disputed election.

S. C. post. 421. 452.
Post. 452.
Yelv. 65.
Cro. Jac 60.
Comb 266.
Skin. 13. 454. 468. 483. 491. 513.
Carth. 93.
4. Mod. 106. 236. 368.

BY the local statutes of CLARE-HALL in the university of *Cambridge*, it is provided, that the person "*in quem magister* "*et major pars sociorum convenerit pro socio habeatur.*" It happened that *M. Jennings* was chosen by eight of the fellows, and another was chosen by six; and the master of the Hall, *Dr. Blythe*, gave his vote with the six. *Mr. Jennings*, supposing himself to be duly elected fellow, brought his *mandamus* (*a*) to be admitted, having been refused by the master, &c. because it was insisted that his concurrence was necessary; for by the statutes of THE FOUNDER, he must be consulted without him a fellow could not be elected: the words are, "*in quem magister et major pars* "*sociorum convenerit.*" There was a clause, that if any doubt should arise about the exposition of these statutes, it should be determined by THE VISITOR.

It was argued, that THE VISITOR had only a power to displace upon *misdemeanors*; that he was appointed to a special purpose, *quoad punitionem*, and that the master had only authority to correct for misdemeanors.

CURIA. It was never yet determined what power THE VISITOR has: in *Dr. Patrick's Case* (*b*) the question was, Who was visitor? and the Court was divided. All *eleemosynary corporations* who are to receive the charity of THE FOUNDER, have VISITORS, if they are *ecclesiastical corporations*, and if a particular visitor is not provided by THE FOUNDER, then the ordinary of the place is visitor; if they are *lay-corporations* (*c*), the founder and his heirs are perpetual visitors.

ROKEBY, *Justice*, was of opinion, that a fellowship was such an interest for which *a mandamus* ought to be granted; and it would appear upon the return, whether the party had such an interest, or not.

THE COURT were also of opinion, that the master had only a negative vote in this case.

(*a*) But see 6. Mod. 26.
(*b*) 1. Lev. 65. 1 Sid. 356
(*c*) Rex v. Chancellor of Cambridge, 3. Burr 1647.

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Case 209.

* Calverly *against* Leving.

An action of covenant for non-repair of a house laid in *Chester* generally, is well tried by a jury from the *county of Chester* at large.

COVENANT for not repairing a house in *Chester*. The action was brought in *Chester* generally: After issue joined, *quod reparavit*, there was *a mandate* to THE CHIEF JUSTICE of *Chester*, to award *a venire*, "*quia exitus præd. inter partes præd.* "*superius junct. per bellos com.* PALATINI CESTRIÆ, *videlicet* "*de vicinet. de* TARVIN *præd. in com.* CESTRIÆ *præd. ubi breve* "*dom. regis non currit, et alibi triari debet, ideo record. loquelæ*

S. C. Comb. 472. S. C. Carth. 448. S. C. Holt, 710. 2. Roll. Abr. 601. Ante, 223. 1. Saund. 8. 229 247. 2. Saund. 252 258 393. 414. Comb. 75. Carth. 234. 3 Bac. Abr. 257.

"*præd.*

" *præd. mand. justiciar. ipsius domini regis præd. com.* CESTRIÆ, " *ita quod iidem justiciar. dict. domini regis com.* CESTRIÆ *præd.* " *&c.*" CALVERLY *against* LEVING.

There was a verdict for the plaintiff, and forty shillings damages.

It was moved in arrest of judgment, that this was *a mis-trial*, for the issue was local, *viz.* within *Chester* generally, and the trial was in the county of *Chester* at large; so it was not of a jury of the county or place where the action was laid, but by a jury of the wrong county, which is not aided by the statute, but only a wrong *venue* in a proper county: as if the issue arise at *Islington* in *Middlesex*, and the *venue* is of *Hertford* in the same county, the county is right, but the *venue* is otherwise. So it was in the case of *Cotton* v. *Johnson* (*a*), an ejectment was brought for lands in the county of *Ely*, and the cause was tried in *Cambridgeshire*; it was held good, because *Ely* was part of the county: but in this case there are distinct counties. The statute must not be construed, that the cause shall be tried where the action is laid, but in the county where the issue arises, which was in *Chester*; but this cause was not tried there.

CURIA. Trials have been set aside lately for this reason (*b*).

(*a*) Hilary Term, 1. *Will. and Mary.* S. C. Carth. 290. for it was tried by a jury of the county where the action was laid. S. C. Comb. 422. and 1. Ld. Raym. and 5. *Mod.* c. 16.

(*b*) The question was moved again, and THE WHOLE COURT held, that it was cured by the statute 16 and 17. *Car.* 2. c. 8. and gave judgment for the plaintiff,

Roberts *against* Savill.

Case 210.

Resolutio Curiæ.

HOLT, *Chief Justice*. This case comes before us on a *writ of error* brought upon a judgment given in THE COMMON PLEAS, in an action on the case, wherein the plaintiff declared, that the defendant did falsely and maliciously, &c. cause him to be indicted at the sessions for *a riot*, upon which he appeared, * and was acquitted; and also, that the defendant did falsely and maliciously cause him to be indicted another time at the sessions for *a riot*, to which indictment he appeared, pleaded, and was acquitted; by reason of which prosecutions he lost his good name, and was at great trouble and expences, &c. to his damage one hundred pounds. To this declaration the defendant pleads *not guilty*, and issue being joined and tried, the jury gave a verdict for the plaintiff, and eleven pounds damages. The defendant moved in THE COMMON PLEAS for arrest of judgment, and the question there was, Whether the action lay? And upon debate there, the Court was of opinion, that the action did lie: and the same question having been debated and argued here, we are also of the same opinion, that the action does lie. This is no

An action on the case will lie for falsely and maliciously procuring the plaintiff to be indicted for *a riot*.

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S. C. ante, 394. S. C. 1. Salk. 13. S. C. Carth. 416. S. C. 3. Salk. 16. S. C. 1. Ld. Ray. 374. S. C. 12. Mod. 208. S. C. Holt, 8. 150. 193. S. C. 3. Ld. Ray. 196. 2. Mod. 306. Carth. 416.

6. Mod. 30. 90. 137. 185 169. Cases in Law and Equity, 115. 210. 217.

new

ROBERTS *against* SAVILL.

new point, it has been often controverted here, though I think there are full authorities to maintain this action. And for the better settling the matter, it may be fit to consider, upon what grounds these actions are maintained; and I take it, that there are three sorts of damages which will support all actions of this nature.

Three sorts of damages which will support actions of this nature.

2. Salk. 13, 14. 1. Vent. 86. Ante, 395. 2. Sid. 424. 463. 3. *Edw.* 3. pl. 19. 3. Assize, 1. 7. *Hen.* 4 pl. 31. 11. *Hen.* 7. pl. 25. Stiles, 379. Nat. Brev. 98. 106. 3. Lev. 292. Skin. 131.

FIRST, Where a man is injured in his fame or reputation, so that his good name is lost; by reason of which injury, if the words themselves do not bear an action, the loss or damage that may ensue, will. In the case of *Barns v. Constantine* (*a*), the action was for indicting the plaintiff before such justices, *ad diversas felonias necnon ad pacem conservand. assignat.* as a *common barrator*, and that on not guilty pleaded, he was lawfully acquitted; the defendant demanded *oyer* of the indictment, and it was certified to be taken before such Justices *ad pacem conservandam* only; and yet it was held, that the action lies; for that this action being but for damages for the slander, it well lies, although the indictment be *erroneous*; or, as it has been adjudged (*b*), if a bill be offered, and found *ignoramus*. In the case of *Sir Andrew Henley v. Dr. Burstall* (*c*), for maliciously indicting the plaintiff, being a justice of peace, for delivering a vagrant out of custody without examination, the Court said, that where a man prefers an indictment maliciously, and such indictment contains matter of imputation and scandal, as well as crime, there the action will lie. *Sed alter* where the indictment contains crime without scandal, as on forcible entry; and here is slander as well as crime, and judgment was given for the plaintiff.

*[407] * THE SECOND relates to a man's person, where he is assaulted or beaten, or put under any confinement whereby he is deprived of his liberty; as appears by the statute 3. *Edw.* 3. c. 33. But my LORD COKE (*d*) says truly, that that statute was made in another year, *viz.* 3. *Edw.* 3. c. 19.

But neither of these sorts of damages are the foundation of this case, for here his reputation or person are not damnified.

Now there is A THIRD SORT of damages which a man may sustain in respect of his property; and this is the ground of the present action, for that the plaintiff was put to *unnecessary charges* to answer this indictment; and it is most plain, that he was put to unnecessary expences, for that the jury have found this prosecution was false and malicious. Now if there be an injury done to a man's property, occasioned by a wicked and malicious prosecution, it is all the reason in the world that a man should have an action to repair himself. And so it appears in the Year-book of *Edward the Third* (*e*), which is express. One was indicted by two de-

(*a*) Yelv. 46. S. C. Cro. Jac. 32.
(*b*) See Chambers *v.* Robinson, 2. Stra. 1691. Jones *v.* Gwynne, Gilb. Rep. 185. S. C. 10. Mod. 148. 214. S. C. 1. Salk. 15. Payne *v.* Porter, Cro. Jac. 450. and Wicks *v.* Fentham, 4. Term Rep. 248.
(*c*) Ray. 180.
(*d*) 2. Inst. 566.
(*e*) 3. *Edw.* 3 pl. 19.

fendants

fendants in another county than where he was demurrant, according to the ſtatute 8. *Hen.* 6. c. 10. though it be *conſpiraverunt*, yet one ſhall plead without the other, for *the tort* is ſeveral; and many other books (*a*). It has been objected againſt theſe old caſes, that theſe actions were grounded upon *a conſpiracy*, which is odious in the law, and that to diſcourage ſuch conſpiracies to ruin men, ſuch actions were allowed. But I anſwer, that in thoſe caſes *the conſpiracy* was not the ground of the action, but *the damage* (*b*) which the plaintiff ſuſtained in reſpect of the needleſs expences he was put to; for no action lies for the bare *conſpiracy*, but it is the *malicious proſecution* which is the ground of the action, and when one only falſely and maliciouſly carries on the proſecution, yet an action lies; and though it is called an *action of conſpiracy*, yet truly it is only an *action on the caſe* (*c*). And it is only properly an action of conſpiracy where the indictment is for *treaſon* or *felony* (*d*). *And therefore if ſuch an action be brought againſt two, and one only is found guilty, no judgment can be given, for this is properly a conſpiracy, it being to indict a man for ſo criminal a matter (*e*). But where the conſpiracy is only to indict a man for *a miſdemeanor*, though the action be againſt two, and only one is found guilty, yet judgment ſhall be againſt him, as in the caſe of treſpaſs (*f*); for really it is an action on the caſe, and no action of conſpiracy.

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Action of conſpiracy againſt two, and one is only found guilty. 1 Salk. 13, 14. Ante, 223. 1. Saund. 229. 1. Vent. 12. 25. Raym. 135. 176. 180. 2. Salk. 456. 2. Mod. 306. 6. Mod. 261. &c. 1 Hawk. P. C. c. 72. ſ. 8. 1. Will. 210.

There has been another objection, and that is, the opinion of the Judges in the caſe of *Sir Andrew Henley v. Dr. Burnſtball* (*g*), and *Low v. Beardmore* (*h*). But though I have a great reſpect for the authority of the Judges who at that time ſat here, yet I think it ought not to have ſo much weight, for that the Judges only ſpoke it *obiter*, it not being material to the main point; and when a bill of indictment is not found, there is no damage done. There is a great deal of difference between bringing an action maliciouſly, and proſecuting an indictment maliciouſly. In an action a man either claims ſome title, or complains of an injury; and therefore if a man only think ſo, the law allows him all juſt remedy (*i*). But then if the plaintiff's demands are unjuſt, he is to be puniſhed by way of amerciament, *pro falſo clamore ſuo*; and beſides, no man is to proſecute an action without finding of pledges; and where an action was vexatious, the plaintiff was amerced proportionably (*k*). But indeed, this remedy being but formal, the act of parliament gave the defendant coſts: however, the ancient form of finding pledges, and being amerced, is ſtill retained; and though it is true that it is nothing but form, yet the principle of law which makes the difference is ſtill the ſame (*l*).

(*a*) See 3. Aſſize, pl. 13. 7. *Hen.* 4. pl. 31. 11. *Hen.* 7. pl. 25, 26.
(*b*) 2. Will. 146.
(*c*) Fitz. N. B. 110. 116. Jones, 93.
(*d*) 2. Inſt. 562.
(*e*) Ante, 223. Cro. Eliz. 701. 1. Roll. Abr. 111. 1. Salk. 174. 1. Hawk. P. C. c. 72. ſ. 8.
(*f*) See Subley v. Mott, 1. Will. 210.
(*g*) Ray. 180.
(*h*) Ray. 135.
(*i*) 4. Co. 16.
(*k*) Finch Law, 189. 252.
(*l*) 3. Bl. Com. 275.

And

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*[409]

Caſes in Law and Equity, 145. 209.

And beſides the coſts, if it appear that an action is brought merely through malice and vexation, a good action lies upon ſhewing forth this ſpecial matter. So where one man arreſts * another for a great ſum of money, when but a ſmall one is due; or where a ſtranger, who is not concerned, brings an action; in either of theſe caſes a good action lies. In the caſe of *Daw v. Swain (a)*, the plaintiff declares, in an action on the caſe, that the defendant having arreſted the plaintiff in *Middleſex*, and intending to detain him in gaol, *falsò et malitiosè* told the ſheriff, that the plaintiff owed him five thouſand pounds, and that he ought to take bail accordingly, and that he was kept in priſon ſeveral days, and verdict for the plaintiff; and the plaintiff had judgment, becauſe he had ſpecial damage by ſuch parlance. An action on the caſe in nature of a conſpiracy was brought againſt three *(b)*, one was found guilty, and the other two not guilty; and by the Court, it is good againſt him that is found guilty; this action was brought to the intent to keep him in priſon for default of manucaptors for three hundred pounds, *ubi revera* there was no cauſe of action *(c)*. The caſe of *Chamberlain v. Preſcot (d)* was for malicious indictment on ſtatute 8. *Eliz.* c. 2. for procuring the defendant to be arreſted in another man's name; and held the action lies; yet it is ſaid there, that this judgment was reverſed in the exchequer-chamber: and this matter was mightily controverted. And it is true, the judgment in that caſe was reverſed, but it was not becauſe the action would not lie, but becauſe he was not indicted of any offence within the ſtatute, as appeared upon the fact as it was ſet forth in the indictment: ſo that if he had been convicted, he could have incurred no damage; for the Court would have arreſted judgment. In *Carlion v. Mill (e)* the caſe was, that the defendant, being apparitor under the biſhop of *Exeter*, maliciouſly, and without colour or cauſe of ſuſpicion of incontinency, of his own proper malice, procured the plaintiff, *ex officio*, to be cited to the conſiſtory-court, &c. and there to be at great charges and vexation until he was cleared by ſentence, which was to his diſcredit and great expences; it was moved, that the action lay not for this; for he did not cite him but as an informer, and by virtue of his office; but, PER CURIAM, the action lay; for it is alledged, that he *falsò et malitiosè* cauſed him to be cited upon pretence of fame, when no ſuch offence was committed, and avers, that there was not any ſuch fame, ſo as he did it maliciouſly and of his own head. In an action on the caſe againſt churchwardens *(f)*, for that they *falsò, &c.* to the intent to draw the plaintiff within the eccleſiaſtical cenſures for adultery with *A. S.* and the declaration was, that they conſpired to do it, and the one was found guilty, and the other not guilty;

(*a*) Michaelmas Term, 21. *Car.* 2. 1. Sid 424.

(*b*) 1. Saund 228.

(*c*) Gunſton's caſe.

(*d*) In Michaelmas Term, 1659. cited in Low *v.* Beardmore, Ray. 135.

(*e*) Cro. Car. 291. Jones, 312. 1. Roll Rep 63.

(*f*) Dament *v.* Rudock, 1. Roll. Abr. 112.

yet

yet this being but an action on the caſe, it lies. * If *A.* cauſe *B.* to be indicted for a *common barretor*, upon which indictment *B.* is acquitted, he may have his action againſt *A.* (*a*).

ROBERTS *againſt* SAVILL.

But I muſt tell you, that this action ought to be handled with a great deal of caution, after THE GRAND JURY have found the bill upon their oaths. But indeed, unleſs *the bill* be found, no action will lie, for that the party is not damaged; neither is it a good ground of action or indictment againſt a man, that he barely procured him to be falſely indicted; but there muſt be *expreſs malice* found, that it may appear that the proſecution was not for the ſake of juſtice, but to gratify the party's peeviſh revenge or malice (*b*).

Vide 1. Salk. 14, 15. 6. Mod. 137.

So that upon the whole WE ALL AGREE, that the judgment muſt be affirmed.

(*a*)

(*b*) An action for a malicious proſecution will not lie, if *probable cauſe* appear on the proceedings; and both *malice* and want of *probable cauſe* are neceſſary to ſupport this kind of action. Johnſtone *v.* Sutton, 1. Term Rep. 428. But the want of probable cauſe ſhall be evidence of malice; and the action will lie, although the bill of indictment be defective, Wilks *v.* Tenham, 4 Term Rep. 247. or the grand jury return it *ignoramus*, Pollard *v.* Evans, 2. Show. 51. Morgan *v.* Hughes, 2. Term Rep. 237.

Memorandum.

Caſe 211.

IN the vacation after the Term, SIR SAMUEL EYRE, *Knight*, one of the Judges of the court of king's bench, died on the tenth day of *September* 1698, at *Lancaſter*, on the northern circuit.

1. Ld. Ray 349.

MICHAELMAS TERM,

The Tenth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.* } *Juſtices.*

Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

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* Harriſon *againſt* Cage and his Wife. Caſe 212.

THIS is an action on the caſe, wherein the plaintiff declares, that in conſideration the plaintiff would marry the defendant, the defendant promiſed to marry him, and that he had offered himſelf to her, but that ſhe refuſed him, and had married the other defendant.

If there be mutual promiſes of marriage between man and woman, *the man* may maintain an action on the caſe againſt *the woman* for the breach of her promiſe.

S.C. 1. Salk. 24. S. C. Carth. 467. S. C. 12. Mod. 214. S. C. Holt, 456. S. C. 1. Ld. Ray. 386. S. C. Ray. Ent. 403. 1. Roll. Abr. 22. 470. Cro. Eliz. 79.

FIRST, This action does not lie. Indeed it might be otherwiſe in the caſe of a woman; for a marriage is an advancement to a woman, but not to a man, as appears in *Anne Davis's Caſe (a)*, and in the caſe of a feoffment *cauſâ matrimonii prælocuti (b)*; which ſhews, that there is a great difference between the two caſes of a man and a woman; for it is a breach of a woman's modeſty to promiſe a man to marry him, but it is not for a man to promiſe a woman to marry her.

SECONDLY, Here is no time laid when this marriage was to be; and it may be ſtill.

THIRDLY, The conſideration is ill; it is no more than, "I "will be your huſband if you will be my wife:" it is no more than this, "I will be your maſter, and you ſhall be my ſervant *(c)*."

Cart. 273. 1. Sid. 180. 1. Lev. 147. Carth. 99. 1. Keb. 886. 6. Mod. 156. 172. 3. Lev. 65. 2. Salk. 437. 555. 2. Stra. 850. 937. 1. Com. Dig. 8vo. 208. 211. 1. Bac. Abr. 285. 3. Bac. Abr. 574.

(*a*) 4. Co.
(*b*) See Swinburn's Eſpouſals, 74.
(*c*) Carter, 220.

HARRISON *against* CAGE AND HIS WIFE.

FOURTHLY, It is not reasonable that a young woman should be caught into a promise.

E contra. FIRST, The action very well lies; and certainly marriage is as much advancement to a man as it is to a woman. And I am sorry that the Counsel on the other side has so mean an opinion of a good woman, as to think that she is no advancement * to a man. We say that we have offered ourselves, and that she did refuse us; and though we do not mention the portion, it is well enough.

* [412]

Nelf. Lutw. 68. 78, 79. 1. Salk. 24.

HOLT, *Chief Justice.* Why should not a woman be bound by her promise as well as a man is bound by his? Either all is a *nudum pactum*, or else the one promise is as good as the other. You agree a woman shall have an action; now what is the consideration of a man's promise? Why, it is the woman's. Then why should not his promise be a good consideration for her promise, as well as her promise is a good consideration for his? There is the same parity of reason in the one case as there is in the other, and the consideration is mutual. As for the case of the *matrimonii prælocuti*, that goes upon another reason, there being a feoffment of lands and a condition annexed to it; but this here is upon a contract. In the ecclesiastical court he might have compelled a performance of this promise (*a*); but here indeed she has disabled herself, for she has married another. Then you might have given in evidence any lawful impediment upon this action; as that the parties were within the Levitical degrees, &c. for this makes the promise void; but it is otherwise of a pre-contract.

TURTON, *Justice.* There is as much reason for the one as for the other; and *Halcomb's Case*, in *Vaughan*, is plain.

ROKEBY, *Justice.* If a man be scandalized by words, *per quod matrimonium amisit*, a good action lies, and why not in this case (*b*)?

TURTON, *Justice.* This action is grounded on mutual promises.

HOLT, *Chief Justice.* The man is bound in respect of the woman's promise; if she make none, he is not bound by his promise, and then it is a *nudum pactum*, so that her promise must be good to make his signify anything to her; and then if her promise be good, why should not a good action lie upon it?

Judgment for the plaintiff.

(*a*) But see now the Marriage Act, 26 *Geo.* 2. c. 33. s. 13.
(*b*) 1. Roll. Rep. 73. 2. Roll. 18. b.

Odes

* Odes *againſt* Clark.

Caſe 213.

Trinity Term, 10. Will. 3. Roll 475.

SIR B. SHOWER. This is an action of eſcape brought againſt the ſheriff, in which the plaintiff declares, that the defendant arreſted *J. S.* by virtue of a *latitat*, but ſays not out of what court, and afterwards ſuffered him to eſcape: and now the ſheriff moves in arreſt of judgment, and pretends, that the proceſs is not well ſet forth in the declaration. But the ſheriff cannot take advantage of erroneous proceſs. Here is ſufficient in the declaration to charge the ſheriff, and to ſhew he has been guilty of a breach of his duty; and if we have alledged ſufficient authority for the ſheriff to take him, it is well enough.

Quære, If a declaration againſt a ſheriff for an eſcape, ſtating, that he arreſted the party by virtue of a *latitat*, without ſtating *the court* out of which it iſſued, be good?
Ante, 8. 202.
Poſt. 415.
S. C. 1. Ld. Ray. 397.
1. Salk. 272.
Gilb. Ex 82.
4. Bac. Abr. 451.
2. Lev. 85.
1. Term Rep. 611.

NORTHEY *è contra*. The exception to the declaration is, that it cannot appear to your lordſhip, upon this record, out of what court this writ iſſued. It is only ſaid, that the plaintiff arreſted *J. S. virtute cujuſdam brevis de latitat* in general, without ſaying that it iſſued out of this court; and they have *latitats* in one ſenſe in the common pleas, that is, they have writs in which the word *latitat* is uſed. Now though a ſheriff ſhall not take advantage of *erroneous proceſs*, yet he ſhall take advantage of *void writs*; and this is a void writ, for that it does not appear out of what court this writ iſſues; and if a writ iſſue out of the common pleas, and be made returnable here, it is void.

Upon reading the declaration the words appeared to be, "*quod-*" "*dam breve de latitat de curiis dom. reg. apud Weſtmonaſterium,*" without ſaying out of which court it iſſued.

ROKEBY, *Juſtice*. A *latitat* goes out of no court but this.

TURTON, *Juſtice*. Every one imagines a *latitat* to go out of this court.

COUNSEL. Then it is "*breve de latitat,*" and there is no ſuch thing in nature as a "*de latitat.*" It ſhould be, "*quoddam* "*breve* VOCAT. *latitat.*"

* OBJECT. Whether *proſecut. fuit in curiâ dom. regis* will not imply this court? * [414]

RESP. They are all the king's courts; and here it is always ſaid, "*coram ipſo rege.*"

HOLT, *Chief Juſtice*. Suppoſe he had ſaid only "*latitat*" in general, and had not ſaid "*cur. dom. regis,*" would not that be well enough?

Let it ſtay (*a*).

(*a*) It appears, S. C. Ld. Ray. 397. that THE COURT ſaid, that there is no writ properly called a writ of *latitat* but that which iſſues out of the king's bench; and therefore ſeemed to be clear of opinion for the plaintiff. But it was adjourned.

Case 214.

The King *against* Fells.

An indictment against the keeper of NEWGATE for an *escape*, must shew that the prisoner was in his custody *as keeper* of that prison.
3. C. 1. Salk. 272.
S. C. Holt, 279.
S. C. 12. Mod. 226.
S. C. 1. Ld. Ray. 424.
Ante, 137.
1. Sid. 208. 439.

SIR B. SHOWER. We move upon two several indictments of *Fells*, the keeper of *Newgate*, for suffering *Berkenhead* and *Rayes* to escape out of gaol, &c. upon which indictments *Fells* has been found guilty.

And now we move in arrest of judgment:

FIRST, Upon *Berkenhead*'s indictment. It is not said, that he was in custody of *Fells* as the keeper of *Newgate*; so that he might be in his keeping tortiously, or out of the gaol, and perhaps he never was within the gaol of *Newgate*, and then the letting him escape is no crime; and to say that *Fells* did negligently permit him to escape out of the gaol, where he was not laid to be, will not do. And no indictment shall be taken by *intendment*; the facts must be certainly alledged, that we may know what to answer unto.

An indictment against a gaoler for suffering an escape, must shew that the prisoner was *legally* committed.
6. Mod. 72.
86. 211.
Ante, 202. 413.

SECONDLY, It is not said that *Berkenhead* was in his custody lawfully, or that he was to be there until he were discharged by law. To oblige a gaoler to keep a prisoner, there must be a legal commitment, and there ought to appear a lawful warrant to charge him; and therefore if he did not come there by a lawful warrant, the gaoler is not bound to keep him until he be discharged by law: and perhaps this *Berkenhead* might be only committed until the next sessions, or till examination by a secretary of state, &c.
Comb. 114. 295.

An indictment or an *escape*, stating only that the prisoner was *charged* with high treason, is bad.—3. Com. Dig. "Escape" (A. 2.). 2. Bac. Abr. 240. 245. 2. Hawk. P. C. ch. 19. s. 2. s. 14.

And, THIRDLY, It is only said, that he was there *charged* for high treason, which might be only by fame or hearsay.

* [415]

If a *gaoler* suffer an escape, the action must be against the *sheriff*.
3. Salk. 272.
Comb. 95. 435.
2. Bac. Abr. 243.

* FOURTHLY, As to *Rayes*'s indictment. It is said, that he was committed in execution to THE GAOLER; which is ill, for it ought to be expressed, that he was committed to the custody of THE SHERIFF, who is the proper officer: and why should *Fells* be any more subject to be answerable for these escapes than any private turnkey or warder?
4. Bac. Abr. 444.

An indictment for an *escape* must shew that *satisfaction* was not made.

FIFTHLY, It ought not to have been, that *Fells* permitted him to escape without satisfaction made to the plaintiff, or performance of the judgment, &c. for it is to the sheriff, who is to see the punishment inflicted or satisfaction made. It is not in the gaoler's power to perform the judgment.

NORTHEY. These indictments are very extraordinary in the frame of them; and certainly, if turned, would not make good declarations. The word "*onerabilis*" is not good; they must shew how he was committed, for that "*onerat.*" is uncertain; and though it is said, he was *charged* with high treason, yet it is not said, that when

when he eſcaped; he remained *ſo charged* as all the precedents are in actions of eſcape. THE KING *againſt* FELLS.

ROKEBY, *Juſtice.* There is certainly a difference between *actions of eſcape* and *indictments*.

TREVOR, *Attorney General.* The gaoler is an officer of whom the law takes notice, and he is anſwerable for eſcapes as well as the ſheriff.

As to the objection, that it is not ſaid that *Berkenhead* remained *charged* with high treaſon at the time of his eſcape; if the fact were ſo, then *Fells* might have taken advantage of it at his trial, and he would have been acquitted.—So a general allegation that the judgment was not ſatisfied, is well enough: if it was ſatisfied, it ought to have been ſhewed on their ſide.—Then the indictment is expreſs, that *Berkenhead* was in *Fell*'s cuſtody in *Newgate* as gaoler, and not there in cuſtody of him as a private perſon. The greateſt exception is, that it is only ſaid generally he was *charged*, and does not ſhew particularly how; and perhaps in actions of eſcape the precedents may be ſo particular, becauſe the party muſt ſhew how he is entitled more than any other perſon, and to aſcertain the damage muſt diſtinguiſh the perſon; but here the king is a ſovereign and truſtee for the public, and he need not diſtinguiſh himſelf, or ſhew how he is charged. 1. Salk. 272.

* HOLT, *Chief Juſtice.* FIRST, The charge upon him is as gaoler of *Newgate*, and you do not ſay *Berkenhead* was in *Newgate*. * [416]

SECONDLY, You ſay, he was *charged* for *high treaſon*; now that might be, and yet he might not be *committed* for high treaſon. Suppoſe he had been in cuſtody for debt or felony, now he may be *charged* with high treaſon by another perſon, and yet all this while he was not *committed* for high treaſon. And in indictments for ſuffering perſons to eſcape, it muſt appear that the party was lawfully committed (*a*). There was an indictment (*b*) for ſuffering two perſons to eſcape *qui commiſſi fuerunt* by the juſtices of peace for offences againſt the ſtatute of Forcible Entry; error was aſſigned, becauſe it is not ſet out how the commitment was, whether upon a view of the juſtices or verdict on the indictment; and ſo it appears not whether he was legally committed; and the Court held, that it being but inducement to the offence, and after verdict, ſhall be intended the commitment was legal.

But, THIRDLY, without doubt gaolers are chargeable for eſcapes. Indeed, if the gaoler be inſufficient, the ſheriff is anſwerable.

Adjournatur (*a*).

(*a*) See Walker's Caſe, Cafes Cro. Law, 92; Rex *v.* Greenliff, Caſ. Cro. Law, 292.

(*b*) Rex *v* Wright, 1. Vent. 169.

(*c*) The caſe was moved again in the Hilary Term following, and the judgment was arreſted on the THIRD EXCEPTION, *viz.* that it was only ſaid that the priſoner was *charged* with high treaſon, and did not ſhew that he was *committed* for that crime. S. C. Ld. Ray. 424.

Case 215.

The Parish of Ricclip *against* The Parish of Henden.

An order of removal *disallowed* on appeal is only conclusive as against the *appellant parish*; but an order of removal *affirmed* is conclusive as against *all parishes* with respect to settlements gained anterior to the order of removal.

IT was moved to quash an order of sessions which was made for the removal of a poor fellow from the parish of *Ricclip* to the parish of *Henden*.

They set forth an order of two justices of peace, by which he was removed first of all from *Harrow* to *Henden*. Upon appeal to the sessions he was sent back again to *Harrow*. Then *Harrow* sends him to *Ricclip*, who appeal, and the order is affirmed. Then *Ricclip* sends him to *Henden*, and *Henden* appeals; and that appeal is disallowed. And upon this appeal he was settled at *Ricclip*.

The order by which he was sent from *Ricclip* to *Henden* is not good. The statute of 13. & 14. *Car.* 2. c. 12. gives an authority to send poor persons to the place of their last legal settlement; and therefore the justices, at their sessions, having once settled this person at *Ricclip*, and so executed their authority, he is not to be removed again.

* [417]

S. C. 1. Bar. K. B. 226.
S.C. 1. Ld. Ray. 394. 425.
S. C. 2. Salk. 524.
S. C. Sett. & Rem. 224.
S. C. 3. Salk. 261.
S. C. Holt, 572.
S. C. 2. Bott, 222. 674. 807.
S. C. Fort. 312.
Ante, 163. 209. 396.
Blackerby's Cases, 188, 189. 190, &c.
2. Salk. 492.
4. Com. Dig. 600, 605.
6. Mod. 287.
2. Mod. 72.
10. Co. 101.

SIR B. SHOWER. I hope this order shall be quashed, for it is at *Henden* that he was legally settled, where he had four pounds a-year *freehold*: he was never legally settled at *Ricclip*. * We say, that *Ricclip* is not concluded, for that we were never before heard; for an appeal is only final and conclusive between the parties; but shall a combination between two parishes conclude another parish? Because *Henden* has prevailed against *Harrow*, by consent perhaps, that shall not conclude *Ricclip*, which is a third parish, and a stranger to the appeal between *Henden* and *Harrow*.

E contra. If *Ricclip* could have shewn that he had a legal settlement elsewhere, it would be something.

SIR B. SHOWER. Our case is this: The parish of *Ricclip* remove him to *Henden*; then *Henden* appeals, and that appeal is disallowed; but it appearing upon the face of the order that he was legally settled at *London*, that order ought not to have been likewise quashed.

E contra. The first order was from *Harrow* to *Ricclip*, and that order was adjudged good upon an appeal by *Harrow*; then *Ricclip* sends him to *Henden*, which we say they cannot do, for that they were concluded.

HOLT, *Chief Justice*. Where the justices of peace give a special reason for their settlement, and the conclusion which they make in point of law will not warrant the premises, there we will rectify their judgment; but if they had given no reason at all, then we would not have travelled into the fact. But here it appears, that he had a freehold at *Henden* which descended to him. Now if this man go and live there forty days, shall he be disturbed? No certainly. And though they adjudge this not to be a settlement, yet we determine it otherwise according to law.

But

But it was said, that the justices have adjudged the matter upon an appeal between *Ricelip* and *Henden*; and that this is conclusive.

TURTON, *Justice*. No, since it appears that this order was good upon the special matter.

SHOWER. This matter comes here upon the whole for the opinion of the Court.

* HOLT, *Chief Justice*. But suppose he had sold his estate at *Henden*, why then his settlement ceased there, and perhaps he might have acquired another elsewhere, and therefore *Ricelip* may well be concluded; for this might be the place of his last legal settlement, and then this parish must maintain him till they find out another parish where he was last legally settled. The question here is, What was the last place at which he was legally settled?

* [418]

TURTON, *Justice*. If it appear that they have adjudged a legal settlement which is not so, we may quash that order, where the special matter appears upon the order.

HOLT, *Chief Justice*. That is true.

ROKEBY, *Justice*. I thought this difference had only been, whether the boarding had been a legal settlement, or he had got a freehold, the one being at *Ricelip*, and the other at *Henden*; and if so, I should be of opinion that the settlement is at *Henden*.

TURTON, *Justice*. Here seems to be *res inter alios acta*, &c. for *Ricelip* and *Henden* were not concerned before.

HOLT, *Chief Justice*. But *Ricelip* was no third person, for *Ricelip* was concerned.

TURTON, *Justice*. It plainly appears now, that *Henden* is the place where he was legally settled, and why shall not *Ricelip* send him thither?

HOLT, *Chief Justice*. This follows, that at this rate he is sent up and down from parish to parish, and so made a *wanderer* by the justices of the peace's order. Indeed, the question here was, to have the judgment of the Court upon the whole where this man was legally settled, and the design of this order was to lay all matters before us.

SHOWER. We say, that this man was not settled at *Ricelip*, for that he had a freehold at *Henden*.

HOLT, *Chief Justice*. But the adjudication of the justices of the peace was, that he was settled at *Ricelip*, and we cannot nullify their * judgment; though it be illegal, we cannot correct them in fact, of which they are sole judges.

* [419]

SHOWER. Two justices of peace cannot send a man over to any other place than his last legal settlement before an appeal,

THE PARISH OF RICELIP *against* THE PARISH OF HENDEN.

2. Salk. 524. 536.

appeal, and why ſhould they have power to ſend him over after an appeal?

HOLT, *Chief Juſtice.* Let a man be ſettled where he will, we are all of opinion, that a man may go and live where he has *an eſtate*, and therefore that he might have gone to the place where he had a freehold.

Adjournatur (*a*).

(*a*) This caſe was again debated in the Hilary Term following, when HOLT, *Chief Juſtice*, and GOULD, *Juſtice*, were of opinion, that *Ricelip*, by the confirmation of the order removing him from *Harrow* to *Ricelip*, was now concluded againſt all perſons and places from conteſting that *Ricelip* was not the place of his laſt legal ſettlement, S. C. 2 Salk. 524. TURTON, *Juſtice*, was of opinion, that it ſhould be concluſive againſt *Harrow*, but not againſt *Herdon*. ROKEBY, *Juſtice*, was of opinion, that the appeal to the ſeſſions was not final in any caſe, but that it might be removed into the king's bench, and examined there upon its merits, S. C. 1. Ld. Ray. 425. And on account of this difference of opinion no judgment was given. But it ſeems, that an order of removal *confirmed* is concluſive on the *appellant parish*, not only as to the *pariſh removing*, but as to *all other pariſhes* with reſpect to ſettlements anterior to the order of removal, Rex *v.* Stoney Stratford, 2. Salk. 527.; but not as to ſettlements ſubſequently gained, Rex *v.* Shenfield, 2. Salk. 492.; Rex *v.* Filmgtowe, 2. Bott's P. L. 810. pl 765. But an order *revoked* is only concluſive as between the contending pariſhes, Bedington *v.* Kingſton Bowſey, 2. Salk. 486. Carth. 516. Cirenceſter *v.* Coln St. Aldwins, Burr. S. C. 17. Rex *v.* Brideniham, 2. Burr. S. C. 394. Rex *v.* Partley, Burr. S. C. 425. Rex *v.* Leigh, Cald. 59.

Caſe 216.

The ſeſſions cannot *commit*, but muſt *indict* for diſobedience to their order.—*Qu.* If they can order payment of *ſervants wages*.

Ante, 140.

2. Salk. 442. 477. 484. Carth. 156. Comb. 63. 213. 365.

The King *againſt* Pope.

MOMPESSON moved to quaſh an order made by the juſtices of peace at their ſeſſions for *ſervants wages* and coſts of ſuit.

FIRST, They have committed him to priſon for not performing it, which they cannot do; they ought to have *indicted* him for diſobeying their order (*a*).

SECONDLY, The juſtices of peace have no power to compel the payment of *ſervants wages* (*b*).

HOLT, *Chief Juſtice.* Let it be quaſhed, *niſi.*

(*a*) See the caſe of Sherrold *v.* Holloway, 2. Stra. 1162. 2 Saff. Caſ. 100.

(*b*) The juſtices of peace have authority concerning the wages of ſuch ſervants as are hired under the ſtatute 5 *Eliz.* c. 4. by the year for the ſervice of huſbandry, but not otherwiſe, Rex *v.* Champion, Carth. 156.; for though by the ſtatute they are only impowered to ſet the rate of wages, yet they may alſo order payment of them, Rex *v.* Gouch, 2. Salk. 431.; and if the order be general, the Court will intend that the ſervant was employed in huſbandry, Rex *v.* Gregory, 2. Salk. 484.: but if it appear, that the ſervant is the valet of a gentleman, or the journeyman of a trader, the order is bad, Rex *v.* London, 2. Salk. 442.; for the juſtices have only juriſdiction in caſes of huſbandry, Rex *v.* Helling, Stra. 8. Atkins' Caſe, Fort. 318. And now by the ſtatute 20. *Geo.* 2 c. 19. "All complaints, differences, and diſputes, between maſters and ſervants in "huſbandry, hired for a year or longer, "or between maſters and artificers, "handicraftmen, miners, colliers, keelmen, pitmen, glaſsmen, potters, and "other *labourers* employed for any certain "time, or in any other manner, may be "heard and determined by one juſtice "of the county or place where the maſter "ſhall inhabit, although no rate or aſſeſſment of wages have been made that "year by the juſtices, PROVIDED that "the ſum in queſtion do not exceed *ten* "*pounds* with regard to any *ſervant*, nor "*five pounds* with regard to any artificer, "&c. or other labourer; and if the wages "ordered are not paid in one-and-twenty "days, the ſame may be levied by diſtreſs."

Alinſon *againſt* Spence.

Caſe 217.

NORTHEY moved to quaſh an order that was made for the maintaining of a *baſtard-child* when it was born in *lawful wedlock*, becauſe it is only ſaid, that the huſband was at *Cadiz*.

An order of two juſtices for the maintenance of the *baſtard child* of a *married woman*, muſt ſhew that the huſband had *no acceſs* for the ſpace of *forty weeks* antecedent to the birth; for it is not ſufficient to ſay only, that the huſband was *beyond the ſea*.

SECONDLY, Then here is a ſum *in groſs* ordered, which is ill. Beſides, we ſay it is a contrivance.

SIR B. SHOWER. None can be a baſtard within the ſtatute 18. *Eliz.* c. 3. ſ. 2. but thoſe who are baſtards within the ſtatute of Stillborn Children, 21. *Jac.* 1. c. 27. and no one will ſay that this woman was within that ſtatute. I grant this child could not inherit the huſband's eſtate, but that goes upon the particular rules of deſcents; but this child is within the ſtatute of 43. *Eliz.* c. 2. and the father ſhould have maintained it.

* I have another fatal exception to this order. It is ſaid, that he was not there when the child was begotten or born, in the diſjunctive, which is ill, for he might be there at one of thoſe times, and he might be abſent the whole ſpace of time, both when the child was begot, and when it was born.

* [420]

S C Carth. 469
S C Salk. 483
S C Holt, 507.
S C Sett & Rem 136.
S C 1 Ld. Raym 395
1 Salk 122.
2 Salk 434.
Stra 51 925 1056
B R H 379.
2 Com Dig. "Baſtard" (A.)
1 Bott's Poor Laws, 395
1 Bac Abr. 311
Comb 418.

HOLT, *Chief Juſtice*. Suppoſe a real action had been brought by this child, and baſtardy pleaded, muſt not the biſhop have certified that he was a baſtard? Indeed, where a man is *a nullus*, there muſt be a ſpecial baſtardy certified, for that the biſhops own ſuch a one to be legitimate. But here the father being beyond ſea, Whether this child is not *nullius filius* (*a*)? And what if he be born within lawful matrimony, yet why is he not within the ſtatute of 18. *Eliz.* c. 3.? Is not the child born in adultery? As to the caſe of ſtill-born children, that ſtatute is a penal law, and to be taken ſtrictly. Is it not an unconſcionable thing for the huſband to keep this child, which was got by another man? Indeed, the other exception requires ſome conſideration. If the child be not a baſtard, the order is *ipſo facto* void, it is out of their juriſdiction; they muſt take care that it be a baſtard.

NORTHEY. But the juſtices have undertaken to ſay, that ſhe was delivered of a male baſtard child, and the reſt ſtands indifferent whether he was here in the mean while, you will not intend it.

SHOWER. It would have been void if you had only ſaid that ſhe was delivered of a baſtard-child.

HOLT, *Chief Juſtice*. The order muſt be quaſhed, for it muſt appear, that he was not here all the ſpace. If he was here either at the begetting, or at the birth of the child, it is ſufficient.

Let the *reputed father* be bound over to appear here.

(*a*) See 1 Term Rep 101 that a baſtard being *nullius filius* applies only in the caſe of inheritance.

The

Caſe 218.

The King *againſt* Overſeers of Shepton Mallett.

A *mandamus* will not lie to overſeers to account, unleſs it appear that there was no other remedy.

2. Salk. 525. 531. Ante, 314. 6. Mod. 97. 4. Term Rep. 246.

A MANDAMUS was granted to the juſtices of the peace, and to the overſeers of *Shepton Mallett*, to give an account for certain monies which they had received, &c. * The juſtices and overſeers make a return, that there was an account given of their monies, and that they had diſpoſed ſeveral ſums in ſuch particular manner, &c.

PER CURIAM. Both *the return* and the writ of *mandamus* are very ill (*a*).

HOLT, *Chief Juſtice*. You ſhould have ſaid in your writ, that you could not have your ordinary remedy.

TURTON, *Juſtice*. That ought to have appeared as well in the writ itſelf as upon the ſuggeſtion of the Counſel at the bar.

(*a*) See Rex *v.* Mayor of York, 5 Term Rep. 66 where it is ſaid, that after *a return* has been made to a *mandamus*, the defendant cannot make any objection to the writ itſelf.

Caſe 219.

Coot *againſt* Lynch.

If judgment from *Ireland* be affirmed in *England*, execution cannot iſſue in *England* for *coſts* of the affirmance, but it may in *Ireland*.

S. C. 1. Salk. 321. S. C. Carth. 460. S. C. Lilly. Ent. 275. 27.. S. C. 12. Mod. 225. S. C. Holt, 372. S. C. 1. Ld. Ray. 427. Yelv. 118. Cro. Jac. 535. Cowp. 843. 2. Bac. Abr. 357.

THE QUESTION in this caſe was, Whether a judgment given here in the king's bench upon a writ of error on a judgment in *Ireland*, could be executed here in *England* for the coſts? for that execution had been taken out againſt the party who was here in *England*.

HOLT, *Chief Juſtice*. Whatever judgment the Court gives here muſt be executed in *Ireland*: here can be no *teſtatum* go into a foreign county, the original judgment being given in *Ireland*. Would you execute a judgment by piecemeals? Shall you execute an acceſſary part of a judgment, when the principal judgment cannot be executed here?

ROKEBY, *Juſtice*. Execution muſt follow the nature of the original action, and this Court is to ſend *a mandate* to the Judges in *Ireland*, to ſee that the judgment which was given here be put in execution there (*a*).

HOLT, *Chief Juſtice*. I am of opinion, that this execution ought to be ſet aſide.

And ſo BY THE COURT, Let a *ſuperſedeas* go, *quia erroniceè*.

(*a*) See 22. *Geo.* 3. c. 53. by which *Ireland* is deprived of appealing to the courts in *England*.

The

The Case of Mr. Jennings of Clare-Hall.

Case 220.

COUNSEL moved, upon a return to a *mandamus* to "The "master and fellows of CLARE-HALL" to restore *Jennings* to his fellowship on *Mr. Dickins's* foundation.

Qære, If THE FOUNDER of a college appoint a *general visitor*, whether his authority extends to *annexed foundations*.
S. C. ante, 404.
Post. 452, 453.
6. Mod. 18. 260. 363.
Skin. 454.
Carth. 93.
8. Mod. 183.
1. Bl. Rep. 76.
1. Wilf. 266.

* They return their several statutes, &c. and that by one of them THE CHANCELLOR is appointed to be their VISITOR, and therefore *the master* is not obliged to admit *Mr. Jennings* to his fellowship, there being A VISITOR.

WRIGHT. I take this return to be very insufficient; for I agree, that where there is a *general visitor*, that he ought to be applied to: but here THE CHANCELLOR is only *a visitor* to some particular purposes, as appears by the context of the statute, which says, "If a man be guilty of such particular crimes, why then *in omni-* "*bus, &c.*" that is, in *all things* relating to those facts, he shall be subject to THE CHANCELLOR.

SECONDLY, The King cannot appoint A VISITOR to any particular foundation. Indeed, to *hospitals, &c.* he may appoint visitors. So that it signifies nothing, though KING JAMES did make A VISITOR; for the *Countess of Clare* founded this charity *in protectionem regii Hospitalis*. So that this is wholly a *lay foundation (a)*; and it does not appear to be for spiritual matters. So a foundation *ad fluvium, et orand.* is lay, though it be *ad orand.*; for every man is bound to pray to God.

THIRDLY, The statutes of my *Lady Clare*, who puts the master and fellows, founded by her, under the power of THE CHANCELLOR, do not subject those fellowships which were founded afterwards to his power. Therefore since we have no other remedy, I hope we shall have a *peremptory mandamus* granted by this court.

E contra. As for what he says out of the return, I shall not answer it.

FIRST, I take it, that no *peremptory mandamus* ought to go, for that he is not duly elected.

SECONDLY, Whether he be or be not duly elected, the examination of it does not belong to this Court, but to another jurisdiction. These *fellows* are the founder's creatures, and must be subject to the restrictions and limitations that are prescribed by the statutes, which say, "that the majority of the fellows and the "master shall chuse;" so that *the master's* consent is absolutely necessary: and here *Dr. Blith* is the master, and does not think fit to consent and chuse *Mr. Jennings* fellow. And here is nothing in the statute to enforce the master's consent. 1. *Rol. Abr.* 530.

(a) That the corporations of universities are lay foundations, see Rex *v.* Vice-Chancellor of Cambridge, 3. Burr. 1647.

So

THE CASE OF MR. JENNINGS, OF CLARE-HALL.

* So in *Peterhouſe* there cannot be an election without the maſter's conſent.

In the next place, here being A VISITOR appointed by the ſtatutes, this Court will not interpoſe.

THIRDLY, If this cauſe had related to the old foundation, there had been no doubt of it. Now it is ſaid, that "*in omnibus* THE "CHANCELLOR ſhall be VISITOR."

Then, FOURTHLY, *Profert hic in curiâ* is not neceſſary to be in a return.

HOLT, *Chief Juſtice*. To what purpoſe ſhould it be produced in court, when nobody is here to demand *oyer*?—As to the merits of the cauſe: How can they bring in ſtrangers, and make them ſubject to the reſtrictions impoſed by THE FOUNDER? Though there be A VISITOR for the fellows founded by my *Lady Clare*; yet, Whether the power of this viſitor ſhall be extended to the new fellows? is the queſtion. Whether there muſt not be a new incorporation of the ſecond fellowſhip founded by *Dickins*?

ROKEBY, *Juſtice*. *Dickins's* charity is to be diſpoſed of by the maſter and fellows, but it does not ſeem to relate to the old eſtabliſhment (*a*).

Adjournatur.

(*a*) It does not appear that this caſe was ever decided, 1. Burr. 191. But that new engrafted fellowſhips, if no ſtatutes be made by the founders of them, muſt follow the original foundation, and be ſubject to the ſame diſcipline and judicature, ſee Green *v.* Rutherforth, 1. Vezey, 475.; Attorney General *v.* Talbot, 3. Atk. 662.; 1. Vezey, 78.; Rex *v.* Biſhop of Ely, 1 Bl. Rep 76.; and St. John's College, Cambridge, *v.* Toddington, 1. Burr. Rep. 158.

Caſe 221.

Okell *againſt* Sudlow.

Power of a rural dean to grant adminiſtration.

6. Mod. 134. 145. 241. 1. Salk. 40, 41. Carth. 148.

THIS is an action of debt upon a bond for forty pounds, wherein the plaintiff declares as adminiſtrator to *Thomas Rider*, and ſets forth, that adminiſtration of all the goods, &c. not exceeding above the ſum of forty pounds, was granted to him by *Dr. Cartwright*, dean rural of *Fradſham*, within the dioceſe of *Cheſter*, who had a peculiar juriſdiction, &c.

The defendant pleads, that *Thomas Rider* had goods, &c. to above the value of forty pounds, *viz.* to the ſum of fifty pounds, at *Fradſham*, within the dioceſe of *Cheſter*; and that the biſhop's official had granted the adminiſtration of all the goods, &c. of *Thomas Rider* to *Sarah Dutton*, and traverſes ABSQUE HOC that *Dr. Cartwright*, the dean rural of *Fradſham*, had any power to grant the aforeſaid adminiſtration to the plaintiff as he had declared, &c.

To

ORTEL against SUDLOW.

* To this plea the plaintiff demurred, and ſhewed for cauſe that it is double.

HOLT, *Chief Juſtice.* You ſhew for cauſe of demurrer, that the plea is double, and wants form, &c. Now let them ſhew, that the plea is not double, nor wants form.

ANSWER. Then, with ſubmiſſion, it does not appear that this bond of forty pounds was out of the peculiar's juriſdiction at the time of *Rider's* death. It is ſaid indeed in the plea, that he died at *Fradſham*, but it is not ſaid where this *Fradſham* is, whether within the dioceſe or not.

HOLT, *Chief Juſtice.* It does not ſay, that it was out of the archdeaconry.

ANSWER. It is a dean rural.

HOLT, *Chief Juſtice.* But you ſhould have ſhewn ſome ſpecial matter to ouſt the peculiar.

ANSWER. The peculiar has only juriſdiction of forty pounds, and we have ſhewed, that the teſtator had above forty pounds when he died, and traverſe that the dean rural had power to grant adminiſtration; which is the giſt and material part of the declaration.

HOLT, *Chief Juſtice.* It does not appear he had above that value within the peculiar juriſdiction.

THEN this plea contains double matter.

It is ſaid, that *Thomas Rider*, at the time of his death, had above forty pounds at *Fradſham*; and alſo, that adminiſtration was granted by the biſhop's official; ſo that he has jumbled all together; and therefore the inducement is ill with theſe ſeveral facts jumbled together, when either of them alone might have been a good plea, and a ſufficient anſwer to the declaration.

THEN the traverſe is ill, for it is matter of law, Whether the peculiar has a right, or not? which cannot be tried by the jury.

ANSWER. It is a matter of fact, Whether the peculiar has power to grant this adminiſtration, or not? which we are willing to have tried, and we have no other way to try it.

* The caſe of *Price v. Simpſon* (*a*): *Jackſon* leſſee for years by ſeveral leaſes of lands, ſome in the dioceſe of *York*, and ſome in another peculiar in the ſame dioceſe, deviſes theſe lands to his ſon, and made his daughter, a minor, executrix: the mother adminiſtered *durante minoritate*: and *per Curiam*, Adminiſtration ſhall be granted in two places, *viz.* one within the peculiar, and the * [425]

(*a*) Cro. Eliz. 718.

other

OKELL *against* SUDLOW.

other by the *Archbiſhop of York*; for the archbiſhop ſhall not have any prerogative here, becauſe this peculiar was firſt derived out of his juriſdiction. There this caſe is expreſs, that both theſe juriſdictions are conſiſtent, and that THE PECULIAR and THE BISHOP too may at the ſame time grant out two adminiſtrations; and ſo it was reſolved in that caſe of *Price v. Simpſon*.

Comb. 196. Cro. Jac. 556. Palm. 98.

But it is diſputed, Whether this peculiar had any juriſdiction at all?

HOLT, *Chief Juſtice*. Not ſaying that it was out of the archdeaconry makes the plea immaterial.

Let it ſtay.

Caſe 222. Anonymous.

Both an *action* and an *information* on 5. *Eliz.* c. 4. muſt be in the proper county. Ante, 225.

HOLT, *Chief Juſtice*. It was reſolved lately by TEN OF THE JUDGES, that no action of *debt* lies in WESTMINSTER-HALL for exerciſing a trade contrary to the ſtatute 5. *Eliz.* c. 4. out of the proper county. But the *proſecutor* is reſtrained by the ſtatute 21. *Jac.* 1. c. 1.

1. Salk. 373. 4. Mod. 145 158. 164. 6. Mod. 128. 220. Ante, 225. 1. Com Dig. "Action on "Statute" (D.). 3 Bac. Abr. 555.—But ſee the caſe of Shipman *v.* Herbert, that the 21. *Jac.* 1. c. 4 only reſtrains the proceedings on penal ſtatutes in the *ſuperior courts* where the informer before the paſſing of that act might have ſued in the *inferior* as well as the *ſuperior* courts, "by action, bill, plaint, "ſuit, or information." 4. Term Rep. 109.

The 21. *Jac.* 1. c. 1. does not extend to *penal ſtatutes* made ſince that act.

And we were alſo of opinion, that this ſtatute 21. *Jac.* 1. c. 1. only extends to acts made before that act, and not to ſubſequent acts of parliament. HALE, *Chief Juſtice*, was always of opinion againſt the *Caſe of Hughes*, according to our reſolution.

1. Salk. 372. Andr 25. Carth. 465. 2. Lev. 204. 2. Stra. 1081. 1. Bac. Abr. 40. 3. Bac. Abr. 465. 2. Hawk. P. C. ch. 26. ſ. 34.

Caſe 223. Heyling *againſt* Haſtings.

A conditional promiſe, as "*Prove it and* "*I will pay*," will avoid the ſtatute of Limitations.

THE PLAINTIFF as executor brings an action of *indebitatus aſſumpſit* for goods ſold by the teſtator to the defendant. The defendant pleads "*non aſſumpſit infra ſex annos*;" and in evidence it appeared, that the goods were ſold ſix years before the action was brought &c. but that the defendant ſaid to the * plaintiff, when he demanded the money, "Prove it, and "I will pay you."

* [426]

S. C. 1. Salk. 29. S. C. Carth. 470.

HOLT, *Chief Juſtice*. We are all of opinion, that this is a new promiſe, and ſhall charge the defendant notwithſtanding the ſtatute of Limitations. For to ſay, "Prove it, and I will pay

S. C. 12. Mod. 223. S. C. Holt, 427. S. C. Comy. 54. S. C. 1. Ld. Ray. 389. Gilb. L. E. 178. 2. Ld. Ray. 1101 Buſl N. P. 148. 3. Bac. Abr. 517. Cowp. 548. Douglas, 629. 2. Burr. 1099. 2. Term Rep 760.

"you,"

"you," is as much as to ſay, If the goods were ſold to the teſtator, I promiſe to pay you for them.

HEYLING *againſt* HASTINGS.

WE ARE ALSO OF OPINION, that if a man *acknowledge* a debt within ſix years, though this is not a promiſe, yet it is an evidence of a promiſe (*a*). As in the caſe of trover and converſion, though a denial be not a converſion, yet it is an evidence of a converſion (*b*).

Acknowledging a debt is evidence of a promiſe to pay.

2. Vent. 152. Carth. 471. 1. Salk. 29. 1. Com. Dig. 8vo. 220. Gilb. L. E. 258.

(*a*) The ſtatute of Limitations does not deſtroy the debt, but only ſuſpends the remedy, 5 Burr. 2630 ; and therefore the ſlighteſt word of *acknowledgment* will take it out of the ſtatute, 2 Show 126. *notis*, though made after the commencement of the action, Yea *v* Fouraker, 2 Burr. 1099.—See 3. Bac Abr. 517, 518.

(*b*) But ſee 6 Mod 212. that the very denial of goods to him that has a right to demand them, is an actual converſion, *per* HOLT, *Chief Juſtice.—Vide* 10. Co. 56. 1. Cro. 262 *q.* 2 Salk 655. 2. Mod. 245. 3. Mod. 2. 8 Mod. 172.

HILARY TERM,

The Tenth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.* } *Juſtices.*
Sir Henry Gould, *Knt.*
Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

Memorandum.

Caſe 224.

1. Ld. Ray. 414.

GOULD, *King's Serjeant*, was this Term made One of the Judges of the Court of King's Bench, in the place of SIR SAMUEL EYRE, *Knt.* deceaſed.—And DARNEL, *Serjeant*, was made *King's Serjeant*, in the place of SIR HENRY GOULD, *Knt.*

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Caſe 225.

* Parkhouſe *againſt* Forſter.

Trinity Term, 9. *Will.* 3. *Roll.* 363.

TRESPASS. On a ſpecial verdict the jury find, that the plaintiff was a houſekeeper at *Tunbridge*, and let out lodgings to ſtrangers, and alſo furniſhed them with ſtable-room for their horſes, &c. and that the defendant being A CONSTABLE, quartered A DRAGOON at the plaintiff's houſe, for which this action is brought.

A houſekeeper at *Tunbridge* or *Epſom*, or other watering-place, who lets lodgings and furniſhes meat and drink and provides ſtable-room, for the company who reſort there, for health or pleaſure, is not liable, under the mutiny act, to have *ſoldiers* billeted upon him as upon a perſon keeping a *public-houſe*; and therefore if THE CONSTABLE quarter a *dragoon* on ſuch *houſekeeper*, he is liable to anſwer in an action of *treſpaſs* for the damages ſuch dragoon may occaſion.—S. C. Salk. 387. S. C. Carth. 417. S. C. 1. Ld. Ray. 479. 1. Show. 268. 2. Roll. Abr. 84. Kely, 50. Palm. 367. 2. Roll. Rep. 345. Hutton, 200. 8. Co. 32. Raſt. 405. Moor, 877. Hetley, 49. Latch. 88. Dyer, 266. Cro. Eliz. 622. 398. 4. Co. 123. Cro. Jac. 224. 3. Bac. Abr. 180.

PARKHOUSE *against* FORSTER.

The queſtion is, Whether the defendant can juſtify this? and, Whether he has acted in purſuance of the late act of parliament made in the ninth year of his preſent majeſty?

Before the ſtatute 4. & 5. *Will. and Mary*, c. 13. ſ. 18. *(a)* the billeting of ſoldiers was wholly unlawful; but by that act, and alſo by the 9. *Will.* 3. c. . it is lawful for the conſtable to quarter ſoldiers upon *public-houſes*; but if the conſtable billet them upon *private houſes*, a good action lies againſt him, and there is all the caution imaginable uſed that *private houſes* ſhould be exempted from quartering ſoldiers. *Public-houſes* have a different conſideration in law from *private houſes* of this nature; for a good action will lie againſt an innkeeper for refuſing to entertain
[428] a ſtranger *(b)*. * And an innkeeper has no hire for his lodgings, and is anſwerable for any goods of his gueſts which happen to be loſt *infra hoſpitium*: but otherwiſe it is in caſe of lodgers in private houſes, for the landlord there is not anſwerable for the loſs of their goods, and before the late act of parliament, 3. & 4. *Will. & Mary*, c. 9. it was not felony for a lodger to take away the landlord's goods, though it was with a deſign to ſteal them. Then a livery-ſtable does not alter the caſe, for that is an entertainment only for horſes, and not for gueſts; and it is found here, that this ſtable was only for the uſe of the lodgers; and the ſtable being part of the houſe, cannot be taken neither for a livery-ſtable, which is diſtinct from a houſe, as was ruled in the caſe of *The King v. Marriott (c)*. So that we are not within the conſideration of *an inn*, nor within any the four particulars mentioned in the act which ſeem to deſcribe inns and public-houſes *(d)*.

E contra. This action is brought againſt a poor conſtable for doing his duty, ſo that we ſhall be intitled to all the favour the Court can give us. And I take it, that this caſe does not depend upon the conſtruction of any act of parliament concerning *tipling-houſes*, but merely upon the late act of parliament for billeting ſoldiers. Now they would exempt this houſe from quartering ſoldiers, by ſaying, that this is not merely *an ale-houſe* nor *a livery-ſtable*, but that it is of a mixed nature. Now if it be ſo to be taken, yet I ſhall ſhew it to you to be within the act of parliament. But, ſay they, this is not an *houſe of entertainment* generally for all the king's ſubjects, as *inns* are, but if this evaſion ſhould prevail, a great many *ale-houſes* would confine their buſineſs to a particular ſort of people: ſo the *inns* near the river-ſide would entertain none but watermen: ſo an *inn* on the Northern road is not univerſally uſed, it is only for people travelling that way; and yet I hope that this is *an inn* to all intents and purpoſes within the meaning of the
* [429] act of * parliament; and ſo at *Epſom*, and thoſe public places, ſince they entertain any body that comes there, either for the air, pleaſure, or health, and they refuſe nobody that comes for either

(a) See 7. Geo. 2. c. 2. ſ. 36.
(b) Godb. 345. Palm. 367. 374.
(c)
(d)

of

of thoſe purpoſes, they are as much within the ſtatute as any inns whatſoever. Another reaſon is, that the intention of the act is to comprehend thoſe that ſold *ale* by retail in their houſes; and if he had ſold *metheglin*, he had certainly been within the expreſs letter of it; and why not in this caſe? The *membra dividentia* of this act, are the *public-houſes* and the *private houſes*. If it be not a *private houſe*, it muſt be a *public-houſe*; there are no middle ſort of houſes. PARKHOUSE *againſt* FORSTER.

THEN I obſerve this upon the declaration, that though the giſt of the action is for billeting A DRAGOON upon the plaintiff, yet it is not ſaid that he was quartered there *contra voluntatem* of the plaintiff. Indeed, it is ſaid, that we cauſed the plaintiff to find THE DRAGOON with meat and drink; but there is no ſuch thing in the verdict, though indeed, there it is ſaid to be againſt his will, which is not in the declaration; ſo that what is actionable in the verdict, is not taken notice of in the declaration; and that which is actionable in the declaration, is not found in the verdict. In the verdict it is ſaid, that it was againſt his will; but not ſo in the declaration. In the declaration, it is ſaid, that the defendant cauſed THE DRAGOON to be in the plaintiff's houſe, where the plaintiff found him meat and drink; but it is not ſaid ſo in the verdict: ſo that one or other of them is defective, by reaſon of which defect the plaintiff cannot recover.

THEN the conſtable is not reſponſible for conſequential damages. He ſhall not be anſwerable for the outrages which THE DRAGOON may commit, who is a free agent; and he is himſelf reſponſible for his own injuries which he offers to any perſon. Indeed, in the caſe of a beaſt, the owner is anſwerable for all damages that may be done by his cattle, the beaſt not being a free agent: But the ſtatute provides a remedy for damages done by the ſoldiers themſelves.

* HOLT, *Chief Juſtice*. If a conſtable place A DRAGOON where it is unlawful for him to do ſo, he muſt make ſatisfaction for the conſequential damages; as if THE DRAGOON ſhould, out of a frolick, let the drink about the cellar, or do any other prejudice, the conſtable is reſponſible for the damage that enſues; for ſince the placing of him there was unlawful, it ſhall be taken as if the conſtable had put him there on purpoſe to do an unlawful act. * [430] 3. Will. 409.

Adjournatur.

Afterwards, in *Trinity Term* following, THE WHOLE COURT were of opinion, that the action was well brought, and that judgment ought to be given for the plaintiff.

EASTER TERM,

The Eleventh of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.* } *Juſtices.*
Sir Henry Gould, *Knt.*
Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

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* The King *againſt* Dr. Burrel.

Caſe 226.

THIS is an information againſt *Dr. Burrel*, for executing the office of CENSOR of the college of phyſicians, he not having taken *the oaths* as the ſtatutes do direct.

Qu. If the cenſor of the college of phyſicians be ſuch an *officer* as is compellable to take the oaths required by the 25. *Car.* 2. c. 2.

S. C. Carth. 478. Ante, 316. 403. 4. Mod. 233. 3. Bac. Abr. 722. 1. Hawk. P. C. ch. 8.

To this information the defendant pleaded *not guilty*; upon which the jury find a ſpecial verdict, which was very long: but,

The ſingle queſtion is, Whether this be ſuch an office, and place of truſt, as is within the ſtatute of 25. *Car.* 2. c. 2. and the new ſtatute 1. *Will. & Mary*, c. 8. which require the taking of the oaths?

PRO REGE. I hold this to be an office within thoſe ſtatutes. I will conſider the nature of an office. In the *Latin*, the word "*officium*" ſignifies the place and duty of it, and therefore an office is generally taken for a place of truſt: ſo in ſtatute 3. *Jac.* 1. c. 5. it is ſaid, "that no Popiſh recuſant ſhall exerciſe any office "or charge." So *Blount*, in his Law Dictionary. So *Finch*, 13. Now I will conſider whence this office is derived. The royal authority is the ſupreme office and charge of our conſtitution, and of our government; and has likewiſe under him the

THE KING *against* DR. BURREL.

*[432]

care and preservation of all his subjects healths; which office in this particular is exercised by the censors of the * college in subordination under him; and therefore those who have any branch of the regal office, ought to be termed officers under him: so are watchmen, &c. *(a)*. And these CENSORS are not only officers for the college, but they are designed for the public advantage and benefit, to take care of the people's health, by supervising and correcting all offenders against the rules and methods of physic. So Judges, and those who inflict punishment, are officers: and the statute 15. *Hen.* 8. c. 5. says, "that THE COLLEGE OF PHYSICIANS was "incorporated for the good of the commonwealth." But it is objected, that an inferior civil officer, as a constable, watchman, &c. is not within those statutes. But this admits of an easy answer; for these officers are wholly servile and subordinate; but these CENSORS are judges, and may fine and imprison, and make rules and orders, &c. and not altogether subordinate.

E contra. I take it plainly, that this office is not within the statute, which has wholly a reference to the public administration that concerns the public peace, manners, and government of the people; but these CENSORS are not officers appendant to the government, they only depend upon a private constitution which relates to the particular science of physick. It is an office of art and science, and the principal thing is knowledge; it does not intermeddle with the government, or with public affairs. It is no more an office than a schoolmaster's place. Then it was never known, that any of these CENSORS did at any time take these oaths; they never looked upon themselves to be within this statute.

HOLT, *Chief Justice.* The only question is, Whether this is *a public officer*, or not?

ROKEBY, *Justice.* I do not think but a Popish doctor may be a good doctor to a Protestant patient; but I do not think that a Popish governor can be a good governor for a Protestant subject.

HOLT, *Chief Justice.* Aye, but a Popish censor is not so proper to supervise and inspect all the Protestant physicians.

Adjournatur.

(*a*) Year Book 22 *Edw.* 4 pl. 22. 9. Co. 68.

*[433]

Case 227.

* The Bishop of Chester's Case *(a)*.

The *archbishop* has a power over his *suffragans*, and may deprive them for an offence committed against the spiritual duties of their office; but if THE LIBEL also contain charges of a nature cognizable by the temporal courts, *a prohibition* shall go as to those charges.—S. C. 1. Salk. 135. 7. Mod. 56. 117. 1. Salk. 106. 294. Carth. 484.

THE BISHOP had moved for *a prohibition* to THE DELEGATES, to whom he had appealed upon *a libel* against him in THE ECCLESIASTICAL COURT.

(*a*) *Quære*, If this be not the case of *Dr. Watson*, the *quondam* Bishop of *St. David's*. See 1. Salk. 134. Farresley, 56. 117. NOTE *to former edition.*

WRIGHT,

WRIGHT, *Serjeant*, now argued that no prohibition ought to go, for that THE LIBEL here is concerning ſpiritual matters. And without queſtion the archbiſhop, as metropolitan, has the ſupreme juriſdiction over the biſhops, and every thing that calls itſelf eccleſiaſtical *(a)*. So ſays *Archbiſhop Whitgift*, in his *Reg.* 177. which was printed in 1592. Indeed he talks there of THE HIGH COMMISSION COURT; but however as to this matter it is the ſame thing; for I confeſs the archbiſhops are tied up only as to ſuch matters as come within their eccleſiaſtical conuſance *(b)*. And no inſtance can be given where a prohibition has been granted to reſtrain the archbiſhop from reforming his clergy in matters of this nature which are mentioned in THE LIBEL. THE BISHOP OF CHESTER'S CASE.

The firſt charge againſt the biſhop is, for *ſimony*; and certainly this is ſingly and purely an eccleſiaſtical offence, and depends chiefly upon THE CANONS of the church, as appears in *Lyndewode*, 397. at the General Council of *Chalcedon*.

The ſecond charge is, *for taking exorbitant fees* for giving inſtitution, which is wholly of a ſpiritual nature; and by the 135th canon it is expreſſly ſaid, that "no money ought to be taken for "inſtitution or collation."

The third charge is, for *miſapplying charities*, and converting of them to his own private uſe, and though I do agree, that this matter may be redreſſed in *Chancery*, upon a commiſſion of *charitable uſes*; yet here the deſign is to inflict a puniſhment on the biſhop for this offence, which is not puniſhable in any other place.

* The fourth charge is, for *certifying a falſity* under his epiſcopal ſeal, in a matter which very nearly concerns the government; for he has frequently certified that ſeveral perſons had taken the oaths, when in truth they had not taken them. * [434]

This is the caſe as it ſtands before the archbiſhop; and I hope your lordſhip will not prohibit the archbiſhop from proceeding to enquire into theſe offences, and to puniſh them by eccleſiaſtical cenſures. It is true, they ground their ſuggeſtion upon this, that theſe matters are puniſhable in the temporal courts, as in the caſe of *Slater v. Smalbrook (c)*: Prohibition on ſuggeſtion that the ſpiritual court ſued one there for forging letters of ordination; but the truth is, it was to deprive him becauſe *mere laicus*; and no prohibition was granted. But this is no objection, for the proſecution here is of a different nature, it is *pro ſalute animæ*, as in the caſe of *Searl v. Williams (d)*. And ſuppoſe two or three of the crimes mentioned in THE LIBEL, of which I have only repeated a few, were of a temporal nature, yet you will not grant a *general prohibition* as to all: indeed, *a conſultation* may be *quoad, &c.* but a prohibition *quoad, &c.* is a *rara avis in terris (e)*. 1. Lev. 138.

(a) 1. Bl. Com. 380.
(b) 11. Co. 49.
(c) 1. Sid. 217. See alſo 1. Sid. 251.
(d) Hob. 288. See alſo 1. Keb. 121. 2. Keb. 215.
(e) 2. Keb. 215.

HOLT,

THE BISHOP OF CHESTER'S CASE

1. Salk 134. 2 Lev 64

HOLT, *Chief Juſtice.* If it be a matter that relates to the duty of his office, as a cauſe of deprivation, &c they may proceed, and ſo it is in the caſe of perjury by a clergyman, he may be proſecuted in THE SPIRITUAL COURT, though the crime is of temporal cognizance, but you will not go originally there.

SIR B SHOWER. *Mr. Serjeant's* argument ſhews, that there are many points very doubtful and difficult, therefore I pray that we may declare upon a prohibition.

HOLT, *Chief Juſtice* If he were only puniſhed there for a temporal offence, it would be another matter, but what was the ground of *Carey's Caſe (a)*? Why, he was deprived for acting againſt the duty of his place

GOULD, *Juſtice* The Church has always had a power to clear themſelves *(b)* In the *Second Inſtitute (c)* it appears, that in the time of *Henry the Sixth* the clergy's extortions were complained of, which were redreſſed amongſt themſelves. And the caſe of * *Slader* of *Birmingham*, in *Trinity Term*, in the ſixteenth year of *Charles the Second*, is a full authority in point, it was for forging orders, for which he was puniſhed in the ſpiritual court.

* [435]

ROKEBY, *Juſtice.* Suppoſe a clergyman commits a temporal offence by which he alſo acts againſt the duty of his place, ſhall we prohibit the ſpiritual court from puniſhing him in not doing his duty? In the *Caſe of Properties (d)*, you have good learning as to this matter.

A ſuggeſtion containing all the facts of the caſe, ought to be entered on the Roll before motion for a prohibition is made

HOLT, *Chief Juſtice.* If you do enter your ſuggeſtion on THE ROLL, you ſhall enter all the fact, that it may remain on record for ever.

WRIGHT, *Serjeant.* Their deſign is only to delay us, and to get off for ſix months. If they have any thing to offer, I deſire they may do it now, and enter it upon THE ROLL.

S. C. 1 Salk 136

HOLT, *Chief Juſtice.* Indeed, wherever you move for *a prohibition*, it is ſuppoſed that the ſuggeſtion is entered upon THE ROLL, though this is not practiſed

It was ſaid by the Counſel, that if the prohibition is not granted, we generally carry away the ſuggeſtion in our pockets.

Adjournatur.

At another day this caſe was again debated.

HOLT, *Chief Juſtice.* The eccleſiaſtical men are governed by different laws than other men are, and therefore we are not ſo proper judges of the matters of facts ſet forth in THE LIBEL, as *the ſimony* and the *charity perverted*, and the *taking of money* for or-

(a) 5 Co 1 Poph 59
(b) 31 Edw 3 c. 4
(c) 2 Inſt 586
(d) Davis Rep 3 b

dination.

dination. Indeed, it seems strange that a man should give money for taking on him the cure of souls. THE BISHOP OF CARLISLE'S CASE.

SIR B. SHOWER. Here the question is, Whether if the custom be to take such and such fees, and the party take more than the custom allows, this is not conusable here? Indeed, if he had done any thing in general against the duty of his office, it might be otherwise. * [436]

HOLT, * *Chief Justice*. I do not know why they should not try a custom which relates only to an ecclesiastical person when a lay fee is not touched. So in the case of *a pension* by prescription there shall be no prohibition granted (*a*). But that is not the case, for you have not suggested that you ought to take any thing by custom; you do not say there is any custom for you. 2. Vent. 239. 1 Salk 58. 551. 1. Vent. 3. 120. 265. 274. Cro. Eliz. 810. Cro. Car. 238. Hob. 247. 1. Mod. 167. 176 3. Mod. 268.

PER CURIAM. Take a prohibition, *quoad*, &c. (*b*)

In the case of *Crook v. Sampson and Another, churchwardens* (*c*), Libel in the bishop's court of *Exeter* for a seat which the churchwardens assigned to one *M.* in whose right the plaintiffs claimed. The defendants there, who now prayed the prohibition, prescribed by a *que estate* for the seat as ancient, and belonging to their tenement in *W.* and that they, and all those, &c. had used to repair. It was doubted whether this prescription in *the nave* of the church be good; but in *an aisle* it would be good. THE COURT inclined, that such a prescription *in navi ecclesiæ* may be for special cause: but they would not grant a prohibition. In the case of *Jacob v. Dallow* (*d*), cause was shewed why a prohibition ought not to go to THE ECCLESIASTICAL COURT, where the libel was for a seat in the church. I take it, that the placing and displacing of people in the seats of the church belongs purely to *the ordinary*, unless there be a prescription by one who has a freehold (*e*). In the case of *May v. Gilbert* (*f*), prohibitions were denied. Then some prescriptions are also triable in THE ECCLESIASTICAL COURT, as *modus decimandi*, repairing of churches. 8. Mod. 338. 1. Salk. 551. Ray. 246. Ante, 69, 71. Farefl. 8. Skin. 7.

* *E contra*. Where a man shews a fixed interest, he may have an action on the case, which must be tried at common law: for how can they in the spiritual court award damages? Here is a direct prescription, which they deny. * [437]

CURIA. Take a declaration, and set forth the suggestion.

Suppose a man has sat there for some time, and he is disturbed, shall not he sue in THE ECCLESIASTICAL COURT? The de-

(*a*) 2. Inst.

(*b*) But see the case of the Bishop of St. David's v. Lucy, 1. Salk. 136. S. C. 3. Salk. 90. S. C. Carth. 484. S. C. 1. Ld. Ray. 447. 539. S. C. 12. Mod. 237.

(*c*) S. C. 2. Keb. 92.

(*d*) 2. Salk. 551. 6 Mod. 230. 7 Mod. 8. 2. Ld Ray. 755.

(*e*) 2. Roll. Abr. 288. Hob. 69.

(*f*) 2. Bulst.

fendant

THE BISHOP OF CHESTER'S CASE.

fendant ſurmiſes, that he and his anceſtors have uſed, time out of mind, &c. to have an aiſle with a ſeat in the church for himſelf and family. This was on A LIBEL for a ſeat in the church. Becauſe it appeared upon the examination of the party himſelf, that the pariſh have always uſed to repair the aiſle and ſeat, the Court would not grant a prohibition, for that proves his anceſtors were not founders of the ſaid aiſle and ſeat. *Godb.* 199 *Moore*, 878. 12. *Rep. Garaen v. Pym.*

TRINITY

TRINITY TERM,

The Eleventh of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt,*
Sir Henry Gould, *Knt.*
} *Juſtices.*

Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

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* The City of London *againſt* Vanacre. Caſe 228.

HOLT, *Chief Juſtice.* This caſe now ſtands for the reſolution of the Court. It comes before us upon a return to a *habeas corpus* (*a*); in which it is ſet forth, that the CITY OF LONDON is an ancient city, and a body politic; and that KING JOHN, by his charter, did grant that the mayor and aldermen ſhould chuſe any of the freemen to be their ſheriffs. Then they return that branch of MAGNA CHARTA which relates to the city, and the ſeveral acts of confirmation, &c. and that it has been *a cuſtom*, time immemorial, for the mayor and aldermen to make new *bye-laws* for the advantage of the city; and that in purſuance of that cuſtom, in the ſeventh year of *King Charles the Firſt*, an act of common-council was made, by which it was enacted in manner following: "That the election of ſheriffs ſhall

The *bye-laws* of *London*, that perſons ſhall be elected ſheriffs of *London* and *Middleſex* on *Midſummer-day*; and that no perſon ſo elected ſhall be diſcharged, unleſs he make oath that he is not worth *ten thouſand pounds*; and that if ſuch perſon ſhall not at the next court give bond in 1000l. to ſerve the office, he ſhall forfeit 400l. and 100l. more if not paid within three months; is a good bye-law, and reaches to *Middleſex* although it be out of *London*.

* S. C. 1. Salk. 142. S. C. Carth. 480. S. C. 12. Mod. 269. S. C. Holt, 431. S. C. 2. Ld. Ray. 496. Ante, 105. 156. Raym. 447. 1. Mod. 10. 164. 1. Salk. 192. 341. 352. 6. Mod. 123. 177. 4. Mod. 27. 3. Mod. 193. 2. Jones, 145. 1. Jones, 162. Cart. 68. 114. 1. Vent. 21. 196. 1. Sid. 284. B. R. H. 284. 1. Burr. 235. 533. 4. Burr. 2260. 1. Bac. Abr. 338.

(*a*) See the caſe of Ballard *v.* Bennet, 2. Burr. 775.

"be

THE CITY OF LONDON *against* VANACRE.

" be annually on *Midſummer-day*, and that no citizen who is " elected ſhall be diſcharged, unleſs he will take an oath that he is " not worth *ten thouſand pounds*; and that if the perſon elected ſhall " not appear at the next court, and give a bond of a *thouſand* " *pounds* to take upon him the office of ſheriff at the eve of *St.* " *Michael* then next following, or ſhall refuſe to take upon him " the ſaid office, or ſhall not appear at the next court, that then " he ſhall forfeit *four hundred pounds*, and if he do not pay the " ſum within three months afterwards, that he ſhall forfeit *one* * [439] " *hundred pounds* more." * That *Vanacre* was choſen ſheriff ſuch a day, &c. but did not appear at the next court either to take upon him the ſaid office, or to make any excuſe for his diſcharge, by reaſon of which he had forfeited the ſum of *four hundred pounds*.

The queſtion was, Whether this act of common council ſhall be ſo far obligatory as to compel the payment of this four hundred pounds?

And though ſeveral objections have been made, yet we are of opinion, that this is a good bye-law, and that a *procedendo* ought to go.

FIRST, It is objected, that the mayor and aldermen in common-council have not power and authority to make ſuch a bye-law.

SECONDLY, That it impoſes hardſhips upon the citizens themſelves, in reſpect of this oath which they are obliged to take.

THIRDLY, That it is unreaſonable he ſhould forfeit four hundred pounds if he do not appear at the next court and hold, unleſs they can excuſe it, which, ſay they, makes them arbitrary.

FOURTHLY, That here is no proviſion made that the party ſhall have notice of this election, that he may have an opportunity to excuſe himſelf.

Theſe are the objections that have been made to this return.

Every corporation may, without any ſpecial power in the charter for that purpoſe, make *bye-laws* for the good government and advantage of the corporation; for it is a power inherent and eſſential to it, conſtitution.

Now as to THE FIRST OBJECTION, we are of opinion, that this privilege of making bye-laws and ordinances is veſted in the city by common right, if not by cuſtom, for it concerns the good and better government of the city, and every city and town corporate may, by an eſſential power inherent to their conſtitution, make bye-laws for the advantage of the government of that body politic; and this is the true touchſtone of all bye-laws, which ought to be for the adminiſtration of the government with which they are intruſted. LORD HOBART, in the caſe of *Norris v. Staps* (*a*), ſays, " that though power to make laws is given by " ſpecial clauſe in all corporations, yet it is needleſs; for I hold it,"

10. Co 31. Hob. 211. Moor, 579. 1. Salk. 142. 1. Bac. Abr. 505.

(*a*) Hob. 211.

continued

continues his lordſhip, "to be included by law in the very act "of incorporating; for as reaſon is given to the natural body for "the governing of it, ſo the body corporate muſt have laws as a po- "litic reaſon to govern it; but thoſe laws * muſt ever be ſubject to "the general laws of the realm, and ſubordinate to it." So is the *Chamberlain of London's Caſe* (*a*). Now it is for the advantage of the city to have ſuch a bye-law, that the ſheriffs ſhould be men of ſubſtance, that they may be the better enabled to execute ſo great a truſt. Then the very conſtitution of KING JOHN's charter gives the CITY OF LONDON power to chuſe ſheriffs; and it would be a vain thing for the charter to give a power to chuſe ſheriffs, if they cannot be compelled to hold that office; and therefore the perſons whom the city nominates are obliged to ſtand. So by the acceptance of any letters patents there is an obligation on the parties accepting to perform all things thereby required, as to undergo all charges, offices, &c. Certainly theſe citizens who were then in being when this charter was firſt granted, were obliged to ſtand, and ſo are all thoſe who come after. Now if there be letters patents which grant to the body politic an exemption from tolls, or privileges of fairs, commons, &c. yet all the particular members ſhall take advantage of theſe grants, though they were made to the body politic; therefore it is but reaſonable that the particular members, who reap the benefit of the body politic, ſhould alſo take upon them the burthen and charge of offices incident to it. Then no body can queſtion but that this conſtitution is for the advantage of the city; and therefore they muſt obſerve it exactly, or elſe it is a forfeiture of the whole franchiſe; and it is not in their power to make an alteration in their conſtitution. And to ſecure this franchiſe, it is neceſſary for them to have a power to compel them to execute this office, or elſe this franchiſe will be loſt; and that the aldermen may make ordinances to enforce the execution of their bye-laws, which are for the advancement of the public good of the city, appears in *Snelling's Caſe* (*b*) very full. Now as to MR. NORTHEY's objection, that the party refuſing to take upon him this office may be indicted, and that it was held ſo in *Norwood's Caſe* (*c*): FIRST, This will not ſave the forfeiture, for then there muſt be a vacancy in the mean time of this office of juſtice; ſo that they are bound to name ſuch ſheriffs as ſhall ſtand, that there may be no failure of the execution of juſtice; and therefore it is that they chuſe ſheriffs ſo long beforehand, that if ſome * refuſe to hold, they may chuſe others; ſo that there may be no forfeiture of the franchiſe. Then here can be no indictment grounded; for to refuſe that he will come and appear ſuch a day will not do, for though he ſay to everybody that he will not come, yet he may come notwithſtanding; and here he muſt come within ſuch a time, and acquaint the mayor and aldermen that he will ſtand, or elſe he muſt be fined. But it is objected farther, that though they may make ſuch a bye-law which

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* [440]

* [441]

Vide 1. Roll. Rep. 365. 3. Leon. 264, 265. Moor, 576, 577. 580. 8. Co. 127. Hard. 56. 210. Cart. 68. 114. &c. 3. Burr. 1827. 4 Burr. 2515. 1. Bac. Abr. 505.

(*a*) 5. Co. 62. (*b*) 5. Co. 82. Cro. Eliz. 409. (*c*)

ſhall

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shall affect the city, yet it shall not reach to the county of *Middlesex*, which is out of their jurisdiction. But I take it, that this act of common council binds; for though the execution of the act be out of the city, yet it is for their advantage, and the persons of the sheriffs are within the city, and the sheriffalty is within the city of *London* and its jurisdiction, and the interest of it.

THE SECOND OBJECTION is, That it is unreasonable to impose this oath, that he is not worth *ten thousand pounds*. But this is so far from being a hardship upon the citizens, that it is a relaxation of a burthen which lay on them before; for heretofore, though a citizen was worth never so little, yet he was bound to hold this office. And so it was resolved in the case of *the City of Norwich* (*a*), that a man who is chosen sheriff of that city is bound to serve it, and that no incapacity will excuse him; so that if he do not qualify himself by receiving the sacrament, &c. it is his own fault, and he shall be punished for not holding the office. So is the case of *Player v. Jenkins* (*b*) on a bye law in *London*, that there shall be but four hundred and twenty carts let to hire in *London*, and that if any more be used the owners shall forfeit forty shillings; and by the Court, It is a good bye-law; for if the number of carts should not be restrained, they would stop the streets and be a great nuisance. But say they, What if the person chosen to be sheriff be a madman or a fool, &c.? Why, these incapacities are excepted, they are tacitly excepted out of all laws whatever, and therefore this bye-law shall not extend to such persons; and the bye-law need not run, "PROVIDED that the party to be chosen sheriff be not a fool or a "madman;" it is excepted without it.

1. Vent. 21. 196. Moor, 580. 585. Pal. 3. Hard. 55. 2. Brownl. 179. 278. 3 Kin. 381.

* [442] * THE THIRD OBJECTION is, That he is obliged to appear at the next court of aldermen, and to hold the office, unless he can shew a good excuse to the contrary. This, say they, gives an arbitrary power to the court of aldermen to allow or disallow the excuse.

To this I answer, that this part of the bye-law is for the advantage of the citizens, for that they may make any reasonable excuse that is consistent with their constitution.

But suppose the party who is chosen sheriff make a good excuse, and they will not allow it, why, he may either plead this, or give it in evidence upon an action brought; for it is not reasonable that the party should be concluded by their disallowance if the excuse be reasonable; so upon that case of the commissioners of sewers, their discretion must be grounded upon reason, and it must not be fanciful.

(*a*) 4. Vin. Ab. 308. But see the case of
(*b*) 1 Sid. 284. 1. Roll. Abr. 364. Robinson *v.* Watkins, 4. Mod. 328.
Ply. 183. 324. 328. Gavel *v.* Tasker, Skin 371, *semb. contra.*

THE

THE FOURTH OBJECTION is, That here is no notice given of this election, and it may be that he was abſent at the time of the election, and then it would be very hard that he muſt take notice of it.—To this I ANSWER, That every freeman and citizen, being a member of THE BODY POLITIC, is ſuppoſed to be preſent where the whole body reſides; and though in fact one of the members ſhould be abſent, yet it was his duty to be there, and he is ſuppoſed in law to be there: he ſhall be obliged to take notice of this election at his peril. Then the election is made in view of the city, of which all perſons are to take notice as members of THE BODY POLITIC; and the proclamation is alſo made in the moſt notorious place of the city, *viz.* on THE HUSTINGS, where every perſon may take notice of it. As in caſe of outlawry, the ſuppoſition is that the tenant is commorant upon the land, &c. and ſo at the *quinto exactus*, that the party is at the county court preſent: ſo here, Is it not the ſame caſe that the freemen and citizens of *London* are reſident where the whole body politic is aſſembled? Every member of it is virtually and legally there, and all acts done there conclude his aſſent, and therefore he ought to take notice of it. Suppoſe the perſon ſo choſen was at *York* at the time of his election, yet he might have left word with ſome of his own family to give him notice of it, and to apply to the court of aldermen to excuſe him. * The miſchief would be very great if every rich citizen might withdraw himſelf from the ſervice of the city againſt the time of the election; for then you would have nobody to execute the office of ſheriff. I muſt needs ſay, that the government of the city very much concerns the good of the whole nation; for here the trade of the kingdom is chiefly managed, which ought to receive all the care and protection the law can give. I have endeavoured to inform myſelf as to the ſeveral acts and bye-laws which have been made about perſons withdrawing themſelves from the ſervice of the city; and I find there is one act of common council by which it is ORDAINED AND ENACTED, "That if any perſon doth willingly withdraw himſelf from ſerving any office in the city, he ſhall forfeit the ſum of one hundred pounds, and alſo be diſfranchiſed, unleſs he do come with ſix compurgators, and declare that he went abroad about his lawful occaſions." But notwithſtanding all theſe precautions, and that elections have been always practiſed for many ages in the manner as is ſet forth in this return, yet, I know not for what reaſon, there is a ſtrange temper of oppoſing this plain method of electing ſheriffs amongſt ſome of the citizens. But as our predeceſſors who ſat in this place have ever ſupported the good government of the CITY OF LONDON, ſo we ſhall do the ſame, and I hope that it will continue ſo when we are dead and gone.

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Under the cuſtom of *London*, that the perſon elected ſheriff of that city ſhall forfeit *four hundreds*, unleſs, at the next HUSTINGS ſubſequent to ſuch election, he ſwear that he is not worth 10,000l. it is no excuſe, to avoid the forfeiture, that no *notice* was given of ſuch election, for every freeman is bound to take notice of it.

1. Salk. 142. Carth. 484. 1. Roll. Abr. 365. Cro. Car. 498. 1. Burr. 533.

* [443]

And therefore WE ARE ALL OF OPINION, that this is a good bye-law, and that *Mr. Vanacre* has juſtly forfeited the ſum of four hundred pounds for not complying with it.

Case 231.

The King *against* Harniſſe.

On an indictment of *forcible entry*, if the force be found, *reſtitution* ſhall be made immediately.

THE caſe here was this: Upon a *vi laicâ removendâ*, a parſon had forcibly ſeized THE CHURCH, and, upon *inquiſition*, the force was found; but the juſtice of the peace did not preſently reſtore the poſſeſſion (as he ought to have done), but had a record of it made up, and deferred the delivery of the poſſeſſion for two or three years.

* [444]

S.C. Carth. 496. S.C. 1 Salk. 260. S.C. 3. Salk. 313. S. C. Holt, 324. S.C. 1. Ld. Ray. 440. 482. S. C. Comy. 61 S C. 12. Mod. 268. 2. Brownl. 266. 2. Bulſt 139. 2. Juſt 780. Bro, "*Faux Inſ.*" 32. Bro. "*Dett.*" 16. Bro "*Execution*," 135 &c Comb. 262. 2. Bac. Abr. 180.

And now all this matter appearing to the Court, it being removed before them by *certiorari*, they were of opinion, that this proceeding was very irregular, and that *reſtitution* ought to be awarded.

* HOLT, *Chief Juſtice*. I ground my opinion upon the authority in *Dr. Bonham's Caſe* (*a*), which ſays, that the commitment muſt be immediately. So upon the ſtatute of 8. *Hen.* 6. c. 9. of Forcible Entry, when the force is found by the inquiſition, reſtitution muſt be made immediately. The reaſon of one caſe is the ſame with the other.

ROKEBY, *Juſtice*. Where an inquiſition is taken, it is ſuppoſed there is a quicker remedy; and therefore we think it is not in the power of the juſtice of the peace to defer reſtitution ſo long. The act requires it to be done forthwith; and ſo is the authority expreſsly in the latter end of *Dr. Bonham's Caſe*; it muſt be reſtored upon view.

PER TOTAM CURIAM, Let reſtitution be awarded.

(*a*) 8 Co 119, 120.

Caſe 232.

The City of York *againſt* Toun.

Indebitatus aſſumpſit will lie for a *fine* for not holding the office of ſheriff.

INDEBITATUS ASSUMPSIT for a fine impoſed upon the defendant for not holding the office of ſheriff in the city of *York*.

S.C. 1. Ld Ray. 502. Ante, 439, 440. 5. Co. 62. Cart. 68. 114. 1 Bac. Abr. 165, 166. 2 Bac. Abr. 16.

SIR B. SHOWER. With ſubmiſſion, an *indebitatus aſſumpſit* will not lie in this caſe; for how can there be any privity or aſſent implied, when a fine is impoſed on a man againſt his will? Nor is there any precedent conſideration; neither do they ſhew any right to this fine; nor who impoſed it, &c.

HOLT, *Chief Juſtice*. We will conſider very well of this matter; it is time to have theſe actions redreſſed. It is hard that cuſtoms, bye-laws, rights to impoſe fines, charters, and every thing, ſhould be left to a jury.

Adjournatur (*a*).

(*a*) HOLT, *Chief Juſtice*, was of opinion, that an *indebitatus aſſumpſit* would not lie in this caſe; ROKEBY, *Juſtice*, ſeemed to be of a contrary opinion; but it does not appear that any judgment was given, S. C. Ld. Ray 502. It has, however, been decided that *aſſumpſit* will lie for *a penalty* forfeited by the bye-law of a company for not ſerving the office of ſteward in purſuance of ſuch bye-law, *Barbers v.* Pelſon, 2. Lev. 252.; for *ſalvage* due by the cuſtom of *London*, Mayor of London *v.* Soty, Carth 92.; for *a fine* due on admiſſion to a copyhold eſtate, Shuttleworth *v.* Garnet, Carth. 90. Evylin *v.* Chicheſter, 3. Burr. 1717. Whitfield *v.* Hunt. Dougl 727. *notis*; for money due for *petit cuſtoms*, Mayor of Exeter *v* Trimlet, 2. Wilſ. 95.; and for *tolls*, Seward *v.* Baker, 1. Term Rep. 616. See alſo Bell *v.* Burrows, Bull. N. P. 129. Sandetſon *v.* Bignal, 2. Stra. 747. Duppa *v.* Gerrard, 1 Salk. 78. and 1. Bac. Abr. 165.

Turner

Turner *againſt* Maine.

Caſe 232.

NORTHEY. This is an action of debt brought by the aſſignees of the commiſſioners of bankrupts; and it is not ſaid that the defendant had notice of this aſſignment.

Assignees may bring action without giving notice of the aſſignment.

6 Mod. 131.
1. Salk 111.

HOLT, *Chief Juſtice*. No notice is neceſſary.

E contra. How can we be guilty of a *devaſtavit* to them, and yet do not know when the aſſignment was made?

* [445]

* AT ANOTHER DAY *it was moved*, that this is an action brought by the aſſignee of the commiſſioners of bankrupts, ſurmiſing a *devaſtavit*, &c. and that the declaration is ill.

An action by aſſignees againſt the executors of the bankrupt's debtor, is good, after verdict, without ſtating the place of converſion, &c.

S. C. 12. Mod. 306.

FIRST, It is not ſaid where the *converſion* was.

SECONDLY, It does not appear, that at the time of ſuing out the commiſſion he was indebted.

THIRDLY, It is not ſaid any where in the declaration, that the money was not paid to the bankrupt himſelf.

HOLT, *Chief Juſtice*. Read the record—It is all well enough. FIRST, The place is alledged. SECONDLY, The *ſuperinde* is enough. And THIRDLY, for the laſt exception, it is ſaid, that execution ſtill remains of the debt.

Let the plaintiff have judgment.

MICHAELMAS TERM.

The Eleventh of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.*
Sir Henry Gould, *Knt.* } *Juſtices.*

Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

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* The King *againſt* Chandler.

Caſe 234.

BRODERICK. This is a conviction of the defendant for deer-ſtealing, on the ſtatute 3. *Will. & Mary*, c. 10. (*a*); and ſeveral exceptions have been taken againſt this indictment.

In deſcribing the offence on a penal ſtatute, it is ſufficient if the information follow the words of the ſtatute.

FIRST, That hunting was neceſſary as well as killing.—But I know not upon what rule ſuch an exception is founded; nothing of it appears in the ſtatute.

S. C Ld. Ray. 583. 1. Show. 48. Ld. Ray. 791. 2. Burr. 697. Stra. 496. 1 Term Rep. 222. Boſcawen on Convictions, 53.

SECONDLY, That it is "*forisfacit*" inſtead of "*forisfecit.*"—But that ſure is nothing, for the ſenſe of the one word is as full and expreſſive as the other.

"*Forisfacit*" inſtead of "*forisfecit*" in a conviction.

S. C. Carth. 501. Stra. 858. Fitz. 124.

(*a*) But ſee the 16. *Geo.* 3. c. 30. by which this and all former acts relating to *deer-ſtealing* are repealed, a different mode of proceeding eſtabliſhed; and other penalties inflicted.

In an information for killing deer, it muſt appear that the killing was *unlawful* S. C Ld. Ray 583. 1. Salk. 377, 378. 583. Carth. 503. 4 Com Dig. 810. 570. Strange, 1119.

THIRDLY, That ſeveral ſorts of killing is lawful, as appears in *Manwood's Foreſt Law*.—But here it is ſet forth, that the killing being within the park, was unlawful.

But the two things which ſeem to carry the faireſt appearance
* [447] of objections are theſe:

In an information on a penal ſtatute, it is ſufficient to alledge that the offence was committed between *ſuch a day* and *ſuch a day*.
S. C. Salk. 369. 378. S. C Ld. Ray 582 Carth 502. 10 Mod. 248 Boſcawen on Conviction, 23.

FOURTHLY, That the days of the killing do not appear.—But this ſignifies nothing, for if the killing were within a year before the indictment brought, it is ſufficient. * So to ſay, between ſuch a time and ſuch a time, is well enough; as in the caſe of a butcher for the buying and ſelling of live cattle contrary to the ſtatute. Beſides, it is not practicable to ſet down the day of the month; and one of the miſchiefs is, that it is difficult to diſcover when the fact was done.

What ſhall be a ſufficient *adjudication* in a conviction on a penal ſtatute
S.C. Carth 509
1. Salk. 112 385 2. Salk 681.

The FIFTH OBJECTION is againſt the form of the indictment. It is ſaid that it ought to have been, that if there were not ſufficient diſtreſs found, then the offender ſhould ſuffer imprisonment.—But this is not of neceſſity, for the forfeiture is ſufficient to be ſet forth in the indictment.

In a *conviction*, it muſt appear that the defendant had opportunity of being heard.
Stra. 46. 630. Salk. 181. 383 Ld. Ray [illegible] 2 Burr. 1, 1 Stra 261. 3 Burr. 1785. Stra. 44.

HOLT, *Chief Juſtice*. It does not appear whether the conviction was upon confeſſion or upon evidence.

BROTHERICK. It is ſaid we gave them a fair opportunity of being heard, and that is ſufficiently averred.

Certainty to a common intent is ſufficient in ſummary convictions. S. C. Ld. Ray. 581. 2 Term Ry. 18

HOLT, *Chief Juſtice*. It ſeems to be well enough. Here the act of parliament delegates a *ſummary juriſdiction* before a juſtice of peace.

Caſe 235. Anonymous.

A prohibition lies to the ſpiritual court againſt a libel to enforce a rate *to repair*, if an act of parliament has paſſed enabling the pariſhioners to raiſe money *to rebuild* the church. Arte, 380, 390, &c —1 Mod. 79. 194. 236 261. Raym 246 4 Mod 148 Hard 379 2. Jon 122. 1. Vent. 367.

COUNSEL ſhewed cauſe, why *a prohibition* ſhould not go to THE SPIRITUAL COURT. The foundation of the libel was for a rate to repair *the church*, and there was a ſentence, and an appeal upon that. And now, after all this, they would have a prohibition; but, with ſubmiſſion, they come too late. It is true, in the time of the late king *James the Second*, there was an

act

act made for building this church (*a*), with power to raiſe a ſum not exceeding fifty thouſand pounds; ſo that they ſuggeſt, that there was money enough raiſed by that act, and that this rate was illegally made; but your lordſhip will not examine into that now. Therefore we hope, that ſince here is nothing contrary to the act, or, for aught that appears, againſt law, the rule may be diſcharged. ANONYMOUS.

E contra. I hope not; they ſnipped a ſentence *ex parte* in the firſt place. But we go upon two points: FIRST, Upon the act of parliament, which preſcribes a particular manner of raiſing the monies; and therefore you cannot go to the ſpiritual court for it. SECONDLY, It is a rate declared to be made by *the veſtry*, and no veſtry could be called till the church was finiſhed. That which we inſiſt upon is, that the ſtatute is not followed, which preſcribes particular ways of raiſing the money. * [448]

HOLT, *Chief Juſtice*. Aye, what ſay you to that?

ANSWER. Our ſuit is for the *repairing* of the church, and not for the *building* of it.

HOLT, *Chief Juſtice*. But what will you ſay to the rate that is made for repairing *the watch-houſe*? that certainly muſt be ill. *Qu.* If a pariſh-rate for repairing a *watch-houſe* be good.

ANSWER. The money was not raiſed for the *watch-houſe*, but for repairing the church. There is indeed ſomething of a *watch-houſe* mentioned in the libel.

HOLT, *Chief Juſtice*. For that I am clear, *a prohibition* muſt go.

Give them the declaration in a prohibition.

Clement *againſt* Beard. Caſe 236.

SIR J. SHOWER. The libel in the ſpiritual court is for having married, and for cohabiting with his *wife's ſiſter's daughter*, which, we ſay, is clearly prohibited by the *Levitical Degrees*. Sot's *Ca. Lit.* 735. 2. *Jones*, 191. *Ney*, 29. *Hob.* 182. *Vaugh.* 313. and many other books. It is ſaid in ſome of the books, that *an uncle* may marry his *niece*, but that a man cannot marry his *aunt*, by reaſon of the ſuperiority which ſhe has over him. I hope that we ſhall have a conſultation. A man cannot marry his *wife's ſiſter's daughter*, for, by affinity, he is her *uncle*. Ante, 168. * [449]

HOLT, *Chief Juſtice*. What ſuperiority is there by an *aunt* over her *nephew*? What ground is there for the diſtinction? I cannot ſee any difference between the two caſes. Now for your caſe, it is certainly within the degrees of *affinity*; and in the * ſame degree of *conſanguinity*, there would be no doubt of it; for a man cannot marry his own ſiſter's daughter. I thought this caſe had been ſettled; there is a caſe againſt you in point. But

2 Jones, 118. 191 213. 2. Lev. 51. 2. Vent 9. Vaugh. 206. 272. Cro. Eliz. 228. Moor 907. 4 Leon. 16. Ley 464.

Lut 1077. 2 Inſt. 683. 1. Sid. 434. 1. Eq Caſes, 157. 1. Com. Dig. "Prohibition," (B. 4.)

CLEMENT *againſt* BEARD.

indeed, if this marriage be not within the *Levitical degrees*, we are to hinder THE SPIRITUAL COURT from proceeding on a wrong foundation.

Adjournatur.

Caſe 237.

Alanſon *againſt* Brookbank.

A *citation* from the ſpiritual court on a libel againſt a woman for incontinency, is not that kind of *proceſs*, which, by 29 *Car.* 2 c. 7. is forbid to be ſerved or executed on a *Sunday*.

S C. 2 Salk 627. S.C. Carth 504. Ld. Ray. 706. 12. Mod 275. 1. Hawk. P. C. c. 6. ſ. Sellon's Pract. 16.

MR. NORTHEY moved for *a prohibition* to THE ECCLESIASTICAL COURT of *Durham*. This comes before your lordſhip upon a ſuggeſtion, that whereas a libel was exhibited in the ſpiritual court of *Durham*, againſt a woman for living incontinently with MY LORD, &c. (*a*). Now the ground of our ſuggeſtion is, for that this *citation* was ſerved on her on *a Sunday*, which is contrary to the expreſs words of the 29. *Car.* 2. c. 7. by which it is enacted, "That no proceſs whatever ſhall be ſerved "upon a *Sunday*, except in caſes of *treaſon*, *felony*, or *breach of* "*the peace*." So that ſince the foundation of their proceeding is ſo irregular, they ought not to go on any further. Indeed, they pretend that this *citation* was well enough ſerved, for that it was fixed upon the church-door according to the cuſtom. But as to that, we ſay, they have no authority to fix the citation of any perſon on the church-door, but when the party cannot be cited perſonally; and it does not appear here, that this woman could not be perſonally cited, or that any attempt has ever been made to cite her perſonally; ſo that this citation has been wholly irregular, and conſequently this woman has been wrongfully excommunicated, and therefore we pray, that ſhe may be abſoiled. Then they object, that we might have inſiſted on this act of parliament in THE SPIRITUAL COURT: but we ſay, we were not bound to appear there by virtue of ſuch an erroneous citation, it being againſt an act of parliament. And a citation is looked upon to be as much *a proceſs* as any proceſs whatſoever, in any of THE TEMPORAL COURTS, as appears by 25. *Edw.* 3. *ſtat.* 6. And therefore, the one muſt be as much within the act 29. *Car.* 2. c. 7. as the other; though I made doubt, we had the opinion of the court of *Durham*, that this act of parliament did not bind the ſpiritual
[450] * court. But I hope your lordſhip will be of another opinion, and think fit to grant a prohibition.

Contra. I am told by THE CIVILIANS, that the law and cuſtom of the eccleſiaſtical courts is to fix the citation on the church-door, and that this is ſufficient without any perſonal ſervice, and that this has been the conſtant practice both before and ſince the ſtatute of king *Charles the Second*, and we defy them to ſhew any precedent wherever any prohibition has been at any time granted ſince the making of the ſtatute, which was a great many years ago.

NORTHEY. That is no objection; for though the cuſtom has been ſo practiſed ever ſince the making of that ſtatute, yet, we

(*a*) See Carth. 504.

ſay,

ALANSON *againſt* BROOKBANK.

ſay, it has been a miſchievous practice, and therefore it is high time now to have it redreſſed.

HOLT, *Chief Juſtice.* Indeed, the greater queſtion is, Whether the act of parliament extends to this proceſs, which was uſed to be ſerved in ſuch a manner, by the fixing of it at the church-door, before the making of the ſtatute? And ſuppoſe the eccleſiaſtical law is, and has always been, to ſerve this proceſs on *a Sunday*, ſhall theſe general words in the ſtatute take away their law? There may be ſome caſes to which the ſtatute may not extend; as for inſtance, there is A PROCLAMATION to be made on a *Sunday* at the church-door, by the ſtatute of 31. *Eliz.* c. 3.; now this is not taken away by the general words of the ſtatute. The reaſon of ſerving the *citation* in ſuch a manner on *a Sunday*, may be, for that they cannot do it as well on any other day in the week. But the caſe ſeems to be different in the execution of other temporal proceſs, which might have been as well ſerved on any other day as on *a Sunday*. So that it does not ſeem to be the intent of the ſtatute to take away the ſerving this proceſs in ſuch manner. But I do not like your partiality in THE SPIRITUAL COURT, for proſecuting the woman only, and not MY LORD, &c. Pray why ſhould not you proſecute him, as well as the woman, if they are both equally guilty? (*a*).

(*a*) The Court held that the 29. *Car* 2. c. 7. does not extend to this kind of proceſs, or to ſummons at the church-door, S. C. 2 Salk. 625. S C. 12 Mod. 275. and therefore, on the laſt day of the Term, although it appeared by the return of the APPARITOR, that he ſerved it perſonally on *a Sunday*, a prohibition was denied, S.C. Carth 504. But COMYNS, *Chief Baron*, in abridging this caſe, ſays, that although *a citation* may be publiſhed on the church-door on *a Sunday*, according to the uſage of the ſpiritual court, yet it cannot be ſerved upon the perſon on *a Sunday*. 6. Com. Dig. "Temps." (B. 3.) In the caſe of Walgrave *v.* Taylor, Mich. 13. *Will.* 3. however, the above deciſion, *viz.* the ſervice of a *citation* upon a *Sunday*, is recognized by HOLT, *Chief Juſtice*, as good law, and no notice is taken of the diſtinction mentioned by the Chief Baron. 1 Ld. Ray. 706. S.C. 12. Mod 606.

* [451]

Machin *againſt* Malton.

Caſe 238.

HERE the caſe was, That *Machin* had ſubſtracted tithes, as they ſay, within the dioceſe of *York*, and then removed out of that dioceſe to *Lincoln*, and lived there; and ſeven years after his living there, they *libel* againſt him in THE SPIRITUAL * COURT *at York*: upon which he brings an action upon the ſtatute 23. *Hen.* 8. c. 9. for being cited out of the dioceſe where he lived.

If a perſon live in the dioceſe of *York*, and there ſubſtract tithes *for land*, and afterwards remove into and inhabit in any other dioceſe, yet he may be libelled againſt in the SPIRITUAL COURT of *York*, notwithſtanding the 23 *Hen* 8 c 9 ſays, that no one ſhall be cited out of the dioceſe in which he lives; for by 32 *Hen* 8 c 7. the ſuit for withholding tithes is *local* S C. 2 Lutw 1057. S. C. N Lut 335. S.C. 2 Salk 549. S. C 3 Salk. 90 S.C. Carth 76 S. C. 12 Mod 252 S C. 1. Ld. Ray. 452. 13 Co 4 Cro. Jac. 321. Cro Car 97. 162. Hard. 421. Skin. 233 1. Lev. 96. Godb. 191. 6. Com. Dig "Prohibition," (F 9.) 1. Bac. Abr. 616.

The

MACHIN *against* MALTON.

The queſtion is, Whether this is within that act?

I take it, that this caſe is not within that act. Indeed, the deſign of the act was to maintain the juriſdiction of inferior dioceſes (*a*). But where there is not a remedy in the inferior dioceſe, the party may be cited to ſuch a court which has juriſdiction of the matter. And in the caſe of *Porter v. Rocheſter* (*b*), the archbiſhop is reduced to his proper dioceſe, or peculiar juriſdiction, except in five caſes, FIRST, in default of the ordinary: SECONDLY, in the caſe of appeal: THIRDLY, if the ordinary dare not, or if he will not convent the party: FOURTHLY, if the ordinary be party to the ſuit below: FIFTHLY, in caſe of inſtance and requeſt by the ordinary. In this caſe (*c*), the ſuit is begun below, and ſentence there given, and after, an appeal upon this ſentence to the delegates, and all this while no endeavour to ſtay theſe ſuits upon this ſtatute: a legacy has been ſued for in THE PREROGATIVE COURT, though the parties dwelt in another dioceſe (*d*). And in every one of the caſes expreſſed in the ſtatute, it is plain that "dioceſe and juriſdiction" are coupled together; ſo that it is evident, the word "dioceſe" imports "juriſdiction," and not any compaſs of ground; as appears alſo by the ſtatute of 27. *Hen.* 8. c. 20. *Winch. Entr.* 570. In 2. *Roll. Rep.* 448. one was ſued for tithes in the *Biſhop of Saliſbury's court*, the other ſues a prohibition, for that he is in the juriſdiction of *a peculiar*, and that the archdeacon is his peculiar. I take this caſe to be expreſsly within the ſtatute, which was made for the general eaſe of the ſubject from the oppreſſion of the *apparitors*. For before that ſtatute the poor ſubjects were worried up and down, and cited at great diſtances from the places where they lived, not only for defamatory words, but alſo for the ſubſtraction of tithes, as appears in 1. *Keb.* 481. The ſuggeſtion was, that the party was cited out of the county where he lived, which is now within 23. *Hen.* 8. c. 9. the cauſe of action being local for tithes within the dioceſe, and conſideration was awarded on motion; and the canons made 1603. take notice of this ſtatute. Then to ſay, that here is no juriſdiction in the inferior dioceſe is falſe, for the perſon may be ſued in the place where he lives, for the ſubſtraction of tithes in another dioceſe; and ſo is * the caſe of *Lynch v. Porter* (*e*), which was argued by THE CIVILIANS. For it is A MAXIM in the civil law, that "*the Court may follow* "*the criminal.*" There is a caſe of *Woodward v. Mackprice* (*f*), where a prohibition was granted in ſuch a caſe: *Woodward*, and others, who lived in the dioceſe of *Litchfield* and *Coventry*, but occupied lands in the dioceſe of *Peterborough*, were taxed by the

1. Lev 96. 1. Roll Rep. 329. 448. 2. Brownl. 121.

* [452]

Godb. 134. 152. 154. 2. Saund. 423. 5. Co. 67. Cro. Eliz. 659. 843. Comb. 132. 1. Cro. 97. 2. Roll. Rep 1. 191 270 Pop. 197. 1 Bulſt. 20. Latch. 203.

(*a*) See the caſe of Fiaums *v.* Powell, Godb. 191.
(*b*) 13. Co 5.
(*c*) S. C. 2. Brownl. 1.
(*d*) 2. Roll. Rep. 328. See alſo Fitz. 110.
(*e*) 2 Brownl 1
(*f*) 3. Mod 211.

parishioners

parishioners where they used the land, for THE BELLS of the church; and, upon refusal to pay, a suit was against them in the diocese of *Peterborough*, and they had a prohibition. There is another authority, on which I chiefly depend; it is the case of *Jones v. Boyer (a)*, where it was agreed, that if a man inhabit in one diocese, he has cause to sue for tithes in the same diocese in which he inhabits; and if in another diocese, there he ought to sue in the diocese where the defendant did inhabit, and not where the tithes are payable, nor where the plaintiff inhabits. The case is express for me, that the suit ought to be in the diocese where the defendant inhabits. Therefore upon this authority, which is so express for me, I pray your lordship's judgment for a prohibition.

MACHIN *against* MALTON.

HOLT, *Chief Justice*. As for that case of *Jones v. Boyer*, it was in the case of *personal tithes*, and there indeed "*forum sequitur rem*," but not so in case of *real tithes*.—We will give our opinions next Term *(b)*.

(*a*) 2 Prowl. 28.

(*b*) S. C. 1 Ld. Ray. 655. Says, "THE COURT awarded a prohibition, because by the statute 27 *Hen.* 8. c. 12. the suit for withholding tithes is in the court of the place where the tithes arise; but otherwise in case of personal tithes, which are to be sued in the diocese where the defendant inhabits." S. C. Carth. 456 accord.

Usher's Case.

Case 239.

I AM to pray your lordship for *a mandamus* to the vice-chancellor of the university of *Oxford*. It is in the case of one *Mr. Usher*, who has been expelled out of UNIVERSITY-COLLEGE in *Oxford*, and was refused by the *Burgesses* there; upon which *Mr. Usher* would appeal to the vice-chancellor and convocation; but the vice-chancellor refuses to admit of this appeal.

Mand. nms. to the vice-chancellor of *Oxford*, to receive an appeal upon expulsion of a fellow. Ante, 237. 314. 424. 421.

The question therefore is, Whether the vice-chancellor and convocation are visitors of the college? And we take it, that the body of the university in convocation are legal visitors of this college, as appears plainly by the statutes of the college; and they have all along continued to exercise this visitorial power ever since the year 1219, in the fourth year of the reign of *Henry the Third*. Therefore we hope, that the vice-chancellor shall be compelled to do his duty, and to receive the appeal.

6 Mod. 18. 260 386. 1 Bl. Rep. 58. 1. Wils 266.

* [453]

Ad idem. That the vice-chancellor and convocation are THE VISITORS of this college, is without question, for they are appointed so to be by the statutes of the college, and *by* several public instruments: but it is a great question, Whether the VISITORS have an absolute power to condemn without cause? or, Whether it is not a limited power to expel for a good and lawful cause? For the act which constitutes visitors, it says, says, that they may condemn *ex causis licitis*. That it is impossible for *Mr. Usher* to come at his remedy by appeal, but only

Vide ante, 421. 322.

USHER'S CASE.

poſing it to the vice-chancellor; and ſince he has refuſed to receive it, there is no other way but for your lordſhip to compel him to it by your *mandamus*, that he may do his duty; which now he declines to do, by ſtopping up the channels of juſtice.

HOLT, *Chief Juſtice*. You are too ſoon for argument: let me know how the caſe ſtand's as to the fact. Read to me your conſtitution by the ſtatutes, that I may know how this power is founded.

Then the ſtatutes were read.

HOLT, *Chief Juſtice*. If you have any *mandamus* at all, it muſt be directed "To the vice chancellor, maſter, and ſcholars in con-"vocation."

SIR B. SHOWER. The vice-chancellor and doctors of divinity, and the proctors, are without doubt viſitors of this college, and the vice-chancellor and the two proctors have three negative voices; and if either of them refuſe to accept of this appeal, or to propoſe him to the convocation, it cannot be done. Then this gentleman ſtands expelled out of THE UNIVERSITY for a particular offence. And whether the crime for which he was expelled be true or not, he has acquieſced under that expulſion: ſo that now if this *mandamus* ſhould be granted, it would occaſion a great confuſion in the univerſity. And we ſay, that this gentleman is not capable of being relieved here, for that this is a cauſe not examinable in this place, there being proper viſitors. And *mandamus*'s have been often denied, where it is plain that there is A VISITOR to whom the party grieved may appeal (*a*). Therefore we hope your lordſhip will not grant any *mandamus*.

HOLT, *Chief Juſtice*. The queſtion is only this: Whether or no if an original VISITOR refuſe to accept an appeal, and to do the party grieved juſtice, we ſhall compel him to it? — Let us be attended with the ſtatutes of the college, and we will conſider of it.

*[454] *Adjournatur* (*b*). *

(*a*) See Rex *v.* Biſhop of Ely, 1 Wils. 266. S. C. 1. Bl. Rep 52.

(*b*) See 2. Term Rep. 338 a note of the caſe of Rex *v.* Biſhop of Lincoln, Trinity Term, 25 *Geo* 3 where a *mandamus* was prayed to the biſhop as VISITOR of *Lincoln College* in *Oxford*, to compel him to receive, hear, and determine an appeal of *Dr. Halliſax*, who complained of an undue election to the office of rector of that college, to which *Mr. Horne* had been admitted; and THE COURT determined, that where by *the ſtatutes* of a college, a VISITOR is appointed who is to interpret the ſtatutes, and an appeal is lodged with him, *a mandamus* will lie to compel him to hear the parties and form ſome judgment, though he cannot be compelled to go into the merits; for it is ſufficient if he decide that the appeal came too late.

Caſe 240.

Anonymous.

Notice muſt be given before an order is quaſhed.

NOTE, Before we quaſh an order of ſeſſions, we muſt have an affidavit of notice given to the parties concerned, or elſe we will only quaſh *niſi* on notice.

The

The King *againſt* The Inhabitants of Cherſey.

Caſe 241.

IT was moved to quaſh an order of ſeſſions, for that the only ground of ſettling a poor perſon in a parish, appears, upon the order, to have been, for that the *banns of matrimony* of the poor perſon were publiſhed in the pariſh-church; which is ill, for the *notice* to be given to the pariſh muſt not only be in writing, but the other ceremonies required by the ſtatute of 3. & 4. *Will. and Mary*, c. 11. muſt be obſerved, and that act being an explanatory act, cannot be taken by equity.

The *notice* required by 1. *Jac.* 1 c. 17. 13. *Car.* 2. c. 12. and 3. *Will. & Mary*, c. 11. of a perſon coming to ſettle in a tenement under 10l. a year, cannot be ſupplied by any collateral act.

'CURIA. Let it be quaſhed.

2. Salk. 472, 473. 476. 478. 523, 524. 534 Ante, 330 Skin. 620.

Captain Kirk's Caſe.

Caſe 242.

THE queſtion was, Whether *Captain Kirk*, who was indicted for the murder of *Conway Seymour, Eſq.* ſhould be brought to his trial this Term?

On a ſurrender, in Vacation, to an indictment of murder, *notice* that he will enter his prayer for *trial* the firſt day of the enſuing Term, is not ſufficient.

S. C. 12. Mod. 394. S. C. Holt, 86. 1. Show. 190.

HOLT, *Chief Juſtice.* I am of opinion that this fact ought to be tried; for, as I take it, the proſecutor has been too dilatory in his proſecution; and men ought not to be reſtrained of their liberty any longer than a convenient time for them to be brought to trial. This remiſſneſs in the proſecution of criminals was looked upon to be a great miſchief at the common law, and therefore was redreſſed by the 3. *Hen.* 7. c. 1. by which it appears, that juſtice ought not to be delayed.

But by TURTON and GOULD, *Juſtices*, the trial ought to be put off; for that after his ſurrender he did not give the proſecutor timely notice; and therefore he ſays, he is not prepared.

* [455]

At another day, *Captain Kirk* was brought up by rule of Court.

The court of king's bench will not bail a perſon committed for murder on account of *ill health*, unleſs it appear to be the immediate conſequence of the confinement, and that his life is in danger.

MR. MONTAGUE moved, that *Mr. Kirk* might be admitted to bail, for that he and the other gentleman *Mr. Cage* were dangerouſly ill, by reaſon of the badneſs of the air, and the inconveniency of the priſons; and that, upon proofs of ſuch matters, the Court had frequently bailed perſons, though the coroner's inqueſt have found them guilty of murder; and the reaſon is, becauſe impriſonment in ſuch * caſe is not deſigned as a puniſhment, but only to bring the parties to juſtice.

2. Inſt. 185. 189. Salk. 61. 3. Bulſt. 113. Kely. 90. Palm. 558. Dyer, 79. 1. Bac. Abr. 223. 10. Mod. 334. Stra. 49. 543. 2. Hawk. P. C. ch. 15. ſ. 80. Cowp. 333.

The court of king's bench will not bail a perſon in cuſtody on an indictment for *treaſon* or *murder*, except on very extraordinary circumſtances.

*****, *è contra*, replied. It is true, YOUR LORDSHIP has power to bail in treaſon or murder; but you will not exert that power, unleſs it be in extraordinary circumſtances; as in ſome

Ante, 288. 323 2. Jones, 210. 222, 1. Bulſt. 85. 1. Roll 268, 3. Bulſt. 113. Ray 381. Skin. 56. 1. Bac. Abr. 224. 3. Bac. Abr. 13. 14. 2. Hawk. P. C. ch. 15. ſ. 79, 80. 2. Hale, 129. 148.

caſes

CAPTAIN KIRE'S CASE.

cases that have been quoted; and especially in such where the prosecution is thought not to be well grounded. But here is no pretence of a malicious prosecution, for that here are two inquisitions for murder found, one before THE CORONER, and the other by THE GRAND JURY. But it is not doubted whether *Mr. Seymour* was killed by this gentleman; that too plainly appears. Here is no peradventure whether this unfortunate gentleman was killed by *Captain Kirk*; so that it is but reasonable that he should give account of spilling his blood. There has not here been any long lying in prison, this being but the first Term after their commitment. The blood of *Mr. Conway* is upon the land, until it be revenged, or the justice of the nation be cleared by a fair trial. I could remember YOUR LORDSHIP of a case, where a person, after he was out upon bail, was taken up in the Vacation, and was committed, it being in the case of murder, meaning *Mr. C.*

HOLT, *Chief Justice.* I was very well satisfied with what I did then, and am so still. But indeed, in this case I do not think that their affidavits are full enough. It does not appear, that by this imprisonment they are in danger of their lives. It is said in *Egerton's Case*, in the thirteenth year of *James the First*, that if there were any delay in the prisoners in the putting off their trial, or in not giving timely notice, there could be no bailing of them. And here, since they did not give notice of their render to the prosecutor, as this is good reason for deferring their trial, so it is also the same for not being bailed.

[* 456]

Case 243.

Lane *against* Cotton, Postmaster General.

An action will not lie against the POSTMASTER GENERAL to recover the value of an EXCHEQUER BILL inclosed in a letter, and delivered at the post-office, and lost.

THE plaintiff brought an action against *Sir Robert Cotton*, postmaster general, wherein he declares he sent a letter by the post, &c. in which there was inclosed an *exchequer bill*, and that this letter and bill were lost, &c.

* Upon the general issue pleaded, the special matter was found, *viz.* that the letter and bill were delivered to such a postmaster, and that afterwards the mail was robbed, and the letter and exchequer bill taken away, &c.

Upon arguing this case, THE COURT seemed to be of opinion, that the action was well brought against the defendant.

S. C. 1. Salk. 17. 143. S. C. Comy. 100. S. C. Carth. 487. S. C. 11. Mod. 12.

HOLT, *Chief Justice.* It would be very hard upon the subject, if this action should not lie. The crown has a revenue of a hundred thousand pounds a-year for the management of this office; and therefore care ought to be taken that the letters be safely conveyed, and that the subjects should be secured in their

S. C. 12. Mod. 472. S. C. 1. Ld. Ray. 646. S. C. Holt, 582. Carth. 485. 4. Co. 84. 1. Sid. 36. 1. Roll. Abr. 338. 3. Mod. 323. 227. Skin. 278. Cro. Jac. 202. Palm. 523. Molloy, 209. 2. Mod. 270. 1. Bac. Abr. 48. Rol. Ent. 103. 3. Bac. Abr. 561. Harg. Co. Lit. 89. *b.* note (3).

properties,

properties. And why ſhould not this be the ſame with *a common carrier*, who muſt anſwer for the jewels or other valuable things that he loſes, as appears in *Aleyn's Rep.* (*a*)? Then it is very hard, that the ſubject ſhould be prevented by the act of parliament from ſending his letters by any other carrier againſt whom he might have his remedy, and yet not have his remedy againſt *the poſtmaſter*, by whom he is obliged to ſend his letters.

LANE *againſt* COTTON.

But I was informed, that, afterwards, judgment was given in the court of king's bench for the defendant (*b*), *aſſentiente* HOLT, *Chief Juſtice*.

(*a*) Bateraft's caſe, cited by ROLL, *Chief Juſtice*, in the caſe of Kemeſſy *v.* Evgleſton Allen, 93. But ſee Cowp. 764.

(*b*) See the arguments of the Judges accordingly, Carth. Rep. 459 to 468.; but it is ſaid that the defendants, ſeeing that the plaintiff intended to bring a writ of error, paid the money, S. C. 1 Ray. 638. and thereby prevented the further litigation of this queſtion. 3 PeerWms. 394. notis. See Cowp. 762. The opinion of the three Judges, however, has been recognized and confirmed by the Judges of the court of king's bench, in the caſe of Whitfield *v.* Lord Le Deſpencer, in which it was ſolemnly determined, that no action will lie againſt the poſtmaſter-general for a bank note ſtolen by one of *his ſervants* out of a letter delivered into the poſt-office Cowp. 754. to 766.

Memorandum.

Caſe 244.

SIR THOMAS ROKEBY, KNIGHT, one of the Judges of the court of king's bench, died during this Term, after a long illneſs.

1. Ld. Ray. 503.

HILARY TERM,

The First and Second of William and Mary,

IN

The Common Pleas.

Sir Henry Pollexfen, *Knt. Chief Justice.*
Sir Thomas Powell, *Knt.*
Sir Thomas Rokeby, *Knt.* } *Justices.*
Sir Peyton Ventris, *Knt.*
Sir George Treby, *Knt. Attorney General.*
John Somers, *Esq. Solicitor General.*

Tippet *against* Eyres.

Trinity Term, 4. *Jac.* 2. *Roll* 1035.

* [457]

Case 245.

IN debt upon a bond for three hundred pounds, it appeared, upon *oyer*, to be for the performance of an award to be made by *Barlow* "before the fourth day of *April*, or else to the "umpirage of such a one as he shall choose, to be made on or "before the sixteenth of *April*."

If a submission be made to *arbitrators*, so as the award be made before *the first* of *April*, or else to such *umpire* as they shall chuse, so as the umpirage be made before the *sixteenth* of *April*, and the arbitrators, making no award, nominate a person for umpire who refuses to act, they may chuse another person

The defendant pleaded, that neither *the arbitrator*, nor *the umpire*, made an award, *prout*, &c.

The plaintiff replied, confessing that the arbitrator made no award; but that on the *first of April* he chose and nominated one *Gyssop* to be umpire, who refused; and that then he named one *Clerk*, who accepted and awarded, &c. and sets forth a breach on demand.

VENTRIS, *Justice*. I am of opinion, that the award by *Clerk* is good; for the submission has put the matter to the determination of an umpire, and I think this umpire is sufficiently named by the arbitrators intitled to the power. It is true, that it is laid that they

umpire. S. C. 3. Lev. 263. S. C. 2. Vent 113. 1. Sid. 428. 455. 1. Lev. 174. 285. 302. Raym. 187. 1. Mod. 15. 275. 2. Mod. 169. 2. Jon. 167. 1. Salk. 70. 72. 2. Saund. 64. 130. Kyd on Awards, 58. and see 2. Term Rep. 645.

TIPPET *against* EYRES.

named *Gyffop*, and it is as true that he did not accept thereof, and therefore could be no umpire; and that an acceptance is requiſite, the manner of pleading proves. But it is objected, that this is an authority, and being once executed, cannot be acted over again. I agree, that an authority once well executed cannot be tranſacted anew; but where it is not well executed, it may be acted again: as where executors by deviſe have a bare power to ſell land, though they make a teſtament, yet they may afterwards ſell; and in our caſe the naming of *Gyffop* is only a commencement of the execution of his authority. Two perſons cannot have a concurrent juriſdiction to make an award. 1. *Rol. Abr.* 261.

ROKEBY, *Juſtice*. *Gyffop* had never any authority veſted in him, for his refuſal prevented it; ſo that I take it, the caſes of authority do in no wiſe influence the preſent caſe. The arbitrator had an authority to make an award until the *fourth of April*, and then he had a * power to name an umpire; for *Gyffop* had no more than a communication, &c.

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POWELL, *Juſtice*. The nomination of *Clerk* was good; for *Gyffop*'s was wholly avoided by his refuſal: and it is fit that we ſhould compare it with other caſes of authorities; as where the lord for years will not conſent to the firſt livery, the ſame attorney may make livery again, as in *Molyneux v. Tolin (a)*. So if lands be given to *J. S.* the remainder to ſuch a perſon as he ſhall appoint, and he appoints *a monk*, he may, notwithſtanding, appoint again. So of elections, a void election is adjudged to be no election.

POLLEXFEN, *Chief Juſtice*. I agree, that if there be only a communication or diſcourſe between them, that would not have amounted to a nomination; but *pariels font plea*, we muſt take it as it appears in the record before us, and that ſays there was a nomination, and if there had been none, the other party could take advantage of it upon iſſue. I do agree, that an authority ill executed may be rectified, as in the caſe of attornies. But the arbitrator in our caſe has no other power than to nominate; which he has done, and I cannot imagine how *Gyffop*'s refuſal ſhould give him a new power. I know no difference between this and other powers: if the refuſal make the nomination void, it muſt be immediately void, or elſe he has no power to make a new one; and if it do, then it argues that he has a greater power than the ſubmiſſion gave him, which was only once to nominate, which he has done. I take it, that where a man has only a bare authority, and no intereſt, his refuſal ſhall not diſable him from executing it; as if an executor, or an attorney, in the caſes before-mentioned, ſhould ſay they would do nothing, that

(a) Palm. 289.

will

will not discharge their naked power (a). So that this consequence may follow our case, that Eggs, after his refusal, may, notwithstanding, make a good tender, and if Cross may do so too, there will be two umpires well and ill, and a concurrent jurisdiction, which is not allowed, as in the case of *Bernard* v. *King* (b). The case also of *Copping* v. *Hannam* (c) is very strong. But since my brothers are against me,

TIPPER against EVERS. 2 Mod. 169. 2. Jo. 167.

JUDGMENT for the plaintiff.

(a) Year-Book 14. Eliz. 3. pl. 12. 1 Cro. El. 780. 1 Bro. P. C. 81. Sir T. Jones, and Albany's case, Moor 905.

(b) 1. Roll. Rep. 6.

(c) 2 Saund. 150. S. C. 1. Lev. 285. S. C. Raym. 187. 1 Sid. 428. 455. S. C. 1. Mod. 15.

TRINITY TERM,

The Second of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir William Dolben, *Knt.*
Sir William Gregory, *Knt.*
Sir Giles Eyres, *Knt.*
} *Juſtices.*

Sir George Treby, *Knt. Attorney General.*
John Somers, *Eſq. Solicitor General.*

* Mr. Prynn's Caſe.

Caſe 246.

The ATTORNEY GENERAL may, by the common law, file a *criminal information* againſt perſons for meeting together and pulling down certain fences erected by a lord of a manor.

AN INFORMATION was exhibited in THE CROWN OFFICE againſt ſeventy poor perſons, ſetting forth, that one *Mr. Prynn* was lord of ſuch a manor, where the defendants aſſembled and met together in a riotous manner, and pulled down certain fences, &c. To which one of the defendants appeared and demurred.

The queſtion was, Whether an *information* lies for this riot?

SIR FRANCIS WINNINGTON. I conceive it does not, and that the defendants cannot be proceeded againſt otherwiſe than by *indictment* or *preſentment* in the county where the fact was committed. And this I ſhall make appear: FIRST, By the ancient books of our law: By *Glanvil (a)*, *Fleta (b)*, and *Magna Charta (c)*, no man can be charged but by indictment or preſentment: ſo are the ſtatutes 25. *Edw.* 3. c. 4. the 42. *Edw.* 3. c. 3. the 5. *Edw.* 3. c. 9.; and in THE YEAR-BOOKS of the 26. *Edw.* 3. *pl.* 4. & 70. and 43. *Aſſ. pl.* 5. all ſuits of the king muſt be by *preſentment* or *indictment*. I ſhall now ſhew to YOUR LORDSHIP from whence theſe informations had their birth, and how they had their names.

S. C. Holt, 362. S C Comb. 141. S. C. 1. Show. 49. 106. 3. Mod. 72. 117. 317. 1. Vent. 8. 1 Sid. 360. 4. Burr. 2556. 2. Hawk. P. C. c. 26. 4. Bl. Com 303.

1. Salk 372. 2 Hak P C 151 2. Hawk. P. C 369. 3. Bac Abr. 165. 4. Term Rep. 285. 4 Com. Dig. "Information" (A 1.). 3. Bac. Abr. 94. 165.

(a) Glanvil, book 1.
(b) Fleta, book 2. ch. 52. 102.
(c) Mag. Car. ch. 29. 2. Inſt. 46.

MR. PRYNN'S CASE. *King Henry the Seventh* was a very rich prince, and used all the care and industry imaginable to encrease his coffers: the instruments he made use of for this purpose were *Empson* and *Dudley*, who, in order to accomplish their designs, procured an act of parliament to be made impowering justices of the peace, &c. upon INFORMATION *for the King*, to hear and determine all offences and contempts, except treason, murder, and felony (*a*). But this act was afterwards repealed (*b*), and condemned as injurious and oppressive to the king's subjects; and *Empson* and *Dudley*, the authors of those horrible oppressions and grievances, came both to infamous ends, for they were very justly hanged, so there was an end of them and their informations (*c*). In all *Rastal* (*d*), and in *Coke's Entries* (*e*), there are no informations except upon general statutes; and in *Rastal* I think there is but only one information. *Lord Coke* (*f*) says, that no man ought to be punished but by *presentment* or *indictment*. Now I shall come down to THE PETITION OF RIGHT (*g*), which establishes and confirms the liberty of the subject; and ordains, that no man shall be tried out by legal process; and enumerates many things there wherein the liberty of the subject was invaded. But the king perceiving how the parliament struck very deep, and being tender of his royal prerogative, presently dissolved them, and did not call them again until the fourteenth year of his reign (*h*). It was in this long interval of parliament this mischief crept in. The first [illegible] was [illegible] *Charles the First*, being exhibited [illegible] *and Others* (*i*). Their Counsel then insisted, against THE ATTORNEY GENERAL, that though the crime was [illegible], yet he ought not to have proceeded by *information*, but by *indictment* or *presentment*. THE ATTORNEY told them there were many precedents, but produced none (*k*). After the long intermission of parliaments (the determination of which was certainly the cause of many irregularities both in church and state) comes the statute 16. *Car.* I. c. 1. in the year 1640 (*l*), and the parliament presently abolished THE STAR-CHAMBER COURT, which had so long oppressed and harrassed the subject by their mischievous informations and other arbitrary proceedings; of which the parliament were so sensible, that they enacted, "that no court of that "nature should ever again be set up in *England*." That parliament also takes notice of THE PETITION OF RIGHT. After this, informations seemed to be totally lost, but certain it is they slept until the restoration of *King Charles the Second*; after which they were sometimes made use of, though but very rarely neither, for they received but little countenance from the reverend Judges; with one of whom I had the honour to be acquainted, and that was my LORD CHIEF JUSTICE HALE, who I remember very well has often said,

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(*a*) The 11. *Hen.* 7. c. 3.—See the statute at large in Rastal's edition of the statutes.
(*b*) By 1 *Hen.* 8. c. 6.
(*c*) 11 State Trials, 3.
(*d*) Rastal's Entries.
(*e*) Co. Ent.
(*f*) 4 Inst. 41. 1. And 156.
(*g*) 3. *Car.* 1. c. 1.
(*h*) Hume.
(*i*) Cro. Car. 181. 604.
(*k*) See Wingfield's Case, Cro. Car. 251. 2 Danv. 473. Lee's Case, Cro. 593. Freeman's Case, Cro. 579.
(*l*) This was an act for the preventing of inconveniencies happening by the long intermission of parliament. It was repealed by 16. *Car.* 2. c. 1.

that

that "if ever informations came in diſpute they could not ſtand, "but muſt neceſſarily fall to the ground." The reaſon why informations were ſo ſeldom queſtioned, becauſe they were very rare; and when few people are pinched, few do object. But I confeſs, of late times they have been more frequent than ever, and the miſchiefs they produced are yet freſh in our memory. I will not trouble your lordſhip with a long recitation, but I cannot paſs by two or three of them without mentioning them. As firſt, that of *Sir Samuel Barnardiſton*, againſt whom an information was preferred only for writing a meer private letter to ſome of his friends in the country, for which he was fined ten thouſand pounds (*a*). So about the election for ſheriffs, an information was exhibited againſt *Pilkington, Shute, and Others* (*b*), and they were fined extravagant ſums for nothing, but becauſe they would not betray their country by voting for ſuch ſheriffs as would be ſubſervient to the then court faction and prerogative intereſt. I remember alſo, for only drinking to the *pious memory* of *Stephen College* (*c*) he was proſecuted by a malicious information, and had an exorbitant fine impoſed on him for ſo ſlight and frivolous a reaſon. Beſides the arbitrary proceedings of theſe informations, many other inconveniences attend them.—FIRST, The party, if he be acquitted, cannot have any *coſts* againſt THE KING, but after an expenſive troubleſome ſuit muſt ſit down content with his own loſs, and be glad he eſcapes ſo (*d*).—SECONDLY, If a man come into court upon his recognizance he muſt plead *inſtanter*, though he cannot poſſibly be prepared for it, having never before heard the information. And this was my *Lord Ruſſel's Caſe* (*e*). I cannot, MY LORD, conclude, without mentioning the late *Caſe of the Reverend Biſhops* (*f*), whom the information brands for preſenting a malicious, ſeditious, and ſcandalous libel, which, in truth, was nothing but a pious and humble petition, and which they were obliged to do by the laws of God and man. Certainly no jury could have ever found them guilty (*g*). I ſuppoſe it will be objected againſt me, that there are many precedents of *informations* in the office. But I anſwer in the words which a great and learned lawyer heretofore uſed, *Nil agit exemplum quod litem non tollit* (*h*). Wherefore, MY LORD, relying on the authority of the ſtatutes I have quoted, none of which, as I ever heard of, are yet repealed, and in reſpect alſo of thoſe inconveniencies which are the eſſential concomitants to all informations, I pray YOUR LORDSHIP's judgment for the de-

MR. PRYNN'S CASE.

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(*a*) 3 State Trials, 939; and ſee Rex v. Johnſton, 2 Show. 1.

(*b*) 8. State Trials, 630.

(*c*) 3. Mod. pag. 52 caſe 30.—See alſo the caſe of Cook, Smatt, and Comer, ante, 363.

(*d*) But this is now remedied by 4. & 5 *Will. & Mary*, c. 18.—And ſee Clark's Caſe, 7. Mod. 47; Reg v. Danvers, 1 Salk. 194; Rex v. Woodfall, 2 Str. 1131; Rex v. Filewood, 2 Term Rep. 145; Rex v. Brooke, 2 Term Rep. 197; and Bullock on Costs, 573.

(*e*)

(*f*) 3. Mod. 212.

(*g*) 4. State Trials, 304.

(*h*) 1 And. 157

Mr. Pryn's Case.

fendant, not only for * my client's ſake, but for all the gentlemen's at the bar, nay for all the ſubjects of *England*, that our liberties may not be invaded, nor our properties trampled on, and our lives ſnatched away by theſe oppreſſive informations.

Sir William Williams *for the Crown.* Sir Francis Winnington's argument is, I ſuppoſe, extemporary, and ſo I ſhall anſwer it. The matter on which this information is grounded is *a riot*, for which I think the information will very well lie, and is no innovation for the officers of the court will inform you, that there are precedents of informations as ancient as indictments (*a*). As to the caſe of *Empſon and Dudley* (*b*), the exhibiting of informations was not alledged as a crime againſt them, but it was for compounding of informations, and mixing popular actions in them (*c*). It is ſaid informations do not extend to capital caſes; and where the ſtatute ſays, "they ſhall not lie for life or "limb," it implies, that they lie in other caſes. The reaſon why the court of Star Chamber was repealed was, becauſe there was nothing puniſhable there but what could be remedied by the common law in the king's courts, and not becauſe they proceeded by information. So as to my *Lord Hollis's Caſe* (*d*), there the information was preferred againſt him and others for aſſaulting the Speaker in his chair, and for ſpeaking ſeditious words in the houſe, for which judgment was given againſt them (*e*). And afterwards, in 1667, that judgment was reverſed by the houſe of lords; but the reaſon of that reverſal was, becauſe this Court had intermeddled with matters done in parliament, and becauſe the Attorney did craftily intermingle matters in the information, and not becauſe he proceeded by way of information. And though I grant, that informations have ſometimes been miſuſed, yet the abuſe of a thing will not deſtroy it; but if there be any irregularities committed, your lordſhip will reduce matters to their old ſtamp and method, and the Court may do it in their diſcretion. As to my *Lord Hale's* opinion concerning informations, I heard him make this diſtinction between an *information* and an *indictment*: in the firſt, every perſon gives a diſtinct fee; but in the laſt, one fee lies only for ſeveral perſons. By this my Lord Chief Juſtice Hale granted, that an information would lie; and truly I never heard it queſtioned before this

*[463] time. * As for the information concerning my lord *the biſhop* (*f*), thoſe epithets of "malicious, ſeditious, &c." were only words of form and courſe, though I will not undertake to juſtify the proceedings of the late Government: we have all done amiſs, and muſt wink at one another.

Caſes in Law and Equity, 101.

Sir George Treby, Attorney General, *for the king.* I never heard informations queſtioned before. It is certainly a doctrine very lately broached, and I believe will have very few proſelytes to ef-

(*a*) See the argument intended to have been made in this caſe by Sir B. Shower, 1 Show. 106.

(*b*) 11. State Trials, 3.

(*c*) See 18. *Eliz.* c. 5.

(*d*) See Lord Vaughan's report of this caſe, and 8 C. Cro Car. 181.

(*e*) Cro. Car 150 152.

(*f*) 4. State Trials, 304.

pouſe

pouse its intereſt. As for the old ſtatutes which SIR FRANCIS WINNINGTON cites, that all proceedings ſhall be by *indictment* or *preſentment*, Why may not *preſentment* there be meant of a preſentment by the king's attorney, which is nothing but an information? The proceeding by information has been conſtantly practiced, and therefore is now the law of the land. And it is not created by the 11. *Hen.* 7. c. 3. In *Raſtall's* and *Coke's Entries* there are many informations, ſome for intrusions, and others in nature of a *quo warranto*. So the ſtatutes that reſtrain informers ſuppoſe, that there were informations before. As for my *Lord Hale* and *Selden's Caſe* (*a*), that was, Whether an information would lie for a matter tranſacted in parliament? As to my LORD HALE's opinion, I am ſure there were ſeveral informations in his time; and he was a very conſcientious man, and if he had thought that informations were wholly unlawful, he would not have ſuffered them: but indeed, I have heard him tell the officers of the court, that the informations ſhould not be vexatious, but never that they were illegal. All the records in THE CROWN OFFICE are to many authorities for us.

Mr PEYNN's Caſe.

Cro. Car. 130, 131 152. Hob. 115 109. 1 Vent. Dyer, 93. 98. 370.

HOLT, *Chief Juſtice*. The matter truly ſeems not of any great difficulty, for we ſhall hardly now impeach the judgment of all our predeceſſors: it would be a reflection on them all. In *Lamb and Winſield's* information (*b*) there were learned Counſel who would certainly have taken exceptions to the information, had they thought that it did not lie. My LORD CHIEF JUSTICE HALE complained of the abuſe of informations, but not that they were unlawful. As to the ſtatute of 11. *Hen.* 7. c. 3. I do not think that THE STAR-CHAMBER was ſet up then, but was at the common law; and ſo informations in that court and others were at the common law. So notwithſtanding the repeal of 11. *Hen.* 7. c. 3. by the 1. *Hen.* 8. c. 6. yet afterwards the ſtatute 32. *Hen.* 8. c. 9. of Maintenance, ſuppoſes, that informations ſtill lay; and if it had been a new thing, that ſtatute would have ſaid, that there ſhall be an information for that crime, and not that it ſhall be puniſhed by information, which ſuppoſes informations to lie. You could never move to quaſh an *information* againſt THE ATTORNEY, but *an indictment* you may. A man may make a better argument againſt *writs of enquiry* and *new trials* than againſt *informations*.

3 Mod 58. 113 119. 186. 2 Sa. 326.

Carth. 14. 226.

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DOLBEN, *Juſtice*. There was an information againſt *Plowden* (*c*), who was a learned man and a great lawyer; and if he had thought informations illegal, he would certainly have taken advantage of it. I confeſs, that in that long interval of parliaments which SIR FRANCIS WINNINGTON mentions, between the fifth and the ſixteenth of *Charles the Firſt*, there were more irregularities committed in this court than ever were before. Then the buſineſs of *ſhip-money* was tranſacted in this court (*d*).

(*a*) 11. State Trials, 121.
(*b*) Cro. Car 251
(*c*)
(*d*) See Hampden's Caſe, 1. State Trials, 505

The

MR. PRYNN'S CASE.

The next Term this queſtion was moved again (*a*).

1. Saund. 301, 302. 2. Mod. 128. 132.

HOLT, *Chief Juſtice*. Informations were at common law, and ſo the ſtatutes do ſuppoſe: the court of STAR-CHAMBER was [illegible] y, becauſe the crimes were puniſhable here. But a [illegible] committed in *York* cannot be puniſhed here by *indictment*, for it cannot be removed out of the county, where all indictments muſt be laid; therefore it is only puniſhable here by *information*. In the Books of Entries there are informations for perjuries and inſultions againſt the bailiff of *Weſtminſter* and keeper of the *Gatehouſe* (*b*), and yet there are no officers of the court.

ALL THE COURT were of opinion, that *informations* lay at common law.

And ſee 1. *Salk.* 374. that wherever a matter concerns the public government, and no particular perſon is intitled to *an action*, there *an information* will lie.

(*a*) Sir Bartholomew Shower was prepared to argue the *demurrer* to this information on the part of the Crown; but no Counſel appearing on the other ſide to ſupport it, judgment was given for the King.—See the intended argument 1. Show. 105. to 125.

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5. If a poor man be asked in a parish-church, yet it makes no settlement without notice in writing, for the explanatory act 3. and 4. Will. c. 12. cannot be taken by equity, *Rex v. Chertsey*, 454

6. Order of two justices to remove one from *Harrow* to *Hendon*, where he had a freehold, was quashed on an appeal: then *Harrow* sends him to *Ricclip* by the like order of two justices, which was affirmed upon an appeal: then *Ricclip*, by an order of two justices, send him to *Hendon* again; that order was quashed on an appeal, but affirmed in *B. R.*; for though the justices had executed their authority between *Harrow* and *Ricclip*, yet that shall not exclude *Ricclip* from sending him to a third parish where he had a freehold, *Ricclip v. Hendon*, 417

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END OF THE FIFTH VOLUME.